SCHENCK PRICE SMITH & KING, LLP
ATTORNEYS AT LAW
– FOUNDED 1912 –

LEGAL UPDATES FOR BUSINESSES

www.spsk.com

September 2017

We welcome to the current issue of Schenck, Price, Smith & King's *Legal Updates for Businesses*, a new newsletter that explores the issues and developments that impact business. Our aim is simple: to tell you what is happening and why it matters to your business. We welcome your feedback. Please let me know if there are topics that you would like us to cover in upcoming issues.

Edward W. Ahart, Esq.
Chair, Corporate Practice Group
ewa@spsk.com

Commercial Tenants: Understand Your Rent Commencement Date

By John M. DeMarco, Esq.

A commercial tenant should avoid any possibility that payment of fixed rent will commence prior to the tenant having the ability to occupy the Premises for its intended use. In negotiating when rent should commence, the tenant should consider the following:

1. Zoning Issues. The need for a use variance, change in use or other similar governmental approvals may delay the tenant's ability to occupy and use the premises. The New Jersey Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq.) and many local ordinances provide for certificates of zoning compliance, zoning permits or similar applications which will confirm whether your use is permitted as of right or whether certain approvals are necessary. Knowing what approvals, if any, are required is necessary in order to properly negotiate when rent should commence. It is preferred that receipt of required approvals be a pre-condition to the commencement of the lease and the obligation to pay rent. If approvals are to be pursued after the lease is signed, then tenant should negotiate a rent-free period to pursue the approvals and the lease and the obligation to pay rent should be contingent upon those approvals being received.

2. Landlord or Tenant Improvement Work. If the landlord is performing all tenant improvement work, the commencement of rental payments should not begin until the work is completed and tenant is provided with a certificate of occupancy. There should be also a deadline by which the landlord must deliver the premises (a tenant should not be expected to wait for the premises indefinitely and any delay in delivery by the landlord could lead to the tenant becoming a holdover tenant in its current location). If the landlord fails to meet the deadline date, tenant should have remedies available to it such as a rent abatement equal to one day for each date of delay (which will defray the cost of holdover rent) or a right of termination.

3. Early entry. In many instances the landlord will perform only a portion of the work, with tenant performing additional improvement work after the landlord's work is completed. The period where tenant is performing work to prepare the premises for occupancy should be rent-free. As in many instances rent will commence after an agreed period of rent-free months whether the tenant work is completed or not, a tenant should negotiate the right to enter the premises to perform some of its work prior to completion of landlord's work and delivery of the premises.

Commercial leases are complicated and involve many issues, some more likely to arise than others, and many which are subtle but important. Understanding these issues and assessing their impact on your business prior to signing your new lease are critical steps to create a solid foundation in your new facility.

For more information, contact John M. DeMarco at jmd@spsk.com, or (973) 540-7423.

Are Non-Compete Agreements Valid in New Jersey?

By Jason J. Waldstein, Esq.

Non-competition agreements are contracts that prevent workers at a certain company from going to work for a competing employer within a certain period of time after leaving a job.

As of May 2016, research on non-competition agreements showed that 18%, or 30 million, American workers were covered by non-compete agreements. Non-compete clauses are found not only in the contracts of senior executives or other highly compensated employees, but also for comparatively low-skill occupations. The Obama Administration issued a report regarding the potential misuse of non-competition agreements. The report concluded that in certain cases, non-competes can negatively impact the welfare of workers and hamper the efficiency of the economy as a whole by depressing wages, limiting mobility and inhibiting innovation.

In the large majority of states, non-competition agreements are enforceable for workers across all income brackets, and many states do not have restrictions around the geographic or temporal limitations of non-competition agreements. However, these agreements appear to be coming under heightened scrutiny.

In New Jersey, there is no state statute or regulation governing non-competes in employment generally. However, a bill that recently died in committee would have invalidated any covenant, contract, or agreement not to compete, not to disclose, or not to solicit, entered into by an individual with the individual's most recent employer, if the individual is found to be eligible for unemployment insurance benefits pursuant to New Jersey's unemployment compensation law.

