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1st Wednesday of every month at 12:15 p.m.
Upcoming meetings: Oct. 2, Nov. 6, Dec. 4

Corporate Practice YLS Committee
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Upcoming meetings: Oct. 10, Nov. 14, Dec. 12

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4th Tuesday of every month at 12:00 p.m.
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ABOUT US

CORPORATE CREATIONS CHICAGO L.L.C. is an Incorporation and Trademark Services firm staffed by experienced attorneys. We have the ability to do filings in all 50 states, as well as the Virgin Islands, Puerto Rico, and the Bahamas. Furthermore, we are educated in Trademark searches and the Federal Application Process at the United States Patent and Trademark Office. With our streamlined business focus, we are able to provide quality and knowledgeable services in an efficient and economical manner.

USING LIMITED LIABILITY COMPANIES FOR REAL ESTATE INVESTMENTS

By Benjamin W. Wong, J.D., LL.M.

Real estate investors are choosing to form Limited Liability Companies ("LLC") over any other entity because of the many potential legal and tax benefits it provides. With the simple and cost-effective approach for ownership, the LLC has become a favorite for not only those larger real estate ventures, but also for those smaller investments where a few friends or family members come together to purchase rental property in hopes of building their real estate empire.

As discussed in further detail below, when considering which entity to organize for the purpose of holding real estate investments, the LLC should be the entity of choice when compared to an S or C corporation, a general or limited partnership, or a real estate investment trust. As also discussed below, an LLC's tax benefits favor setting up an LLC for holding real estate investments.

What is an LLC?

It is important to initially discuss what an LLC is before discussing the advantages of setting up an LLC. An LLC is a hybrid between a corporation and a partnership. Like a cor-

poration an LLC is a legal person that is created under state law. It has certain legal rights and obligations such as the right to transact business and the obligation to pay taxes. One common thread behind both the LLC and the corporation is that it allows real estate investors to invest money for their new real estate ventures but not risk unlimited personal liability. In other words, the Members, or owners, of an LLC, like shareholders of a corporation, are generally not responsible for the debts and obligations of the LLC beyond their contributions to the LLC.

An LLC, if properly structured, is not taxed at the entity level like a corporation. Rather, it is taxed like a partnership where an LLC's profits are taxed on its Members' individual tax returns. Accordingly, there will only be one level of taxation, not two layers of taxation that occur with a C corporation.

When considering which entity to choose from, real estate investors must know which options are available to them and how they compare to other viable options, such as an LLC, an S or C corporation, a general or limited partnership, or a real estate investment trust, discussed as follows:

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USING LIMITED LIABILITY COMPANIES... CONTINUED FROM PAGE 1

LLCs v. C and S Corporations

Many of an LLC's benefits are available without the various restrictions faced by both C and S corporations. LLCs address many practical issues faced by closely held small businesses. All these businesses wish to have limited liability for their owners. In order to accomplish this objective in the past, they have had to organize either as a C corporation and face double taxation, or as an S corporation and face severe restrictions on the structure of equity interests and shareholder numbers and characteristics.

In addition, setting up an S corporation as the ownership vehicle for real estate is rarely appropriate. This is because the entity level debt of an S corporation cannot be included in the tax basis of its shareholders even if the debt is personally guaranteed by the shareholders; and special allocations, common to many real estate ventures, cannot be structured within the scope of the S corporation's one-class-of-stock requirement. Moreover, at the state tax level, many states impose a corporate tax on the income of an S Corporation, which makes this form of entity less attractive to utilize.

LLCs v. General and Limited Partnerships

The general partnership form historically has been unattractive to real estate investors because partners lack limited liability protection.

Limited partnerships, perhaps the most commonly used business form in real estate transactions, are often unsuitable because they preclude limited partners from actively participating in the management of the business or risk losing their limited liability protection. In addition, at least one partner must be liable for the business debts in a limited partnership.

The benefit of an LLC is that all its Members are able to manage and control the business without causing the LLC to be taxed as a corporation. Members of an LLC can directly participate in the company's management or can elect Managers to manage the business. This is a key distinction between an LLC and a limited partnership, where limited partners risk losing its limited liability if they actively manage the business.

When comparing the use of a limited partnership with a limited liability company, both entities can limit the liability of its owners. In a limited partnership, however, the general partner will still have unlimited liability. This problem can be alleviated by setting up a corporation as a general partner. Now the corporation is the partner that is

liable. Since corporations have limited liability, no individual owner is liable. This structure, however, results in further complications such as more start-up costs and the filing of more annual tax returns. The advantages of setting up an LLC is that it avoids the need for two entities (the corporation as a general partner and the limited partnership), is less costly to set up, and requires fewer annual tax returns and other complications.

LLCs v. Real Estate Invests Trusts

A real estate investment trust ("REIT") is a trust or corporation organized to hold real estate assets. It is generally owned by a large number of shareholders. Although a REIT may be classified as a corporation, it can qualify to avoid tax on most of its income, that is, if it meets the many strict REIT tax requirements. Once these complex requirements are met, the taxes can then pass through to its shareholders.

