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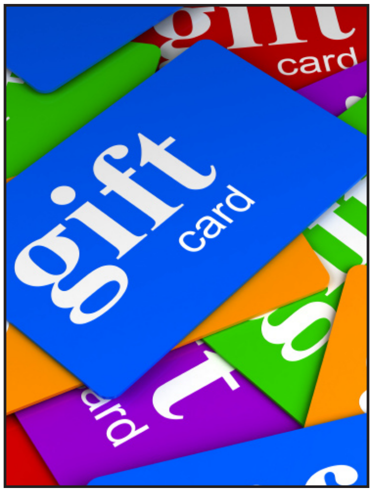
Hospitalitas

The Hospitality Industry Newsletter from Baker Donelson



Gift Card Management—When Income Tax and State Unclaimed Property Laws Converge

Scott Smith, 202.508.3430
sdsmith@bakerdonelson.com

As we emerge from the 2009 holiday shopping season, the popularity of gift card programs for retailers, restaurants and other hospitality businesses and their customers has become even more apparent. "Breakage," that portion of gift card balances that is not redeemed for food, beverage or merchandise, also can be an

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Greetings from *Hospitalitas*

Hospitalitas is the Baker Donelson newsletter for our clients and friends in the hospitality industry – hotels, restaurants and their suppliers. It is published several times a year when we believe we can deliver first class, useful information for your business. Please send us your feedback and ideas for topics you would like to know more about. True to our Southern heritage of hospitality, we'll work hard to make each visit with us something special and worth repeating.

FDA Amends *Food Code*

Joel Buckberg, 615.726.5639, jbuckberg@bakerdonelson.com

In November 2009, the U.S. Food and Drug Administration (FDA) amended its *Food Code*, which serves as a model for codes of the lower tier governmental agencies that administer state food regulation. Below is the FDA's summary and a link to the 2009 *Code*. Please note the new focus on safety for cut leafy greens, non-continuous preparation methods for meat items and new cleaning and sanitizing requirements. With so many well-publicized incidents of food-borne illness during the last two years, these changes are sure to get more attention than conventional code changes.

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Crimes on Your Properties Have Multiple Victims: The Affected Patron, Your Future Patrons and Your Business

Josh Mullen, 615.726.7318, jmullen@bakerdonelson.com

In December 2007, a gunman entered a shopping mall in Omaha, Nebraska and killed nine people. Frequently, there are news reports of armed robberies or shootings occurring at hotels, restaurants or other commercial properties. With each of these tragic occurrences, businesses are asking a very important question: can we be liable for the criminal acts of third parties that occur on our property? In most states, including Tennessee, the answer is yes. Owners and operators of commercial property have a duty to take reasonable measures to protect their customers from

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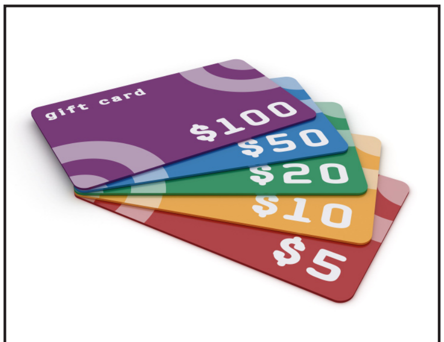
Gift Card Management – When Income Tax and State Unclaimed Property Laws Converge, *continued*

important short-term cash flow benefit for the card issuer. Yet, a number of states will treat unredeemed gift card balances as unclaimed property. As a result, some issuers of gift cards have used separate entities to manage their gift card programs to achieve intended unclaimed property compliance benefits. In turn, how these gift card management entities recognize income from gift card sales has caught the attention of the Internal Revenue Service (IRS).

IRS's LMSB Audit Initiative

In 2007, the IRS's Large and Mid-Size Business Division (LMSB) issued a directive to its revenue agents in the field announcing an audit initiative targeting what the IRS viewed as improper treatment in recognition of income from sales of gift cards and gift certificates by restaurants and retailers.[1] The directive clarifies that, although a sale of a gift card is income for financial statement accounting purposes when the card is redeemed, income is generally recognized for tax purposes when the card is sold. However, if a taxpayer can properly use the "advance payment" deferral rules of Treas. Reg. § 1.451-5 and Rev. Proc. 2004-34,[2] then unredeemed gift card income can be deferred up to the last day of the second tax year following the year of sale. Among other requirements, IRS rules require the seller of the gift card to also be the seller of the merchandise for which a card balance is redeemed.



