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LEGAL UPDATES FOR BUSINESSES

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Urban redevelopment, ransomware, tax issues facing both for-profit and nonprofit organizations, secured loans and trademarks: these specific topics and the range of issues they cover is illustrative of only a few of the issues that business owners and managers face every day. We at Schenck Price hope that the articles in this newsletter will help you to be better informed and therefore better prepared to deal with your many challenges. Please feel free to reach out to any of our knowledgeable corporate and business counseling team to assist you in growing your organizations. We would be honored to help.

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Environmental

New Jersey Expands Brownfields' and Urban Development Efforts: A Nice Start But...[1]

By Michael K. Mullen, Esq.

Over the past ten months New Jersey has embarked upon a number of different initiatives designed to expand Brownfields-related programs. For the most part, these programs are tied to larger efforts to spur urban development throughout the State. The genesis of most of these initiatives lies not just in legislation but rather efforts arising from Governor Murphy's initiative geared toward building a "Stronger and Fairer Economy in New Jersey." While such efforts are laudable, it remains to be seen as to the real impact of the same on the Brownfields' landscape.

In early March of 2019, Governor Murphy announced a Brownfields' tax credit, which is co-administered by the New Jersey Economic Development Authority (NJEDA), the Department of Environmental Protection (NJDEP) and the New Jersey Division of Taxation, and is designed to close project financing gaps as a part of the overall effort to revitalize underutilized industrial properties. A related goal of the initiative is the preservation of New Jersey green spaces. The State appropriated nearly $15,000,000.00 to the Brownfields Site Reimbursement Fund in 2019. Governor Murphy's initiative anticipates that the appropriated funds will be phased out quickly and be replaced by a competitive grant opportunities mechanism administered jointly by EDA and NJDEP.

This Brownfields initiative was followed by an expansion of the NJEDA's Community Collaborative Initiative (CCI) which enables NJDEP staff to provide ground level support on Brownfields' redevelopment and urban revitalization efforts. Initially, such efforts were focused in cities such as Bayonne, Camden, Perth Amboy and Trenton. The CCI embeds NJDEP staff at the ground level within communities and attempts to provide a more direct connection to the necessary expertise that will enable communities to address environmental concerns effectively and appropriately.

CCI has produced some results in Bayonne, Camden, Perth Amboy and Trenton. The State reports that CCI's staff collaborated with local leaders and NJDEP experts in Camden to jump-start the process of transforming a 61-acre landfill into a restored shoreline area with improvements, including the creation of new tidal wetlands, recreational amenities for residents and a solar field. CCI developed a similar approach with respect to Perth Amboy which involved the launch of a project to clean up a 6-acre scrap heap and construct a new park on the subject site. In Trenton, CCI staff helped to advance development of the Assunpink Greenway Park which is a 99-acre redevelopment project that will include soccer fields, a waterfront walk and other amenities.

Last year the NJEDA also approved the creation of a new Brownfields' Loan Program to provide low-interest financing to help complete remediation of vacant or underutilized Brownfields' sites. The program will make financing up to $5,000,000.00 available to potential Brownfields' site purchasers and current Brownfields' site owners to help cover the cost associated with site investigation, assessment, remediation and related building and structural issues (including demolition, removal of asbestos, etc.).

Funding will be made available through a series of competitive "application" rounds. Projects that meet base eligibility will be scored or evaluated by NJEDA staff according to various details involving the Brownfields' site and/or proposed redevelopment project. The award of funding within competitive rounds will be determined by the highest overall scores and all projects must meet certain minimum scores in order to be considered for funding or, at the very least, advance to the next round of consideration.

The latest initiative within the Brownfields universe involves a joint effort on the part of NJEDA and the New Jersey Institute of Technology (NJIT) to establish a New Jersey Brownfields Center at NJIT. The Brownfields Center will provide a variety of technical assistance and resources to assist New Jersey communities with the process of transforming their Brownfields sites into community assets.

The Brownfields Center at NJIT will expand upon the other efforts cited in this article to offer assistance to communities beyond the now 12 CCI municipalities as well as providing additional tools of a technical nature to all Brownfields' communities in New Jersey. The goal of the center will be to provide guidance and resources to county and local government entities to help them overcome the challenges and otherwise navigate the Brownfields development process. A further goal of the program is to educate and engage communities throughout the State about Brownfields' issues.

