

# **BUSINESS SURVIVAL STRATEGIES FOR 2009**

**January 16, 2009  
SHERATON DETROIT NOVI HOTEL  
NOVI, MICHIGAN**

**PRESENTED BY THE LAW OFFICES OF  
MADDIN, HAUSER, WARTELL, ROTH & HELLER, P.C.**

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# BUSINESS SURVIVAL STRATEGIES FOR 2009

Registration and Breakfast - 8:00 a.m.

## GENERAL SESSION

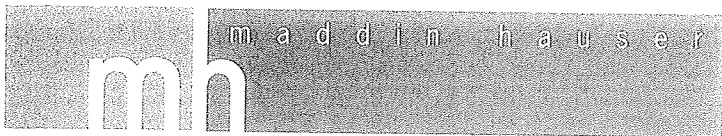
<u>MARK R. HAUSER</u>	8:30 – 8:45	Page 1
Looking at the Big Picture		
<u>MARTIN S. FRENKEL AND MICHAEL S. LEIB</u>	8:45 – 9:15	Page 2
An Ounce of Prevention is Worth a Pound of Cure: Improve Your Options by Planning in Advance for Customer and Vendor Failures		
<u>COURTNEY D. ROSCHEK</u>	9:15 – 9:30	Page 8
Bank Balance Bug Spray: Protect Yourself!		
<u>STEVEN D. SALLEN</u>	9:30 – 10:00	Page 19
Mergers & Acquisitions – Synergies and Strategies		
Break	10:00 – 10:15	

## BREAKOUT SESSION A MANAGING HUMAN RESOURCES

<u>RONALD A. SOLLISH</u>	10:15 – 11:00	Page 26
Managing Workforce Expenses		
<u>GARY M. REMER</u>	11:00 – 11:15	Page 55
OMG! What is Happening To Our Retirement Plan?		
<u>MARC S. WISE</u>	11:15 – 11:30	Page 63
Health and Welfare Benefit Review for Troubled Times		

## BREAKOUT SESSION B MANAGING COSTS AND BANKING RELATIONSHIPS

<u>DANIELLE M. SPEHAR</u>	10:15 – 10:30	Page 76
Revisiting the Cost of Leasing the Roof Over Your Head		
<u>JOHN P. GONWAY</u>	10:30 – 11:00	Page 83
Banking Relationships and Finance Options		
<u>RICHARD J. MADDIN</u>	11:00 – 11:15	Page 87
Reduce Your Real Estate Taxes		
<u>RICHARD M. MITCHELL</u>	11:15 – 11:30	Page 93
Insurance Issues in Times of Financial Crisis ...		



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January 16, 2009

Dear Program Participant:

Welcome to our program, *Business Survival Strategies for 2009*. We are pleased that you have joined us this morning. As you can appreciate, 2009 will be a daunting undertaking for every business located in southeast Michigan. Our program has been designed to help business owners and key management personnel deal with a myriad of legal and business related issues in our troubled and uncertain economic environment. While we intend to provide information and recommendations on defensive strategies that should prove useful for most businesses (e.g., cutting various costs and utilizing better collection and credit practices), we also intend to explore various opportunities that may be exploited at this time (e.g., possible acquisitions and hiring new personnel).

An additional aspect of our program is to introduce you to the broad range of practice areas that Maddin Hauser can offer you on a day-to-day basis. Maddin Hauser is truly a "full service" commercial law firm. If you would like further information on the scope of our practice, we encourage you to either visit our web site at [www.maddinhauser.com](http://www.maddinhauser.com) or merely ask any of our attorneys. Once again, we are delighted that you have joined us this morning.

Very truly yours,

MADDIN, HAUSER, WARTELL,  
ROTH & HELLER, P.C.

# LOOKING AT THE BIG PICTURE

By: Mark Hauser

- I. Making Tough Decisions
- II. Planning for Contingencies
- III. Including Your Professional Advisors

AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE:  
IMPROVE YOUR OPTIONS BY PLANNING IN ADVANCE FOR  
CUSTOMER AND VENDOR FAILURES

By: Martin S. Frenkel and Michael S. Leib

- I. THE IMPORTANCE OF EARLY ASSESSMENT AND EVALUATION OF VENDOR/CUSTOMER PROBLEMS
  - A. Failing to recognize problems early may lead to
    1. Increasing your exposure to a third-party's inability to pay
    2. Missed opportunities to restructure the business relationship to your benefit.
    3. The danger of being on "auto-pilot" means missed chances to engage in a cost-benefit analysis with regard to continuing the business relationship
  - B. Being pro-active is almost always better than being reactive and allows
    1. For creation of a strategy for controlling the problem, rather than permitting the problem to control you
    2. May help you preserve the business relationship rather than making conflict inevitable
  - C. You want to be first, not last
    1. Failing companies have a limited pie
    2. Do not bank on the fact that other customers/vendors of the failing business will sit on their hands

3. All creditors are not created equal
  - a. Secured vs. unsecured
  - b. Judgments and the "race to the courthouse"

D. Status of the Bailout Package-what does it mean to you?

## II. UNDERSTANDING "LEVERAGE" IN YOUR KEY VENDOR/CUSTOMER RELATIONSHIPS

A. Dictates your willingness and ability to take action from a business perspective

1. How important am I to my customer's business?
2. How important is my customer to my business?

B. Creating leverage from a legal perspective

1. Communication, communication, communication
  - a. Clarity in invoices and purchase orders
  - b. Letters and e-mails (beware the double-edged sword)
2. Documentation, documentation, documentation
  - a. Written agreements and the statute of frauds
    - i. With certain exceptions, a contract for the sale of goods for the price of \$1,000 or more is not enforceable by way of action or defense unless there is a writing sufficient to indicate that a contract of sale has been made between the parties and signed by the party against whom enforcement is sought or by that party's

authorized agent or broker. Skyline Steel Corp. v. A.J. Dupuis Co., 648 F. Supp. 360, 3 U.C.C. Rep. Serv. 2d 475 (E.D. Mich. 1986).

- b. Piecemeal or inadequate documentation
  - i. Multiple correspondence can create a contract
  - ii. The sale of goods, the UCC, and the “battle of the forms”
  - iii. Incompleteness, conflicting terms, and vagaries diminish leverage and lead to disputes
- C. He who has the better documentation often wins in negotiations or litigation
- D. Do not miss the chance to create leverage in your contract documents through
  - 1. Clarity
  - 2. Forum selection clauses
    - a. Although, generally, matters relating to a right of action are governed by the laws of the state where the cause of action arose, the parties may agree in a forum selection provision that all causes of action pertaining to a particular matter will be brought in a particular venue, or agree in a choice-of-law provision that all causes of action pertaining to a particular matter will be subject to the law of a particular jurisdiction. Offerdahl v. Silverstein, 224 Mich. App. 417, 569 N.W.2d 834 (1997); Certified Restoration Dry Cleaning Network, L.L.C. v.

Tenke Corp., 511 F.3d 535 (6th Cir. 2007) (applying Michigan law).

3. Liquidated damage provisions

- a. A liquidated damages provision is an agreement by the parties that fixes the amount of damages in case of a breach of contract, and is enforceable if the amount is reasonable with relation to the possible injury suffered and not unconscionable or excessive. UAW-GM Human Resource Center v. KSL Recreation Corp, 228 Mich.App 486, 508; 579 NW2d 411(1998).
- b. A liquidated damages provision is appropriate if the actual damages would be uncertain and difficult to ascertain, or would be purely speculative. Saint Clair Medical, PC v. Borgiel, 270 Mich.App 260, 271; 715 NW2d 914 (2006).

4. Attorney fee provisions

Attorney's fees may be awarded in an action based on contract where the parties have contractually stipulated for reasonable attorney's fees. Central Transport, Inc. v. Fruehauf Corp., 139 Mich. App. 536, 362 N.W.2d 823 (1984).

5. Agreements that grant liens or other security

6. Stop work provisions

7. arbitration provisions

a. Pros

b. Cons



8. Anticipate possible bankruptcy issues-Section 503 (b)(9) of the United States Bankruptcy Code-goods versus services.

### III. MECHANISMS TO IMPROVE YOUR OPTIONS IN DEALING WITH FAILING CUSTOMERS/VENDORS

- A. Security
  1. Liens, mortgages, pledges, irrevocable letters of credit
  2. Consensual
  3. Statutory
- B. Personal guaranties
- C. COD or CIA delivery
- D. Elective mediation provisions
- E. Collection of customer/vendor information (bank accounts, key players, credit information, EIN).

### IV. THE LIMITS OF LITIGATION AS A COLLECTION TOOL

- A. The end of your relationship?
- B. How expensive is it?
- C. An overview of the process
- D. What happens if I get a judgment?
- E. Litigation is often like closing the barn door after the horse has left – you may find you can't get blood from a turnip.
- F. The value of pre-litigation investigations

- G. How would that attorney fee provision, personal guaranty, or grant of security help me now?

V. BRIEF OVERVIEW OF THE BANKRUPTCY PROCESS

- A. Chapter 7 vs. Chapter 11.
- B. Unsecured vs. secured creditors and the concept of priority.
- C. What happens to judgments I may have obtained?
- D. When do you become involved in the bankruptcy process?
- E. What happens to suppliers at the beginning of a bankruptcy of a Tier 1 or OEM?
- F. What happens to contracts in a bankruptcy?

# BANK BALANCE BUG SPRAY: PROTECT YOURSELF!

By: Courtney D. Roschek

## I. THE FEDERAL DEPOSIT INSURANCE CORPORATION

### A. What is the FDIC and how is it funded?

1. The Federal Deposit Insurance Corporation (FDIC) preserves and promotes public confidence in the U.S. financial system by insuring deposits in banks and thrift institutions for at least \$100,000; by identifying, monitoring and addressing risks to the deposit insurance funds; and by limiting the effect on the economy and the financial system when a bank or thrift institution fails.
2. An independent agency of the federal government, the FDIC was created in 1933 in response to the thousands of bank failures that occurred in the 1920s and early 1930s. Since the start of FDIC insurance on January 1, 1934, no depositor has lost a single cent of insured funds as a result of a failure.
3. The FDIC receives no Congressional appropriations – it is funded by premiums that banks and thrift institutions pay for deposit insurance coverage and from earnings on investments in U.S. Treasury securities. With an insurance fund totaling more than \$49 billion, the FDIC insures more than \$3 trillion of deposits in U.S. banks and thrifts – deposits in virtually every bank and thrift in the country.

### B. FDIC coverage basics.

1. The basic FDIC insurance amount is \$100K per depositor, per insured bank. Coverage, however, is based on the concept of

ownership rights and capacities. Deposits maintained in different ownership rights and capacities at one bank are separately insured to the insurance limit. Deposits maintained in the same ownership rights and capacities at one bank are added together and insured to the insurance limit. Thus, it is possible to have deposits of more than \$100K at one insured bank, in different ownership capacities, and still be fully insured.

2. There are 8 different legal categories recognized by FDIC regulations for coverage beyond the basic \$100K amount: single accounts, joint accounts, self-directed retirement accounts, revocable trust accounts, employee benefit plan accounts, corporation/partnership and unincorporated association accounts, and government accounts.
3. Quick FDIC resources:
  - a. FDIC Coverage Calculator: Edie the Estimator will help you estimate your clients FDIC coverage: <http://www.fdic.gov/edie/index.html>
  - b. Determine if your clients bank is FDIC insured: [http://www2.fdic.gov/idasp/main\\_bankfind.asp](http://www2.fdic.gov/idasp/main_bankfind.asp)
  - c. FDIC Employee's guide to FDIC coverage, a user friendly resource: <http://www.fdic.gov/deposit/deposits/financial/index.html>
  - d. FDIC Information Specialists: 1-877-ASK-FDIC

## II. FDIC DEPOSIT INSURANCE CATEGORIES AND LIMITS

### A. \*NEW\* Recent Changes to FDIC Deposit Insurance Limits

1. On October 3, 2008, President George W. Bush signed the Emergency Economic Stabilization Act of 2008, which temporarily raises the basic limit on federal deposit insurance coverage from \$100,000 to \$250,000 per depositor. The temporary increase in deposit insurance coverage became effective upon the President's signature. The legislation provides that the basic deposit insurance limit will return to \$100,000 after December 31, 2009.
2. By letter dated October 3, 2008 (Financial Institution Letter 102-2008), the FDIC advised insured institutions they should inform depositors that the coverage increase is temporary and effective only until December 31, 2009. The legislation did not increase coverage for retirement accounts; it continues to be \$250,000.
3. For the purposes of the below examples and for your planning, the \$100K limit is utilized.

### B. Single accounts (12 C.F.R. § 330.6)(added together with a total insured limit of \$100K).

1. Single accounts are accounts that are:
  - a. in one person's name alone;
  - b. established for one person by an agent, nominee, guardian etc.;
  - c. held in the name of a sole proprietorship; or

- d. established for a decedent's estate.
  - 2. The default category: Any account that fails to qualify under another ownership category defaults to a single account.
- C. Self-directed retirement accounts (12 C.F.R. § 330.14(c)(2)): (owned by one person, titled in the name of that person's retirement account) added together and the total is insured up to \$250K).
  - 1. These accounts include:
    - a. All IRAs (Traditional, Roth, SEPs, SIMPLE);
    - b. §457 deferred compensation plan accounts;
    - c. Self directed defined contribution plan accounts (401Ks, SIMPLES, money purchase plans, profit sharing plans);  
and
    - d. Self directed Keogh plan (403(b)) accounts.
  - 2. Note:
    - a. "Self directed" means plan participants have the right to direct how the account is invested.
    - b. Naming beneficiaries does not increase coverage.
- D. Joint accounts (owned by 2 or more people) (12 C.F.R. § 330.7)
  - 1. Requires the following three (3) items for \$100K coverage per co-owner (each co-owner's share of every account that is jointly held at the same insured bank is added together with the co-owner's other shares, and the total is insured up to the limit):
    - a. All co-owners must be people;

- b. With equal rights to withdrawal; and
- c. All co-owner must sign signature card (unless it's a CD).

E. Revocable trust accounts (12 C.F.R. § 330.10)

1. POD accounts are insured up to \$100K per qualifying beneficiary (in addition to the insurance coverage of owners) if the following requirements are met:
  - a. Title of account must include commonly accepted terms (POD, ITF, ATF);
  - b. Beneficiaries must be identified by name in the deposit account records; and
  - c. \*NEW\* While formally beneficiaries were required to be "qualifying" (spouse, child, grandchild, parent, siblings), the FDIC has eased the rule governing revocable trust accounts. Now, an account owner can name any person or charity as a beneficiary and the owner will qualify for the additional deposit insurance coverage.
2. Living/Family Trust Accounts are insured up to \$100K per owner (grantor) for each named qualifying beneficiary and the following is met:
  - a. Title of account must include "living trust" or "family trust;" and
  - b. Beneficiaries must be qualifying.
3. NOTE: while similar to POD insurance, these types of trusts often have multiple beneficiaries with varying trust interests and accordingly extensive requirements for maximum coverage.