State Unclaimed Property Laws

Roughly half of the states treat balances on gift cards or certificates that have not been redeemed for a period of years, usually three to five years after issuance, as unclaimed property. These states require the "holder," the card issuer, to report and pay to the state the unredeemed balance upon expiration of the "dormancy period" when the unredeemed gift card balance is deemed abandoned by the owner. Thus, while unredeemed gift card balances may be taken into income for tax purposes, that balance also may be unclaimed property payable to a state.

Another group of states will not treat unredeemed gift card balances as unclaimed property, depending on requirements that may vary by state.

A holder may determine whether unredeemed gift card balances are escheatable as unclaimed property, and to which state, based on statutory unclaimed property reporting priority rules of the states where the holder is legally domiciled and/or engages in commercial activities. These priority rules are patterned after the priority rule for escheat of intangible property established by the U.S. Supreme Court in *Texas v. New Jersey*, 379 U.S. 674, 681-682 (1965), and affirmed in *Delaware v. New York*, 507 U.S. 490 (1993).

As a result, a popular unclaimed property compliance management technique has been for holders to establish separate gift card management companies or other entities. These companies/other entities manage a gift card program from

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Remember That Post You Wrote About Me on MySpace? You're Fired.

Christie Hayes
423.928.0181
chayes@bakerdonelson.com

Employee gossip about supervisors is as ancient as chatter around the water cooler. But the dynamics of workplace gossip have gone through massive changes since online social networking sites like MySpace and Facebook found their way into the lives of employees with a notion to complain. In the case of *Pietrylo v. Hillstone Restaurant Group*, a federal jury in the United States District Court for the District of New Jersey sent a stern message to employers regarding social networking and its effect on the workplace. On June 16, 2009, the Pietrylo jury issued a verdict against Hillstone Restaurant Group, the operator of a Houston's restaurant in Hackensack, New Jersey.

The case stemmed from a complaint filed against Hillstone by former servers Brian Pietrylo and Doreen Marino. During his employment with Houston's, Peietrylo created a group on MySpace called "Spec-Tator." Members who were invited to join the group and accepted the invitation could read or add postings. In his initial post, Pietrylo wrote that the group's purpose was to vent about work without "any outside eyes spying," as the group was intended to be "entirely private" and could only be joined by invitation.

Some time after the formation of the group, Pietrylo invited a greeter from Houston's, Karen St. Jean, to join Spec-Tator. St. Jean, in turn, accessed the MySpace group through her manager's home computer and showed the manager postings from Spec-Tator. The manager informed other managers of the existence of Spec-Tator and requested the Spec-Tator group password from St. Jean.

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Gift Card Management – When Income Tax and State Unclaimed Property Laws Converge, *continued*

the purchase and design of cards to the sale of cards, tracking, redemptions and other aspects of marketing gift cards. Depending on where it is domiciled and other factors, the management company/other entity also may be intended to enhance unclaimed property compliance with respect to unredeemed gift card balances.

IRS Field and Legal Advice

In field advice,[3] the IRS has held that separate gift card management subsidiaries of their parent company retailers could not defer income recognition of gift card sales as "advance payments" under Treas. Reg. § 1.451-5 and Rev. Proc. 2004-34. Because the gift card management subsidiaries were issuers of gift cards but did not own the merchandise for which the gift card balances were redeemed, income from those sales could not be deferred.

More recently, the IRS ruled that a full-service restaurant management company could not defer the recognition of income from its gift card sales that were redeemed in restaurants that the management company did not own.[4] The restaurants were owned by separate entities that were corporations wholly, partially or not owned by the management company. The management company also held interests in entities treated as partnerships for federal tax purposes. The IRS reasoned that under state law, property titled in the name of a corporation is an asset of the corporation, not its shareholders. Since the food and beverages of the restaurant corporations were owned by those corporations - not the management company - gift cards were not redeemed for goods owned by the management company. Thus, the income deferral rule could not apply. Likewise, the same reasoning and conclusion were applied by the IRS to the restaurant entities that were treated as partnerships for federal tax purposes.

