802.2(c)

**Verne, B. Michael**

**From:** [redacted]
**Sent:** Friday, January 27, 2006 10:13 AM
**To:** Verne, B. Michael
**Subject:** Exempt assets under Sec. 802.4

Mike:

We represent a buyer who is purchasing a controlling interest in an LLC. The LLC's only assets ar a controlling interest in another LLC. The assets held by that LLC consist for the most part of a hotel/casino that was heavily damaged by Hurricane Katrina. Construction of the hotel/casino was completed and an occupancy permit was granted was few days before the hurricane hit. The hotel/casino never went into operation. A restaurant on the premises opened for business and operated for a few days. Its did not derived revenues of $5 million. The LLC's other principal assets are potential insurance claims which it carries on its balance sheet as an account receivable.

With respect to the hotel/casino, the question is whether it qualifies as an exempt asset under Section 802.(c) as unproductive real property. The facility meets the definition of unproductive real property set out in Section 802.2(c)(1). The issue is whether the exclusion in Section 802.2(c)(2) that relates to non-manufacturing facilities that have not yet begun operation applies. Section 802.: (c) is the corollary to Section 802.2(a) which exempts new facilities capable of commencing operations immediately with minimal additional capital investment provided that the facility is held by a person who held the facility at all times solely for resale. The SBP to Section 802.2(c) makes clear that the exclusion set out in Section 802.2(c)(2) was designed to exclude new facilities (turnkey facilities) that are held by a person who neither constructed the facility for sale nor held the facility at all times for resale.

Because the hotel/casino never commenced operation and is not capable of commencing operation immediately without substantial additional capital investment, the exclusion set out in Section 802.2 (c)(2) arguably does not apply. Further support for this conclusion is set out in a statement in the SBP that provides "[ A] new facility that is partially complete, is not ready to commence operation in the immediate future and requires substantial additional capital investment is not yet a manufacturin or non-manufacturing facility within the .... (meaning of the rule)." Granted the hotel/casino was completed and received an occupancy permit the day before Katrina hit, but the current condition of the facility is such that it is not ready to commence operations without substantial additional capital investment and thus does not fall within the exclusion.

The other principal asset held by the LLC are potential insurance claims covering the losses sustained by the hurricane. The claims are in dispute and it is not certain what the proceeds will be ultimately. The potential insurance proceeds arguably are the equivalent of cash and thus qualify as exempt assets.

Please let me know whether you agree with the above analysis and the conclusions that the hotel/casino and potential insurance proceeds qualify as exempt assets under these facts.

AGREE –
B Michael
1/27/06