F. Irrevocable trust accounts (12 C.F.R. § 330.13)

Generally: the interests of a beneficiary in all deposit accounts, established by the same grantor, and held at the same insured bank under an irrevocable trust are added together and insured up to the \$100K, only if all of the following requirements are met:

1. Insured bank's account records must disclose the existence of the trust relationship;
2. The beneficiaries and their interests in the trust must be identifiable from the bank's account records or from the trustee's records;
3. The amount of each beneficiary's interest must not be contingent; and
4. Trust must be valid under state law.

G. Employee benefit plan accounts (12 CFR 330.14)

Insured up to \$100K for each participant's non-contingent (presumably the vested account balance) interest in the plan—coverage is not based on number of participants, but rather each participant's share of the plan.

H. Corporation/partnership/unincorporated association accounts (12 C.F.R. § 330.11): deposits owned by the entity are insured up to \$100K at a single bank, but are insured separately from the personal accounts of the entity's stockholders, partners, or members.



NOTE:

1. To qualify for coverage under this category the entity must be engaged in “independent activity” (i.e. operated primarily for some purpose other than to increase insurance coverage).
  2. Number of partners/members/associates does not matter—entity account gets \$100K
- I. Government accounts (12 C.F.R. § 330.15): also known as public unit accounts. This category includes deposit accounts of:
1. The United States,
  2. Any state, county, municipality (or a political subdivision of any state, county, or municipality), the District of Columbia, Puerto Rico and other government possessions and territories), and
  3. An Indian tribe.

III. THE TEMPORARY LIQUIDITY GUARANTEE PROGRAM

A. Debt Guarantee Component:

1. The FDIC will guarantee newly-issued senior unsecured debt issued on October 14, 2008 through June 30, 2009.
2. Eligible debt is unsecured borrowing that:
  - a. is evidenced by a written agreement or trade confirmation;
  - b. has a specified fixed principal;
  - c. in non-contingent and contains no embedded options, forwards, swaps, or other derivatives;

- d. Is not, by its term, subordinated to any other liability; and
  - e. has a stated maturity of more than 30 days.
3. Examples: Federal funds purchased, promissory notes, commercial paper, unsubordinated unsecured notes, including zero-coupon bonds, US dollar denominated certificates of deposits owed to an insured depository institution, etc.

B. Transaction Account Guarantee Component:

- 1. The FDIC will guarantee total balance in non-interest bearing transactional deposit accounts.
- 2. A non-interest bearing transactional deposit account is defined as a transaction account with respect to which interest is neither accrued nor paid and on which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal.
- 3. Coverage lasts through December 31, 2009.

IV. THE SIPC AND CDARS

A. Securities Investor Protection Corporation (the SIPC).

- 1. Though created by the Securities Investor Protection Act (15 U.S.C. §78aaa et seq., as amended), SIPC is neither a government agency nor a regulatory authority.
- 2. SIPC is a nonprofit, membership corporation, funded by its member securities broker-dealers.

3. How the SIPC differs from the FDIC
  - a. The SIPC is not the securities world equivalent of FDIC. Congress specifically considered creating a Federal Broker-Dealer Insurance Corporation, but lawmakers concluded that such a designation would be both misleading and out of step in the risk-based investment marketplace that is so different from the world of banking.
  - b. When a member back fails, the FDIC insures all depositors at the institution against loss up to a certain dollar amount. The SIPC, on the other hand, does not bail out investors when the value of their stocks, bonds, and other investments fail for any reason. Instead the SIPC replaces missing stocks and other when possible to do so as a result of theft by a broker or other risk related to brokerage failing.
  
4. What assets are eligible for SIPC coverage?
  - a. Eligible for coverage: cash and securities – such as stocks and bonds – held by a customer at a financially troubled brokerage firm.
  - b. Ineligible for coverage: commodity futures contracts and currency, as well as investment contracts (such as limited partnerships) and fixed annuity contracts that are not registered with the U.S. Securities and Exchange Commission under the Securities Act of 1933.

5. SIPC coverage basics:
  - a. SIPC does not cover individuals who are sold worthless stocks—the SIPC helps individuals whose money, stocks, and other securities are stolen by a broker or put at risk when a brokerage firm fails for other reasons.
  - b. SIPC will replace up to \$500,000.00 of equities, fixed-income securities and funds for each account. Included in the \$500,000.00 is coverage for up to \$100,000.00 in cash.
  - c. Note: the SIPC replaces shares and not dollar values. Thus, if you own 100 shares of McBuger Queen stock worth \$3,000.00 and they disappear, SIPC replaces your 100 shares—even if they are only worth \$1,500.00.
  - d. For more information: [www.sipc.org](http://www.sipc.org)

B. Certificate of Deposit Account Registry Service (CDARS).

1. With CDARS, banks can offer up to \$50 million in FDIC coverage by having one institution place your funds into certificates of deposit issued by banks in the CDARS network in increments of less than \$100,000 to ensure that both principal and interest are eligible for full FDIC Insurance.
2. How it works. An example.
  - a. Seymour Smith has \$600,000.00 deposited at Bank A (a bank that is a CDARS participant).
  - b. Bank A separates Seymour Smith's funds into 11 different CD's: 6 @ \$90,000.00 and 1 @ \$60,000.00.

- c. Each CD is held at a different CDARS participating bank→ thus the principal and interest of all CD's will be under the FDIC general rule for coverage: \$100,000.00 insured per ownership category, per insured bank.
3. For more information: [www.cdars.com](http://www.cdars.com)
- a. Participating Michigan banks: <http://www.cdars.com/find-cdars.php>
  - b. Other benefits of CDARS: <http://www.cdars.com/why-cdars.php>

## MANAGING WORKFORCE EXPENSES

By: Ronald A. Sollish

The purpose of this presentation is to help you manage your business during these tough economic times. When evaluating business operations in order to avoid excess spending, businesses should evaluate their line item expenses. More specifically, one of the most costly areas for any business is their company and workforce costs. This presentation is intended to provide you with various strategies to help manage and monitor these expenses so that your company can maintain and survive successfully through our current economic state.

### I. LAYING OFF WORKFORCE

#### A. General Considerations. Good Employment Practices

1. Reducing liability for terminating employees depends on the employment practices.
2. Keep up to date and accurate employee files. These files should contain:
  - a. Properly documented disciplinary and performance infractions. This should include what happened, who the employee spoke with, and how it was resolved.
  - b. A signed copy of the employee acknowledging that they are at will.
  - c. The basis for the discharge from employment
3. Consistently apply employment practices and policies. There should be minimal exceptions from the standard policy for all employees.

## B. Exit Interviews

1. For any employment termination, there should be an exit interview conducted. This should be between the:
  - a. discharged employee;
  - b. the individual recommending the discharge; and
  - c. a member of the personnel department.
2. The employee should be given an opportunity to respond to the basis for discharge, which should be given to them in writing.
3. Do not try to embarrass the employee – this should be done in a respectful and dignified manner and there should be as little stress and embarrassment as possible in the termination process.
4. Notes should be conducted of the exit interview by all present at the interview.
5. Obtain conciliations from the employee regarding the employee's understanding of the basis for termination.

## C. Economic Reductions in Force (RIFs)

1. In many circumstances, an employer desires or will need to reduce its workforce because of economic or strategic reasons. In these circumstances, the discharge of the employee will not be related to performance or conduct.
2. To minimize liability upon the institution of an RIF, the following plan should be initiated. The first is develop a Task Force to evaluate which employees should be let go in a RIF:

a. Task Force Makeup – a task force is internal group consisting of:

i. legal counsel

ii. an upper level officer of the business; and

iii. personnel familiar with the internal benefits of the company who is knowledgeable as to the financial condition of the business.

b. Familiarity with the employment agreements:

There should be familiarity with the employment agreements of all employees.

This is because employees with a written agreement for a definite period of time must be handled differently from those who are “at-will.”

c. Documentation:

Immediately evaluate the performance of the employees who will potentially be terminated and document their performance and inadequacies *in writing*.

d. Justification:

Establish and document the economic justification for a reduction in force, as well as alternative expense reduction measures.

e. Release Plan:

Your task force should establish an incentive plan where the discharged employees *execute a release* in return



for compensation and benefits in excess of those typically offered to discharged employees.

f. Internal Audit:

Conduct an internal audit to determine the race, sex, ethnic and age distribution for the workforce which will be compared to the projected workforce.

3. Explore alternatives to a reduction in force that may be considered rather than removing employees. There are two general types: program base and personnel base:

a. Program based

- i. Elimination of unprofitable operations;
- ii. restrictions on programs;
- iii. Consolidation of programs.

b. Personnel base

- i. Hiring freeze;
- ii. Promotion freeze;
- iii. Pay Cuts;
- iv. Reduced work weeks;
- v. Attrition.

- c. To have a successful alternative to a reduction in force, the following preparation should be made:
  - i. Detail the anticipated savings of each cost cutting alternative;
  - ii. Evaluate the financial and non-financial positive and negative impact on each alternative;
  - iii. State the rationale for selection of practical alternatives selected or rejected as they relate to the financial considerations;
  - iv. Retain outside experts – accounting firms – to lend support to your rationale for termination or implementation of a new plan.

4. Employment Monitoring/Hiring

- a. Monitor the hiring, promotions and salary increases for at least one year following the reduction in force;
- b. Monitor the hiring before the reduction in force and after the reduction in force by having all hiring decisions approved by your task force:
  - i. Different positions: Place no new hires into positions or job functions previously performed by the discharged employees – these new hires should have job descriptions broader in nature than the discharged employees.
  - ii. Freeze promotions: Audit promotions so that young employees are not promoted into jobs previously held by discharged employees.

- iii. Freeze salaries where practical
- iv. Evaluate job functions:
  - aa. Develop uniform guidelines that identify unnecessary job functions.
  - bb. Determine the most essential jobs after the RIF—identify the skills needed to perform those functions.

5. Exit Interview

You should conduct an exit interview with the employees terminated by the RIF. For this interview there should be:

- a. Guidelines.
- b. Practice as to how it will be conducted.
- c. The conversation should be limited to the interview essentials.
- d. Inform the employee briefly as to how and why the job function was eliminated, how employee evaluations were made, and what ways the job performance was deemed inadequate.
- e. At least two people should be present during the interview and all should take notes.
- f. Request any comments the employee has on the determination decision and if the employee believes that it was unfairly done.

6. Do not do the following during a RIF
  - a. Advertise for any other job openings in your company while terminations are going on;
  - b. Do not hire unless you consult with your task force approving the hire;
  - c. do not place the new hires in identical positions as those terminated;
  - d. do not permit promotions to identical jobs that were terminated; and
  - e. If job functions are not eliminated, divide the jobs among the number of employees, but do not divide based on age, color, religion, race, sex, or national origin.

7. Releases

Releases are one of the best ways an employer can eliminate liability upon termination of employees. A release should contain the following provisions:

- a. Voluntary:
  - i. A release must be knowingly and voluntarily executed. There should be an express provision to this effect.
  - ii. This cannot be made through duress, fraud, or misinformation.

- b. Consideration:
  - i. The discharged employee must receive some type of consideration which he/she would not have otherwise been entitled to but for the release.
  - ii. The consideration can be any form. For example:
    - aa. additional compensation;
    - bb. payment for health benefits if permitted by the health plan;
    - cc. letters of recommendations;
    - dd. use of secretary/office facilities;
    - ee. out placement services
  - iii. Time to Review:
    - aa. The employee must be given ample time to deliberate and review the lease.
    - bb. Courts have reviewed this issue and have consistently held that it will uphold a release only if the employee is given a reasonable period of time to review the documentation.
  - iv. Express release:
    - aa. The nature and scope of the release must be specifically set forth in the document.

bb. The release itself should be broad based and apply to all forms of employment related claims which could be asserted by the employee.

v. Execution:

The release must be signed by all of the parties to the document.

vi. Additional things that should be within the release:

aa. Reaffirmation that the employee was retained on an "at-will" basis.

bb. The release should provide a certification that the employee has seen or been afforded the opportunity to review the release with an attorney.

cc. This is one of the best defenses to rescission.

dd. The release should contain a provision that the employee agrees not to disclose the terms of the release – i.e. confidentiality.

ee. The employee should agree not to act in a way which would cause embarrassment, damage or injury to the reputation of the employer.

- ff. Return of property which is owned by the employer in the possession of the employee to the employer.
- gg. Default provisions dealing with breach or default by the employee of the terms and provisions of the release.
- hh. Alternative dispute resolution mechanisms.
- ii. Waiver of the right to tender back consideration.
- jj. Waiver of the right of reinstated and/or re-apply for a position with the employer.

8. There are additional issues that apply to releasing older workers:

Workers who are 40 years of age or older may be covered by the Older Workers Benefit Protection Act. This Act applies to all releases and waivers of any claim under the Age Discrimination in Employment Act. To be valid, the release must:

- a. Be written, understandable and refer to claims under the Age Discrimination in Employment Act.
- b. Acknowledge that the employee cannot waive rights that arise after the date of the release.
- c. The employee must receive some consideration which that would not otherwise be entitled to but for the release.

- d. The employee must be advised of the right to consult with an attorney before the execution of the release.
  - e. The employee must be given at least 21 days to consider the release and 7 days to revoke it after signing it.
  - f. If the waiver is offered as part of an incentive program which is offered to a group of employees, the employees must be given 45 days to consider the agreement.
9. The Worker Adjustment And Retraining Notification Act (“WARN”) – 29 USC 2101:

Employers about to experience mass layoffs or plant closings must notify employees of the upcoming events:

- a. WARN applies to:
  - i. employers who have at all their sites a total of 100 or more full time employees; or
  - ii. 100 or more employees including part time employees who work at least 4,000 hours per week, exclusive of overtime.
- b. Notice is required when there is a mass layoff or plant closing:
  - i. A mass layoff:
    - aa. is a reduction in the hours that effects 500 or more full time employees or;



- bb. 50 or more full time employees if they constitute at least 33% of the active full time employees.

A reduction in hours worked means a reduction of 50% during each month of any six month period as compared to the previous six months.

- ii. A plant closing is:

- aa. When there is a temporary or permanent shutdown of a single site of employment; or

- bb. One or more facilities or operating units within a single site of employment and 50 or more full time employees are laid off, terminated, or experience a reduction in hours

- c. How must the notice be presented:

- i. If there is a mass layoff or plant closing, notice must be given to the employees or their union, the state dislocated worker unit and the chief elected official of the local government.

- ii. Notice must be given 60 calendar days prior to the final day of work.

- iii. Shorter period of time are allowed:

- aa. in the event the employer is seeking capital or business which would avoid the plant

closing or there is a dramatic and unforeseen circumstance forcing the layoff;

- bb. there is a natural disaster,
- cc. or if the layoff extends beyond the six month period and was not originally intended to do so.
- d. The notice should contain comprehensive information regarding the site of employment, the temporary or permanent nature of the layoff, the date the layoff or plant closing is to occur, individuals affected, and other relevant information.
- e. Penalties:
  - i. Unions, governments and discharged employees have the right to file a lawsuit under WARN if WARN is not followed.
  - ii. The recovery can be:
    - aa. Back wages.
    - bb. Benefits.
    - cc. Fines.
    - dd. And attorney's fees.