Whether the same result would be applied by the IRS to a gift card management entity that is disregarded as a separate entity for federal tax purposes, such as a single member limited liability company (SMLLC), is not addressed in the field advice. Because of certain administrative and commercial practicalities, SMLLCs have become more popular as gift card management entities for unclaimed property compliance management purposes.

While the IRS field advice is not binding on taxpayers and cannot be cited or relied on as precedent, the advice does reflect the current IRS audit and litigation position that implements the LMSB directive previously described. Restaurants, retailers and other gift card issuers should review their gift card programs and the associated income tax and unclaimed property consequences, especially if they have implemented, or are contemplating, gift card management entities.

Mr. Smith is an attorney in our Washington, D.C. office.

1. Industry Director Directive on the Planning and Examination of Gift Card/Certificate Issues in the Retail, Food & Beverage Industries, May 23, 2007. http://www.irs.gov/businesses/article/0,,id=170842,00.html.
2. 2004-1 C.B. 991.
3. Technical Advice Memorandum (TAM) 200849015 (Dec. 5, 2008) and Field Attorney Advice (FAA) 20082801F (March 26, 2007).
4. IRS Legal Memorandum 20093801F (Sept. 18, 2009).

Remember That Post?, *continued*

Spec-Tator's postings included sexual remarks about restaurant management and customers, jokes about customer service standards and references to violence and illegal drug use. Members of management testified that they found the postings to be "offensive." Based on these postings, management subsequently fired Pietrylo and Marino, who responded by filing suit against the restaurant owner, asserting a number of claims like wrongful termination, invasion of privacy, violations of the Stored Communications Act (SCA) and violations of the Wiretap Act.

The federal jury returned a verdict against the employer for violating the federal SCA and invasion of privacy. The jury awarded Pietrylo and Marino the maximum amount of back pay to which they were entitled, and the parties continued to argue about whether Pietrylo and Marino can recover their attorneys' fees under the SCA.

The SCA is a federal law that creates Fourth Amendment-like privacy protection for email and other digital communications stored on the internet. The SCA addresses voluntary and compelled disclosure of "stored wire and electronic communications and transactional records" held by third-party internet service providers. In *Pietrylo*, the jury's verdict hinged on its finding that restaurant management had obtained the password for Spec-Tator through implied coercion. Instead of accessing the discussion group directly, management could have asked a member to print out screenshots. In light of the employee's testimony, the court found that the jury had reasonably concluded the managers had not been authorized to enter the site and refused to toss out their verdict.

Pietrylo reminds us of the complexities involved in accessing employees' social networking sites, as well as

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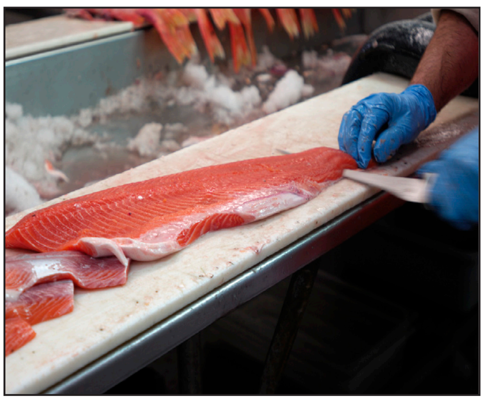
FDA Amends *Food Code*, *continued*

Summary of 2009 FDA *Food Code*

On November 11, the FDA released its 2009 Edition of the *FDA Food Code*. The *Food Code* is a model code and reference document for state, city, county, tribal and territorial agencies that regulate over one million restaurants, retail food stores and vending and foodservice operations in institutions such as schools, hospitals, nursing homes and child care centers.