All these initiatives represent a "start" or perhaps a "re-start" in terms of efforts to join notions of environmental remediation with economic opportunity. Budgeting pressures and a somewhat fractured political landscape raise legitimate questions as to whether the will and means exist to financially support and possibly expand these sorts of Brownfields–related initiatives of the future.

[1]This article is an abbreviated version of the more complete article on this topic that can be found on the Schenck Price Smith & King website.

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Cybersecurity

The Ongoing Threat of Ransomware

By Deborah A. Cmielewski, Esq.

Despite all the publicity surrounding the topic, ransomware attacks have continued to plague businesses in a variety of industries. Such attacks, which are a fast and easy way for cybercriminals to profit, are expected to continue in 2020 and beyond. Threat actors are becoming more sophisticated and, in some cases, are joining forces to create strength in numbers. Shockingly, the 2019 Cybersecurity Almanac released by Cisco Security and Cybersecurity Ventures projected that by the year 2021, damages from cybercrimes will cost businesses $6 trillion annually.

Believing that they are immune from danger, or simply lacking the resources to allocate to cyberhygiene, many small businesses leave themselves wide open to attack. Evildoers do not discriminate; they target small and large businesses alike. Whether you are a solo shop or a multinational enterprise, you need to educate yourself against the potential dangers of ransomware.

By now, we all know that ransomware is a form of malware that denies users access to their data by encrypting it. Cybercriminals request payment of a ransom allegedly to release the decryption key to their victims. Payment of the ransom, however, does not guarantee that the victim will receive the decryption key or that the data has not been lost or destroyed during the attack.

All businesses need to employ proper cyberhygiene to guard against incidents. Recognize that your workforce is a weak link and the negligent behavior and/or bad habits of even one worker can have significant consequences. Now is the time to review your system, implement necessary changes and prepare a plan for guarding against (and responding to) untoward events.

Some tips for protecting your business against a ransomware attack include the following:

- Educate your workforce to avoid clicking on suspicious e-mail attachments, dubious websites and random pop-ups
- Install updates and security patches
- Segment access to servers and files so that hackers, if successful, gain access to only a limited portion of your network
- Back up your data to an external cloud
- Implement a robust password policy
- Scan your system for malware

Every time the victim of an attack pays a ransom, cybercriminals are incentivized to continue their bad behavior. Whether you represent low hanging fruit or a giant payday to an attacker, failing to take appropriate precautions can cripple your operations and devastate you financially. Don't try to go it alone. If your business suffers a ransomware attack, employ knowledgeable legal counsel and consultants without delay.

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Nonprofit Tax

Revisions to the Private Foundation Excise Tax on Net Investment Income

By Farah Ansari, Esq.

On December 20, 2019, the Taxpayer Certainty and Disaster Tax Relief Act of 2019, as part of the Further Consolidated Appropriations Act, 2020 (the "Act"), made changes to the private foundation excise tax on net investment income under Internal Revenue Code (the "Code") section 4940.

For background, private foundations are a type of Code section 501(c)(3) charitable organization, which are subject to many restrictive operational rules. Failure to operate consistent with those rules typically results in the imposition of an excise tax against the foundation, a foundation manager and/or "disqualified persons" depending on the violation. For example an excise tax is imposed on certain prohibited acts, including: (i) failing to meet certain minimum distribution requirements; (ii) having "excess business holdings;" (iii) engaging in "self-dealing" transactions; (iv) investing in amounts in such a manner as to jeopardize the carrying out of any of the foundation's exempt purposes, and (v) making improper distributions generally referred to as "taxable expenditures." Separately, a standing excise tax is automatically imposed on the annual net investment income generated by a private foundation's regular operations. The Act modified this standing operational excise tax on net investment income as described below.

Code Section 4940 Prior to Revisions

Prior to the changes imposed by the Act, the Code section 4940 tax on net investment income was equal to 2% of the net investment income of the foundation for the tax year. Net investment income is gross investment income (including amounts from interest, dividends, rents and royalties), plus capital gain net income, but not including amounts taken into account when computing the unrelated business income tax, less deductions.