## II. CUTTING EXPENSES

- A. Prior to cutting any expenses, it is important to create a viable plan. This should not be done on a whim. Plan ahead, create a realistic budget and get the entire staff involved. Employees are more willing to

help managers control expenses when they understand the next cut could be their own job.

- B. Before attempting to reduce operating and production costs in a business, you must lay some groundwork for an adequate reduction plan.
- C. Prior to working on reducing costs:
  - 1. you should have measured your business.
  - 2. and established your targets and business plan.
- D. After fulfilling these items you are ready to start working on reducing costs. Bypassing these steps will end up damaging their businesses with "quick fix" methods that will not work in the long run.
- E. Wage Deductions:
  - 1. All employees must be paid the minimum wage set by federal law unless your business is one of those that falls outside the scope of the Fair Labors Standards Act.
  - 2. The current minimum wage in Michigan is \$7.40 for adults, which is higher than federal law.
  - 3. The current minimum wage in Michigan for children is \$6.55, as required under federal law.
  - 4. Explore possible wage deductions:
    - a. An employee must be paid the required minimum wage "free and clear." So any deduction from wages which the employer may wish to impose cannot be taken if the effect is to lower the employee's wage below the required minimum wage.

b. Permissible deductions: An employer may deduct the fair value of board, lodging, or "other facilities."

i. What is permissible under "other facilities":

aa. Meals furnished at company cafeterias;

bb. Housing;

cc. Merchandise from a company store or commissary;

dd. Utilities for company supplied housing, and;

ee. Transportation provided to and from work.

ii. What is not permissible under "other facilities":

aa. Trade tools;

bb. Laundering of uniforms;

cc. Sleeping facilities for employees required to be on duty;

dd. Meal expenses for employees on the job;

ee. Transportation during the course of employment.

iii. Uniforms:

If an employer requires employees to pay for a uniform from the employee's wages, the deduction is permitted if it does not reduce the employee's wages below the applicable minimum

wage or reduce the required payment of overtime wages.

5. Explore wage reduction:

a. Wages:

It's the employer's prerogative to set pay rates for employees and to periodically adjust those pay rates (up or down) unless otherwise defined or limited by an employment or union agreement.

b. Wage reductions are appropriate in the following circumstances:

- i. Reduction of hours or work schedule;
- ii. Reduction of responsibility or change in duties;
- iii. Change in work shift or working conditions causing loss of premium pay;

c. Preparation necessary to reduce employee pay:

When a pay reduction is necessary to reduce costs to save the business during difficult economic times and the appropriate notice is given, an employee may consider a job with a lower pay rate to be a better alternative to a layoff.

No employee is going to be happy if you're reducing their income. A prior notice or warning to the employee is recommended. Clearly communicate to all affected employees the economic conditions and the resulting employment actions being considered.

d. Eliminate some of the benefits that your employees have:

i. Bonuses:

aa. If they were mandatory or given to all employees:

i) develop an incentive based bonus plan that is based on production instead of being automatic at the end of the year. This will be effective by:

a) reducing costs;

b) increasing sales;

c) improves customer satisfaction;

d) increases customer retention.

ii) This will eliminate some of your end of the year expenses and will increase workforce productivity.

A plan should be in writing so employees are not surprised at the end of the year and do not resent the fact some are not getting a bonus.

- bb. Evaluate the amount given as a bonus:
  - i) if you traditionally gave a certain amount as a bonus, evaluate the total expense and look to see if it can be effectively reduced.
  - ii) Explain to the employees the reason why and if you intended to return once economic circumstances get better.
  - iii) However, don't lie. Be honest with your employees. Don't give false expectations. People will appreciate the honesty and if this is a major cost saving expense, it must be done, so give the reason.

ii. Fringe Benefits:

aa. Paid time off/sick days:

- i) Providing paid time off is in the discretion of the employer. Evaluate your policy and determine the expenses lost on PTO.
  - a) If you're going to reduce PTO, make sure you state the reason in writing and when it will be effective. Make sure when the plan is going to occur leaves

adequate planning time for the employee.

b) Employees will have based their schedules around PTO so, as a benefit to them, they should be given the chance to adjust.

ii) Providing employee sick leave benefits is voluntary for employers. Evaluate how many days you are giving and determine the appropriate amount given your current economic circumstance and economy.

iii) State the reason for a reduction in writing and when the plan is going to be effective.

However, it is still required in some circumstances (FMLA or Maternity Leave).

bb. Paid lunch period

cc. Paid holidays

i) Remember, these are all fringe benefits provided at the discretion of the employer. Evaluate your costs and savings. Give your employees



appropriate notice and have your plans be in writing.

- ii) All of these plans are subject to agreements already in place, so be fully aware of agreements already entered into and their duration.

iii. Manage hours worked/modifying the work week:

aa. a reduction in hours may provide an opportunity to re-focus resources where they are most critically needed. It may also allow for the more effective utilization of time and energy within the workplace. This also results in a saving of some salary expenditure.

bb. Ways to reduce work week:

- i) Look into 4 day work weeks for each employee.

Staggering the days and shifts would also reduce overtime.

- ii) Eliminate time for specific departments – make maximum time allowed.

- iii) Make sure that you explain to your employees the reason why so that the reduction is expected and minimal resentment is held.

## F. Overtime

1. Overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek.
  - a. There is no limit on the number of hours employees 16 years or older may work in any workweek.
  - b. The FLSA does not require overtime pay for work on weekends, holidays, or regular days of rest, unless overtime is worked on such days.
2. Explore ways to reduce overtime
  - a. create a policy prohibiting overtime or unauthorized work. Stick to this policy, and it must be manageable. Reducing overtime should NOT compromise the service you provide.
  - b. If overtime was a large part of your culture, there may be an additional hiring needed to make up for the hours which people would have to spend to satisfactorily meet your requirements, however, it will still be less than what you would have to pay for overtime.
    - i. Note: if an employer knows and permits an employee to work beyond his or her normal work hours, the employer must pay wages at the applicable rate to the employee even if the employer has a written policy prohibiting overtime or unauthorized work.
    - ii. Generally, time provided for meals is not work time requiring compensation. As such, remember

that the work time is not to be included in the compensable day, so, that amount can reduce the amount of overtime for one party.

However, rest/coffee breaks do count as compensable time if it is for 20 minutes or less.

- c. Negatives of eliminating overtime:
  - i. When you begin to take measures to eliminate overtime, you need to understand the effect this will have on your workforce.
  - ii. If overtime has become part of your company culture, your employees are probably used to the extra money in their paycheck.
  - iii. When you eliminate this extra money, your employees are going to be upset because it will make them think differently about the company, or its status. They also may view it as a personal pay cut to them, rather than a cost saving method for the overall viability.
  - iv. It's important to address your employees' concerns before making reducing overtime – explain why it is necessary.
- d. Alternatives to overtime
  - i. Reducing Schedule
    - aa. You may be able to rearrange an employee's schedule during a workweek to

ensure that the employee does not work overtime.

- bb. Under federal law, an employee works no more than 40 hours in a week has not worked overtime and is not entitled to overtime pay. So, for example, an employee who works four 10-hour days and then has three days off need not be paid overtime.

- ii. **Comp. Time**

- aa. Explore the possibility of Comp. Time. However, an employer may not trade comp time for overtime under the FLSA – unless the employer is a public agency.

- i) Employers who are not subject to the FLSA may provide for “comp” time. Comp time is a required amount of time off for every hour worked.

- 2) You can also adjust an employee's hours during a pay period so that the amount of the employee's paycheck remains constant.

- bb. The negative: You will have less of the employee's time, but at least it will keep your rate constant.

## G. Paid Time Off

1. Companies spend approximately 10% of payroll on paid time off plans. Explore your paid time off and look into reduction options. Make sure that you are in line with the following averages:
  - a. The number of vacation days granted to employees varies with years of service. Typically employees are granted 10 days of vacation per year upon hire, 15 days after five years of service, and 20 days after 15 years of service.
  - b. Sick pay is paid time-off for employee illness. Most companies also allow employees to use sick leave for the illness of a family member. Nine days per year is the average amount of sick leave granted.
  - c. A personal time-off (PTO) benefit, which combines vacation and sick leave is offered by a small (about 25%) but growing number of companies. On the average, employees are granted 17 days of PTO after one year of service, 21 days after 5 years of service, and 24 days after 10 years.
2. The negatives:
  - a. Paid time off is highly valued, especially with today's time pressures on employees and their families.
  - b. More than a third of companies have a formal policy that allows for flexible scheduling.
  - c. Any reduction in PTO might reduce the happiness of the employee.

- H. Evaluate Restructuring as an alternative, or, in combination with wage deductions. This will either prevent wage deductions or will lessen the wage reductions.

Restructuring includes jobs *and* departments.

1. These include things such as closing of obsolete plants or branches, administrative overhauls, selling of non-core operations, or improving internal processes.
2. If a function is not contributing to the company's success get rid of it, but cut from the top down, not from the bottom up. The remaining employees should understand the selection process used to cut under-performing units or functions no longer sufficiently valuable to the company.

- I. Retraining of employees:

Look into retraining your staff to improve efficiency.

1. Lack of proper skills – and especially the latest skills -- will affect the bottom line profits.
2. This will also prevent the necessity to hire new people to fill new gaps if the people presently there, who are capable, can be trained to function in a changing environment.
3. The training workers receive should be skill-based training, in order to raise their competency levels.
4. Staff must learn to use the equipment required to do the various tasks in their jobs.

These skills are already available from previous training or job experience, but increasingly due to advancing technologies, methods, or processes, workers must receive extra training.

J. Salary Reduction

1. Salary sacrifice arrangements can help employers save on employment costs without reducing the number of their employees. They may be used to structure the provision of:
  - a. pension plans;
  - b. childcare;
  - c. mobile phones;
  - d. accommodations during travel;
  - e. car parking;
  - f. staff restaurant/canteens and company cars.
  - g. Reduce annual bonuses.
2. Managed well, they can be cost and time effective ways of providing benefits to employees without losing any employees and having tensions reduced during an economic downturn.

K. Reduce Employer contributions

1. Health Plans
  - a. Evaluate your current health plan. See if there is a similar quality health plan that is cheaper in price but offers similar benefits.

- b. For example, look into health savings accounts. HSA works very much like an IRA, except you use the money you contribute to pay healthcare costs:
  - i. To qualify, participants must enroll in a relatively inexpensive, high-deductible health insurance plan.
  - ii. Once qualified, a tax-deductible savings account can be opened to cover current and future medical expenses. The money deposited in the savings account, as well as the earnings on it, are tax-deferred. You may withdraw the money as needed, tax-free, to cover qualified medical expenses.
  - iii. Unused balances in HSAs roll over from year to year.
- c. However, qualifications for HAS are very high. The employer must have a high deductible health insurance policy that qualifies to be partnered with such account. A HDHP is a health plan that:
  - i. has an annual deductible which is not less than
    - aa) \$1,000 for self-only coverage and
    - bb) \$2,000 for family coverage (the minimum is \$1,000 for individuals and \$2,000 for families) *and*
  - ii. the sum of the annual deductible and other annual out-of-pocket expenses required to be



paid under the plan for covered benefits does not exceed:

aa) \$5,000 for self-only coverage, and

bb) \$10,200 for family coverage.

iii. This creates a savings opportunity for employers since health insurance plans with higher deductibles typically cost less.

iv. The employee then sets up an HSA account, similar to an IRA, and makes his or her tax-deductible contributions. This relieves the employer of its fiduciary responsibilities - again creating a cost saving opportunity. The employee, the employer, or a combination of the two can fund contributions to an HSA. The amount that can be contributed each year is:

aa) the lesser of the annual deductible of the plan, or \$2,650 for self-only coverage; and

bb) the lesser of the annual deductible or \$5,250 for family coverage.

## 2. Retiree Plans

a. Employers that continue to offer retiree health benefits to future retirees and new hires have cut these benefits by:

i. Reducing average premium contributions from 80 percent for current retirees to less than 60 percent for future retirees.

- ii. Imposing more stringent minimum service requirements for workers to earn these benefits.
  - iii. Tying the employer's portion of the retiree health benefit premium to the worker's length of service at retirement.
  - iv. Placing caps on the amount that the company will pay toward annual retiree medical premiums.
- b. Explore alternatives:

For example, retiree medical accounts:

Retiree medical accounts (RMAs) as an alternative to traditional retiree medical plan designs. Contribution formulas differ under various RMAs, but participants are typically credited a fixed dollar amount for each year of plan participation, and the account may earn interest both before and after retirement.

## OMG! WHAT IS HAPPENING TO OUR RETIREMENT PLAN?

By: Gary M. Remer

### I. THE NEED FOR LOANS AND IN-SERVICE DISTRIBUTIONS

- A. Provided a retirement plan allows for loans, a participant can avoid being taxed on the receipt of funds as a distribution if a loan is made pursuant to an enforceable agreement, and the agreement meets certain requirements with respect to the term of the loan, the repayment schedule, and the dollar amount loaned.
- B. The specific requirements for a loan are as follows:
  - 1. A loan must be evidenced by a legal enforceable agreement, which may be composed of more than one document.
  - 2. Generally, the term of the loan must be no longer than 5 years. An exception to the 5 year rule exists for principal residence loans. A principal residence loan is used to acquire a dwelling unit which is to be, within a reasonable time, the principal residence of the participant.
  - 3. The loan must provide for level amortization over the term of the loan with payments not less frequently than quarterly.
  - 4. The loan must bear a reasonable rate of interest.
  - 5. Generally, the amount of the loan (when added to the outstanding balance of all other loans, whenever made, from all plans of the employer) may not exceed the lesser of (i) \$50,000 (reduced by the excess of the highest outstanding balance of plan loans during the one year period ending on the day before the date when the loan is made over the outstanding balance of plan loans, the date when the loan is made), or (ii) one-half of

the present value of the employees non-forfeitable accrued benefit under such plan. A plan may provide that a minimum loan amount of up to \$10,000 may be borrowed, even if it is more than one-half of the present value of the employees non-forfeitable accrued benefit.

C. In-Service Distributions.

1. Pre-tax contributions to 401(k) plans may not be distributed prior to the occurrence of certain distributable events: severance of employment, death, disability, attainment of age 59 ½, hardship, and termination of the plan.
2. In-service distributions may be made from a qualified profit sharing plan to participants that have not separated from service upon attainment of a stated age (usually age 59½) and for emergency purposes.
3. All types of qualified plans are required to have certain participants begin receiving distributions at age 70 ½.
4. Even if a plan does allow for in-service distributions prior to age 59 ½, the distribution may be subject to a 10% premature distribution penalty.