This is the first update to FDA's *Food Code* since 2007, when it issued a supplement to the 2005 Edition. Below are key changes and additions made by the 2009 Edition of the *FDA Food Code*:



- Each provision in the FDA *Food Code* is now designated as a "Priority Item," a "Priority Foundation Item" or a "Core Item," to assist the industry and regulatory community in prioritizing their food safety interventions and their inspections. These designations are based on a qualitative risk assessment and replace the use of "Critical" and "Non-Critical" designations in previous editions of the FDA *Food Code*.

- Cut leafy greens are now included among the foods that require time and temperature control for safety and a new supporting reference document, "Recommendations to Food Establishments for Serving or Selling Cut Leafy Greens" is summarized in Annex 2.

- Requirements were added to improve food worker awareness of food allergen concerns in the foodservice and retail setting.

- Serving hamburgers and other ground meats in an undercooked form upon a consumer's request is no longer an option for items offered on a children's menu.

- A new definition and criteria are added in a new FDA *Food Code* section for the non-continuous cooking of foods comprised of raw animal products to address the safety of this cooking method.

- Several requirements related to the effective cleaning and sanitizing of equipment and surfaces are enhanced or clarified.

The full text of the 2009 FDA *Food Code* can be found at http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FoodCode/FoodCode2009/default.htm.

Mr. Buckberg is an attorney in our Nashville office.

Remember That Post?, *continued*

that of using information obtained from social networking sites to discipline or terminate employees. The jury award in *Pietrylo* was limited to $2,500 and $903 in compensatory damages to Pietrylo and Marino, respectively. Pietrylo and Marino were also awarded four times that amount for punitive damages. While the amount awarded was relatively small because of the minimal amount of ascertainable lost wages, other situations involving employees with higher incomes may warrant much larger jury verdicts. Employers in the hospitality industry should carefully consider the risks of privacy invasion claims associated with obtaining information from social networking sites and weigh the potential liabilities in basing employment action decisions on non-workplace behaviors.

Ms. Hayes is an attorney in our Johnson City office.

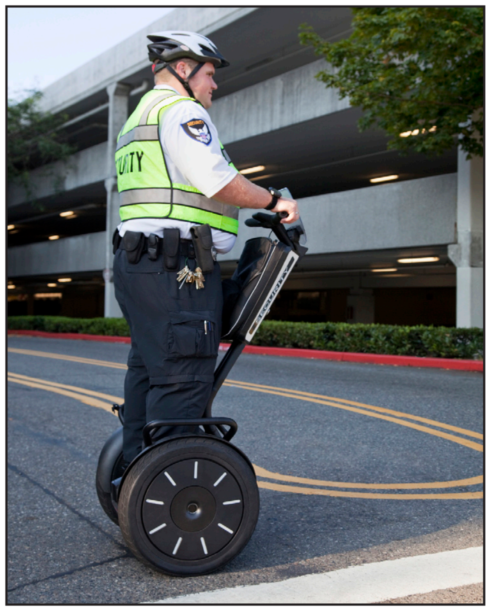
Crimes on Your Properties Have Multiple Victims: The Affected Patron, Your Future Patrons and Your Business, *continued*

the foreseeable criminal acts of third parties.

Prior to 1996, Tennessee courts held that commercial property owners had a duty to protect their customers only if they knew or should have known that criminal acts were occurring, or about to occur, on their property. Under this standard, businesses were almost never liable because their duty to protect customers only arose if they had actual notice that a crime was about to be committed and then did nothing about it.

In 1996, in *McClung v. Delta Square Limited Partnership*, 937 S.W.2d 891 (Tenn. 1996), Tennessee joined a national trend and established a new standard by adopting a balancing test. Under the test, if it is foreseeable that a third party's criminal act could occur on the premises, the business has a duty to provide reasonable protective measures to reduce the risk. Likewise, low foreseeability of potential criminal acts results in a much lower burden upon the business. Thus, the first step in determining the business's duty is to analyze whether criminal acts on the premises are foreseeable.

To determine foreseeability, Tennessee courts most often review prior incidents of crime on the premises and adjacent properties. For example, in a case involving a knifepoint robbery in a shopping center parking lot, the court determined that the criminal act was not foreseeable because there were only two assaults in the parking lot in the previous two years and no robberies. To the contrary, in a case where 286 criminal acts were committed at a shopping mall in the previous 14 months, the court ruled that a third-party criminal act was foreseeable. To prove that crimes are foreseeable, most plaintiffs introduce



copies of local police reports and statistical analysis showing crime locations.