Additionally, there was a special reduced 1% tax rate on net investment income for a tax year in which the private foundation met certain distribution requirements. This provision was meant to encourage higher than required charitable distributions. Essentially, the private foundation had to make charitable distributions for the tax year that equal or exceed the sum of (i) the amount equal to the noncharitable assets of the private foundation for the tax year multiplied by its average percentage payout for the 5 tax years preceding such tax year, plus (ii) 1% of the net investment income of the private foundation for such tax year. Further, in order to qualify for the reduced 1% rate, the private foundation must not have been subject to the excise tax for failure to distribute income under Code section 4942, for any of the preceding 5 tax years.

Code Section 4940 After Revisions

The excise tax under Code section 4940 was simplified by eliminating the "two-tiered" excise tax in response to concerns that the formula was unnecessarily cumbersome

and that the reduced 1% tax rate actually served as a disincentive for private foundations to pay out larger distributions in certain times of need. This is essentially because a larger distribution in a single year would increase the "average percentage payout" needed to qualify for the 1% reduced rate in future years. Now instead, for tax years beginning after December 20, 2019, a flat 1.39% tax is imposed on a private foundation's net investment income. The new 1.39% tax rate will generate either a tax savings or a tax increase for individual private foundations depending on whether each particular private foundation previously qualified for the special reduced 1% rate under the former law.

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New Jersey Bulk Sales Act

New Jersey and Free? Two Things That Rarely Go Together!

By Jason Waldstein, Esq.

It is hard to believe in this day and age in the State of New Jersey that it is possible to receive something for nothing, especially from New Jersey itself. But it is 100% possible, and even better, the something that you receive for nothing, is something of significance!

Not to get your hopes up too high, the something that you receive for nothing is not tangible; rather it is intangible. The something that you receive for nothing is piece of mind.

Hopefully, by now, you are asking yourself, how do I get in on this? Well, it is not for everyone. In fact, it is only for purchasers of business assets outside the ordinary course of business. Business assets are any assets that generate income or loss and may include real property.

New Jersey has a Bulk Sale Statute, the purpose of which is to protect a purchaser from inheriting any tax debt which a seller of business assets may have. That is any tax debt, including income tax, sales tax or withholding tax.

Now to the free part. The process to comply with the Bulk Sale Statute, and as such, reap the benefits of its protection from inheriting any tax debt which a seller of business assets may have, is *free* to the purchaser.

Almost as good as the cost is that the process is simple.

The purchaser of business assets, other than in the ordinary course of business, notifies the State of New Jersey, Department of the Treasury, Division of Taxation, at least 10 business days in advance of the sale. Business days exclude weekends and holidays. This notification is to be accomplished by completing and submitting the form which New Jersey has promulgated and which is available on the Division of Taxation's website.

Upon its receipt of the notification, the Division of Taxation has 10 business days to reply, and the reply from the Division will be in the form of one or more of the following: (1) an escrow letter indicating the sum of money to be held at the closing of the sale, (2) a letter outlining which tax returns must be filed and taxes and fees paid to obtain clearance and release of any escrowed funds, (3) a clearance letter stating the purchaser will not assume any obligation of the seller and no escrow is required, (4) an insufficient notice listing the items that are missing from the notification and must be sent in order to make the notification complete, or (5) a bulk sale violation stating that the purchaser has assumed the seller's tax obligation for the sale.

In the unlikely event the Division fails to respond to the notification within the 10 business days, the purchaser will not be liable for any tax debt which a seller of business assets may have.

On the other hand, if the sale occurs before the expiration of the 10 business-day period and the Division has not assigned an escrow to the purchaser or issued a clearance letter, it is a bulk sale violation and the purchaser will be held responsible for the tax obligation of the seller. What this means is that the Division can take steps necessary to satisfy the seller's tax debt against the purchaser *and* the seller. Depending upon the seller, this could be a huge burden on the purchaser.

The State of New Jersey offers this process at no cost to the purchaser, so there is no downside to the purchaser complying with this process. The risk in the purchaser not complying with this process, however, can be at great cost to the purchaser.