The LLC may offer a possible alternative to the use of a REIT for real estate investing. Most importantly for real estate investors, this can all be accomplished with far less complexity and administrative costs that are associated with REITs.

Tax Considerations

Although tax reasons should not be the sole reason for setting up a specific entity, they do play an important role in the decision making process. Along with the single-level of taxation, an LLC provides an opportunity for real estate investors to: (i) characterize income and losses derived from the entity as potentially active income losses; (ii) have the flexibility to allocate its tax benefits on special allocations of income, gain, and loss from an investment; and (iii) have recourse liabilities allocated to the its Members, just to name a few of the tax benefits. A tax advisor should be consulted to discuss these complex tax benefits in greater detail.

In sum, the real estate investors will definitely benefit from the simplicity, costs, legal and tax benefits that are associated with setting up an LLC to hold their real estate investment properties as compared to the other legal entities available to them. For those few friends or family members beginning to build their real estate empire, setting up an LLC is the first step in accomplishing this task.

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NEW TAX LAW OFFERS SUBSTANTIAL BENEFITS TO BUSINESSES

by **Joseph A. Odzer**

Earlier this year, President Bush signed the Job Creation and Worker Assistance Act of 2002. The new law contains \$38.7 billion in tax incentives over ten years, containing important provisions that affect both businesses and individuals. Several of the tax benefits are retroactive to the 2001 tax year, including those detailed below.

New 30% first-year special depreciation allowance The new legislation offers businesses an opportunity to significantly increase their first-year depreciation deductions. Depreciable property acquired after September 10, 2001, may be eligible for an additional 30% first-year depreciation allowance.

What property qualifies?

Property eligible for this special treatment generally must be:

- a) Property with a recovery period of 20 years or less;
- b) Property acquired after September 10, 2001, and before September 11, 2004; or
- c) Property acquired pursuant to a written binding contract entered into after September 10, 2001, and before September 11, 2004.

Businesses can take advantage of the additional first-year depreciation in taxable years ending after September 10, 2001. Business owners should review their 2001 asset purchases to determine if any of the purchases qualify for the deduction. If a return has already been filed, the new benefit can be claimed on an amended tax return.

Passenger automobiles

Passenger automobiles may also qualify for the depreciation bonus. New passenger vehicles must be purchased after September 10, 2001, and utilized more than 50% for trade or business purposes to qualify. The new law raises the limit on first-year depreciation from \$3,060 to \$7,660. Please note, if business use of the car falls to 50% or below in a subsequent year, the business may have to recapture a portion of the depreciation previously claimed. More generous depreciation rules apply to certain

property that is located in the area of New York City damaged in the September 11th terrorist attacks.

Immediate relief for tax losses

Carrying back a net operating loss (NOL) to a previous tax year allows taxpayers to offset taxable income in the carry-back year and obtain a tax refund. Under prior law, the carry-back period was two years.

The new law states that if you carried back an NOL from a tax year ending in 2001 or 2002, you may carry it back for five years (in contrast to the previous limit of two years). The extension from two to five years is a temporary provision, and NOLs that are not carried back may be carried forward up to 20 years. The new law also allows a taxpayer's NOL deduction to reduce its alternative minimum taxable income up to 100% (in contrast to the previous limit of 90%). Taxpayers may opt to utilize the two- or five-year carry-back option, or to waive the carry-back option altogether.

To find out if you can benefit from these important provisions or for assistance with amending your 2001 tax return, please contact my office.

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FORUM SELECTION CLAUSE - WHAT'S IN A FORUM?

by Chad A. Schiefelbein

A. What is a "Forum Selection Clause"?

Forum selection clauses are contractual clauses through which parties to a contract can designate a forum in which disputes arising out of or related to the contract will be heard. A typical forum selection clause reads, "The courts _____ shall be the exclusive venue for any and all disputes arising out of or related to this contract" or "all disputes arising out of or related to this contract shall be brought in the courts located in _____ county of the State of _____."

B. Are Forum Selection Clauses Enforceable?

So long as they are reasonable, forum selection clauses generally are enforceable because they are seen as a part of the parties' "freedom to contract." "Reasonable" forum selection clauses are the by-product of arms-length negotiations. "Unreasonable" forum selection clauses are those which are entered into by one of the parties under duress or fraudulent circumstances, or are the by-product of unequal bargain power or overreaching during negotiations.

The presumption in federal courts and many state courts is that forum selection clauses are reasonable. The burden of showing that a forum selection clause is unreasonable is a "heavy one" that rests on the party challenging the applicability of the forum selection clause.

However, in limited instances, courts will relax this burden "in the interests of justice" or for the convenience of the parties and witnesses. This typically occurs when one of the parties to a contract merely seeks transfer to a sister court, where the dispute could have otherwise been brought.

Additionally, a handful of state legislatures have declared forum selection clauses void against public policy. For example, forum selection clauses contained in Illinois franchise contracts are void if they designate a forum other than Illinois.

