Legacy M&A Advisors LLC

M&A UPDATE®

March 2014 Volume 9, Issue 3

Mike Ertel is a Certified M & A Advisor and a Principal Broker with Legacy M&A Advisors, LLC, 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 M&A Advisors, LLC, 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.

The Non-Compete

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

Introduction

Non-Compete Clauses and Agreements (also known as Covenants Not to Compete), quite simply are agreements that are used to limit an employee's competition against an employer when the employee is no longer working for the employer. They are necessary when an employee gains access to clients and in the due course of working for the client, gains certain relationships.

The fact of the matter is that they are some of the most misunderstood documents. Many employers and even attorneys still believe that a clause disallowing work "In the entire United States from termination date plus 10 years…" is a clause that will survive judicial scrutiny. It will not. Many others believe they are prima facie invalid from the start. In most states they are valid. What employers need is a narrowly crafted document that will still protect their business interest.

The Health Service of the Ozarks v. Copeland Case

Although it is a Missouri Supreme Court Case, The Health Services Case represents the current status of the law in many states. In this case, the court points out that it is the courts job to realize that non-compete agreements have their place. The employer has a legitimate interest in protecting his or her business from loss of customers and trade secrets and intellectual property, while the employee has a legitimate interest in earning a living and being able to transfer from one employer to the next in order to provide for his or her family. Second, a non-compete will be enforced if it is reasonable and no more restrictive than necessary in order to serve the interests of the employer.

Continued on page 2

A CASE STUDY

FAMILY LIMITED PARTNERSHIP

The Tax Court ruled that interests given in an FLP were completed gifts as they satisfied the present interest tests. As trustees of their respective trusts, a decedent and his wife established a family limited partnership for the benefit of the family. Shares in the FLP were granted among the family members with various restrictions in order to not cause adverse tax consequence on the family. The FLP was funded by publicly traded stocks of which some paid dividends.

A question came up as to whether the interests given to family members were, in fact, gift of present interest thus qualifying for the annual exclusion.

The Court applied a three prong test in deciding whether the interests were present interests. Among what the court found was that the FLP expected to generate income. Second, the income would flow to the shareholders, and third, the income was readily ascertainable as the family members could estimate their income from quarter to quarter.

Continued on page 3

Advising • Educating • Researching • Publishing

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

Third, the non-compete must be narrowly tailored in time and geography. Fourth, the burden of proof is on the employer in these cases to prove the non-compete serves its legitimate interest and is reasonable in time and geography.

The Kennebrew Case

In the Kennebrew case, the Supreme Court of Missouri went into a little more detail concerning non-competes. Kennebrew had restrictions, namely a period of two years, all customers of the employer and prospective customers, and an employee non-solicitation clause for two years as well. The Supreme Court ruled that the existing customer requirement was overbroad because an existing customer could have included any customer in the United States. This clause was rewritten by the court to narrowly mean any customer that Kennebrew had contact with during the course of his employment. Secondly, any prospective customer could have included absolutely any business in the United States, this clause was deemed invalid.

Third, Missouri has a statute that is on point concerning employee solicitation being limited to one year as being presumptively reasonable. The Court remanded the case back to trial as triable issues remained open. The fact is that Courts can rewrite clauses to make them enforceable, strike clauses altogether, or remand issues back for trial.

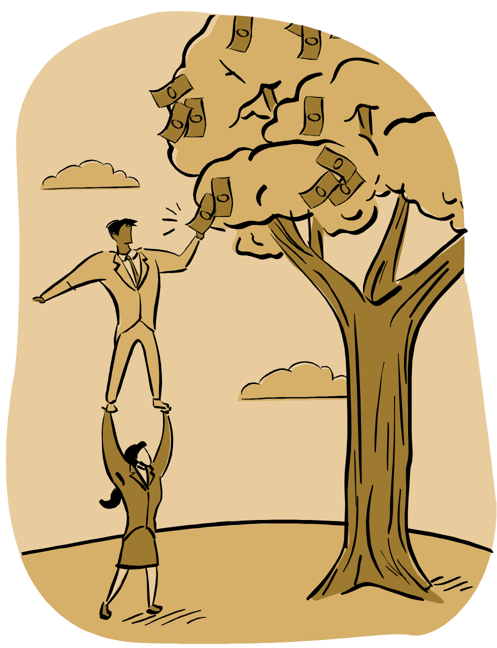
Conclusion

Because of the personal computer, legal forms can be filled in and printed out in minutes. As a result, non-compete agreements have become somewhat common in recent employer-employee relationships. What does not come with them is an attorney to review the agreement and scrutinize whether the agreement does not go against public policy and the document is reasonable in duration and geography. In order to be effective, the document must be narrowly tailored, and in some states must meet additional requirements. The last thing you want is to go to court with a non-compete that says, in essence, “Everywhere and Forever” to face a judge.

