

Briefly

. . . from Burns, Figa & Will, P.C.

Spring 2007



Burns, Figa & Will Announces Wealth Preservation Group

Back row, left to right: Peter F. Waltz, Mike P. Barry, Jeremy P. Cohen
Front row, left to right: Michael J. Norton, Candy C. Figa, Tracy M. Villecco

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TICs – more than a facial twitch or a bug

By Herrick K. Lidstone, Jr.

Tenant-in-common real estate investments, commonly known as TICs, have waxed and waned in popularity over the years. They are **attractive to investors because they have the apparent security of a real estate investment**; and because there is more than a single participant involved (the “tenants-in-common”), each participant can own an interest in a nicer (i.e., more expensive) piece of property than the participant could own alone. They are attractive to the real estate agents and the other promoters who are putting the opportunities together because the promoter usually keeps control over the project, earns handsome fees, and believes that they avoid the application of federal and state securities laws.



Right and Wrong

From the participant’s perspective. The “real estate is a safe investment” aspect of a TIC disappears as you add more people to the ownership and operational structures. **Common ownership works as long as all of the owners meet their obligations for future capital investments** when needed to maintain or improve the property, or even to pay taxes and insurance when the cash flow from the property proves to be insufficient. Allowing the promoter who puts the deal together to manage and operate the property works well, as long as that person is competent and trustworthy.

Unfortunately, many TIC arrangements are not put together well, contractual obligations are unclear, the participants’ financial conditions change, unexpected contingencies develop, and promoters are not always competent or trustworthy.

From the promoter’s perspective. While real estate agents and others generally have a high degree of ability in transactions with which they are familiar, putting together and then managing an arrangement among a number of unrelated participants can tax the skills and patience of even the most competent person.

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Even more to the point, unless extremely carefully structured, a TIC arrangement does involve the offer and sale of a security. When a promoter is offering or selling securities without registration or there being an exemption from registration available, serious sanctions can arise:

- **Even without fraud in the transaction, the promoter is liable to the participants for up to three years for rescission** – giving each participant an opportunity to view the success of the investment and have a second bite of the apple.
- **The promoter may be liable for civil enforcement actions** brought by the Colorado Division of Securities and the Securities and Exchange Commission. This can result in fines, penalties, injunctions, cease-and-desist orders, and disgorgement.
- **The promoter may also be liable for criminal enforcement** since a violation of the securities laws is a felony under both federal and Colorado law.

Furthermore, a TIC arrangement frequently involves complex tax considerations, and a failure to structure the arrangement properly can result in unsatisfactory tax treatment for all of the parties.

Securities Issues

Application of federal securities laws to any investment opportunity is usually easy – whenever a promoter seeks to use an investor's money to make a profit for the investor when the promoter is doing most (if not all) of the work, a security is involved. For a TIC transaction to avoid the application of the securities laws, the participants in an agreement for common ownership in real property must, at a minimum:

- Have the knowledge and experience to be able to fend for themselves in the real estate business similar to the TIC opportunity.
- Have the contractual right to manage their own investment (alone or in combination with the other co-owners), including the right to remove or replace the promoter as the manager of the investment on commercially reasonable terms.
- Have received (and during the operations continue to receive) sufficient information so that they have the ability to exercise their discretion.
- Have the ability to withstand the risk of loss of their entire ownership interest and any responsibility for loans on which they are personally liable.

Seldom does a promoter want to give up such control. Seldom can a promoter find sufficiently sophisticated and experienced investors to participate in a TIC transaction.

Securities Compliance

Depending on the nature of the investor and the nature of the project, **securities compliance can range from hard to difficult to impossible**. In any case, securities compliance requires disclosure of all aspects of the investment opportunity to the prospective investors, including the property condition and operating history, management, tax issues, real estate issues, any unique issues that are anticipated as a result of the purchase or during the operation of the properties.

- In some cases, this will be set forth in long, detailed private placement memoranda; in other cases the information will be summarized in a long-form subscription agreement intended for accredited, sophisticated investors.
- In all cases, there will have to be a contract establishing the relationship among the investors and with the promoter – whether it be a TIC agreement, an operating agreement for a limited liability company, or a limited partnership agreement.
- In all cases, there will have to be a detailed consideration of the tax ramifications of the arrangement – whether it will be treated as a partnership or as a tenancy-in-common relationship not treated as a partnership, or even perhaps (but usually inadvisably) as an association taxable as a corporation.

Conclusion

Whether you are a promoter or prospective investor in a proposed TIC, **there are a number of issues that you must consider. Competent legal and tax advice is a must.**



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Mr. Lidstone is a senior member of the firm. He practices in the areas of business transactions, including corporate law, federal and state securities compliance, mergers and acquisitions, contract law, tax law, real estate and zoning law, and natural resources law.

