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### COMMERCIAL TRANSACTION NEWSLETTER

#### **WHAT CONSTITUTES CONSIDERATION TO SUPPORT A CONTRACT**

Every contract must be supported by consideration in order to be enforceable. The majority of the time, consideration is not an issue. However, the issue of consideration to support a contract arose in regard to a real estate transaction in the purchase of a resort lot site on Lake Nickajack at the Rarity Club. In the Shearer case, Mr. and Mrs. Shearer purchased a lot, but they were reluctant purchasers. They purchased the lot only upon the condition that Mr. McArthur, the Executive Vice President for Sales for the Rarity Club, executed a separate Option Agreement whereby he agreed that at any time he would purchase the lot back at a fixed price.

Three years after the Shearers purchased the lot, they notified the Executive Vice President, Mr. McArthur, of their desire to sell the lot back. Mr. McArthur did not purchase the lot and therefore the lawsuit ensued. The Trial Court found that the Option Agreement was enforceable and entered a judgment for the Shearers in the amount of the purchase price in the contract for the lot. Mr. McArthur appealed and alleged among other things that the Option Agreement was not enforceable against him for lack of consideration.

The Court of Appeals wrote that all contracts and writings signed by the party to be bound are prima facie evidence of consideration. The burden of proof to overcome the presumption of consideration is on the party asserting the lack of consideration. McArthur argued that "outside contracts" from the one at issue cannot constitute consideration. The Court of Appeals wrote that the inquiry before the Court was not the consideration for the original purchase agreement for the lot, but the consideration for the Option Agreement. The Court further wrote consideration exists when the promisee does something that it is under no legal obligation to do or refrains from doing something which it has a legal right to do. The Court wrote the Shearers did something they were not legally bound to do, i.e., they purchased the resort lot based on the Option Agreement. The Shearers' execution of the purchase agreement for the resort lot and resulting commission to Mr. McArthur constituted legally sufficient consideration for the Option Agreement. Therefore, the Court of Appeals enforced the Option Agreement and entered the judgment against McArthur.

**OUR RECOMMENDATION:** Consideration can take many forms, and usually Courts will go to great length to find consideration to enforce a contract. However, the parties to a contract should always be careful that there is adequate consideration. A good example to consider as to whether adequate consideration exists for a Guaranty Agreement. The party receiving the benefit of the guaranty from a third party needs to make an appropriate analysis that there is consideration to the guarantor to support the guaranty of another person or entity's debt or contractual obligations. For example, see my newsletter dated November 26, 2013, discussing the guaranty on a lease. Although the issue was different, analysis should always be made if the guarantor has received adequate consideration to support the guaranty.

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NOTICE: This letter is intended to provide you with ideas for consideration in commercial transactions. It is not intended to give a general solution applicable to all apparently similar individual problems, since slight changes in facts may require variance in legal advice. Please contact legal counsel with specific questions.