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Loans and Security Interests

Secured Transactions: Getting It Right With UCC Filings [2]

By Thomas L. Hofstetter, Esq.

Revised Article 9 of the Uniform Commercial Code ("UCC"), as adopted in each state, specifies the methodology for perfecting the interests of lenders in securing liens on particular items of collateral. This article summarizes some of the most important steps and issues in the perfection process.

Attachment and Perfection Together

Article 9 of the UCC provides minimum requirements for perfecting a secured interest in collateral property. Generally, the first secured party to file a UCC financing statement attains lien priority. However, prior to filing the financing statement, the security interest must "attach" to the collateral property. A security interest attaches to collateral property when the following occurs: value is given in exchange for the property; it is established that the debtor has rights in the property; and in most instances a security agreement has been entered into between the lender and the debtor wherein the collateral is described. In certain instances, the security agreement will have to describe the land upon which the collateral is situated.

There is no particular form that a security agreement must take. The necessary language can be contained in a promissory note, mortgage, deed of trust, pledge agreement or loan agreement, but it must explicitly grant a security interest to the secured party.

Security agreements must provide a reasonable identification of the collateral property. Very generic descriptions, such as "all assets" or "all personal property" may not be sufficient for attaching a secured interest. A sufficient description would list the collateral by categories such as "all equipment, inventory, and accounts." A sufficient description should also include after-acquired property. Such property is collateral in which the debtor has no rights at the time of the transaction, but subsequently acquires rights to, like equipment purchased years after the transaction is completed.

Once a secured interest attaches to collateral property, that secured interest needs to be perfected to establish the lien priority. There are three general methods of perfecting a security interest: filing of a UCC financing statement (most common method); effecting possession of the collateral property; effecting control over the collateral property. In some cases, the attachment of a security interest automatically acts to perfect the security interest. Once a security interest is perfected, that security interest prevails over judgment creditors and bankruptcy trustees. It is best practice in all instances to file a UCC financing statement to reflect the security interest.

Get the Name Right

It is imperative that the names of the various parties in a UCC financing statement are accurate. A state or county's lien search system's capacity to detect a UCC filing is based solely on searching a debtor's name. Inaccurate naming of a debtor on a filing can distort public records. With respect to entity debtors, such as corporations and limited liability companies, the name to use is the exact depiction of the name of the entity as found in the public record at the time the entity was formed, as amended. Since there is no official index or organic public records for individuals, it is recommended that parties filing UCC financing statements use the name on a debtor's unexpired driver's license. Issues arise when: the debtor does not have a driver's license; the format of a driver's license does not distinguish among surname, first name and middle name; or the debtor has legally changed his or her name.

Where to File?

A security agreement can cover real estate, fixtures, or personal property and each of these categories have their own particularities as to how and where a secured interest can be perfected. Article 9 of the UCC only pertains to filing liens on fixtures and personal property. It provides for two filing options based on the type of property being used as security.

Fixtures

UCC financing statements covering fixtures must be filed in the recording office of the county where the real estate that the fixtures are connected to is situated. A fixture filing can also be done in conjunction with recording of a mortgage or deed of trust on the real estate. It should be noted that a UCC financing statement covering fixtures does not have to be filed if there is language within the recorded mortgage creating a secured interest in the fixtures under the UCC. Notwithstanding, it is considered a best practice to file a fixture UCC financing statement in addition to the filing of a mortgage or deed of trust.

Personal Property
UCC financing statements covering personal property must be filed in the central filing office of the state in which the debtor resides, typically the secretary of state's office. If the debtor is an entity, the state of residence is the state where the entity was formed or organized. If there is uncertainty concerning the debtor's place of residence, it is considered a best practice to file financing statements in multiple states.

Perfection by Pre-Filing
Secured parties have the option of pre-filing UCC financing statements prior to their security interests attaching to the collateral. This may enable the secured party to get a senior lien position or prevent an intervening lien in the collateral, but it can only be done if the debtor grants written consent for pre-filing.

