



**Mike Ertel is a Certified M & A Advisor and a Principal Broker with Legacy Advisors Group, a full-service M & A Advisory firm with an office in Tampa, Florida specializing in representing sellers and buyers of small- to mid-sized companies. Prior to joining Legacy Advisors Group, Mike's business career spanned 30+ years with Fortune 500 and Fortune 1000 Companies, with senior management roles in Marketing, Operations and Logistics. Mike also served as President, COO of a mid-sized Manufacturing company headquartered in Tampa. Mike also holds a BS in Electrical Engineering and an MS in Industrial Administration, both from Purdue.**

## Secured Transactions: Not All Sales are Safe

*Bart A. Basi, CPA/Attorney at Law  
The Center for Financial, Legal & Tax Planning, Inc.*

### Introduction

As the country has been in a recession for the past year, many companies have endured economic hardships. These hardships include loss of revenue, lay off of qualified employees, debtor defaults, bad cash flow, delayed cash flow and vanishing credit lines just to mention a few. When a customer does not pay a bill that is owed to a company, this is known as a debtor default. It is especially devastating for the company that either sold or rendered a service to the customer or client because the company, in fact, expended their own money, took certain risks, and put their hopes and existence into the expectation that the customer would pay the bill. When the customer does not pay the bill, the company is left holding the bill for what the customer was obligated to pay. This advisory focuses on how sellers can structure sales transactions in order to prevent this type of loss.

### Using a Secured Transaction

Companies use secured transactions to ensure property in many sales transactions. Generally, when the property is sold, a financing statement is filed in the state where the product is

sold; thus, if a debtor defaults or files bankruptcy on the obligation to pay, the creditor (company) can regain possession of the item sold. Although a secured transaction is designed to achieve this result, it does not always work in this fashion. There are events that cause even secured property, to fall out of the hands of the company when a debtor defaults on an obligation.

The Secured Transaction is governed by Article 9 of the Uniform Commercial Code (UCC). As a practical matter, all 50 states have adopted Article 9 of the UCC. This inclusion even affects the state of Louisiana, which follows a more Non-Anglican form of law.

### Don'ts of Secured Transactions

When using a security agreement, do not blindly assume the security agreement alone will secure your property. Though you may have properly completed the security agreement, it does not entitle you to completely abandon caution in your dealings. It is therefore useful NOT to do the following

Continued on page 2

## A CASE STUDY

The Tax Court ruled that payments made by a corporation to a married couple were repayments of a loan made by the wife. In this case, the wife loaned money to a corporation, in which her husband was the sole shareholder. This corporation later dissolved and a new corporation was later formed to continue the business. The new corporation made payments of \$95,000 and \$70,000 to the wife, which the couple treated partly as taxable interest and partly as nontaxable repayment of the wife's loan. The IRS ruled that the payments were nondeductible constructive dividends to the

husband. The Tax Court ruled against the IRS, finding that while there was not a written assumption of the loan between the new and old corporations, the new corporation had purchased a software working model from the old corporation that had been developed with the money borrowed from the wife. The Court found that if these payments were not considered repayments, then the new corporation would have been unjustly enriched. As a result, the payments made to the wife were not treated as constructive dividends to her husband.

Continued on page 2



**The Center for Financial, Legal & Tax Planning, Inc.**

while using a secured transaction in a sale: 1) Put blind faith in a client with a poor credit rating; 2) Depend solely on the secured transaction; 3) Forget to record the transaction with the state.

### Do's of Secured Transactions

As with any sale or service, approach any transaction with a healthy degree of financial skepticism. Do not assume the customer is going to default on the transaction, nor assume any customer will make good on the purchase because the customer seems honest or of good character. Be sure to DO the following in any secured transaction: 1) Check credit ratings; 2) Properly file the UCC arrangement; 3) Explore the possibility of leasing equipment to customers (capital lease); 4) Be willing to rent equipment to customers (operating lease); 5) Sell on a conditional sales contract to be ultra secure.