Under the *McClung* standard, even if the court concludes that third-party criminal acts are foreseeable, businesses are not required to be the insurers of their customers' safety. The court will still evaluate the second part of the balancing test by considering what protective measures are reasonable. For instance, in a case involving a shooting in a hotel parking lot, the court did not hold the hotel liable because one security guard was on duty and there was no evidence that an additional guard would have prevented the shooting. Because these rules of analysis are so fact-specific, there is no predictable bright line test that will allow the business operator to win the case on summary judgment.

Under fact-based tests like *McClung*, businesses can best prevent liability by first evaluating what crimes are foreseeable and then taking action to deter those crimes. This could require an advanced video system and full-time security or the installation of additional lighting. If a business finds itself defending a crime-related claim in court, an important factor is the record of how the business seriously considered protecting its customers from foreseeable criminal activity and then took reasonable action. Since the business's actions are always viewed in hindsight, after an incident occurs, the practical burden on a defending business to prove its actions were reasonable can be daunting. Operators must demonstrate situational awareness of risks posed by their surroundings and the crimes committed at nearby businesses with similar exposures. Ignoring the issue is not likely to be a successful defensive strategy.

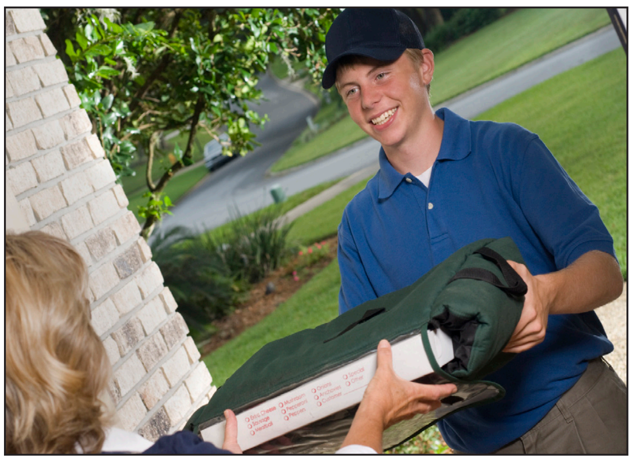
Mr. Mullen is an attorney in our Nashville office.

"Do You Deliver?" — Is Your Equity on the Delivery Menu?

Joel Buckberg, 615.726.5639, jbuckberg@bakerdonelson.com

Delivery of food, goods or services to customer locations is an integral part of the service concept underpinning many hospitality and franchised businesses. Some purveyors have abandoned on-premise service formats in favor of carry-out and delivery-base store fronts. But how far should the system owner go to set standards for delivery operations?

An Oregon appeals court recently considered the personal injury claims of a person struck by a Domino's® pizza delivery driver in *Viado v. Domino's Pizza, LLC*. While such accidents are not unusual, the injured party's appeal of the lower court's ruling that Domino's was not liable and the comprehensive analysis of the law by the Oregon appellate court merit some attention. Contrary to recent rulings by state appellate courts in South Carolina and Florida, this Oregon appellate court held that the franchisee was indeed the agent of Domino's (the franchisor). The ruling exposed Domino's to further analysis of potential vicarious liability for the negligence of the franchisee's driver. Ultimately, the court held that because Domino's did not direct the actual, physical driving details of the delivery driver, Domino's was not liable to the injured party for the damages suffered in the accident with the franchisee's delivery driver.



Most franchisors strike a balance between uniformity of retail outlet operation set out in the franchise agreement and operations or standards manual, so that consumer expectations are met consistently by every outlet, and the flexibility needed for franchisees to operate their own businesses independently. In practice, the balance is hard to define for business-to-consumer business format franchises in competitive genres where consistency of delivery is paramount for system growth and survival. When faced with a personal injury claim, courts use agency principles to avoid forcing the injured party into an expensive-to-prove case about whether the franchisor or the franchisee is singularly responsible for the injuries.

