



SMITH HAUGHEY

RICE & ROEGGE

ATTORNEYS AT LAW

BUSINESS & REAL ESTATE LAW

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PULLING CHIPS OFF THE TABLE: SALE OF BUSINESS, MAJORITY RECAP & MINORITY RECAP

BY JONATHAN J. SIEBERS, ATTORNEY

One of the most stressful aspects of owning a small business is having your life savings tied up in one asset – the business itself. This can cause stress as you consider what could happen to your primary investment if the business struggles or fails. Though this stress is something that many small business owners have little control over, more and more business owners are discovering (and taking advantage of) options to pull money out of the business (i.e., pull some chips off the table) and to use that money to diversify their investment portfolio.

The most obvious way to pull chips off the table is to sell the business outright. Whether the sale is to management, a family member, a competitor, a private equity group or some other buyer, a total sale turns the value of the business to cash that can then be reinvested in a more diverse (and less risky) investment portfolio. The total sale is especially appealing for owners who are ready to retire and walk away from the business altogether.

While the total buyout is not a good fit for

someone who wants to maintain control of, or to retain some ownership in, the business, a majority recap may be an option. In a majority recap (i.e., recapitalization), an investor (typically a private equity group) acquires a majority stake in the business. However, the owner retains a minority stake in the firm and typically continues to manage the operations (with a varying degree of oversight from the investor). One possible advantage of a majority recap is that it may allow the owner to pull some chips off the table now and then sell the remaining chips a few years later for a higher per-chip price. This is what owners refer to as “getting another bite at the apple.”

Another option that is gaining popularity is the minority recap. In the minority recap, the business owner sells a minority stake in his or her company to an investor (typically a private equity group), but retains a majority stake in the company and continues to operate the company (with varying degrees of oversight from the investor – but typically less oversight than would be expected in a majority recap).

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Client Successes

Daniel Morley and Kate Flewelling recently assisted a local community bank in the refinancing of a \$25 million loan transaction for a northwestern Michigan resort.

Mike Shelton and Kirk Morgan have been instrumental in helping Maurice Jacobsen form a new company – Circus of the Mind, LLC. With Smith Haughey’s help, Maurice was able to get his company up and running, along with supporting the installation of Jacobsen’s 2013 ArtPrize entry. His piece, Facing Al Aqaba, made the 2013 ArtPrize Juried Short list in two categories: Time/Performance and Use of Urban Space.

Bill Franks assisted a client in forming a new local restaurant that opened in Grand Rapids, Michigan.

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The minority recap may be a good option for the business owner who is not ready to cede control of his or her company, but wants to pull some chips off the table. One added benefit to the minority recap is that a private equity group as a minority investor can be a good source of growth capital for the company.

The options discussed above are not available to every company and are not right for every owner. Companies lacking strong management and growth potential likely will not be considered for a majority or minority recap. Likewise, the owner who either has trouble playing well with others or tends to be a control freak is probably not a good candidate for a majority or minority recap. For such owners, a buyout may very well be the best (or only) option. However, for the right owner with the right business, the majority and minor recap may be options that allow them to take chips off the table without totally walking away from the business.

If you own a business and have questions about pulling some of your chips off the table, please contact one of the business attorneys at Smith Haughey Rice & Roegge.



Contact Jonathan Siebers at
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Piercing the Corporate & LLC Veil

BY ANDERS J. GILLIS, ATTORNEY



Forming a corporation, or limited liability company (“LLC”), helps protect your personal assets from claims against your business. In other words, your personal bank accounts, real estate, equipment and other personal property, wages, and investments are generally guarded from your company’s creditors, or others who have been harmed or injured by your company. This is because courts will recognize a corporation and LLC as separate from its shareholders and members. However, this protection is not automatic. Courts may disregard limited liability when a company is treated as someone’s alter ego.

Simply stated, a corporation, or LLC, is a shield. Wield it correctly and your personal assets are protected. But if you set it down, ignore it, or become clumsy, your personal assets are no longer protected. As a result, your personal assets are exposed because you are personally liable for the company’s debts, contracts, and damages.

On October 24, 2013, the Michigan Court of Appeals made this risk apparent in *Woodridge v Williams*. Douglas Williams owned a roofing company that was sued for a breach of contract. The company lost the lawsuit, and was held liable. Soon thereafter, the company declared bankruptcy. Even though the company could not pay, Mr. Williams was forced to pay with his personal assets.

In reaching its decision, the court noted that Williams lost the protection usually afforded by an LLC for several reasons.

First, he used the company to pay for his personal expenses, including his car, cable, internet, telephone service for his entire family, and Country Club and athletic club membership fees. Second, he made personal loans to his company – without bothering to execute promissory notes. Third, he removed money from company bank accounts in order to avoid paying the judgment against the company. These factors, and more, effectively turned the company into his alter ego. As a result, he was held personally liable.

The court’s decision was a strong reminder to members of LLC’s and shareholders of corporations of what they should do to prevent acquiring personal liability. Here are a few general guidelines to follow:

1. Make sure that all entity-related documents are signed by the entity, not the individual.
2. Do not mix, or commingle, your personal assets with those of the company.
3. Keep accurate records, and record promissory notes, whenever you make a loan to the company.
4. Act in good faith, and do not shift assets from the company to avoid liability.
5. Keep your personal accounting and financial accounts and records separate from those of your company.