### Use of the Conditional Sales Contract

A Conditional Sales Contract is a type of contract wherein the merchandise or product's title is retained by the seller. Once ALL of the required payments have been made and the contract has been performed in its entirety, the seller then passes title to the buyer. It is a simple way to ensure first priority in a bankruptcy situation or customer default. In this form, because title remains with the seller at all times, the legal protections of retaining title stay with the seller until all of the conditions of the sale are met. This simply means the seller, during the course of payments, owns the property.

### Renting Property

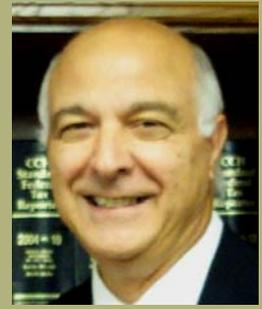
The concept of renting is universally understood and occurs. It is quite simply when a property owner allows use and possession of property, for a fee, to another for a stated or unstated amount of time. In these transactions, title always remains with the owner.

### Capital Lease

The Capital Lease is a somewhat more complex idea than the conditional sales contract and renting. In a capital lease, a buyer makes payments on property, in substantial amount equivalent to the value of the property, with the intent that the equipment be purchased with a final, bargain purchase price. Title also remains with the seller until the lease is completed, rendering full legal protection as well in the event of buyer default.

### Conclusion

The recession this country is currently facing is one for the record books. Though Article 9 of the UCC is designed to assist sellers in retaining property in the event of customer default and bankruptcy, it cannot be used in blind reliance. Utilizing other measures such as the conditional sales contract, lease agreements, and rental agreements during this time could be a seller's best hope of keeping his/her business safe from large losses.



**Dr. Bart A. Basi is an attorney, CPA, and the Senior Advisor of The Center for Financial, Legal & Tax Planning, Inc, a full service company specializing in financial, legal & tax matters. Basi is a nationally recognized author, lecturer, and advisor on how to structure deals to minimize taxes. Tax structure makes the difference between getting the deal done and watching the deal fall apart. Many of you may be familiar with Basi and the topics he covers in the Financial, Legal & Tax Advisory which may be read in various industry-specific trade publications.**

### A CASE STUDY CONTINUED:

**Editor's Comment:** The Tax Court appears to have taken an equitable approach in this case that worked out in the best interest of the taxpayers. However, better tax planning at the time the loan was made and when the new corporation was formed may have avoided this conflict altogether, saving the couple court costs and attorney's fees. A written loan assumption agreement between the old and new companies may have provided more clarity as to how the repayments were to be classified later.

Remember, to prevent such problems, when loaning money to a private, closely-held company, you should always have a loan agreement, a repayment schedule and interest stated. In addition, a corporate resolution should be placed in the corporate records to approve and verify the fact that an actual loan has taken place.

If you have loaned funds to your company, contact the professionals at The Center to review the transaction and determine whether or not you have handled all aspects of the transaction properly.



Legacy Advisors Group  
1101 Channelside Drive, Suite 290  
Tampa, FL 33602-3611

The Center for Financial, Legal & Tax Planning, Inc.  
4501 W. DeYoung St., Suite 200  
Marion, Illinois 62959

## Points of Interest

- When the customer does not pay, the company is left holding the bill for what the customer was obligated to pay.
- Though you may have properly completed the security agreement, it does not entitle you to completely abandon caution in your dealings.
- As with any sale or service, approach any transaction with a healthy degree of financial skepticism.



The Center for Financial, Legal & Tax  
Planning, Inc.  
4501 W. DeYoung St., Suite 200  
Marion, Illinois 62959

Legacy Advisors Group  
1101 Channelside Drive, Suite 290  
Tampa, FL 33602-3611

## **THE IMPORTANCE OF CERTIFIED APPRAISALS IN SELLING YOUR BUSINESS**

### **Mike Ertel, CBI/ M&AMI/ CM&AA**

Certified business appraisals have traditionally been required by lenders as a pre-condition for final loan approval on larger deals.