Wealth Preservation and Estate Planning

By Michael J. Norton and Jeremy P. Cohen

Estate planning is really not for you. It is for your loved ones or to whomever else you want to leave your assets at your death. The line between your business life and your personal life blurs when it comes to estate planning. You work hard to grow your personal, business and financial worth; we work hard to help you protect these assets for your spouse, children and descendants and for the charities you may wish to honor.



Front row, left to right: D. Sean Velarde, Tracy M. Villecco, Peter F. Waltz
Back row, left to right: Mike P. Barry, Michael J. Norton, Jeremy P. Cohen, Candy C. Figa

Often in a strategic partnership with your accountant, insurance agent, investment and financial advisors, **we help you plan for the future and protect your home**, – life insurance, – stocks, – IRA and other retirement benefits, and all the other valuable things you have accumulated during your lifetime.

If you have a well-drafted estate plan in place, **you will insure that your final wishes on how your loved ones should be provided** for and how your assets should be distributed to your heirs are honored. A carefully drafted, comprehensive estate plan is critical to the management and preservation of a family's wealth. This planning often includes protecting family wealth from the claims of creditors or future spouses of the client's designated beneficiaries. **Each plan must be tailored to meet a client's specific needs, goals, and objectives.**

A wisely drafted plan also considers such concerns as income, estate, gift and generation-skipping tax reduction techniques, the orderly transfer of a family business or farm, and advance directives regarding a client's wishes for medical care, potential disability, and funeral arrangements.

Among the legal tools we utilize to customize a plan for the client are wills, trusts, powers of attorney, business succession plans such as funded buy-sell agreements and family limited partnerships, life insurance funded trusts, and charitable contributions.

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Our estate planning attorneys focus on the individual needs of our clients, emphasizing personalized planning. **We have experience in business succession planning, gift and generation-skipping transfer tax planning and minimization, and the utilization of the marital deduction and the unified credit to eliminate or reduce federal estate taxes.** Our attorneys have successfully handled and defended estate and gift tax audits and related appeals with the Internal Revenue Service.

Burns Figa & Will attorneys also have significant experience in representing family members, including an estate's personal representative or executor, in probate litigation and disputes involving estates of all sizes. Litigation can arise out of a will contest or allegations of breach of fiduciary duty or financial mismanagement.

Our firm will always work hard to earn and deserve your trust.



Michael J. Norton

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Mr. Norton is a senior member of the firm. His practice areas include estate planning, complex civil litigation and white collar criminal defense, real estate law, including real estate broker and licensing law, wills and trusts.



Jeremy P. Cohen

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Mr. Cohen devotes his practice to all aspects of tax, estate planning, and the related administration of estates. Mr. Cohen assists clients with wills, trusts, powers of attorney, lifetime gifting plans, charitable trusts, life insurance trusts, and other tax favored planning opportunities. He acts as an advocate and counselor in probate, guardianship, conservatorship, and elder law matters.

Document Retention of Electronic Information

By Merc Pittinos

Late last year, new federal rules were implemented for the identification and exchange of electronic information during litigation. Although Colorado has not adopted these changes for its state court system, new state court rules are sure to come. Responding to these changes as soon as possible will help **businesses reduce both the risks – and costs – of litigation.**

Your business should have a record retention policy that you can suspend when notified of the possibility of litigation. This policy should address how your company backs up, archives, and stores its electronic information and should also ensure that if your business is notified of litigation you preserve all relevant information.

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Policies for Retention of Electronic Information

Backups help protect your electronic information in case of emergency. Because backups are made frequently, it is not necessary to retain large numbers of backup tapes for long periods of time. **An effective policy will define when backup tapes are recycled or destroyed and limit the number of backup tapes that your business retains.** If you are involved in litigation, this will help reduce the amount of information that must be reviewed by your attorneys and produced in litigation.

Archives preserve electronic information for longer periods of time. The retention time may be set by company policy, statute, or contract. **Your policy should ensure – that archived information is stored only as long as necessary.** To make sure that information that is no longer necessary is destroyed, you should have one person who is in charge of implementing and enforcing strict compliance with the policy

Finally, your policy should address how information currently used by your business is stored and deleted. This is especially important for e-mail and instant messaging. Some businesses rely on their employees to delete e-mails, others delete them automatically. The latter method typically is more effective at reducing your risk. Your policy should instruct employees how and where to save important e-mails while ensuring deletion of any other e-mails. **For businesses that allow instant messaging, you should implement procedures for storing the text of instant messages.**

What to Do if You are Notified of Litigation

If you are notified of litigation, your policy needs to make sure that documents relevant to the litigation are preserved. Because litigation can last years, it is necessary that during the course of litigation employees are reminded not to delete relevant records. **If you destroy electronic information after being notified of a suit, your business can be sanctioned in litigation.** As a result of document destruction, one court instructed the jury that it should infer that any destroyed evidence was harmful to the business that destroyed it. An effective electronic records retention policy can avoid this risk and reduce litigation costs.



