

Negotiating Restaurant Purchase and Sale Transactions: Key Legal Issues for Buyers and Sellers

Due Diligence, Closing Contingencies, Reps and Warranties, Indemnification, Licenses and Permits

TUESDAY, JUNE 18, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Donald M. Bernstein, Co-Founder and Managing Member, **Bernstein Redo**, New York

Robin Zeidel, Founder, **Zeidel & Associates**, Rye Brook, N.Y.

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-873-1442** and enter your PIN when prompted. Otherwise, please **send us a chat** or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

RESTAURANT PURCHASE AND SALE AGREEMENTS

Robin Zeidel, Esq.
Zeidel & Associates, P.C.
800 Westchester Avenue
Suite N-613
Rye Brook, New York 10573
(914) 902-3330
rzeidel@zeidellaw.com
www.zeidellaw.com

Donald M. Bernstein, Esq.
Bernstein Redo, P.C.
1177 Avenue of the Americas
5th Floor
New York, New York 10036
(212) 651-3100
donald@brpclaw.com
www.brpclaw.com

1. OPTIONS FOR THE NATURE OF THE TRANSACTION

a. Sale of assets. Assets to be conveyed include:

- i. Lease and security deposit to be assigned and assumed.
- ii. Good Will.
- iii. Trade fixtures and equipment.
- iv. Trade name.
- v. Telephone number, website, URL.
- vi. Inventory / liquor
- vii. Leased equipment / service contracts – Buyer may or may not assume.
- viii. Trademarks.

-
- ix. Exclusions.
 - x. Removal of liens – do a lien and judgment search before contract and update before closing.
 - xi. Existing warranties on equipment.
 - xii. Licenses and permits.
 - xiii. Books and records.
 - xiv. Assignment or new franchise agreement, as applicable.
 - xv. Personally identifiable information – to the extent in compliance with law and privacy policies.
 - xvi. Accounts receivable – alternative structures.

b. Special liabilities on asset sale.

- i. Sales tax and bulk sales clearance. Potential personal liability for Seller and transferee liability for Buyer.
- ii. Potential personal liability for unpaid wages.
- iii. Worker Adjustment and Retraining Notification Act
- iv. (WARN Act) (29 USC Chapter 23). 60 days advance notice for mass layoffs. Certain states: “little WARN” laws.
- v. Perishable Agricultural Commodities Act of 1930 (PACA)
- vi. (7 USC §499e). Sellers are trust beneficiaries; can freeze assets; personal liability
- vii. Personal guaranties.

c. Sale of stock or membership interest.

- i. Liability issues – protect with escrow, indemnification and representations.
- ii. Tax basis.
- iii. Existing liquor license stipulations and restrictions remain.
- iv. Preferred for multi-unit purchase

2. ATTORNEY'S PRE-CONTRACT DUE DILIGENCE

a. Review of Lease

- i. Term; renewal options

- ii. Use clause.

- iii. Assignment provisions.
 - a) Possible recapture rights in the lease.
 - b) Landlord's consent.
 - c) Conditions to assignment.
 - d) The lease may provide for sharing proceeds with landlord.
 - e) Allocate any fees to be paid to landlord.
 - f) Right of successor tenants to assign.
 - g) Include security deposit.
 - h) Good guy guaranty issues – is original guarantor released?

iv. Termination rights (i.e., demolition)

v. Default clause.

vi. Required guaranties by assignee.

vii. Who owns trade fixtures and equipment under lease.

viii. Tenant's obligations at end of term.

b. Status of Seller's liquor license.

- i. Expiration date.
- ii. Existing violations.

c. Certificate of Occupancy. Do not assume use is permitted.

d. Seller's authority to sell (check operating agreement).

e. Copies of permits and licenses.

f. Seller's sales taxes.

g. Service or other contracts – assignable? With or without consent?

h. Liens and judgments.

i. Review brokerage agreement – conditions for payment.

j. Franchise agreement – conditions for assignment/new agreement, guarantees, timing, right of first refusal.

k. Additional corporate documentation on entity transactions.

3. ADJUSTMENTS AND ADDITIONS TO PURCHASE PRICE

- a. Payment on Deposit on Execution – Escrow Agent.**
- b. Rent and charges under lease, contracts, equipment leases, utilities, licenses and permits.**
- c. Lease security deposit.**
- d. Other deposits.**
- e. Wages, vacation accruals.**
- f. Liquor and other inventory.**
- g. Sales taxes on trade fixtures and equipment. Allocate rest of purchase price.**
- h. Pre-paid events.**

4. SECURITY TO SELLER FOR DEFERRED PORTION OF PURCHASE PRICE

a. Security agreement and UCC on trade fixtures and equipment.

- i. Due on sale or assumable.
- ii. Default under lease should be default under security agreement.

b. Sublease with lease assignment in escrow.

- i. Seller may not be interested in reopening.
- ii. Seller has to pay rent if it takes it back in possession.
- iii. Landlord-Tenant courts do not always recognize or enforce it.
- iv. Seller has no liquor license.

c. Personal guaranty.

d. Landlord's consent may be required for lien and/or sublease.

e. Right of set-off against notes.

f. Negotiable or non-negotiable note.

g. Escrow of holdback.

