

LEGAL UPDATE

CLIENT NEWSLETTER OF
CARR, MORRIS & GRAEFF, P.C.

1120 G STREET, N.W., SUITE 930 • WASHINGTON, D.C. 20005-3801 • (202) 789-1000

DECEMBER 2008 - JANUARY 2009

**ON FEBRUARY 28, 2009,
CMG WILL BE RELOCATING TO
TYSONS CORNER—THE BUSINESS HUB
OF NORTHERN VIRGINIA.**

OUR NEW ADDRESS WILL BE:

**CARR, MORRIS & GRAEFF, P.C.
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**WE TRUST THAT OUR NEW LOCATION
WILL PROVIDE EASE OF ACCESS TO ALL
OF OUR CLIENTS IN THE
GREATER METROPOLITAN AREA.**

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TAX ESTATE TAX EXEMPTION INCREASES

For U.S. citizens, resident aliens or domiciliary decedents dying in 2009, the estate and generation-skipping transfer tax exemptions increase to \$3.5 million. The gift tax exemption stays at \$1 million. Estate taxes for decedents dying in 2010 and gift taxes for gifts made the same year have supposedly been repealed; however, all these changes are scheduled to expire (or “sunset”) for decedents dying or gifts made in 2011 and the old law reinstated. A one-year repeal is an interesting way for politicians to claim both that they did, and did not, repeal the estate tax. Most estate planning professionals anticipate a revision of this scheme sometime prior to 2011. The best guess is Congress will leave the exemption at \$3.5 million with a top marginal rate of 45%. In light of the changing state of the law and our indeterminate tenure on Earth, all estate planning has to be done with two concepts in mind: maximal use of existing relief provisions combined with maximum flexibility.

In practice this means a couple with a well-planned estate can currently pass up to \$7 million to its beneficiaries free of estate taxes. It also means couples with an unplanned estate of the same amount will, under certain circumstances, bequeath their beneficiaries an estate tax bill of \$1,575,000. In our experience most couples hold their assets in joint tenancy. By the simple expedients of severing joint tenancies and creating bypass trusts, the estate tax can be completely eliminated for married couples with a combined net worth of between \$3.5 million and \$7 million. For couples with net worth in excess of \$7 million, irrevocable life insurance trusts and/or a lifetime gifting program might be in order.

The annual gift tax exclusion for donations of present interests to noncitizen spouses goes up to \$133,000 in 2009, and the annual gift tax exclusion of present interests increases to \$13,000 for the first time. Unfortunately, the applicable exclusion amount for nonresident aliens has not been indexed for inflation and thus remains at \$60,000. There are many creative techniques, however, whereby we can help nonresident aliens avoid U.S. estate taxes.

At this time it is impossible to predict the final shape or state of the estate tax. We will, though, monitor the situation and keep you informed in these pages. In the meantime the

optimal strategy is still to title roughly half of combined assets in the name of each spouse to fully fund two bypass or credit-shelter trusts. When one of the spouses is not a U.S. citizen, we need more time to develop an optimal plan because of the denial of the unlimited gift tax marital deduction.

If you have any questions on estate planning please feel free to call Roy Morris or the author.

NÉSTOR CRUZ

ASK A LAWYER, Q&A

Q. I run a small business, just nine full-time employees. One employee told me last week that his religion requires him to smoke at least 15 minutes per hour. He’s a Nicotologist. I had not heard of this denomination, but I do know I can’t discriminate. Now three more employees have converted to this religion and want to join Employee #1 on the smoking patio. Is there anything I can do?

Flummoxed in Fairfax

A. Flummoxed, you’ve got too much smoke in your eyes. Ignoring the fact that federal law prohibiting discrimination on the basis of religion only applies to employers of 15 or more employees, employers are only required to make *reasonable accommodations* for an employee’s religious beliefs. Requesting 15 minutes off every hour is not reasonable. Advise your employees that they better get the nicotine patch because their smoking days are a thing of the past.

Q. In order to motivate my employees and make them feel a sense of commitment to the company, I have begun a practice of using stock as a reward. For instance, I picked an “Employee of the Month” and gave him one share of stock. Top salesmen may be offered stock in lieu of cash incentives. And I may even give stock instead of Christmas bonuses. My wife owns the company, but I figure we can always just authorize more stock. Why don’t more businesses do this?

Mystified in McLean

A. Mysty, maybe I should direct this to your wife, who married badly. While legitimate stock bonus plans may be useful and appropriate, what you have is a formula for disaster. Employee stock plans can work well when they are used

to foster a behavior, such as a long term employment. However, stock awards must be carefully implemented. While it is easy to give stock away, getting it back can be a different story. Stock should only be given to employees if the employee first signs a shareholder’s agreement which details what happens to the stock if the employee leaves the company. Does the former employee keep the stock or must it be sold back to the company? If the company has to buy it back, at what price? Can the stock be sold to someone who is not employed by the company? These are just a few issues to consider before giving (or selling) stock in closely held companies to employees. This is another situation where it is best to “look before you leap.”