II. DEALING WITH COSTS ASSOCIATED WITH THE PLAN

- A. Plan expenses may generally either be paid by the employer or paid with plan assets. Certain fees may be charged against participant accounts.
- B. In many cases financial service providers may offer to subsidize administrative expenses depending on the size or amount of the assets under management.

- C. The trustee should evaluate whether this is actually more costly or less costly with respect to the plan depending on the over all cost involved.
- D. The Department of Labor is requiring certain plans to provide fee disclosures.

### III. WHAT CAN BE DONE TO MAKE UP FOR WHAT WE LOST

- A. New Comparability.
  - 1. A defined contribution plan defines the amount that will be contributed currently with no guaranty as to the amount of the benefit at the time of retirement. A defined benefit plan specifies the benefit at retirement without a predetermined annual contribution.
  - 2. The underlying principal determining the funding of a defined benefit plan is the time value of money. For example, a participant that is age 60 needs to have a larger contribution made to a retirement plan today in order to have that amount grow to \$100 at retirement compared to the contribution required for a participant that is age 20 to have their benefit grow to \$100 at retirement.
  - 3. Each year a defined benefit plan is required to have an actuary calculate the required contribution by projecting the retirement benefit to be funded.

4. In simple terms, cross testing works by looking at the contribution made to each participant currently and demonstrating that although each participant may receive a different contribution percentage compared to the other participants, the amount received is projected to be the same benefit at retirement.
  5. The advantage of cross-testing is that it allows the grouping of participants so that members of each group may receive the same allocation percentage.
- B. Key technical requirements must be satisfied to demonstrate that the cross-tested plan does not discriminate in favor of HCEs. This is done by demonstrating that a cross-tested plan is non-discriminatory under the general test of Treasury Regulation §1.401(a)(4)-2(c) by comparing equivalent amounts of benefits instead of contributions. A plan satisfies the general test if each "rate group" satisfies the requirements of IRC §410(b). A "rate group" is established for each HCE and consists of:
1. The HCE; and
  2. All other employees (both HCEs and HNCEs) who have an equivalent accrual rate greater than or equal to the equivalent accrual rate of the HCE.

Each rate group then must either pass the ratio percentage test of Treasury Regulation §1.410(b)-2(b)(2) or the average benefit test under Treasury Regulation §1.410(b)-5.

C. Cross-tested plans must also satisfy one of two minimum contribution requirements, in addition to the technical requirements described above:

1. A minimum 5% allocation rate to each non-highly compensated employee (“NHCE”); or
2. A minimum allocation rate to the NHCEs equal to 1/3 of the highest allocation rate for any highly compensated employee (“HCE”).

D. Show me the numbers! In this example a cross-tested plan is designed to allow the owner of the company to receive an allocation equal to 40% of her compensation while only providing a contribution of 6.25% to each of the other participants.

NAME	AGE	COMPENSATION	CONTRIBUTION	% OF PAY
HCE #1	50	100,000	40,000.00	40.00%
NHCE#2	25	20,000	1,250.00	6.25%
NHCE #3	27	20,000	1,250.00	6.25%
NHCE #4	33	20,000	1,250.00	6.25%
NHCE #5	47	24,000	1,500.00	6.25%
TOTALS		184,000	45,250.00	24.59%

- E. The goal of most owners of a business is to provide themselves with the maximum possible benefit at the least overall cost. The issue the owners may face is if a benefit is already being provided to their employees, the owners do not want the employees to feel that a change in the retirement is harming them.
- F. An example will demonstrate how this works. The owners will be able to receive an allocation totaling \$40,000. The participants can defer pre-tax dollars and receive a 5% contribution from the employer (3% as a safe harbor contribution that satisfies the top heavy funding and 2% subject to a vesting schedule). The ADP Test is not required. The plan shown is designed to break all the participants into two groups. Group One is comprised of each participant that is an HCE. Group Two is comprised of all participants that are not members of Group One. The plan also provides for a minimum contribution to each participant of \$500.

NAME	AGE	CURRENT COMPENSATION	CONTRIBUTION	PERCENT OF PAY	401(K) DEFERRAL	ADP 12.00% 2.14%	TOTAL CONTRIBUTION
HCE #1	46	\$100,000.00	\$26,000.00	26.000%	\$15,000.00*	15.00%	\$41,000.00
HCE #2	59	\$100,000.00	\$26,000.00	26.000%	\$15,000.00*	15.00%	\$41,000.00
HCE #3	57	\$100,000.00	\$26,000.00	26.000%	\$15,000.00*	15.00%	\$41,000.00
	38	\$ 18,552.35	\$927.62	5.000%	0.00	0.00	\$927.62
	53	\$24,957.81	\$1,247.89	5.000%	\$1,686.73	6.76%	\$2,934.62
	25	\$2,621.21	\$500.00*	19.075%	0.00	0.00	\$500.00
	36	\$25,768.85	\$1,288.44	5.000%	\$1,091.68	4.24%	\$2,380.12
	39	\$18,664.57	\$933.23	5.000%	\$355.16	1.90%	\$1,288.39
	53	\$1,529.69	\$500.00	32.686%	0.00	0.00	\$500.00
	60	\$30,371.95	\$1,518.60	5.000%	\$2,278.35	7.50%	\$3,796.95
	43	\$32,923.10	\$1,646.16	5.000%	\$1,658.97	5.04%	\$3,305.13
	53	\$27,134.22	\$1,356.71	5.000%	\$1,379.00	5.08%	\$2,735.71
	34	\$22,266.51	\$1,133.33	5.000%	\$373.98	1.68%	\$1,487.31
	41	\$72,129.91	\$3,606.50	5.000%	0.00	0.00	\$3,606.50
	31	\$1,886.26	\$500.00	26.507%	0.00	0.00	\$500.00



	53	\$11,540.66	\$577.03	5.000%	0.00	0.00	\$577.03
	47	\$22,776.31	\$1,138.82	5.000%	\$1,300.17	5.71%	\$2,438.99
	58	\$22,465.87	\$1,123.29	5.000%	\$1,188.17	5.29%	\$2,311.46
	42	\$22,854.03	\$1,142.70	5.000%	0.00	0.00	\$1,142.70
	50	\$20,869.62	\$1,043.48	5.000%	\$991.87	4.75%	\$2,035.35
	34	\$9,582.81	\$500.00	5.218%	0.00	0.00	\$500.00
	28	\$3,971.93	\$500.00	12.588%	0.00	0.00	\$500.00
	42	\$8,006.97	\$500.00	6.245%	0.00	0.00	\$500.00
	32	\$12,054.47	\$602.72	5.000%	0.00	0.00	\$602.72
	35	\$21,841.91	\$1,092.10	5.000%	\$1,193.42	5.46%	\$2,285.52
	35	\$16,415.02	\$820.75	5.000%	0.00	0.00	\$820.75
	35	\$19,233.44	\$961.67	5.000%	0.00	0.00	\$961.67
	73	\$28,869.60	\$1,443.48	5.000%	0.00	0.00	\$1,443.48
		Totals	\$104,584.52		\$58,497.50		\$163,082.02
		Owners	\$78,000.00	26.000%	\$45,000.00		\$123,000.00
		Non-Owners	\$26,584.52	5.324%	\$13,497.50		\$40,082.02

G. Defined Benefit Plans

1. A defined benefit plan specifies the benefit that a participant will receive at retirement.
2. The risk associated with the growth of the retirement funds is borne by the employer. If the market declines, the employer must fund the shortfall in the retirement plan.
3. This is different from a defined contribution plan where if there is a decline in the market, the participants suffer the loss.

H. With any retirement arrangement, the key is discovering what the end goal is and determining a way to make it happen. Then we have a happy ending.

NAME	AGE	PLAN COMP.	ASSUMED DEFERRALS	NEW COMPARABILITY	CASH BALANCE	TOTAL CONT.	PERCENT OF TOTAL	PERCENT OF COMP.
HCE #1	55	205,000.00	16,000.00	12,607.50	61,500.00	90,107.50	30.19%	43.95%
HCE #2	41	205,000.00	13,000.00	12,607.50	61,500.00	87,107.50	29.19%	42.49%
HCE #3	63	205,000.00	16,000.00	12,607.50	61,500.00	90,107.50	30.19%	43.95%
NHCE #1	36	71,918.00	0.00	4,135.29	1,438.36	5,573.65	1.87%	7.75%
NHCE #2	31	66,421.04	0.00	3,819.21	1,328.42	5,147.63	1.72%	7.75%
NHCE #3	52	38,957.60	0.00	2,240.06	779.15	3,019.21	1.01%	7.75%
NHCE #4	39	36,476.96	0.00	2,097.43	729.54	2,826.96	0.95%	7.75%
NHCE #5	50	35,091.04	0.00	2,017.73	701.82	2,719.56	0.91%	7.75%
NHCE #6	43	34,577.60	0.00	1,988.21	691.55	2,679.76	0.90%	7.75%
NHCE #7	25	33,966.44	0.00	1,953.07	679.33	2,632.40	0.88%	7.75%
NHCE #8	25	29,934.64	0.00	1,721.24	598.69	2,319.93	0.78%	7.75%
NHCE #9	49	28,559.36	0.00	1,642.16	571.19	2,213.35	0.74%	7.75%
NHCE #10	27	25,583.36	0.00	1,471.04	511.67	1,982.71	0.66%	7.75%
HCE'S	=	\$615,000.00	\$45,000.00	\$37,822.50	\$184,500.00	\$267,322.50	89.57%	
NHCE'S	=	\$401,486.04	0.00	\$23,085.45	\$8,029.72	\$31,115.17	10.43%	
TOTAL	=	\$1,016,486.04	\$45,000.00	\$60,907.95	\$192,529.72	\$298,437.67	100.00%	

## HEALTH AND WELFARE BENEFIT REVIEW FOR TROUBLED TIMES

By: Marc S. Wise

### I. GENERAL

During difficult economic times, employers are looking to reduce their costs at every level. To reach this goal, many employers are looking at their health and welfare benefit plans to see whether a restructuring of the existing employee benefits can be made in a manner that will reduce the overall cost.

The alarming increases in health care costs are causing employers to look to consumer-driven health plans to help reduce their expenditures. Consumer-driven plans include Health Savings Accounts (HSAs), Health Reimbursement Arrangement (HRAs), and Flexible Spending Accounts (FSAs) which give individuals more choices and control to encourage them to be a more conscious shopper in the health care marketplace.

### II. WHAT OTHER COMPANIES ARE DOING

#### A. Health Insurance Options – Rank and File Level

1. One hundred percent employer payment for employee and family – not seen in the non-union area.
2. One hundred percent employer payment for employees only – employee pays the cost for spouse and family – this is a common benefit level that we see – Section 125 Plan needed.
3. One hundred percent employer payment for employees only – employee pays costs for spouse and family – this is used for employers with multiple health insurance options – employer payments are made for the lowest cost insurance – Section 125 Plan needed.

4. Base dollar amount paid by employer each month – employee pays the difference – Section 125 Plan needed.
5. Employee opt-out provision – employees who have other health insurance coverage can elect not to participate in the health insurance plan – employer will pay the employee part of the cost savings on a monthly basis – Section 125 Plan needed.

### III. OPTIONS UNDER THE INTERNAL REVENUE CODE TO REDUCE COSTS

- A. Health Savings Accounts. HSAs were created on December 8, 2003 to help individuals save for future qualified medical and retiree health expenses on a tax-free basis.
  1. Eligible individuals may, subject to statutory limits, make deductible contributions to a health savings account. Under IRC Section 223(c), an “eligible individual” means an individual who is covered under a high deductible health plan (HDHP) (see below) and who is not covered under any other health plan which is not a HDHP, unless the other coverage is permitted insurance or coverage for accidents, disability, dental care, vision care or long-term care. HSA contributions for an individual are not deductible if the individual can be claimed as a dependent by another taxpayer for the year.
  2. High Deductible Health Plans (HDHP) - For 2009, a HDHP is a health plan with an annual deductible of at least \$1,150 for individual coverage (\$2,300 for family coverage) and a limit on the maximum out-of-pocket expenses (deductibles, co-payments, and other amounts, but not premiums) of \$5,800 for individual coverage (\$11,600 for family coverage).

3. Other Coverage – Health Flexible Spending Accounts and Health Reimbursement Arrangements are “other coverage” that will generally preclude HSA eligibility. Exceptions to this rule apply for limited purpose FSAs and HRAs (those providing only certain benefits such as dental and vision), suspended HRAs (where the employee forgoes reimbursements) and HRAs providing benefits only after retirement.
4. Limits on Contributions – For calendar year 2009, the limitation on deductions for an individual with self-only coverage under a high deductible plan is \$3,000 and \$5,950 for family coverage.
  - a. Additional contributions for individuals 55 or older - For individuals who attain age 55 before the close of the taxable year, a catch-up contribution of an additional \$1,000 for 2009 and thereafter is permitted.
  - b. Tax treatment of distributions from a HSA –
    - i. Amounts used for qualified medical expenses. Any amount paid or distributed out of an HSA which is used exclusively to pay qualified medical expenses of any account beneficiary will not be included in gross income. A “qualified medical expense” means, amounts paid by such beneficiary for medical care (as defined in Section 213(d)) for such individual, the spouse of such individual and any dependent of such individual, but only to the extent such amounts are not compensated for or by insurance or otherwise.
    - ii. Health insurance may not be purchased from the account, except for:

- a. COBRA continuation coverage
  - b. A qualified long-term care insurance contract;
  - c. A health plan during the period in which the individual is receiving unemployment compensation under any federal or state law; or
  - d. In the case of an account beneficiary who has attained social security retirement age, any health insurance other than a Medicare supplemental policy.
- B. Health Reimbursement Arrangements (HRA). An HRA is an employer-established arrangement to reimburse employees for medical and dental expenses not covered by insurance or otherwise reimbursable. Benefits from an HRA are paid solely by the employer, employee contributions are not permitted. These arrangements were previously referred to as medical expense reimbursement plan.
1. Internal Revenue Code Provisions. HRAs are governed by Section 105 of the Internal Revenue Code, which allows health plan benefits used for medical care to be exempt from taxes, and Section 106 of the Code, which allows employer contributions to those plans to be tax-exempt. Such plans need not be funded and may be paid from the general assets of the employer.
  2. Reimbursements. An HRA can reimburse an eligible employee for “medically necessary” expenses such as co-pays, deductibles, office visits, vision care expenses, prescriptions,

and most dental expenses. Expenses related to cosmetic services are not eligible for reimbursement.

3. Plan Documentation. An employer establishes an HRA by adopting a formal plan and distributing a Summary Plan Description (SPD) to all eligible employees. The SPD describes among other things, the amount of money available to each employee's personal health account for the coverage. As eligible expenses are submitted, the employee's account is reduced and paid to them on a non-taxable basis. At the end of the HRA plan year, the employee's account is increased to the level of reimbursement applicable to the new year. Any funds left over from the prior year can either be forfeited or credited to the participant's account for the subsequent year, as determined by the employer in the initial design of the plan.