The Oregon court followed a 1978 Delaware case and a 1986 Alabama case in which the principles used by many state courts in the U.S. were established: *"If, in practical effect, the franchise agreement goes beyond the stage of setting standards, and allocates to the franchisor the right to exercise control over the daily operations of the franchise, an agency relationship exists."* A franchisor who controls or has the right to control the acts of the franchisee makes the franchisee an agent in the eyes of the court, so the franchisee is merely acting on behalf of the franchisor, who is the principal in the transaction, and not for the franchisee's own benefit.

The Oregon trial court decided the franchisee was not an agent of Domino's, allowing Domino's to exit the case on summary judgment. The appeals court agreed with the result, but not the reasoning, and that appellate ruling is where the mischief lies. The appeals court examined the franchise agreement and the "manager's reference guide," which provides highly detailed specifications for operating the pizza franchise delivery program. These standards included requirements for driving age and experience, proof of insurance, safety record research and qualifications, use of seat belts, use of hands-free mobile phones, periodic vehicle safety inspections, fueling safety procedures, use of truck beds, use of Domino's driving safety training materials and more. The court reproduced language from the franchise agreement and operating manual that reserved for the franchisor the right to establish certain rules and procedures for operating the retail business:

> "(a) the safety, maintenance, cleanliness, sanitation, function and appearance of the Store premises and its equipment, image, fixtures, furniture, decor and signs; "(b) qualifications, dress, grooming, general appearance and demeanor of [franchisee employees]; "(c) quality, taste, portion control and uniformity, and manner of preparation and sale, of all pizza and other authorized food and beverage products sold by the Store and of all ingredients, supplies and materials used in the preparation, packaging and sale of these items; "(d) methods and procedures relating to receiving, preparing and delivering customer orders; "(e) the hours during which the Store will be open for business; "(f) use and illumination of exterior and interior signs, posters, displays, menu boards and similar items; "(g) the handling of customer complaints; "(h) advertising on the Internet or other electronic media, including websites, home pages and the use of domain names; "(i) e-mail capa-

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"Do You Deliver?" – Is Your Equity on the Delivery Menu?, *continued*

bilities of the Store and other electronic communication devices to facilitate communication with us or our offices; and, "(j) the method and manner of payment which will be accepted from customers."

While these rules are typical of any business format franchise, in this case the Oregon court found the rules to confer on the franchisor sufficient control to find the franchise to be an agency relationship. Business people will think such a finding does not square with reality. While some franchises more closely resemble commission sales agency arrangements, pizza delivery has little of the control or economic elements that ordinarily characterize an agency relationship. The capital for the business is supplied by the franchisee, not the franchisor, the operating business risks and benefits lie with the franchisee, and the only avenue of control for the franchisor is termination of the franchise or suspension of franchisor-controlled services.

Once the court made the agency finding, the analysis then looked at whether the relationship was an employment or non-employment agency. Despite the absence of evidence of an employment context and the franchise agreement's recital of independent contractor status for the franchisee, the court took a careful route to reach the conclusion that the franchisee was not an employee. Domino's exposure was thus reduced significantly.

Under Oregon law and the laws of many other states, the principal of a nonemployee agent is vicariously liable for that agent's negligence only if the principal directs the agent in the performance of the task that caused the injury. The question of direction was next examined by this court. The Domino's franchise documentation established stringent controls over the delivery driver and his or her connection to and job performance for the pizza franchisee:

"(1) Drivers must be 18 years old and carry a state issued driver's license; (2) Drivers must have proof of insurance; (3) Drivers' Motor Vehicle Records need to be verified at the start of employment and at a minimum of every six months; (4) Drivers cannot have more than two violations in the past two years; (5) An employee who does not meet the standards may only work in a non-driving capacity and then only after signing a 'Non-Driving Agreement'; (6) Drivers cannot drive with 'suspended,' 'provisional,' 'court restricted,' 'revoked,' 'learners permit,' or 'Junior' license; (7) Drivers and riders must wear seat belts; (8) Drivers cannot leave keys in unoccupied vehicles; (9) Tobacco use is not permitted by any driver while on the clock; (10) Drivers cannot use cell phone unless it is a 'hands free' device; (11) Driver Reference Book is required at the driver station; (12) Only team members in full uniform are permitted to deliver orders to customers; (13) Delivery drivers must wear a properly working watch when delivering product; (14) Drivers cannot look for an address when delivering a pizza; (15) Drivers must leave the store within sixty (60) seconds of being given a pizza and deliver it within nine (9) minutes; (16) Drivers can only drive certain types of vehicles, but not motorcycles; (17) Franchises can be terminated for failure to follow driving standards; and (18) Domino's conducts periodic and surprise inspections of franchise vehicles and delivery drivers."