Enforceable non-competition agreements in New Jersey must strike a balance between protecting the employer's legitimate business interests with the employee's right to work in a field for which he or she is trained. In general, courts balance these considerations by examining the type and size of the business, how long and over what geographic area the restrictions apply and whether adequate consideration, or benefit, was given the employee at the time the agreement was signed. In New Jersey, in the case of a covenant relating to a former employee, to determine if a non-compete covenant is reasonable, courts use a three-prong test. Using that test, to have an enforceable agreement, the employer must show that the restriction: (1) is necessary to protect the parties' legitimate interests, such as (a) customer relationships; (b) trade secrets; or (c) confidential business information; and (2) does not cause undue hardship in the former employee. When determining whether a non-compete will cause undue hardship, a court considers: (a) the likelihood that the employee will find other work in his field; (b) the restriction's burden on the employee; and (c) the non-compete is not against the public interest, e.g., the public's right to have access to receive professional advice and services.

In New Jersey, even if the covenant is found to be enforceable, it may be limited in its application concerning its geographical area, period of enforceability, or its scope of activity.

In the case of covenants not to compete negotiated in the sale of a business, New Jersey courts give wider latitude to covenants not to compete that are ancillary to the sale of a business than in the employment context.

Two takeaways: (1) protect a legitimate business interest – You can't prevent your employees from working for a competitor simply out of spite. The non-compete must protect your company's business interests, e.g., goodwill, proprietary information or personal contact with clients; and (2) narrow the restrictions – Non-competition agreements must be reasonable with regard to time, activities and geographic scope, and they must be supported by reasonable consideration.

For more information, contact Jason J. Waldstein at jjw@spsk.com, or (973) 540-7139.

The Epic 2017 Ransomware Attack: Lessons Learned from WannaCry

By Deborah A. Cmielewski, Esq.

It's hard to pick up a publication about cybersecurity anymore without seeing numerous articles about ransomware. The WannaCry ransomware attack that occurred on May 12, 2017 sent shock waves around the globe, forcing businesses and individuals into a frenzy. What really caused the attack and is ransomware something new? Just what is ransomware, anyway?

A ransomware attack occurs when a computer is infected with malicious software that denies users access to their system by encrypting the data through the use of a private key held only by the attacker. Ransomware is not a novel infection. Rather, the perpetrators of ransomware are becoming more sophisticated and the attacks are gaining more publicity. The ransomware attacks of today affect desktop and laptop computers as well as mobile phones. A ransom note appears on the users' screens and the hacker holds the system hostage until a ransom is paid for the decryption key. The hacker requires the users to pay the ransom in a cryptocurrency (such as Bitcoin). Payment of the ransom does not always guarantee that the attackers will relinquish the data. Experts have advised against paying the ransom and have instead directed victims to immediately notify law enforcement. All of this inevitably leads to serious business interruption and frightening economic consequences.

The WannaCry attack resulted from computer system vulnerabilities. In March of 2017, Microsoft issued a security bulletin and patch for Windows systems under support at that time. Unfortunately, not all system users installed the patch. WannaCry was launched two months later in May, spreading like wildfire and infiltrating exposed systems. For healthcare entities, a ransomware attack raises frightening concerns. In addition to affecting patient care, such an attack can result in a data breach of devastating proportions that triggers various reporting obligations and other legal consequences.

All businesses should arm themselves by implementing the proper policies and procedures, maintaining current backups and ensuring that they can retrieve their data from backups in the event of a cybersecurity incident. Training on prevention and response to ransomware attacks is crucial. In the case of healthcare entities, access to electronic protected health information must be limited to only those users who require it, in order to avoid dangerous consequences.

The best defense is a good offense. Please don't delay.

For more information, contact Deborah A. Cmielewski at dac@spsk.com, or (973) 540-7327.

Good News! Treasury Department Identifies for Modification or Rescindment Proposed Regulations that Would Unduly Burden the Transfer of Family Controlled Business Interests

By Farah N. Ansari, Esq. and Gary Mazart, Esq.