C. Flexible Spending Account. A Flexible Spending Account is a feature contained in a cafeteria plan under Section 125 of the Internal Revenue Code.

1. Summary Description of Cafeteria Plan

- a. Employee choice. The main feature of a cafeteria plan is that it permits each participating employee to choose among two or more benefits. Under such a plan, the employee may "purchase" non-taxable benefits by foregoing taxable cash compensation.

- b. Benefits Offered. A cafeteria plan may offer a number of different types of benefits. In general, in order for a benefit to be a qualified benefit for purposes of Section 125, a benefit must be excludable from the employee's gross income under specific provisions of the Code and

must not defer compensation, except as specifically allowed under Section 125. The examples of qualified benefits include the following:

- i. Group-Term Life Insurance on the life of an employee (Section 79)
  - ii. Employer-provided accident and health plans (Sections 105 and 106)
  - iii. Health flexible spending arrangement (Sections 105 and 106)
  - iv. Accidental death and dismemberment policies (Sections 105 and 106)
  - v. Dependant care assistance program (Section 129)
  - vi. Adoption assistance program (Section 137)
  - vii. Contributions to health savings accounts (Notice 2004-2, Q&A – 33)
  - viii. Long-term and short-term disability coverage (Section 106)
- c. **Non-Qualified Benefits.** Non-qualified benefits may not be offered in a cafeteria plan regardless of whether any such benefit is purchased with after-tax employee contributions or on any other basis. A plan that offers a non-qualified benefit is not a cafeteria plan. Employee elections between taxable and non-taxable benefits through such a plan will result in gross income to the



participants for any benefit elected. (Prop. Reg. 1.125-1(q)(2)).

The following benefits are non-qualified benefits that are not permitted to be offered in a cafeteria plan:

- i. Scholarships described in Section 117
  - ii. Employer-provided meals and lodging described in Section 119
  - iii. Educational assistance described in Section 127
  - iv. Fringe benefits described in Section 132
  - v. Long-term care insurance, or any product which is advertised, marketed or offered as long-term care insurance
  - vi. Long-term care services
  - vii. Group-term life insurance on the life of any individual other than an employee (whether includable or excludable from the employee's gross income)
  - viii. Health reimbursement arrangements (HRAs)
  - ix. Contributions to Archer MSAs
  - x. Elective deferrals to a Section 403(b) plan
2. Flexible Spending Arrangements (FSA) Defined. An FSA is a benefit program that provides employees with coverage which reimburses specified, incurred expenses (subject to reimbursement maximums and any other reasonable

conditions). An expense for qualified benefits must not be reimbursed from the FSA unless it is incurred during a period of coverage. After an expense for a qualified benefit has been incurred, the expense must first be substantiated before the expense is reimbursed.

3. **Maximum amount of reimbursement.** The maximum amount of reimbursement that is reasonably available to an employee for a period of coverage must not be substantially in excess of the total salary reduction and employer flex credit for such participant's coverage. The employer may set limits on the maximum amount that may be deferred to the plan.
4. **Flex-credits allowed.** An FSA in a cafeteria plan must include an election between cash or taxable benefits (including salary reduction) and one or more qualified benefits, and may include employer flex-credits. Flex-credits are non-elective employer contributions that the employer makes available for every eligible employee to participate in the employer's cafeteria plan. These credits can be used at the employee's election only for one or more qualified benefits made available under the plan.
5. **Use or lose rule.** An FSA may not defer compensation. No contribution or benefit from an FSA may be carried over to any subsequent plan year or period of coverage. Unused benefits or contributions remaining at the end of the plan year (or grace period, if applicable) are forfeited.
6. **Reimbursement available at all times.** Reimbursement from the FSA is deemed to be available at all times if it is paid at least monthly or when the total amount of the claims to be submitted is at least a specified, reasonable minimum amount (for example, \$50.00).

7. Conditions for limited FSA COBRA coverage.
  - a. COBRA elections for health FSAs. If a health FSA satisfies the two conditions found below, the obligations of the health FSA to make COBRA continuation coverage available to a qualified beneficiary who experiences a qualifying event in that plan year is limited to such benefits that may be received during the remainder of the plan year. This limitation applies (1) if the benefit exceeds the maximum amount that the health FSA is permitted to require to be paid for COBRA continuation coverage for the remainder of the plan year and (2) the health FSA is not obligated to make such COBRA continuation available for any subsequent plan year. Whether an employer must offer COBRA to a terminated employee during the year of termination and the subsequent year depends on certain factors:
    - b. Year of termination.

COBRA may not be offered to a qualified beneficiary who has overspent their Flexible Spending Account as of the date of the qualifying event. COBRA must be offered to those who have underspent their Flexible Spending Account.
    - c. COBRA Requirements for the year subsequent to the plan year of termination.
      - i. The health FSA is exempt from HIPAA. The health FSA is exempt from HIPAA if those eligible to participate in the health FSA are also eligible to participate in the employer's major medical plan

and the maximum benefit payable to the employee under the FSA exceeds two times the employee's salary reduction amount (or, if greater, the amount of the employee's salary reduction under the health spending account for the year, plus \$500), the employer must comply with HIPAA.

- ii. If the employer contributes more than \$500 to a health spending account either as a discretionary contribution or as a match, the employer may have to comply with HIPAA. For credit based Section 125 Plans, if the employee can receive the unused portions as taxable income, then the employer need not comply with HIPAA. If the employee does not have the option to receive the unused portions as taxable income, the plan will have to comply with HIPAA only if the plan designed prohibits employees from directing more than \$500 of the employer credits to the health spending account.
- d. The maximum COBRA premium the employer may charge for the health FSA coverage equals or exceeds the maximum annual health FSA coverage amount.
- e. As of the date of the qualifying event, the qualified beneficiary has overspent their health FSA account.
- f. COBRA coverage can be cut off at the end of the plan year in which the qualifying event occurred if the health FSA is exempt from HIPAA and the maximum COBRA premium equals or exceeds the annual coverage

amount. In such case, the employer would not have offer COBRA continuation for the health FSA at the next open enrollment.

- D. High Deductible Health Care Plans (HDHP). An HDHP is generally a traditional health care plan that has reduced premiums in exchange for high deductibles. Many plans offer different levels of deductibles, typically starting at or just above the health savings account minimum and going higher. HDHPs are generally combined with a health reimbursement arrangement (HRA) by a health savings account (HSA) that enrollees can use to pay for a portion of their health expenses.

The higher deductible associated with the HDHPs typically result in lower health insurance premiums because the enrollee bears a greater share of the initial cost of care.

- E. Employer Contributions. A 2006 Government Accounting Office (GAO) report provided information as to employer contributions. According to the GAO most employers made a contribution to their employees' health accounts. As previously discussed, employers are required to contribute to the HRA accounts associated with the HRA plan. According to the GAO report, the most common employer HRA contributions in 2004 range from about \$500 to \$750 for single coverage and \$1,500 to \$2,000 for 2 or more persons or family coverage. For HSA's offered by employers, the GAO stated that about two-thirds of employers made a contribution to their employees' accounts and average employer HSA's contribution in 2005 was \$553 for single coverage and \$1,185 for family coverage.

#### IV. VOLUNTARY BENEFIT ISSUES

- A. Voluntary benefits are additional benefits that are generally made available to the employees at their sole expense. Among the voluntary benefits that are available are the following:
1. Accident insurance policy which pays benefits to the employees and their families if they become injured.
  2. Cancer/specified disease insurance which helps employees and their families by minimizing the financial impact of cancer treatment costs and lost income due to time away from work.
  3. Dental insurance which provides the employees with basic, preventative or major medical benefits, with cash benefits paid for specified procedures, regardless of any other coverage.
  4. Hospital confinement indemnity insurance which pays benefits when the employees are required to stay in the hospital for more than one day for coverage, sickness or injury.
  5. Hospital confinement sickness indemnity insurance which pays benefits even for short hospital stays. This type of policy also pays benefits based on hospitalization in addition to benefits that address major diagnostic examines, physicians visits and surgery.
  6. Hospital intensive care insurance assists the employees and their families with the cost of intensive care.
  7. Life insurance is available for the employees and their families at various levels.

8. Long-term care insurance assists employees with the payment for expenses associated with assisted living and other long-term care services.
9. Short-term disability insurance which is designed to help the employees when they become disabled and cannot work due to covered sickness or a covered injury.
10. Long-term disability insurance which is designed to assist employees who have a more permanent disability.
11. Specified health event insurance policy which provides benefits to the employees for specific health events such as heart attacks, strokes, comas, major human organ transplants and other events.
12. Vision insurance which pays benefits for a range of eye-related issues, including prescription eye wear.

B. Change in Benefits

We have seen a number of companies over the past few years who have changed certain benefits from employer-provided benefits to voluntary benefits that are paid by the employees. Among these changes are the short-term and long-term disability insurance, vision benefits and dental benefits.

# REEVALUATING THE COST OF LEASING THE ROOF OVER YOUR HEAD

By: Danielle M. Spehar

## I. IDENTIFYING AND EVALUATING KEY LEASE TERMS FOR POSSIBLE MODIFICATION

- A. Knowledge is power – Review your lease – What did you agree to?
  - 1. What are your rights?
  - 2. What are your obligations?
  - 3. What are the landlord's rights?
  - 4. What are the landlord's obligations?
  
- B. What lease provisions are having the greatest impact on the success or failure of your business?
  - 1. Term.
  - 2. Rent schedule.
  - 3. Size of the leased premises.
  - 4. Pass-through expenses.

## II. PREPARING FOR AN ADVANTAGEOUS LEASE MODIFICATION/- RENEWAL

- A. What provisions of the Lease require restructuring?
  - 1. Term modification.
    - a. Are you willing to extend term in exchange for lease modifications?



- b. Are you willing to renegotiate renewal options in order to secure short term concessions?
  2. Rent schedule restructuring.
    - a. Short term reduction.
    - b. Reallocation of base rent over remaining term.
  3. Reduction in the size of the leased premises.
    - a. Can you operate your business in less space?
    - b. Is space configured such that it could be modified to permit leasing of excess space to a third party?
      - i. Are you willing to share in cost of reducing the size of the leased premises?
      - ii. Are you willing to carry the cost of utilities servicing excess space until reletting?
  4. Recharacterization of lease.
    - a. Net Net Net (or triple net).
    - b. Gross.
    - c. Escalators over a "base year".
- B. Where are you at in the lease life cycle?
  1. Are you approaching the end of the term?
  2. Do you have renewal options available?
  3. Are you current under all lease obligations?

- C. Are you intending on continuing the operation of your business?
  - 1. Short term – Winding down business operations.
  - 2. Long term – Survival and restructuring.

III. ADDRESSING THE INEVITABLE – NEGOTIATING A FAVORABLE LEASE TERMINATION

- A. What are the mechanisms by which a lease can be terminated?
  - 1. Break clause or option to terminate.
    - a. Does one exist?
    - b. What are the terms and conditions of exercising?
    - c. What is the cost of exercising?
  - 2. Assignment or sublease.
    - a. Is assignment or subletting permitted?
    - b. Are there any limitations on Landlord's right to reject prospective assignee or sublessee?
      - i. Financial strength.
      - ii. Creditworthiness.
      - iii. Experience in industry.
      - iv. Availability of personal or corporate guaranty.
      - v. Applicability of reasonableness standard to granting or withholding consent.
    - c. Proceeds from assignment/sublease.
      - i. Who is entitled to excess proceeds?

- ii. Be certain to account for any shortfall?
    - d. Is the tenant and/or guarantor entitled to a novation or release?
  - 3. Breach of the lease.
    - a. Is there any legitimate basis for asserting Landlord is in default?
      - i. Is Landlord in compliance with all of its obligations under the lease?
      - ii. What are your remedies under the lease and/or applicable law in the event of Landlord's default?
    - b. Evaluating your exposure in the event you default.
      - i. Who signed the lease as tenant (entity versus individual)?
      - ii. What is the financial strength of tenant entity?
      - iii. Is there a personal or corporate guaranty?
      - iv. Do you intend to continue to conduct business?
      - v. Does the lease provide for liquidated damages in the event of tenant default (retention of security deposit or fixed amount)?
      - vi. Does the lease entitle the landlord to accelerate rent in the event of a tenant default?
      - vii. Does the lease entitle the landlord to recover its costs and expense, including attorneys' fees, in the event of a tenant default?

4. Buy out by mutual agreement.
- B. Is a Lease Termination Agreement necessary? -- YES.
- C. What should be included in a Lease Termination Agreement?
1. Identify the parties to the lease.
  2. Identify the leased premises being terminated.
  3. Specify the "Effective Date".
    - a. Not always effective on the date signed by the parties.
    - b. Identify the specific time and date that the termination will be effective.
    - c. The date upon which the tenant releases and surrenders the leased premises to landlord.
    - d. The date upon which the landlord accepts the surrender of the lease and the leased premises from tenant.
  4. Include mutual releases.
    - a. Should include a release of the landlord by the tenant of all claims that the tenant has or may have against the landlord including:
      - i. Those arising out of the lease;
      - ii. Those arising out of the tenant's use and occupancy of the leased premises; and
      - iii. Those arising out of the termination of the lease itself.

- b. Should include a release of the tenant by the landlord from claims the landlord has or may have against the tenant including:
  - i. Those arising out of the lease;
  - ii. Those arising out of tenant's use and occupancy of the leased premises; and
  - iii. Those arising out of the termination of the lease itself.
- 5. Include termination language.
  - a. Confirmation by both parties that lease is cancelled and terminated and the term ends on the effective date as if the lease term was otherwise set to expire on the effective date.
  - b. Confirm parties' agreement to remain obligated under the lease for liabilities through the effective date and that such obligations shall survive the expiration of the term of the lease to the extent not fulfilled prior to the effective date.
- 6. Clarify any ongoing rental obligations.
- 7. Specify any termination payments.
  - a. The amount of any termination payment(s) and the terms and timing by which such payment(s) must be made should be identified.
  - b. Specify what remedies exist in the event of tenant's failure to timely remit termination payment(s).

8. Identify any conditions to the effectiveness of the termination.
  - a. Execution of a new lease with a replacement tenant.
  - b. Existing tenant's execution of a new lease for space owned or controlled by landlord.
  - c. Consent of a third party (i.e. landlord's mortgagee).
9. Identify any brokers involved in negotiating termination.
  - a. Specify who is responsible for satisfaction of any payment obligation.
  - b. Indemnification for any claims by brokers not identified in Lease Termination Agreement.
10. Identify any surviving obligations.
  - a. Environmental indemnities.
  - b. Third party claims.
11. Specify any confidentiality requirements.
12. Confirm parties' authority to execute agreement.
13. Address status of any guaranties.
  - a. Termination upon effective date of lease termination.
  - b. Guaranty satisfaction of tenant's obligations under the Lease Termination Agreement.