Whenever possible, prevent yourself from becoming personally liable for your company’s risks. The attorneys at Smith Haughey Rice & Roegge are ready to assist you in forming a corporation or limited liability company. Further, our experienced litigators are prepared to protect your personal assets from claims by your company’s creditors.

Contact Anders Gillis at
agillis@shrr.com or 231.929.4507.

New Faces at Smith Haughey

Welcome Sheila E. Eddy! Sheila joined the firm's Grand Rapids office in June of 2013. She practices in the areas of trademark, copyright, trade secret, defamation, Internet, and business law, in both transactional and dispute resolution contexts. Contact her today if you are seeking legal advice on intellectual property matters involving trademarks; copyrights; domain name dispute resolution; information technology agreements; website agreements; trade secret non-disclosure agreements and more. Sheila can be reached at seddy@shrr.com or 616.458.4256.

Welcome Back Brian M. Pearson! Brian re-joins Smith Haughey's Grand Rapids office as a shareholder for the firm's business and real estate practice group. He represents companies large and small in industries such as manufacturing, construction, commercial real estate development and retail. He assists his clients with contract review, drafting, and negotiation, entity creation, buy and sell agreements, shareholder agreements, and general business interests and counseling. Brian can be reached at bpearson@shrr.com or 616.458.7366.

The Intellectual Property Audit

BY SHEILA E. EDDY, ATTORNEY

A great business owner knows exactly what makes their business stand out among the competition – whether it's a hard-earned reputation associated with their business name, exceptional service offerings, a top-secret recipe, unique and useful goods, or innovative technologies. But many business owners don't take the appropriate steps to adequately protect their business's competitive edge, often because they don't know where to start.

Intellectual property (IP) can take many forms, and can be found woven throughout every facet of a business. A company's secrets, such as customer lists, recipes, techniques, or processes that derive independent economic value from not being generally known to others can be protected as trade secrets. Copyrights protect a company's blogs, publications, software, product manuals, artwork, web designs, marketing materials, and any other original work of authorship created by the company. A business's name, logos, symbols, phrases, and other identifiers associated with the goods and/or services provided by the business can be protected as trademarks, and the look and feel of a product's packaging, or the façade of a display associated with goods or services can be protected trade dress. Patents can

protect especially unique and nonobvious inventions, processes, and business methods, and design patents can protect the non-functional, ornamental design of an otherwise functional item.

Why Have An IP Audit?

There are a number of different reasons why a business might want to conduct an IP audit. An IP audit provides a business an opportunity to assess all the potential IP assets it may have and to review any potential risks or opportunities associated with such assets. In general, an IP audit will assist a business in identifying intellectual property assets that are not adequately protected or being used to their potential. It can also help a business determine what assets it does not have a right to, and develop internal policies and procedures to guard against inadvertent infringement of another's IP.

The scope of an IP audit can be company-wide, event-specific, or tailored to focus on a particular type of IP. Some scenarios that might trigger the need or desire to conduct an IP audit might be: considering a merger or acquisition, developing or launching a new product or service, licensing or assigning IP, or a major new development

in intellectual property law. A business might also want an IP audit to evaluate a third party's infringement claims and possible consequences, consider any bad habits or potentially risky behavior of the company or its employees that may have resulted in infringement of another's IP, or contemplate the impact of a key decision-maker or employee's hiring or departure from the company.

What Information is Needed to Conduct an IP Audit?

The first step in a general IP audit is to identify what intellectual property the business has and may potentially have.

As a starting point, a business should consider:

- Where are the ideas and plans for the business coming from? Are employees or independent contractors creating materials for the business? Do the employees or independent contractors have agreements with the company? If so, are there IP provisions in the agreement?
- Does the company have any brand recognition? What are the central

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trademarks or other identifiers that distinguish the company's goods or services from those of others?

- What goods and/or services does the business provide? What makes the goods and/or services different from others?
- Does the business have any secrets? How does the business maintain confidentiality of its secrets in day-to-day operations?
- Does the business have one or more domain names? How is the website being used (e-commerce, informational, interactive, etc.)? Does the business have a social media presence or blog?

The answer to each of these questions holds a different key to uncovering intangible qualities that add value and

differentiate a business. An effective IP audit can help any business to determine what IP it has, whether it's using and protecting its IP to its fullest, and how to avoid the pitfalls of inadvertent IP infringement.



Contact Sheila Eddy at
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Client Successes, Continued

Bill has been working with the owners on getting their corporate structure in order and obtaining a liquor license.

During the past 12 months, Jon Siebers has successfully closed several complex M&A deals with transaction values up to \$14 million, has worked with developers on real estate, financing and investment-related issues for several high-profile real estate projects, and has represented lenders in closing numerous sophisticated loan transactions, including a \$120 million syndicated loan.

In 2013, Chuck Judson, an experienced mediator of business disputes, presented "Negotiating through conflict" to a Traverse City Area Chamber of Commerce Business leaders conference.