The Department of Treasury and the Internal Revenue Service issued proposed regulations on August 2, 2016 under Internal Revenue Code Section 2704 (Notice of Proposed Rulemaking REG-163113-02). These proposed regulations would severely curtail, or even eliminate, the ability of family controlled business owners to claim lack of marketability and lack of control valuation discounts in connection with transfers of family controlled business entities during an owner's lifetime or at death.

Essentially, the proposed regulations overturn decades of supportive federal case law, and provide that certain restrictions on liquidations and transfers of business interests, often permitted under state law and utilized in agreements among family business owners, should be "disregarded" for purposes of valuing family business interests. The result in many cases would be a substantial increase in tax cost on the transfer of family controlled business entities.

The hue and cry in response to these proposed regulations has been unprecedented among family business owners, estate tax planning lawyers, accountants and valuation experts. They generated over 10,000 comments and reached a crescendo on December 1, 2016, when 36 professionals and other concerned citizens gave testimony opposing the proposed regulations before representatives of the Treasury Department's Office of Tax Policy in a packed Internal Revenue Service auditorium.

The tide seems to have shifted quickly against these proposed regulations and in favor of family business owners since that time. On April 1, 2017, President Trump took aim and issued Executive Order 13789 directing the Secretary of Treasury to review "all significant tax regulations" issued on or after January 1, 2016 and to identify those regulations that "(i) impose an undue financial burden on U.S. taxpayers; (ii) add undue complexity to the Federal tax laws; or (iii) exceed the statutory authority of the Internal Revenue Service."

Most significantly, the Internal Revenue Service responded quickly to the Executive Order, and on July 24, 2017, issued Notice 2017-38. The Notice identified various proposed regulations that add undue complexity to the federal tax laws and impose undue financial burden on U.S. taxpayers, including the proposed regulations under Code Section 2704 as described above. As a result, the Treasury Department requested comments be submitted no later than August 7, 2017 as to whether the proposed regulations identified in Notice 2017-38, including those under Code Section 2704, should be rescinded or modified.

There has been no news since August. We will make every effort to keep interested clients and friends of the firm updated in this regard.

For more information, contact Farah N. Ansari at fna@spsk.com, or (973) 540-7344, or Gary Mazart at gm@spsk.com, or (973) 540-7309.

Does Your Company's Website Create Unnecessary Risk?

By Wendy Z. Greenwood, Esq.

Over the past few years there has been an unprecedented wave of class action lawsuits alleging violations of New Jersey's Truth-in-Consumer Contract Warranty and Notice Act ("TCCWNA" or the "Act"). The majority of these complaints have targeted e-commerce retailers, alleging that the Terms and Conditions found on their websites violate the TCCWNA. Bed Bath and Beyond, Toys "R" Us, J. Crew and Avis Car Rental, among others, have each been sued in federal court alleging that the terms and conditions found on their websites violate the TCCWNA. Unfortunately, in the age of the internet, litigious potential plaintiffs are looking specifically for unsuspecting on-line retailers whose website's terms and conditions may possibly violate the Act. Consequently, a business that operates a website containing innocuous terms and conditions could inadvertently find itself a defendant to a TCCWNA lawsuit.

The TCCWNA, which was enacted in the 1980's, before the internet, is New Jersey's consumer protection statute. Though vague and broad in scope, the Act prohibits sellers from including provisions within their consumer contracts that waive consumer rights under the TCCWNA. The TCCWNA also prohibits consumer contracts from including provisions that may be void and unenforceable in certain jurisdictions without specifying whether they are barred in New Jersey. The intention of the Act was to discourage sellers from engaging in deceptive practices and to prevent sellers from including terms in a consumer contract that could mislead consumers.

It is relatively easy for a plaintiff to bring a claim under the TCCWNA. The TCCWNA does not require a claimant to show financial loss, or provide evidence of an unconscionable commercial practice. A contractual relationship between a plaintiff and defendant is also not required under the TCCWNA. As a result, any company that includes broadly-worded terms and conditions on its website, even if it is acting in good faith, could potentially and unknowingly violate the TCCWNA. Further, an aggrieved consumer can automatically recover a minimum of $100 in civil penalties pursuant to the Act each time he or she visits a website. Consequently, damages resulting from a violation of the TCCWNA can quickly add up substantially.