The appeals court found these controls, along with the generalized standards to comply with applicable laws in the operation of the delivery vehicle, obey the rules of the road, use seat belts and not use cell phones, did not meet the standard of controlling the physical details or performance of the driving. Such control would take the form of specifying routes. In another Oregon case, a quick service restaurant franchisor was liable for directing the franchisee as a nonemployee agent because the specification of food handling and safety procedures was detailed enough to meet the control definition. However, the court found that the driving controls did not reach the level needed to send the case to the jury. One wonders if the question would have a different answer if the franchisor supplied a routing system or specified a GPS device for the franchisee's drivers.

If your franchise agreement and operations manuals demonstrate high levels of detail for delivery operations of franchisees, a court may take a less benign and well reasoned view of the issue of control over franchisee operations, or let the case go to the jury to decide. There is a risk/reward tradeoff inherent in the decision to use non-owned delivery vehicles to create advertising impressions on the cheap. Franchisors may want to revisit the calculus periodically. At the very least, the practice demands a robust insurance monitoring function to assure that franchisees maintain required automobile liability insurance coverage. Otherwise, the franchisor's balance sheet (or at least the self-insured retention) is at risk on every delivery run, and dependent on the franchisee's successful selection and supervision of competent, safe delivery drivers. In a delivery-centric business model, that risk may be part of the ingredient list for success, and the benefits of the detailed standards and specification for delivery operations outweigh the insurable risks of decentralized, franchised delivery. Pizza anyone?

Mr. Buckberg is an attorney in our Nashville office.

10 Questions About Buying Distressed Hotels

Joel Buckberg interviews Mike Cahill, Chief Executive Officer and Founder, Hospitality Real Estate Counselors (HREC) [www.hrec.com]; Denver, Colorado; mcahill@hrec.com, 303.267.0057, extension 101.

The market for distressed hotels owned by borrowers facing lender action, or by lenders who have recovered real estate through foreclosure or a deed in lieu of foreclosure, or through buying discounted hotel loans and first priority security positions that will produce a "loan to own" scenario, will likely become more active as recovery nears. We've asked the seasoned valuation experts at HREC for advice on what to look for and what to expect in these situations.

1. Will the distressed market present attractive investment opportunities for investors, and if so, when?
Definitely. However, 2010 is likely to present more of a trickle of deals than a tsunami. We are already seeing the flow begin, primarily consisting of acquisition opportunities under $10 million. While the flow of opportunities may be slower than many anticipated, the duration of distressed deals coming on market will be longer, extending well into 2013.

2. What investment style is best suited for this market?
The first wave is best suited for the "gun slingers," as much of the upside will be difficult to pencil out, causing the institutional buyers to stall due to "analysis paralysis." All cash/equity buyers will be "King" in the first waves.

3. What evaluation criteria should be applied to distressed hotel situations, when cash flow is negative and capital expenditures are likely well behind schedule?
These deals will be superficially sold on a "price per pound" basis at a significant discount to replacement cost. However, the buyers will each have a unique plan relative to the property under consideration for substantially increasing cash flow and hitting targeted investor yields.

4. What is the best way to address brand affiliation and brand encumbrance?
Branding will continue to have a major impact on sales prices. Many of the early hotel waves will contain assets losing their flags and beginning their inevitable descent down the hotel food chain. The "diamonds in the rough," where upbranding is possible and feasible, will be the deals highly sought after, and the ones that sell for a premium due to competitive bidding pressures.