In today's skittish and skeptical financial environment, certified appraisals of both the business as a whole, as well as of its major asset classes such as real estate, machinery, equipment, inventory, and even intellectual property such as patents & trademarks, are becoming more and more essential.

For some SBA guaranteed loans, certified appraisals for the business as a whole, PLUS ALL of its major asset classes MUST be submitted with the original loan application under recently released SBA guidelines.

Keep in mind that these appraisals must be ordered by the lender from their chosen appraiser. In general, the lender will not consider an appraisal ordered by the seller, and most of the time will not even use the same appraiser out of concerns for getting a truly independent appraisal. Unless otherwise negotiated, the cost for these appraisals is usually borne by the buyer.

The net effect of this new emphasis on certified appraisals has clearly increased the time, effort, expense AND uncertainty of getting loans approved and deals closed in today's environment.

Other than ordering up two complete sets of appraisals -- one for the seller to get the business listed at the right price, and another for the lender/buyer to get the loan approved -- the best course of action for a business seller or buyer is to work with an experienced M&A advisor who keeps abreast of what businesses and business assets are appraising for and advises his client accordingly.

If you know of a business owner who's thinking of selling or buying a business and who might benefit from a free, confidential, consultation with us, have them contact me at [mertel@legacyadvisorsgroup.com](mailto:mertel@legacyadvisorsgroup.com)

**Legacy Advisors Group**  
**813.299.7862 Direct**

[mikeertel@legacyadvisorsgroup.com](mailto:mikeertel@legacyadvisorsgroup.com)

© 2009, J. Michael Ertel, PA

*Legacy Advisors Group  
1101 Channelside Drive, Suite 290  
Tampa, FL 33602-3611  
Phone: 888-864-6610  
Fax: 866-353-0382*

The Center for Financial, Legal & Tax  
Planning, Inc.  
4501 W. DeYoung St., Suite 200  
Marion, Illinois 62959  
Phone: 618-997-3436  
Fax: 618-997-8370  
Satellite Office:  
Longboat Key, FL 34228  
Phone and Fax: 941-383-3338



We're on the Web!

[www.taxplanning.com](http://www.taxplanning.com)

[www.legacyadvisorsgroup.com](http://www.legacyadvisorsgroup.com)

## Frequently Asked Questions...



**Q: I am a businessperson with accounts receivable owed to my business. If my clients do not pay their obligations, can I "write off" the amounts clients do not pay?**

**A:** This depends on whether you are a cash basis or accrual basis taxpayer. If you are an accrual basis taxpayer, then yes, you may charge as an expense, the amount customers default on once it is certain they will default. If you are a cash basis taxpayer, then the receivable is not booked until money is received. It is therefore, not "written off", but merely never booked to start with. For these reasons, it is important that business not allow receivables to go much beyond the standard 10 or 30 day window in which they are due.

**Q: My business is in arrears on it's payments. What is my best course of action?**

**A:** There is no one standard answer for this situation. With that said, generally it is best to not ignore the obligations in which you may be in default of. Calling the creditor, being forthright, and knowing your rights are tantamount to survival and recovery in the process. If a creditor does not know you're willing to work with them, they have no choice but to pursue other legal options against you.

**Q: Is there any good news to be said of the economy?**

**A:** Certainly. While the immediate future looks bleak, what is beyond the next horizon is bountiful. It is a little known fact that the biggest threat to any closely-held business is not estate taxes or even competition. Good businesses tend to make it through recessions one way or another; however, even the best business faces imminent peril if the owner unexpectedly dies without a carefully drafted business succession plan. With that said, it is advisable to begin your business succession or exit plan. While many businesses have necessary legal documents, including buy-sell agreements, not every business has a business succession plan, which is critical.

If you no longer want to receive this e-mail publication, please send an e-mail to [mail@legacyadvisorsgroup.com](mailto:mail@legacyadvisorsgroup.com) requesting to be removed from our mailing list.