C. Why Should I Be Concerned About Forum Selection Clauses?

Because forum selection clauses are generally enforceable, contracting parties should be concerned about

whether a forum selection clause appears in their contract. Reasons to be concerned include, but are not necessarily limited to, accessibility of the forum, travel related expenses, the availability of counsel in the forum, law of the forum and local bias.

Take for example a company from State X which contracts with a company from State Y. If State X negotiates a forum selection clause with State Y that designates State X the exclusive forum, the company from State Y must travel to State X to file or defend against a dispute. As the owner of the company from State Y, you will need to: (i) find and hire qualified local counsel to handle your dispute (or have your current counsel do the same); (ii) transport those officers, directors or employees who will testify on your company's behalf to State X and, depending if there is a trial and how long it lasts, house those officers, directors and employees in State X; and (iii) face, become familiar with, and address potentially unfavorable laws and/or local bias.

On the other hand, the company from State X will not need to find out-of-state counsel to file or defend, or transport its officers, directors or employees to another state for purposes of testifying if there is a trial. Additionally, the company from State X will already be familiar with and have likely faced and addressed State X's laws and local bias, assuming any bias towards it exists.

This example illustrates the advantages and disadvantages of having a forum selection clause appear in a contract. These advantages and disadvantages become even more important when a contract is with a company from a foreign country or territory.

Additionally, parties to a contract should be concerned about the language used in the forum selection clause. Courts have carved out a distinction between "mandatory" forum selection clauses, which require that the dispute be filed or defended against in only one forum,

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and "permissive" forum selection clauses, which suggest, but do not necessarily require, that suit be filed or defended against in only one forum. Put another way, if the forum selection clause states that all disputes "shall," "must" or "will" be filed in State _____, then courts will require the parties to go to State ____ (provided that the clause is "reasonable"). If the forum selection clause states that all disputes "may" be filed in State _____, or if it uses the term "jurisdiction" rather than "venue" without additional language indicating exclusivity of the chosen forum, then courts will not require the parties to go to State _____. This distinction is important because a party may believe that it has an exclusive (and mandatory) forum selection clause when, in fact, it does not. Additionally, mandatory forum selection clauses may prohibit a party from filing or removing a case to federal court, whereas a permissive forum selection clause may allow it.

Only when it is too late do most parties come to these realizations.

D. What Can I Do the Next Time I Negotiate a Contract?

As is the case with any contractual provision, it is important to always review a contract to insure that it correctly captures your entire agreement. With respect to forum selection clauses, look to see if the contract contains the one you want, if you want one at all. Many times parties are simply willing to give up on forum selection clauses, most often in belief that a dispute will never arise, only to find out later that they must go half-way across the country to file or defend against a dispute in a distant or remote forum that may be disadvantageous to their position. The expenses of travel and time lost traveling can quickly begin to add up and, in some instances, might even exceed the reasonable value of the dispute, which could force a party to resolve the dispute for something less than expected.

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by Jeremiah Desmarais

NOWHERE is there a place where sellers so aggressively solicit new business than the yellow pages. Some law firms thrive on their results, others die by the lack of them. Improve your chances to thrive by following these proven techniques:

Evaluation #1: "Well, I Would Hope So!"

When you make a claim, don't think about it in terms of coming out of your mouth... think of it in terms of entering your prospects' ears. Then you'll realize how ridiculous some claims sound. Whenever you make a claim, ask yourself if the prospect will immediately echo this response: "Well, I would hope so!" For instance, one Personal Injury firm ad reads: "Serving You With Integrity." Wow. I guess the others won't. I should probably call that guy... "Well, I would hope so!"

These statements are about like the haircutter telling you that your hair will be shorter after it's cut, or the gas station telling you you'll have more gas after you fill the tank. Always, always, always ask this important evaluation question whenever you make any claim. It will improve your effectiveness by 431% immediately.

Evaluation #2: The Specificity Challenge

QUANTIFY all of your claims. For example, "Millions collected for our clients" is not as powerful as "Hire Our Team of 27 Tough-as-nails Lawyers with 15 Offices Nearby that Have Won Over \$213 Million for 947 Injured People in the past 4 years - And Go Home With The Settlement You Deserve."

1. Specifically How Much? (27 Lawyers, 15 offices, 4 years)
2. Compared To What? (27 lawyers vs. a few or one lawyer)
3. Why Can You Do That? (The rest of the ad should back up that claim)
4. What's The Advantage? (You have more people fighting for your case who have won lots of money before so can get the best settlement)

Evaluation #3: The 'Switcharoo' test

Take out your yellow pages and hide the names of the law firms and see if you can tell yours from the rest just by what they say. If you find that your message is just like everyone else's, how can you expect your prospects to tell the difference?

Jeremiah Desmarais is the President of Extremely Graphic! Marketing, a full service marketing and graphic design firm. Mr. Desmarais and his team help businesses Monopolize Their Marketplace by Separating Them From the Competition through marketing that produces sales results. For a complimentary evaluation of your current marketing tools, email jd@extremelygraphic.tv or call him direct at 312-397-9971. Learn more at www.extremelygraphic.tv