Ensuring Perfected Liens
UCC financing statements are effective for 5 years from the filing date. A lapse will occur unless a continuation statement is filed prior to the lapse. Thus, lien expiration dates need to be monitored. A continuation statement can be filed within a 6-month period prior to the expiration of the 5-year period which will extend the effective date of the original statement for an additional 5 years.

Conclusion
In order to maintain valid perfected security interests, it is essential to make sure that both attachment and perfection have been affected in connection with the grant of a security interest. It is necessary to file perfected liens under the correct name pursuant to Article 9. Termination dates must be monitored carefully, and continuation financing statements need to be filed within the 6-month period before the expiration of financing statements' 5-year life. Pre-filing a UCC financing statement with the borrower's consent is a best practice to obtain perfection and to prevent an intervening lien. Though the UCC as adopted in each state follows the model law, states or local offices may adopt specific local requirements that a filer needs to be aware of when filing UCC's.

[2]This article is an abbreviated version of the more complete article on this topic that can be found on the Schenck Price Smith & King website.

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Intellectual Property - Trademarks

Summary of the U.S. Trademark Application Process

By Jamie Taub, Esq.

Clients often inquire about the applications for trademarks and the related filing process for their word marks and logo marks in the United States. The applications themselves are filed in the United States Patent & Trademark Office (USPTO), and this article is written to provide a better understanding of that process.

Filing the Initial Application
Prior to filing for the mark (and preferably prior to using the mark), performing a trademark search to determine whether there are any conflicting third-party users, applicants or registrants, is the best and recommended practice. Following the search and a decision to move forward with the application, the application can be filed on an in-use or intent-to-use basis depending on whether the applicant is currently using the mark or instead is planning to use the mark in the future. In addition to the general applicant information, such as name, address, state of incorporation, the following materials are needed to file the application: (1) a digital drawing of the mark if it is a stylized logo mark; (2) a specimen or picture of the mark being used in connection with the product or service if the mark is currently in-use; and (3) a listing of the goods and/or services that the applicant offers or plans to offer in connection with the mark (which goods and services are classified by different numbers according to what's known as the Nice Classification).

Post-Filing Application Process

Examining Attorney Review
The USPTO will assign the filed application to a USPTO examining attorney for the initial review within three months of the application date. The examiner will then determine if there are any issues with the application, which issues could include (i) requiring clarification of the goods and services listing, (ii) requiring that a descriptive term in the mark be disclaimed, or (iii) more substantively, a rejection based on the entire mark being descriptive or confusingly similar to a prior mark. If any issues exist, the examiner will issue an office action initially rejecting the application and requiring the applicant to submit a response to the extent possible to overcome the rejection.

Publication in Official Gazette

If the examiner is satisfied with the response from the applicant, or if the examiner finds no issues with the application, he/she will approve the mark to be published for opposition in the USPTO's Official Gazette for a 30-day period during which period third parties have the opportunity to review and possibly oppose the applied-for mark on the grounds that it may conflict with their own. A high percentage of published marks go unopposed.

Supplemental Filings and Registration

If the application goes through the opposition period unopposed, then the USPTO will issue either: (i) a Certificate of Registration for the application if it was filed on an in-use basis; or (ii) a Notice of Allowance for the application if it was filed on an intent-to-use basis. The Notice of Allowance is issued because marks cannot obtain registration in the U.S. unless they are currently being used in commerce. Applicants have six months from the date of the Notice of Allowance to file either: (x) a Statement of Use, declaring that the mark is being used; or (y) an Extension Request, requesting a six-month extension to file the Statement of Use. If necessary, an applicant can file up to 5 six-month Extension Requests, meaning that the applicant has up to 3 years from the date of the Notice of Allowance to start using the mark in commerce so long as the necessary extensions are filed. There are USPTO filing fees associated with these filings (Statement of Use=$100/class; Extension Request=$125/class), and therefore if multiple extensions are required and/or the application is filed in several classes, these supplemental filings can increase the cost of the application). Once the Statement of Use is filed for intent-to-use applications, the USPTO will issue the Certificate of Registration for the mark.

The average time period for a trademark application to reach the point of registration in the USPTO is approximately12-18 months from the date of filing. Until a federal registration certificate is received, it is customary to use the trademark symbol (TM or SM) to signify a common law claim to the mark.

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