Q. My business involves repainting motorcycles of attorneys who can’t keep them upright. Business is brisk, but I can afford my staff a good deal of flexibility. One of my employees plays on the PGA tour. This means he is away Thursday-Sunday, and occasionally he must leave early on Wednesday to get to that week’s tournament. I have allowed him to work his 40-hour week in two 20-hour shifts beginning at noon on Monday and Tuesday. But now he has asked for overtime pay for every hour over eight he works in a given day. I’m already being pretty accommodating of a guy who barely made the Ryder Cup team. Do I have to yield on this, too?

Tooley

A. Tooley, your box is short a wrench. The Fair Labor Standards Act (FLSA) provides that employees must receive overtime pay for all hours worked in excess of 40 in a given workweek (seven consecutive days). While the FLSA is federal law, it applies to all jurisdictions unless the law of a local jurisdiction is more favorable to the employee. For instance California law requires that employees be paid overtime for hours worked in excess of eight per day or 40 in a workweek. Thus, unless you are in California, you need not pay this employee overtime as he has requested. If this is a deal-breaker for him, give him a bucket of balls and point him to the driving range.

PHILIP SCHWARTZ

CONTRACTS**CONDO MARKET COLLAPSE;
ESCAPING THE PURCHASE
CONTRACT**

Do you remember the summer of 2005? Looking back to 2005, you may remember your 401(k) account being much larger, you may remember news stories concerning the Iraqi war dominating the network news, and you may never have heard the terms credit default swap, mortgage backed security, or “too big to fail” bailouts. However, you most likely remember the housing market mania. It was everywhere – from cash-out refinancings to your second cousin studying for their realtor licensure test. Just like internet stocks of 1999, real estate became the investment *du jour*; after all, home values only go up. It was in this mania in June 2005, that the condominiums at the Merrifield Town Center in Northern Virginia, priced at \$500,000 to \$900,000, sold out within six weeks. The Merrifield project has 279 units, and the developer expected to complete the project and deliver the condominiums by 2008. On signing the purchase agreements in the summer of 2005, purchasers were required to make deposits of 7 % for purchasers who committed to live in the condos and 12 % for those who bought them as an investment. The developers acknowledge that the units were not ready for occupancy for almost three years after the purchasers signed the agreements in June and July 2005.

The times have indeed changed. So what do you do if you are in the unfortunate position of putting down tens of thousands of dollars for a deposit on a Merrifield Town Center condominium, committing yourself to a purchase price over \$500,000 for a unit which may have decreased in value precipitously in the interim? If you answered “sue to void the purchase agreement and demand return of your deposit,” you would not be alone. In *Bartley v. Merrifield Town Center Limited Partnership*, U.S.D.C. E.D.Va. 2008cv00145, the plaintiffs contended that Merrifield Town Center had violated

the Interstate Land Sales Full Disclosure Act (ILSFDA) because the developer had not filed a statement of record with the Department of Housing and Urban Development as required by 15 U.S.C. §1704. The plaintiffs also sought rescission of their purchase agreements under §55-79.88(2) of the Virginia Condominium Act, which requires a developer to provide purchasers a current and recorded offering statement.

U.S. District Judge Gerald Bruce Lee, hearing the case, observed, “In the intervening months, our economy is in a tailspin, the real estate market softened, there is a surplus of available condominiums.” However, sympathy notwithstanding, Judge Lee found no basis for invalidating the contracts. Merrifield Town Center posited, and Judge Lee agreed, that the ILSFDA disclosure is not required if the development involves less than 100 units or if the dwelling is completed within two years of the sales contract. The Merrifield tract at issue in the *Bartley* case had only 97 units. Section 55-79.88(2) of the Virginia Condominium Act requires a developer to provide purchasers a current and recorded *offering statement*. Interpreting the statute Judge Lee determined that the offering statement need only be offered at “disposition” of the condominium unit. “Disposition” of a condominium unit occurs when a deed is delivered to the purchasers. As of September 30, 2008, the hearing date, “disposition” had not yet occurred and, thus, the Merrifield Town Center is not yet required to provide the purchasers an offering statement required under the Virginia Code. Judge Lee further found that the plaintiffs had not alleged a material change in the offering statement that would adversely affect the value conferred by the purchase agreements. The plaintiffs’ claims in *Bartley* were roundly rejected.