5. How should current management be evaluated?
Very carefully; buyers need to decide whether existing management is part of the problem and if their replacement is an integral part of the solution. This issue is somewhat moot since most of the early wave buyers will be owner/operators or operators married to a specific investor. Under these scenarios, existing management is out regardless.

6. If you could pose one question to the current general manager (GM) and one question to the current director of sales (DOS), what would the questions be?
GM: If you were given x dollars in capital expenses to spend next year, what would be the top three areas or items that you would spend it on to increase cash flow in the next 12 to 24 months?
DOS: What is the greatest curable problem that you face when attempting to sell the hotel to consumers and planners?

7. What should be the new owner's priorities immediately after taking over the property?
Stabilize cash flow and staffing (retain the good performers and exit the poor performers as soon as conditions permit).

8. What markets or areas are most likely to return quickly to stable and profitable Revenue Per Available Room?
For the next 18 months, we believe the "deal" will be more important than the market area.

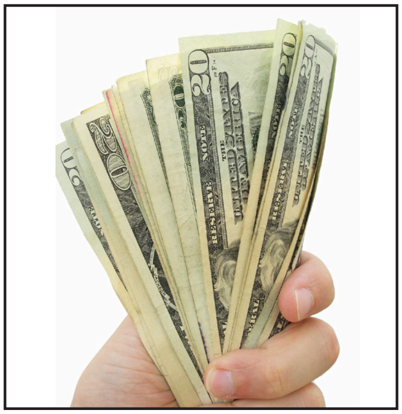
9. What non-traditional approaches offer enhanced prospects for success in the new reality of hotel ownership?
The buyer's ability to buy and close all cash/equity now and to place debt financing on the property at a later date.

10. What role will macroeconomic factors play in the execution of a distressed hotel acquisition strategy?
The major macroeconomic factor will be the availability and cost of debt financing. Recourse versus non-recourse? Maximum proceeds? Duration (term)? These factors will dictate both pricing and buyer deal volume capacity. The second factor is simply the economy, especially job growth. As the economy goes, so goes the hotel business.

IRS Gives Servers A TIP

Vince Schilleci, 205.244.3827, vschilleci@bakerdonelson.com

On December 1, 2009, the Internal Revenue Service issued Revenue Procedure 2009-53, which extended the Attributed Tip Income Program (ATIP). Set to expire on December 31, 2009, the ATIP program is now extended through December 31, 2011. The ATIP program is a voluntary reporting program under which a participating employer reports tip income of its employees based on a formula using the employer's gross receipts, which are generally allocated among employees based on the practices of the restaurant. ATIP is the next generation of the IRS's Tip Rate Determination/Education Program (TRD/EP), which began in 1993 and was designed to enhance tax compliance among tipped employees through taxpayer education and voluntary agreements instead of traditional audit techniques. ATIP differs from the existing programs in that it does not require an employer to enter into an individual agreement with the IRS. ATIP does not alter any of the existing TRD/EP programs. Employers currently participating in an existing TRD/EP program may elect to switch to ATIP.



Participating employers and employees received significant benefits by participating in the ATIP program. Participating employers will not be subject to an "employer-only" examination during the period it participates in ATIP. In addition, tip reporting is simplified, and in many cases, participating employers will not have to receive and process tip records. Participating employees do not have to keep a daily tip log or other tip records.

In order to participate in the ATIP program, employers must meet two basic requirements. First, at least 20 percent of the employer's gross receipts must be charged receipts (credit card charges and charges under any other credit arrangement, e.g., house charges, city ledgers and charge arrangements to country club member, plus debit card sales) with charged tips (tips included on charge receipts). Second, at least 75 percent of the employer's tipped employees must sign employee participation agreements. An eligible employer may elect to participate in the ATIP program by simply checking the designated box on Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips. Form 8027 is available on IRS.gov, or by calling the IRS toll-free at 800-TAX-FORM (829-3676). Revenue Procedure 2006-30, which provides details and requirements for participation in the ATIP program, may be viewed or printed at http://www.irs.gov/businesses/small/article/0,,id=98944,00.html

Mr. Schilleci is an attorney in our Birmingham office.