# BANKING RELATIONSHIPS AND FINANCE OPTIONS

By: John P. Gonway

## I. MANAGING THE BORROWER/LOAN OFFICER RELATIONSHIP

- A. Maintain open lines of communication between Borrower and Lender.
  - 1. Return the telephone call, email and letter.
  - 2. Provide the requested information.
  - 3. Provide status updates of deliverables (financial statements, tax returns, covenant compliance certificates, third party items).
  - 4. Is no news for the loan officer still good news? The Borrower must stay under the radar, but remain impeccable.
- B. Maintain professionalism and legitimacy.
  - 1. not over-promise and under-deliver.
  - 2. Make a realistic commitment and keep it.

## II. KNOWING THE LOAN'S PLACE IN THE BANK'S LOAN PORTFOLIO

- A. Michigan lender and Michigan collateral.
- B. Michigan lender and collateral outside of Michigan.
- C. Non-Michigan lender and Michigan collateral.
- D. Non-Michigan lender and non-Michigan collateral.
- E. Consider and understand your Lender's portfolio exposure to the Michigan economy.
  - 1. Risk rating of your loan.
  - 2. Aggregate risk within loan portfolio.

### III. UNDERSTANDING YOUR LOAN COVENANTS AND FINANCIAL REPORTING REQUIREMENTS

#### A. Loan Covenants.

1. Definite affirmative loan covenants.
  - a. Examples: Debt service coverage ratio, minimum liquidity amount, working capital, tangible net worth, net operating income, etc.
  - b. If business is slow, tend to housekeeping and make the covenant compliance fastidious.
    - i. Clear, concise and complete reports.
    - ii. Anticipate issues and questions and resolve them prior to delivery.
  - c. Above all, deliver in a timely manner.
2. Indefinite loan covenants and negative loan covenants.
  - a. Indefinite Loan Covenants: Lender deems itself insecure, material adverse change.
  - b. Negative Loan Covenants: prohibitions against additional financing, liens, leasing limits, dividends and distributions.

#### B. Financial Reporting Requirements.

1. Dig out the requirements and read them; the loan officer knows them and you need to know them and give special consideration to meeting these requirements. Examples: financial statements, accounts payable reports, accounts



receivable reports, inventory reports, guarantor financial statements, covenant compliance certificates, tax returns, etc.

- a. Involve the CFO and/or accountant early.
  - b. Set forth critical time paths for meeting the deadline.
  - c. Provide for time to review and address issues prior to delivery.
2. Meet the delivery deadline and be prepared to answer questions.
    - a. The goal is to provide good information in compliance with the requirements so it completes the loan officer's file and does not create a reporting exception for the lender.
    - b. Noncompliance starts the lender's clock ticking for curing the loan default status.

#### IV. OPPORTUNITIES FOR REFINANCING: A NEW INSTITUTIONAL LENDER, SUBORDINATED INSIDER DEBT, AND NEW EQUITY

##### A. A New Institutional Lender.

1. The Michigan market and the new normal requirements.
  - a. Credit enhancements.
    - i. Borrower and guarantor deposit accounts.
    - ii. Additional collateral such as cash, other real estate, securities, stock in other entities, letters of credit.
    - iii. Additional guarantors.

2. New equity or subordinated insider debt.
  - a. Indicates commitment of borrower and guarantor.
  - b. Provides a better loan to value analysis.
3. Equity kickers or sharing in the upside.
  - a. Stock in the borrower.
  - b. Returns on profits in project as a means to recover loan write-offs.

# REDUCE YOUR REAL ESTATE TAXES

By: Richard J. Maddin

## I. REAL ESTATE TAXES IN GENERAL

- A. By statute (MCL 211.24 et seq.), on or before the first Monday of March of each year the assessor is to estimate the true cash value of real estate for assessments. Assessments are not to exceed 50% of true cash value.
- B. Increases in real estate taxes are "capped" absent an uncapping event at the rate of 5% per year or inflation, whichever is less. Expenditures for normal repairs, replacements and maintenance are generally not considered events to lift the cap on taxable value.
- C. Tax is calculated from taxable value which can be less than half of the assessed value.
- D. Under no circumstances is the assessed value or taxable value to exceed 50% of true cash value.

## II. ASSESSMENT PROCEDURE

- A. Assessment notices must be processed by first class mail no later than ten (10) days before the local taxing authority's meeting of its Board of Review. The boards meet the beginning of March each year.
- B. Owners of single family residences must protest the assessment by appearing before the Board of Review as a condition for prosecuting an appeal to the Michigan Tax Tribunal.
- C. Owners of commercial, industrial and multi-family residential (more than four (4) residences per unit) need not appeal to the Board of

Review to perfect an appeal to the Michigan Tax Tribunal. (MCL 205.735 a).

III. WHY DO REAL PROPERTY TAXES GO UP WHILE PROPERTY VALUES GO DOWN?

- A. Until recently, property values have increased at a rate higher than the capped rate. This created an assessed value higher than the capped value.
- B. Until recently, absent an uncapping event, the spread between assessed value and taxable value increased annually.
- C. When property values began to fall, the assessors reduced the assessed value. If the reduced assessed value was higher than the capped value, the assessor had the right to increase the capped value by the lesser of the rate of inflation or 5%.
- D. When the taxable value determined by the assessor in its Notice exceeds 50% of true cash value, you are over-assessed and over-paying real property taxes.

IV. HOW TO CALCULATE THE TAX AND POTENTIAL SAVING

- A. Factors needed to calculate the tax:
  - 1. A credible notion of the property's fair market value
    - a. A street appraisal can work at this point.
    - b. A formal appraisal will be needed to prosecute the appeal.
  - 2. The millage rate applicable for the taxing authorities. This rate can change from year-to-year.

3. The taxable value as identified by the assessor in the Notice of Assessment.
- B. The fair market value, based upon the appraisal, is divided in half and then the millage rate is applied to determine what the property taxes should be.
- C. The millage rate is applied to the capped value to determine what the property taxes will be based upon the Notice of Assessment.
- D. The potential savings is determined by subtracting the amount determined in paragraph IV, B from the amount determined in paragraph IV.
- E. The analysis does not include the state equalization factor, but generally it is 1.0 unless the taxing authorities are under assessing properties in their assessment district. This analysis also does not address possible changes in millage rate. These should be kept in mind when determining whether or not to appeal a real property tax assessment.

V. ALTERNATIVES FOR APPEAL

- A. The taxpayer can initiate an appeal representing itself. The complexity of the matter and need for professional help determines whether this alternative is practical or appropriate.
- B. Professional help on a contingency fee basis. Under this approach, the professional handling the appeal generally charges one-third of the property tax savings payable over three years. In addition to the fees, the taxpayer would be responsible for costs such as the filing fee and for a formal, professionally prepared appraisal report which is the foundation for any successful appeal.
- C. The Maddin Hauser way, which is different than B in that fees for services performed are billed on a pay-as-you-go basis and,

depending upon the amount of the anticipated property tax reduction can produce a very substantial fee savings. Similar to B next above, the taxpayer would be responsible for costs such as the filing fee and for a formal, professionally prepared appraisal report which is the foundation for any successful appeal.

VI. CONCLUSION

We are ready to work with you to help you through all phases of the analysis, to help you evaluate your situation, and determine whether a property tax appeal is appropriate and the best way to pursue that appeal.

COMMERCIAL PROPERTY EXAMPLE

2009 NOTICE OF ASSESSMENT

<b>Tax Year</b>	<b>Assessed Value</b>	<b>Taxable Value and State Equalized Value</b>	<b>Applicable Inflation Rate</b>	<b>Applicable Millage Rate</b>
2008	\$2,500,000.00	\$2,300,000.00	5%	60
2009	\$2,450,000.00	\$2,365,000.00	5%	60

2008 tax (exclusive of collection fees, etc.) is \$138,000.00.

2009 tax (exclusive of collection fees, etc.), as assessed, will be \$141,900.00

- Appraisal report says fair market value as of December 31, 2008 (2009 tax day) is \$3,100,000.00
- Settlement is \$3,500,000.00 fair market value or \$1,750,000.00 assessed and taxable value
- Reduced tax will be \$105,000.00 producing a tax savings of \$36,900.00 for 2009

Normal contingency fee:

- One-third of savings payable over 3 years totaling \$36,900.00.

Maddin Hauser hourly pay-as-earned fee (assuming case is settled):

- Has ranged from 1/2 to 3/4 of what would be payable under the contingency fee for a legal fee savings of \$12,300.00 to \$28,450.00

# INSURANCE ISSUES IN TIMES OF FINANCIAL CRISIS; WHAT DOES THIS MEAN FOR YOUR BUSINESS?

By: Richard M. Mitchell

- I. THE INSURANCE MARKETPLACE GOING FORWARD; ARE SOFT MARKET DAYS NEAR THE END?
  - A. How insurers make money
    1. Your premium dollars are just the starting point.
    2. Tough times for insurers reflect on your pocketbook.
    3. What soft and hard markets mean for you as a consumer of insurance.
  - B. What will the insurance marketplace look like in 2009?
    1. What the recession of 2008 has already cost the insurance marketplace.
    2. Your premiums and ability to purchase insurance in 2009.
- II. WHAT TYPES OF CLAIMS ARE YOU LIKELY TO FACE IN TIMES OF FINANCIAL CRISIS?
  - A. Difficult times create litigious people
    1. Employees fear losing their jobs and the benefits that come with them.
    2. Spiraling health care costs make it worse.
  - B. Claims facing US businesses
    1. Wrongful Termination



2. Workplace Injury
3. Shareholder Derivative Actions
4. Fiduciary Claims/ERISA
5. Contract/Representation and Warranty Issues
6. Unemployment Insurance
7. Bankruptcy
8. Other Types of Claims

III. Re-Evaluating Your Insurance Needs.

- A. Make sure coverage is in place for the risks you continue to face
- B. Be cautious and realistic when making changes
  1. Reducing Coverage vs. Maintaining Financial Protection;
  2. Deductible Increases; make sure you have financial resources to satisfy increased deductibles in the event of a claim.
  3. Canceling policies
    - a. Certain policies may have cancellation or surrender penalties;
    - b. Policy cancellation may have unintended tax consequences.
  4. Shopping for a cheaper premium
    - a. You get what you pay for; cheaper premiums likely mean less coverage

- b. Carrier stability; are you switching to a carrier that will be there when you need it?
- 5. Re-negotiating premiums on existing policies
- 6. Read your policy closely and ask questions of your agent

IV. WHAT TO DO WHEN YOU ARE FACING A CLAIM

- A. Claims made vs. occurrence policies
- B. When should you provide notice of a potential claim
- C. Information you should provide on renewal applications
- D. Documenting your file; Information you will need to provide to the carrier and to protect yourself
- E. Your obligations once the claim is tendered

MADDIN, HAUSER, WARTELL, ROTH & HELLER, P.C.

ATTORNEY BIOGRAPHIES

Michael W. Maddin is the President and one of the Managing Directors of the firm. Mr. Maddin has been practicing law for over 40 years, primarily in the areas of real estate, corporate and business law, estate planning and probate. He is a member of the Southfield, Oakland, Michigan and American Bar Associations and the American Judicature Society. He was also a member of the Real Property Law Section Council of the State Bar of Michigan and for many years served as Chairman of the Commercial Leasing and Management Committee of the Real Property Law Section of the State Bar of Michigan. Mr. Maddin has been a speaker at numerous ICSC, ICLE, National Business Institute and State Bar of Michigan Real Property Law Section Seminars, and has authored numerous real estate related articles in professional journals. He has been repeatedly selected by his peers for inclusion in "The Best Lawyers in America," "Chambers USA" and others, and has been President or Chairman of numerous civic, charitable or fraternal organizations and major groups.

Mark R. Hauser is a Managing Director of the firm who specializes in the areas of real estate, partnerships, finance, corporate and business law, taxation and estate planning. A 1964 graduate of the University of Michigan, he obtained his Juris Doctor *magna cum laude* from Wayne State University in 1967 where he served as an Editor of the Wayne Law Review. A member of the Real Estate, Business Law & Taxation Sections of the State Bar of Michigan, Mr. Hauser has lectured at numerous professional seminars for attorneys and accountants on real estate and tax-related issues. He has been continuously selected by his peers to be listed in the "Best Lawyers in America," is the immediate past President of the United Jewish Foundation of Metropolitan Detroit, and is Trustee of United Jewish Communities having recently completed his term as National Vice President and member of the Executive Committee.

Richard J. Maddin is a firm shareholder who has practiced law for over 36 years. He is a graduate of Michigan State University and University of Detroit-Mercy Law School. His areas of practice include general business, commercial and residential real estate construction, corporate, land use planning, zoning and probate law. Mr. Maddin is an active litigator, representing both plaintiffs and defendants in the above-described areas of practice, including also the areas of real estate construction, zoning, real property tax appeals alternative dispute resolution (ADR) practice, and is a certified mediator. He is a member of the real estate, litigation, and ADR sections of the State Bar of Michigan, the Southfield and Oakland Bar Associations, and the American Judicature Society.

**Richard F. Roth** is a shareholder in the firm. He attended the Wharton School at the University of Pennsylvania where he received a Bachelor of Science in Economics. He graduated from the University of Michigan Law School, *cum laude*, in 1972. Mr. Roth has a business practice, with a concentration on corporate law, real estate, estate planning, and taxation, and he currently heads the firm's Alternative Dispute Resolution Department. With regard to the real estate side of his practice, Mr. Roth has handled legal work for the development, construction, and management of numerous shopping centers, including construction loans and end mortgages, as well as all of the leasing work. He has also handled the acquisition and sale of apartment complexes, shopping centers, industrial buildings, office buildings and unimproved real estate. He has also handled workouts for distressed properties. On the corporate side, he has facilitated mergers, acquisitions and financing for his corporate clients. He has handled many corporate and individual tax matters and Michigan sales, use and single business tax issues. He co-authored the statute which exempts from Michigan sales tax the purchase of hi-tech computers used in computer integrated manufacturing and CAD-CAM. Mr. Roth has lectured at numerous professional seminars. He is currently a member of the Board of Trustees of The Jewish Fund, which manages and distributes over \$60 million for charitable purposes. He is also a member of the Board of Trustees of the Karmanos Cancer Institute. Mr. Roth previously served as President of the Michigan Jewish Sports Foundation and the Sinai Health Care Foundation. He was previously a member of the Board of Trustees of Sinai Hospital, Huron Valley-Sinai Hospital, the Anti-Defamation League, Temple Beth Jacob, and Knollwood Country Club.

**Harvey R. Heller** is the shareholder in charge of our Insurance Coverage and Defense Practice Group. He is an honors graduate of Michigan State University, as well as a *cum laude* graduate of Detroit College of Law. In addition to being an active litigator, Mr. Heller is a member of the Michigan State Bar Foundation Fellows and the Michigan Defense Trial Council. On a national level, Mr. Heller is a member of the American Bar Association Standing Committee on Lawyers' Professional Liability, the Defense Research Institute, as well as the International Association of Defense Counsel. He has authored articles on the subject of professional liability and has been a featured speaker at professional liability seminars. Mr. Heller has continually been selected by his peers to be listed in the "Best Lawyers in America."