Merc Pittinos

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Merc Pittinos is an Associate at Burns, Figa & Will, P.C. He focuses his practice in the areas of

Environmental Law, Water Law, and Civil Litigation.

■ **Colleen R. Belak** was named a shareholder of Burns, Figa & Will P.C. Ms. Belak has a substantial amount of experience in business transactions, corporate law, intellectual property and commercial litigation. She represents clients in many aspects of their businesses, including assisting clients in forming their businesses; the purchase or sale of a business; negotiating and drafting contracts of all types, including business acquisitions, intellectual property license agreements, non-competition agreements, confidentiality agreements, distributorship agreements and employment agreements; trademark applications and renewals, including U.S. and international applications; obtaining financing; secured transactions; securities and real estate.

■ **Jeremy P. Cohen** joined Burns, Figa & Will P.C. as Special Counsel. Mr. Cohen devotes his practice to all aspects of tax, estate planning, and the related administration of estates. He assists clients with wills, trusts, powers of attorney, lifetime gifting plans, charitable trusts, life insurance trusts, and other tax favored planning opportunities. He acts as an advocate and counselor in probate, guardianship, conservatorship, and elder law matters. He has handled audits, appeals and negotiations with state and federal taxing authorities. He enjoys advising clients in the creation and growth of closely held businesses as well as public and private charitable organizations and foundations.

Firm News

■ **Geoff Anderson** will present **Law of Easements: Legal Issues and Practical Considerations** on April 12, 2007. Whether you are heavily involved in real property matters on a daily basis or occasionally advise clients on right of way issues, you need to be aware of the essential legal and practical issues associated with easement agreements. For more information contact Lorman Education Services, Seminar ID: 168920; 866-352-9539 or www.lorman.com or Geoff Anderson at ganderson@bfw-law.com

■ **Geoff Anderson** will present “**Road and Access Law**” on June 14, 2007. For more information contact Geoff Anderson at ganderson@bfw-law.com

■ **Karin E. Borke** delivered a presentation on **Copyright and Trademark for Designers** at the University of Kansas, School of Fine Arts as part of the Hallmark Design Symposium Series on January 29, 2007. The presentation focused on the fundamentals of copyright and trademark law and its practical application to design professionals addressing such issues as: what is protected by a copyright vs. by a trademark, designing a strong mark for your client, who owns what rights and how to protect them, and what constitutes infringement. For more information contact Karin E. Borke at kborke@bfw-law.com.

■ **Alix Joseph, Bernie Gehris, Scott Clark, Steve Leonhardt** and **Lee Miller** presented a primer on **Colorado Water Law** at the Southeastern Colorado Water Conservancy District's 3rd Annual Water Users Meeting in Pueblo.

■ **J. Kemper Will** was inducted as a Fellow in the American Academy of Trial Lawyers.

■ Burns, Figa & Will, P.C. announced three new associates have joined the firm; **Genevieve M. Bernal, Damon M. Semmens** and **Peter F. Waltz**.

■ **Genevieve M. Bernal**, will work with the Litigation group. She received a Bachelor of Arts in English from the University of New Mexico, and a J.D., from DePaul University College of Law. Ms. Bernal was the symposium editor 2004-05 for the *DePaul Journal of Sports Law & Contemporary Problems*.

■ **Damon M. Semmens**, will work with the Litigation group. He received a Bachelor of Arts in Government from The University of Texas at Austin, and a J.D., from the University of Notre Dame Law School. Mr. Semmens was the Executive Editor for the *Journal of College and University Law*.

■ **Peter F. Waltz**, will work with the Corporate group. He received a Bachelor of Arts in Liberal Arts from Colorado State University, and a J.D., from the University of Denver College of Law. Mr. Waltz was awarded the James C. Owen Endowed Scholarship for Superior Academic record.

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At Burns, Figa & Will we view our unique mix of size and expertise as the key to providing exceptional legal services with integrity and professionalism. Established in 1980, Burns, Figa & Will attorneys have provided exceptional legal services, practical business-focused solutions and individualized attention for our clients.

While focusing in our primary areas, our attorneys maintain expertise in a broad range of specialized practice areas and subspecialties including:

- Business law and transactions
- Securities law
- Commercial litigation
- Environmental law
- Water law
- Real estate
- Wealth Preservation and Estate Planning
- Legal ethics

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