In a second case, *Abn v. Merrifield Town Center Limited Partnership*, U.S.D.C. E.D.Va. 2008cv00073, decided by Judge T.S. Ellis III, the plaintiffs again argued that Merrifield

failed to provide the required ILSFDA disclosure, reasoning that an exemption was not applicable because Merrifield failed to deliver the condominium units within two years of execution of the purchase agreements. Merrifield acknowledged that the units were not ready for occupancy for almost three years after the purchasers signed the agreements but argued that the two-year clock did not begin to run until after the purchasers ratified and executed the purchase agreements—which Merrifield argued occurred a year later when the purchasers signed a document acknowledging their selection of paint colors, appliances and other amenities. Judge Ellis looked to the congressional intent behind the ILSFDA. The ILSFDA was passed to ensure that a buyer has the information needed to make an informed decision before purchasing certain types of real estate. Judge Ellis found that such intent “provides a compelling reason to conclude that the triggering event for the two-year period is the buyer’s signing the sales contract and incurring of obligations under the contract.” In this case, “Plaintiffs signed the [purchase agreements] in June and July 2005, at which point they each immediately paid a deposit and incurred other obligations pursuant to their respective [purchase agreements].” Judge Ellis reasoned, “At that point, plaintiffs, as purchasers, had already made the decision to buy the condominiums.”

Judge Ellis denied Merrifield Town Center’s motion to dismiss the case, ruling that the sales contracts at issue are not exempt from ILSFDA’s reporting and disclosure requirements, and that Merrifield failed to comply with those reporting and disclosure requirements. The case is ongoing. The *Abn* and *Bartley* cases are indicative of the state of the housing market and reflect the desire of buyers to escape purchase contracts they fought to enter into only a few years ago. Expect similar cases to appear on local court dockets.

JUSTIN BANFORD

**CARR, MORRIS
& GRAEFF, P.C.**

Carr, Morris & Graeff, P.C., was established in 1982 by the named principals—Lawrence Carr, Roy Morris and Stephen Graeff. It is a diversified firm structured primarily to meet the legal needs of businesses and their principals.

The firm strives to provide full service representation to its corporate and individual clients. It is designed to provide such service by organization and presentation of an array of attorneys with diverse backgrounds in specialized areas of the law as well as a generalized background which enables them to look beyond a narrow specialty or need. The academic and cultural backgrounds of the attorneys of the firm are as diverse as their experience and specializations.

Carr, Morris & Graeff, P.C., specializes in the following areas: Corporate/General Business; Taxation/Estate Planning; Civil/Commercial Litigation; Criminal Representation; Alternative Dispute Resolution; Employment/Labor; Discrimination; and Wage-Hour.

STAFF NOTES

A special note of gratitude to our trusted brokers—Pat Nalls and Mike Shuler of Newmark Knight Frank. Incredibly, Pat handled our first move, to Eye Street, in 1987—and then our move to 12th Street in 1992. Pat and Mike have suffered through our renewals, negotiations, false starts, changing requirements and shifting moods. They took us uptown, downtown, upscale and downscale. They helped us sort through the maze of options, looking for the right fit. We think our choices are ideal, that is, our selection of highly professional brokers and our selection of a site convenient to all our metropolitan area clients.

Changing scenery. Looking back over our 17 years at 12th & G, it's striking how much the neighborhood has changed. Parking lots have become new buildings. Old buildings have been replaced. The Verizon Center transformed the Gallery Place-Chinatown area. (Abe Pollin is under-appreciated as a visionary and dedicated civic leader.) The Woodward & Lothrop store closed, sat vacant for years and was finally developed. Same for the Garfinkel's department store. The Convention Center was torn down, now serving as a part-time parking lot, part-time pro tennis venue, part-time circus site. The new Convention Center is just two blocks north. The Nats considered stadium sites nearby but, fortunately, built elsewhere. People now actually live in condos in the Central Business District. (Where do they buy groceries?) For day-to-day life, we may have been most impacted by numerous eateries closing, *e.g.*, Reaves Bakery, Café 1200, and elegant spots known to us as simply the *Dump* and the *Port*. Even our favorite places in Chinatown closed...ironically, there are now just a few Chinese restaurants in Chinatown. There are more white table cloth restaurants now and, of course, no shortage of coffee shops and mega-bookstores. Traffic has worsened. Parking is tight. The convenience of Metro Center access will be missed. The demonstrations and motorcades will not be missed. Overall, it's been a great run...but, in the end, convenience is key. Tysons Corner is more convenient for many of our clients. And it's more convenient to all suburban courts. Time marches on. Even Yankee Stadium and Boston Garden have been replaced. By comparison our relocation is easy to accept.

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