**Michael S. Leib** is a shareholder in the firm. He is a trial lawyer practicing in the areas of business disputes, real estate litigation, creditor's rights law, including bankruptcy law and employment law. He is a graduate of Kalamazoo College, the University of Montana and Wayne State University Law School. He is a member of the State Bar of Michigan and is admitted to practice before several courts, including the United States District Court, Eastern District of Michigan and Western District of Michigan, 6<sup>th</sup> Circuit Court of Appeals and United States Supreme Court. Mr. Leib is also a member of the State Bar of Michigan Judicial Qualification Committee.

Robert D. Kaplow is a shareholder in the firm. His practice is concentrated in estate planning and personal and corporate income tax planning. He is a graduate of Cornell University, receiving his law degree from the University of Michigan. He received a Masters in Tax Law from Wayne State University. He is a member of the State Bar of Michigan (Taxation and Probate and Estate Planning Sections), Oakland County Bar Association (Taxation Committee) and American Bar Association (Taxation, Real Property, Probate and Trust Law Sections). Mr. Kaplow is a frequent lecturer before professional groups pertaining to tax and corporate matters. He is listed in Who's Who in American Law and Who's Who of Emerging Leaders in America. Mr. Kaplow is a member of the Financial and Estate Planning Council of Metropolitan Detroit, and is also active in various charitable and Bar related activities.

William E. Sigler is a shareholder in the firm whose practice involves business law, real estate, internet and computer law, taxation, pension and employee benefits, and probate and estate planning. He graduated from Michigan State University and the University of Detroit-Mercy School of Law where he was an editor of the Law Review. He has lectured frequently on the topics of estate planning and employee benefits and taught federal income taxation at Lawrence Technological University. He has authored several articles, including "Supreme Court Declares Qualified Plan Benefits to be Exempt from Bankruptcy," Michigan Bar Journal, Volume 71, No. 10 (October 1992), "New Revenue Ruling Encourages Gifts of Stock in the Family Business, But Beware!," Michigan Bar Journal, Volume 72, No. 10 (October 1993), "Qualifying for the Annual GST Tax Exclusion," LACHES, No. 387 (April 1998), and "Innovative Retirement Plan Designs for the Small-Business Employer," LACHES, No. 450 (July 2003). Mr. Sigler is a member of the Financial and Estate Planning Council of Metropolitan Detroit and is active in charitable and Bar related activities. He has served as Chairperson of the Oakland County Bar Association Employee Benefits Committee, and is a member of the Board of the Association for Corporate Growth.

Stewart C. W. Weiner is a shareholder of the firm who has concentrated his practice for over 23 years in business, construction, real estate and securities matters with a particular focus on acquisitions, commercial transactions and resolution of business, construction, partnership and shareholder disputes. He frequently counsels clients on construction contracts, employment, securities and computer related matters. He serves as an arbitrator for the National Association of Securities Dealers, as a private arbitrator and is a member of the American Bar Association (Construction Forum, Business Law and Computer Law sections), State Bar of Michigan, Real Property Section, and Oakland County Bar Association.

Charles M. Lax is a shareholder of the firm who has practiced primarily in the areas of employee benefits, taxation, corporate law and mergers and acquisitions. He has authored numerous articles appearing in legal and public accounting journals. Mr. Lax has lectured extensively on qualified retirement plans and other tax topics before the Michigan Institute of Continuing Legal Education, Michigan Association of Certified Public Accountants and other professional groups. He presently serves

as a member of the IRS Great Lakes TE/GE Council, and as Co-Chair of the IRS-ASPPA Great Lakes Benefits Conference for 2008. Mr. Lax has previously served as a member of the Advisory Committee on Tax Exempt and Government Entities Division of the IRS, the IRS Employee Plans, Ad Hoc Advisory Group for the Assistant Commissioner of Internal Revenue Service, EP, the IRS Regional Council Bar Advisory Group, Central Region, the Advisory Group to IRS Northeast Region's Chief of EP/EO Division and the Chairman of the State Bar of Michigan – Section of Taxation/Employee Benefits Committee. He is a Fellow of the American College of Employee Benefits Counsel and recognized by his peers by inclusion in the Best Lawyers in America and as one of the Top 100 Lawyers in the State of Michigan for 2008 by Super Lawyers. Mr. Lax has extensive experience in representing clients in tax controversy matters before the Internal Revenue Service and Tax Court of the United States.

**Stuart M. Bordman** is a shareholder of the firm who is an attorney and a certified public accountant. He has extensive experience in general corporate matters including business purchases and sales, franchise matters, health care law and representation before the Internal Revenue Service. Mr. Bordman was the 1997-98 Chairman of the Oakland County Bar Association Tax Committee. Mr. Bordman is a frequent lecturer before the Michigan Association of Certified Public Accountants and a regular contributor to LACHES, the Oakland County Bar Association publication. He has written on use tax, corporate finance under the Michigan Business Corporation Act and single business tax. He is a graduate of the Northwestern University School of Law.

**Steven D. Sallen** is a shareholder and member of the firm's Executive Management Committee. Mr. Sallen received his undergraduate degree from the University of Michigan and his law degree, *cum laude*, from the University of Detroit-Mercy School of Law where he served as Case and Comment Editor of the University of Detroit Law Review. Mr. Sallen concentrates his practice in the areas of real estate law, environmental law and corporate law, and his clients include real estate developers, general contractors, commercial real estate brokers and environmental consulting firms. Mr. Sallen publishes Real e-State, a Quarterly Electronic Newsletter for Real Estate Professionals. He resides in Orchard Lake, Michigan with his wife and three children.

**John E. Jacobs** is a shareholder of the firm who specializes in commercial transactions, real estate, litigation, and consumer law, including residential mortgage lending. He also engages in lobbying activities in state government on behalf of the Mortgage Bankers Association of America and the Michigan Mortgage Lenders Association. Mr. Jacobs has lectured at professional seminars on real estate, consumer law and residential mortgage lending. He also taught Consumer Credit Regulation at Wayne State University Law School. He has been the President, the Anti-Defamation League, Jewish Family Service and Temple Emanu-El. Mr. Jacobs is a member of the Executive Committee and Board of Governors of the Jewish Federation of Metropolitan Detroit. He has been selected by his peers to be listed in the Best Lawyers in America.

**Julie Chenot Mayer** is a shareholder of the firm who received her undergraduate degree from the University of Michigan. She obtained her Juris Doctor, *cum laude*, from the Detroit College of Law in 1986 where she was a member of the Law Review. Ms. Mayer concentrates her practice in the area of litigation with an emphasis on insurance coverage and professional liability defense. Ms. Mayer is a member of the State Bar of Michigan and the American Bar Association.

**Ronald A. Sollish** is a shareholder in the firm who specializes in the areas of employment, real estate, partnership, finance, corporate and business law. Ron is a frequent speaker on legal topics and has spoken to such groups as the Michigan Chamber of Commerce, Michigan Association of Certified Public Accountants, and American Society for Industrial Security. He is licensed to practice law in both Michigan and Illinois. He graduated from the University of Detroit-Mercy School of Law where he was the managing editor of the Law Review. Ron received his undergraduate degree from the University of Michigan. Ron is a member of the State Bar of Michigan, Illinois Bar Association, American Bar Association and Oakland County Bar Association.

**Lowell D. Salesin** is a shareholder in the firm and a member of the firm's Executive Committee. He has been practicing with the firm since graduation from the George Washington University National Law Center in 1993, where he graduated with high honors and served as an Associate Editor of the George Washington Law Review. He received his undergraduate degree from Indiana University in 1990. Mr. Salesin is a member of the Real Property and Business Law Sections of the State Bar of Michigan and is a member of the American and Oakland County Bar Associations. He concentrates his practice in the areas of real estate development and finance, business planning, lending, commercial leasing, partnership and corporate law. Mr. Salesin's experience includes the acquisition, financing, construction, development, and leasing of all types of commercial real estate. He represents both owners and lenders in a wide variety of real estate transactions.

**Mark H. Fink** is a shareholder in the firm who graduated from Wayne State University, College of Business Administration and the Detroit College of Law with highest honors and is admitted to the practice of law in the states of Michigan and Arizona. Mr. Fink's practice areas include civil appeals and litigation, with concentration on real estate, commercial, and insurance coverage matters. Mr. Fink is the author of several articles, which have appeared in publications such as the Michigan Bar Journal and the Detroit College of Law Review. He is a professional affiliate with the Oakland County Bar Association and Defense Research Institute, and a member of the Appellate Section of the State Bar of Michigan.

**Steven M. Wolock** is a shareholder in the firm who received his law degree from the University of Michigan Law School in 1985 and obtained a Bachelor's of Science in Economics from the University of California at Santa Cruz in 1977. Mr. Wolock specializes in general commercial litigation and professional liability litigation and has extensive experience in labor and employment law. Mr. Wolock is

a member of the Labor and Employment and Negligence Sections of the State Bar of Michigan, American Bar Association and Oakland County Bar Association. He also serves as a panelist on the State Bar of Michigan Attorney Discipline Board. Mr. Wolock has been selected by his peer for inclusion in the "Best Lawyer in America" and in "Michigan Super Lawyers."

**David E. Hart** is a shareholder of the firm and a member of the firm's Executive Committee. He earned his Bachelor degree in Philosophy and Political Science from the University of Michigan in 1988 and received his Juris Doctor Degree, *cum laude*, from the Detroit College of Law in 1991. While at the Detroit College of Law, Mr. Hart was a senior member of the *Detroit College of Law Review* and he participated in several national Moot Court competitions. He concentrates his practice in the areas of title insurance, business disputes, real estate litigation, creditor's rights law, including bankruptcy, and general civil litigation. He lectures frequently on real estate and title insurance. Mr. Hart is licensed to practice in Michigan and Ohio. He is a member of the State Bar of Michigan, the Oakland County and Federal Bar Associations, and The Michigan Land Title Association.

**George A. Contis** is a shareholder of the firm. He earned his Bachelor of Arts degree in Economics from the University of Pittsburgh in 1982 and received his Juris Doctor degree from the University of Detroit School of Law in 1985. While at the University of Detroit, Mr. Contis participated in several local and national Moot Court competitions and was selected for membership to the Order of Barristers. He concentrates his practice in the areas of real estate development and finance, lending, transactional law, commercial leasing and business planning. His publications include: *Tax Aspects of Divorce in Michigan*, Michigan Tax Law Journal, 1984; *Bring a Weapon to School, Get Expelled* 370 LACHES 8, November 1996; and *Year End Planning Considerations for 1031 Exchanges*, Bar Briefs, December 2000.

**Martin S. Frenkel** is a shareholder of the firm. He graduated from the University of Michigan in 1991 and Wayne State University Law School in 1994. He is admitted to practice in Michigan and in the Federal District Courts for both the Eastern and Western Districts of Michigan. Mr. Frenkel was formerly employed by the Michigan Department of Attorney General and has been with Maddin Hauser since 1997 where he specializes in the areas of commercial and real estate litigation including construction, mortgage and title-related disputes. He is a member of the Real Property Section of the State Bar of Michigan and is also an affiliate member of the Associated General Contractors of America. Mr. Frenkel authored the article "*Navigating the Waters of Real Estate Arbitration*" published in Commercial, Inc. Magazine, discussing the dynamics of the real estate arbitration process. He is one of the firm's representatives to the National Mortgage Bankers Association and has authored the article "*Seven Common Mistakes in Selecting/Managing Outside Counsel in the Mortgage Industry*" which was published as a three part series in the MBA News Link. He has also authored the article "Five Common Mistakes in Managing Attorneys in the Construction Industry," which was published in *Michigan Contractor and Builder*. Mr. Frenkel was also selected by his peers as one of the



Michigan's Rising Stars and was identified as such in the *Michigan Super Lawyers and Rising Star Magazine*. Fewer than 5 percent of Michigan's attorneys attain the "Super Lawyer" or "Rising Star" status.

Gary M. Remer is a shareholder of the firm. He received his law degree from the Detroit College of Law at Michigan State University where he graduated *summa cum laude* in May 1997 and obtained a Bachelor of Arts in Accounting from Michigan State University in 1990. Mr. Remer was a Revenue Agent with the Internal Revenue Service, Employee Plans Division, from 1992 through 1996. He concentrates his practice in the areas of employee benefits, corporate law, taxation and estate planning. Mr. Remer has lectured extensively on qualified retirement plans and other tax topics. He is an adjunct professor at Walsh College. Mr. Remer co-authored the The Insider's Guide to IRS Plan Audits. He is a Certified Public Accountant and Chair of the MACPA Employee Benefits Committee.

George V. Cassar, Jr. is a shareholder in the firm who concentrates his practice in the areas of estate and business succession planning, taxation and probate. Mr. Cassar graduated from the University of Michigan with honors and received his law degree with honors from Drake University Law School. He also received his Masters in Tax Law from Wayne State University Law School. He is a member of the State Bar of Michigan, the State Bar of Iowa, the American Bar Association and the Federal Bar Association. Mr. Cassar frequently speaks before professional organizations, as well as to their clients regarding estate planning, tax and probate matters. Mr. Cassar has also been accepted as a Life Member of the National Registry of *Who's Who in American Law* and is active in several charitable and other community organizations.

David M. Saperstein is a shareholder of the firm. He graduated from the University of Michigan Law School in 1993, and University of California, Berkeley with High Honors in 1989. He clerked for the late Michigan Court of Appeals Chief Judge Pro Tem Myron H. Wahls. Mr. Saperstein's publications include: "Why There are No Common-Law Exceptions to a Municipality's Governmental Immunity: A Municipal Perspective," *Public Corporation Law Quarterly*, Spring 2001, No. 9, p.1, and "The Abominable Snowman, the Easter Bunny, and The Intentional Tort Exception to Governmental Immunity: Why *Sudul v Hamtramck* was Wrongly Decided," *16 Michigan Defense Quarterly*, No. 2, p. 7 (2000). Mr. Saperstein is admitted to practice law in Michigan, Ohio and California (inactive). He concentrates his practice in the areas of professional liability defense, primarily defending lawyers, accountants, stockbrokers, real estate agents, and insurance agents. Mr. Saperstein serves on the Board of Trustees for Congregation Shaarey Zedek.

Richard M. Mitchell earned his Juris Doctor degree from Indiana University Law School, Bloomington, in 1991, where he served on the Indiana University Law Review. He earned his Bachelor of Arts degree from the University of Michigan in 1988. Mr. Mitchell focuses his practice on complex insurance coverage disputes and civil litigation. He has authored publications and spoken in these areas. He is also a member of the Society of Chartered Property Casualty Underwriters (CPCU),

a designation granted by the American Institute for CPCU in Malvern, PA, upon the successful completion of a series of national examinations relating to insurance and business related topics. Mr. Mitchell is also on the Board of Directors of the Greater Detroit CPCU Chapter.