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.

Points of Interest

- **Many employers and even attorneys still believe that a clause disallowing work “In the entire United States from termination date plus 10 years…” is a clause that will survive judicial scrutiny.**
- **What employers need is a narrowly crafted document that will still protect their business interest.**
- **The last thing you want is to go to court with a non-compete that says, in essence, “Everywhere and Forever” to face a judge.**



Legacy M&A Advisors, LLC
970 Lake Carillon Drive, Suite 300
Saint Petersburg, FL 33716

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

A CASE STUDY CONTINUED:

Editor's Comment:

A gift is not a completed gift, unless it is a present interest in a gift. If it is not a present interest, it does not fall under the annual gift exclusion amount, currently $14,000 per year, per person. When executing an estate plan, it is important to be sure the gift is a gift that qualifies under the exclusion amount. The IRS is critical of estate plans that fall into FLP arrangements. Often times, owners of FLPs and promoters alike do not abide by the proper detail of the plan and the overall plan fails when too much power or too many liberties are taken by the donors. Be careful of estate planning in FLP arrangements.

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

Legacy M&A Advisors, LLC
970 Lake Carillon Drive, Suite 300
Saint Petersburg, FL 33716

Why Use A Professional M&A Advisor?

Thousands of small- to medium-sized businesses sell privately every year, so why use a professional M&A Advisor? Why not save the professional fees and do it yourself?

There are several reasons, but in my experience most of my clients say they chose me to help them get the best possible result from the years they invested in building their business, while managing the whole process with maximum confidentiality.

An experienced M&A professional can more than earn his/her fee by improving the price, terms, and ultimately, the net proceeds an owner will realize from selling his business.

Our process begins with analyzing and recasting the company's financial statements. Traditional financial statements for privately held companies – even audited, GAAP statements – are not prepared with the intent to sell the business for the best possible price. Mostly, they are prepared to file tax returns and pay the least amount of income tax.

As an example, one business owner asked me to take over the sale of his business after he had attempted to sell it himself for almost a year. He reported that even after lowering his asking price by a third, his trade journal ads hadn't produced a single offer.

After working with the owner to recast his financial history, then creating fresh marketing materials to show his business in the best possible light, and then exposing his business through blind ads to our network of buyers, within 8 months we successfully closed with a strategic buyer for 50% more than the seller's last asking price. The deal also so included several perks that made the deal even sweeter for this seller.

At Legacy Advisors Group, we're in regular, direct communication with hundreds of qualified & motivated, individual and corporate buyers – both domestic and international – for small- to medium-sized companies. We're experienced in CONFIDENTIALLY finding just the right buyer for your business, negotiating a win-win deal, and getting it closed.

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@lmaallc.com

Mike Ertel, CBI, M&AMI, CM&AA
813.299.7862 Direct

Legacy M&A Advisors, LLC
970 Lake Carillon Drive, Suite 300
Saint Petersburg, FL 33716
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
www.legacymandaadvisorsgroup.com

Frequently Asked Questions…

Q: I purchased rental property and there were a lot of costs involved. What costs am I allowed to deduct?

A: You are allowed to deduct interest and real estate taxes, for the most part. Other fees such as closing costs and settlement fees are not deductible. They are simply added to the purchase cost of the property. When the property is sold, these costs will reduce the gains, if any.

Q: Due to the conditions that exist in the real estate market, the sale of my rental property netted a loss. How do I report the loss on the sale of rental property?

A: The loss resulting from the sale of rental property is reported on Form 4797. On the positive side, it is taken as a loss against ordinary taxes and not a capital loss.

Q: If I make repairs or improvements to my rental property, are those alterations subject to an immediate deduction or are they more likely to be depreciated over time?

A: If a major alteration such as a new roof is added, floors are installed or otherwise an alteration that substantially improves the value and adds to the lifespan of the asset, the improvement is subject to depreciation as part of the structure subject to 27.5 years, straight line depreciation. Smaller repairs, such as painting, repairing a window, or replacing one piece of siding can be deducted currently.