5. CONTINGENCIES TO CLOSING

- a. Landlord's consent to lease assignment – possible estoppel letter.**
- b. Liquor license contingency (see below).**
- c. Possible lease extension.**
- d. Possible lease modification (such as change in use).**
- e. Possible consent to Buyer's alterations.**
- f. Seller's release from lease and guaranty if not already provided for.**
- g. Accuracy of Seller's and Buyer's representations.**
- h. Franchisor approval of Buyer, new franchise/assignment, release of Seller.**

6. LIQUOR LICENSE CONTINGENCY

- a. A liquor license cannot be conveyed in certain states.**
- b. Temporary retail permit or beverage agreement whereby Buyer operates under the Seller's license for a limited period.**
 - 1. Do not assume that Buyer will be licensed just because Seller and premises are licensed.
 - 2. For certainty, wait for issuance of license.
- c. Corporate change application if a stock transaction.**
- d. Apply for Liquidator's permit – get written inventory (or affidavit for disposing liquor lawfully).**
- e. Search for liquor law violations against Seller or premises.**
- f. Liquor law violations between contract and closing.**
- g. Legality of use under Certificate of Occupancy.**
- h. Provide for legal fees if deposit not returned.**

7. SIDEWALK CAFÉ – PROVIDE FOR TRANSFER IF PERMITTED

8. SELLER'S RESTRICTIVE COVENANT/ NON-COMPETE

a. Must be reasonable as to scope and duration.

b. Cancelled if Buyer defaults on notes.

9. BUYER'S DISCLAIMER OF REPRESENTATIONS

- a. General integration clause may be insufficient**
- b. Specific disclaimer of reliance is required.**
- c. As is, release of claims against Seller, reliance on due diligence only.**

10. SELLER'S REPRESENTATIONS ON ASSET SALE AND SELLER'S INDEMNIFICATION

- a. Identify lease, confirm it is in full force and effect and no defaults and all rent paid and no modifications.**
- b. All permits in full force and effect and no cancellation proceedings.**
- c. No outstanding contracts – identify service contracts or equipment leases.**
- d. No pre-paid bookings, or identify if so.**
- e. Current amount of Seller's share of real estate taxes.**
- f. No work performed that could result in mechanics' liens.**
- g. Sales tax returns filed and paid.**
- h. No litigation, audits, judgments.**
- i. All property free from liens.**
- j. No condemnation proceedings pending.**

-
- k. Sale authorized by all members/shareholders.**
 - l. Union status, employment contracts.**
 - m. Property and equipment in working order (right of pre-closing inspection).**
 - n. No infringement claims on intellectual property.**
 - o. Legal violations.**
 - p. Numerous additional representations on stock sale.**
 - q. Representations to be made individually and to survive closing, or limit survival period.**
 - r. Sellers and principals' indemnifications for all pre-closing obligations.**
 - s. When to ask for indemnity from a principal.**
 - t. Deductibles and caps.**

11. BUYER'S REPRESENTATION AND INDEMNIFICATION

a. For post-closing obligations.

b. Liquor license representations.

- i. Proper person.
- ii. No disqualifications.
- iii. No prior revocation.
- iv. Sufficient funds from proper sources.

c. Buyer has examined lease, service contracts, etc.

12. ESCROW FOR SELLER'S SALES TAXES

- a. Send notification to State.**
- b. Escrow until release is obtained, or indemnity.**

13. BETWEEN CONTRACT AND CLOSING

- a. Renewal of Seller's licenses.**
- b. No adverse changes – duty to operate in ordinary course of business.**
- c. Landlord consent.**
- d. SLA application.**
- e. Update lien and other searches.**
- f. Obtain payoff letters if necessary.**
- g. Inspection of premises.**
- h. Buyer needs insurance.**

-
- i. Get original lease and original liquor license plus letters of authorization.**
 - j. Bulk sales notice to State.**
 - k. Prepare liquor inventory.**
 - l. Interview of employees, review of employment records, Seller's retention of key employees.**
 - m. Updated representations.**

14. CLOSING DOCUMENTS AND PROCESS

- a. Get drafts of closing documents in advance or attach as exhibits to PSA.**
- b. Escrow agent closing or other alternatives.**
- c. Lease assignment and assumption and consent and Buyer's guaranty, if applicable.**
- d. New or extension of lease if that is a condition.**
- e. Bill of sale.**
- f. Restrictive covenant.**
- g. Resolutions.**
- h. Seller's indemnifications.**
- i. Notes and security (security agreement, UCC's, sublease, guarantees, if applicable).**

-
- j. Escrow for sales taxes and lease assignment.**
 - k. Sales tax notice.**
 - l. Assignable warranties.**
 - m. Original liquor license.**
 - n. Surrender petition and authorization letters.**
 - o. Conveyance of vehicles.**
 - p. Transfer tax forms if applicable.**
 - q. Certificates and bring down of representations.**
 - r. Assignments of contracts, leases, licenses and permits.**

s. Estoppel from landlord.

t. Franchise agreement documents.

u. Termination of employees by Seller and rehiring by Buyer.

v. Closing statement.

w. Direction to escrow agent.

15. POST-CLOSING

- a. Send notice to landlord with lease assignment and insurance certificate.**
- b. Closing statement**
- c. Obtain temporary retail permit and surrender seller's license or place in safekeeping.**
- d. File any UCC's.**