L. Jeffrey Zauberman is a shareholder in the firm. He has been a practicing attorney since 1984 in both the Province of Ontario and Michigan. He received his Bachelor of Laws from Osgoode Hall Law School in Toronto, Canada and his J.D. from the University of Detroit School of Law. Mr. Zauberman is a member of the Real Property Section of the State Bar of Michigan. He concentrates his practice in the areas of real estate development and finance, asset based secured financing and leasing of commercial real estate. Mr. Zauberman is also licensed in the Province of Ontario and able to advise upon matters of Ontario law.

John P. Gonway is a shareholder in the firm and specializes in secured financing, real estate, mergers and acquisitions and commercial transactions. He received his Juris Doctor, *cum laude*, from the Wayne State University School in 1996. Prior to attending law school, he received his undergraduate degree from James Madison College at Michigan State University. Mr. Gonway is a member of the Real Property, Business Law, and Taxation Sections of the State Bar of Michigan and is a member of the Oakland Bar Association. Mr. Gonway's expertise includes the acquisition, financing, construction, development and leasing of all types of commercial real estate, as well as the representation of clients in all aspects of corporate law, commercial law, mergers and acquisitions and commercial transactions.

Kathleen H. Klaus joined the firm's Defense Practice and Insurance Coverage Group in August 2004. Ms. Klaus graduated from the University of Michigan Law School in 1992 and received a Bachelor of Arts degree, with honors, from the University of Iowa in 1987. Prior to joining the firm, Ms. Klaus practiced commercial litigation and bankruptcy in Chicago, Illinois.

Kasturi Bagchi is a firm shareholder and received a Bachelor of Arts in Political Science with honors from UCLA in 1992 and subsequently was awarded her Juris Doctor degree with honors from Tulane University School of Law in 1995. While at law school, Ms. Bagchi was a managing editor of the Tulane University School of Law Environmental Journal where she published an article entitled "Application of the Rule of Lenity: The Specter of the Midnight Dumper Returns." 8 TUL.ENVTL. L.J. 265 (1995). Upon her graduation from Tulane, she clerked for the Honorable William Albrecht and the Honorable Harry K. Seybolt of the Superior Court of New Jersey, Warren County. She concentrates her practice in the firm's commercial lending and real estate groups. Ms. Bagchi is admitted to the Bars of New Jersey, Pennsylvania (inactive), California and Michigan.

Danielle M. Spehar is a firm shareholder. She attended Central Michigan University and earned a Bachelor of Science in Business Administration, *summa cum laude*. She also earned a Master's Degree in Business Administration from Wayne State University. She acquired her Juris Doctor, *magna cum laude*, from University of Detroit-Mercy School of Law in 1998. Ms. Spehar concentrates her practice in the areas of real estate transactions and corporate and business law. She is a member of the State Bar of Michigan and the American Bar Association.

Marc S. Wise is a shareholder of the firm who concentrates his practice in the areas of employee benefits, business planning and taxation. Mr. Wise has extensive experience in the design, financing, implementation and correction of pension and welfare benefit plans for large multi-state employers as well as smaller local employers. As part of his practice, he represents clients in Internal Revenue Service, U.S. Department of Labor and Pension Benefit Guarantee Corporation audits and investigations. He earned his Bachelor of Science degree from Western Michigan University with dual majors in Accounting and Economics. He was awarded his Juris Doctorate degree from Ohio Northern University and a Master of Laws degree in taxation from Wayne State University. Mr. Wise is admitted to practice before the state and federal courts in Michigan, the United States Court of Appeals for the Sixth Circuit and the United States Tax Court.

Brian A. Nettleingham earned his Bachelor of Arts in Pre-Law from Cedarville University in 1993, where he also earned minors in Religion and Philosophy. Brian spent two years studying philosophy at Miami University's Graduate School, before earning his Juris Doctorate from the University of Notre Dame School of Law. While at Notre Dame, Brian was a member of the Appellate Moot Court Team and worked extensively with clients of the law school's Legal Aid and Immigration Law Clinics. He also won the law school's Annual Client Counseling Competition. After graduating from Notre Dame, Mr. Nettleingham clerked for the Honorable Joel P. Hoekstra of the Michigan Court of Appeals. He currently practices in the firm's Commercial Litigation Department and is admitted to the State Bar of Michigan and the Western and Eastern District Federal Courts for Michigan.

Geoffrey N. Taylor graduated *magna cum laude* from the University of Pittsburgh Law School in 1997. He obtained a Bachelor of Business Administration with distinction from the University of Michigan in 1992. Mr. Taylor concentrates his practice in the areas of estate planning, probate, and tax law.

Lori E. Talsky joined the firm as an associate after graduating *summa cum laude* from the Detroit College of Law at Michigan State University in January, 1996. Ms. Talsky has an extensive working knowledge of the Canadian legal system. She is a member of the State Bar of Michigan and the American Bar Association.

**Sheryl K. Silberstein** joined the firm in September, 2000. She is a 1986 graduate of the Detroit College of Law and earned her Bachelor of Arts Degree from the University of Michigan. Her concentration of law is in the area of real estate and related matters. Ms. Silberstein has over twenty years experience in the real estate industry in the corporate sector. She is a member of the State Bar of Michigan.

**Jennifer M. Grieco** is a member of the firm's Defense Practice and Insurance Coverage Group. Ms. Grieco received her Bachelor of the Arts degree from the University of Toledo in 1993 and her Juris Doctor cum laude from the University of Toledo College of Law in 1997. While in law school, Ms. Grieco was a Note and Comment Editor for the University of Toledo Law Review and a Member of The Order of the Coif. Ms. Grieco was elected in 2003 to the Board of Directors of the Oakland County Bar Association ("OCBA"). She is currently the Treasurer of OCBA, having been re-elected to a three-year term on the OCBA Board in 2006. She is a Past President of the Women's Bar Association (Oakland Region of the Women's Lawyers Association of Oakland County), having previously served as the organization's Historian and President-Elect. Ms. Grieco has extensive trial experience in the areas of professional liability and commercial disputes. In 2004, Ms. Grieco was recognized by Michigan Lawyers Weekly when she was named one of Michigan's "Up and Coming Lawyers." In 2007, Ms. Grieco was recognized as a Michigan Super-Lawyer.

**Michelle C. Harrell** is a member of the firm's Litigation Practice Group. She received her Bachelor of Science degree in accounting, *summa cum laude*, from the University of Detroit in 1990 and her Juris Doctor, *cum laude*, from Wayne State University Law School in 1993. While at Wayne State, Ms. Harrell participated in moot court competitions and received three American Jurisprudence Awards. Michelle is a Barrister in the American Inn of Court, Oakland County Chapter, a Mentor in the Oakland County Bar Association Mentor Program and an Oakland County Circuit Court Case Evaluator (Complex Commercial Neutral). Ms. Harrell concentrates her practice in the areas of complex commercial, real estate and family law litigation.

**Brandon Buck** received his Bachelor of Science degree with honors from Wayne State University in 1998 and his Juris Doctor degree with honors from Wayne State University Law School in 2001. During law school Mr. Buck received a Board of Governors Scholarship for Academic Excellence and placed first in the law school's Moot Court brief writing competition. Mr. Buck is admitted to practice law in Michigan and California and concentrates his practice in the areas of business disputes, real estate, commercial and general litigation and creditor's rights law.

**Rebecca M. Turner** is an associate in the firm and concentrates her practice in the areas of franchise law, corporate and business law and real estate transactions. Ms. Turner earned her Bachelor of Business Administration in Accounting from Western Michigan University Haworth College of Business in 1998 and earned her Juris Doctor, *cum laude*, from Syracuse University College of Law in 2001. While at Syracuse, Ms. Turner participated in a National Tax Moot Court Competition in

which her team placed first in Oral Arguments and second with their Brief. Ms. Turner was selected as one of five 2006 Up and Coming Lawyers by Michigan Lawyers Weekly, one of 10 women showcased in an article entitled Raising the Bar published in the Crain's Detroit Business issue Focus Law, and named to the 2008 Michigan Rising Star list. Ms. Turner is a member of the American Bar Association, State Bar of Michigan and Oakland County Bar Association. Additionally, Ms. Turner is a Past President of the Women's Bar Association, Oakland Region of the Women Lawyers Association of Michigan, having also served as Vice-President, Treasurer and Recording Secretary

Alexander Stotland earned his Bachelor's degree from Hofstra University in 1994, with a dual major of international business and marketing. Mr. Stotland worked in the banking sector, before earning his Juris Doctor degree from Hofstra University School of Law in 1998. While in law school, Mr. Stotland participated in the prestigious Philip C. Jessup International Law Moot Court Competition. Mr. Stotland practiced law in New York City for approximately seven years, prior to joining the firm. Mr. Stotland is admitted to practice before the federal and state courts of Michigan and New York, is fluent in the Russian language and concentrates his practice in the areas of business disputes, employment law, commercial and civil litigation.

Michael K. Hauser is a CPA and a summa cum laude graduate of Wayne State Law School. He received his B.A. magna cum laude from Dartmouth College. His practice focuses on partnership and corporate tax, federal taxation of real estate transactions, gift and estate tax, and general business matters. He is an Adjunct Professor in the Cooley Law School LLM program, where he teaches Taxation of Real Estate. He is the author of "Avoiding Dealer Status to Obtain Capital Gains" and "Dealer Status and the Condominium Conversion," (both published in the Journal of Real Estate Taxation). He formerly worked in a mid-sized CPA firm in suburban Detroit servicing small to mid-sized businesses. In law school, he served as a Note & Comment Editor for the Wayne Law Review, for which he authored "The Tax Treatment of Intangibles in Acquisitions of Residential Rental Real Estate." He also served as an intern with the IRS Chief Counsel's Large and Mid-Sized Business Division, where he researched international tax and tax shelter issues.

Lavinia S. Biasell received her Bachelor of Arts degree with High Honors from Michigan State University in 2000, and received her Juris Doctor degree, *magna cum laude*, from Michigan State University-Detroit College of Law in 2003. While in law school, Ms. Biasell was a member of American Inns of Court and earned the Carolyn Stell Award for outstanding achievements and public service from the Women Lawyers Association of Mid-Michigan. Ms. Biasell was admitted to practice by the State Bar of Michigan in 2003. She is also admitted to the Federal District Court for the Eastern and Western Districts of Michigan. Ms. Biasell concentrates her practice in the areas of commercial and real estate litigation. In addition, Ms. Biasell recently served as the Women's Bar Association's President-Elect, and has also served as WLAM Representative and Vice-President.

**Stuart M. Dorf** received his Bachelor of Arts in American History and Jewish Studies, graduating Magna Cum Laude, Phi Beta Kappa, as well as receiving the distinction of Tulane Senior Scholar and received the Ephraim Lizitsky Jewish Scholar Award from Tulane University in 1998. Mr. Dorf subsequently was awarded his Juris Doctor degree from the Chicago-Kent College of Law in 2001. While at law school, Mr. Dorf was selected to sit on the Dean's Advisory Panel for Electronic Voting Reformation and was a member of the corporate law society. He concentrates his practice in the firm's Lending and Finance Group. Mr. Dorf is admitted to the Bars of Illinois and Michigan

**Randall M. Blau** is a member of the firm's litigation practice group. He is a trial lawyer practicing in the areas of business disputes, real estate litigation, title insurance, employment law, and general civil litigation. Mr. Blau received his Bachelor of Arts from Kalamazoo College in 1993 and his Juris Doctor degree from University of Detroit Mercy in 1996. Mr. Blau has extensive litigation and trial experience in courts throughout Michigan and Ohio. He is the past Chairperson of the Oakland County Medical-Legal Committee and was recognized in Who's Who in the legal profession in 2004. Mr. Blau is also a member of the State Bar of Michigan, the American Bar Association, the Michigan Trial Lawyers Association and the Oakland County Bar Association.

**James M. Reid, IV** received a Bachelor of Arts in Political Science-Prelaw with honors from Michigan State University in 2002 and his Juris Doctor degree with honors from Wayne State University Law School in 2005. While at law school, Mr. Reid was an associate editor of the Wayne Law Review. Mr. Reid is admitted to practice before the federal and state courts of Michigan and concentrates his practice in the areas of corporate law and transactions, real estate, defense practice, and commercial and civil litigation.

**Lindsey A. Jerbek** received her Bachelor of Arts degree, magna cum laude, from Albion College in 2001. She earned her Juris Doctor degree, cum laude, from the University of Detroit Mercy School of Law in 2006. While attending law school, Ms. Jerabek interned for Justice Marilyn Kelly of the Michigan Supreme Court and for the Honorable Denise Page Hood of the United States District Court for the Eastern District of Michigan. Ms. Jerabek also served as Title Editor of the University of Detroit Mercy Law Review.

**Courtney D. Roschek** received her bachelor of arts magna cum laude from Western Michigan University in 2004. She earned her juris doctorate magna cum laude from Michigan State University College of Law in 2007. While in law school, she was an active member of MSU Law's Moot Court Advocacy Board and Trial Practice Institute and received the Carolyn Stell Award from the Women Lawyers Association. Previously, Ms. Roschek worked with the United States District Court for the Eastern District of Michigan in developing and conducting the certification program for trial attorneys wishing to use the shared advanced technology courtroom.

Jessica A. McGrath earned her Bachelor of Science in Business Administration, Summa Cum Laude, in 2004, followed by her Masters of Business Administration in 2007, from the University of Detroit Mercy. She received her Juris Doctorate, Cum Laude, from the University of Detroit Mercy School of Law in 2007. While in law school, Ms. McGrath served as a Title Editor for the University of Detroit Mercy Law Review in which she was published and received an award for Excellence in Editing. She was also the co-founder and chairperson of the Business Law Association. Ms. McGrath is currently the co-chair of the University of Detroit Mercy College of Business Administration Alumni Board, Student Outreach Committee.

Mark E. Plaza received his Bachelor of Arts degree with High Distinction from the University of Michigan in 1999, and received his Juris Doctor degree, Cum Laude, from Wayne State University Law School in 2003. While in law school, Mr. Plaza was a Senior Articles Editor for the Wayne Law Review and a member of Phi Alpha Delta Law Fraternity. Mr. Plaza was admitted to practice by the State Bar of Michigan in 2003. He is also admitted to the Federal District Court for the Eastern and Western Districts of Michigan. Mr. Plaza concentrates his practice in the areas of commercial and real estate litigation.

Of Counsel:

Lawrence Pazol is of counsel to the firm. He received a Bachelor of Science degree in Business from Indiana University (Bloomington campus) in 1963 and subsequently was awarded his Juris Doctor degree from Indiana University School of Law in 1966. Mr. Pazol served as an attorney for the Michigan District Office of the U.S. Small Business Administration for 30 years from 1974 to 2004. During his tenure with the Small Business Administration, he was awarded Attorney of the Year for the Midwest Region of SBA. His practice with SBA covered the entire gambit from closing, servicing, liquidating and litigating loans. He also approved Section 8(a) contracts for minority businesses and aided many lenders in interpreting SBA regulations.

## NOTES