The good news for businesses is that there have been a number of decisions that have dismissed claims alleging violations of the TCCWNA. These defense-friendly decisions have dismissed TCCWNA claims for lack of standing. In each of Russell v. Croscill Home LLC, 2016 U.S. Dist. Lexis 159787 (D.N.J. Oct. 11, 2016) and Hecht v. Hertz Corp., 2016 U.S. Dist. Lexis 145589 (D.N.J. Oct 20, 2016) the federal judges dismissed each plaintiff's complaint asserting that the plaintiff did not establish the "injury-in-fact" requirement of standing. According to the federal judges in each of these cases, the plaintiffs failed to demonstrate that they had been an aggrieved consumer under the TCCWNA. Likewise, in a more recent decision, a federal judge dismissed a cause of action against the J. Crew Group citing that the plaintiff failed to plead any underlying injury suffered as a result of purchasing clothing from J. Crew's website and therefore lacked standing to bring a lawsuit. See Rubin v. J. Crew Group, Inc., 2017 U.S. Dist. LEXIS 46389 (D.N.J. Mar. 29, 2017).

While these cases may provide some guidance interpreting the Act, the case law surrounding TCCWNA claims is still evolving. Therefore, it is extremely important for businesses to be mindful of the terms and conditions contained in their website and to review these provisions to avoid becoming a potential target of a class action suit pursuant to TCCWNA.

For more information, contact Wendy Z. Greenwood at wzg@spsk.com, or (973) 540-7301.

Clearing Title to Your Business Assets from Old UCC Liens: Understanding the Risks

By J. Nicole Knox, Esq.

Sometimes business owners or managers discover that UCC liens remain on certain of their business assets from a prior financing. Among other occasions, this discovery can arise during a refinance, the sale of the business or some of its assets, or during a general credit check. Often this problem exists because a previous lender or financing company has failed to terminate its UCC lien upon receipt of the borrower's final loan payment. This failure by the previous lender may prevent the borrower from closing an upcoming transaction quickly. Normally, it is neither difficult to correct, nor does it take a long time to contact the prior lender and obtain its assistance in terminating the lien as the applicable New Jersey Statute requires that lender terminate their liens once the underlying loans are fully satisfied. Specifically, N.J.S.A. 12A:9-513(b), in pertinent part, requires that a secured party file a termination statement (a) within one month after there is no obligation covered by the financing statement and there is no commitment by the debtor to incur further obligations or (b) if earlier, within 20 days after the secured party receives an authenticated demand from a debtor.

If for some reason, however, a secured party fails to file a termination statement under 12A:9-513(b), the New Jersey Uniform Commercial Code also provides protection for the borrower by allowing a third party to file a UCC-3 termination statement on behalf of the secured party if (a) that person has been authorized to do so by the secured party; (b) there is no current or pending obligation under the financing statement; or (c) 20 days after the secured party has received an authenticated demand from a debtor. (N.J.S.A 12A:9-509(d)).

To ensure that title to your valuable business assets remains clear and free for whatever use you need to make of those assets, it is a good idea to occasionally have a quick lien search run on them. If any open liens appear on debt obligations that have been satisfied, the best practice is to contact the prior lender and obtain its cooperation in securing the termination. When a third party files a unilateral termination statement without prior authorization from the secured party, there is a chance that the unilateral filing may be challenged. Two quick examples among many possibilities include a challenge on the basis that the third party failed to obtain an appropriate authorization, or submitted the termination in the name of an improper party (e.g., ABC Bank vs. ABC Trust Bank). Regardless, if for some reason, you can't secure the assistance of the prior lender in terminating the liens, you can still eliminate the problem by following the process outlined in the Statutes

For more information, contact J. Nicole Knox at jnk@spsk.com, or (973) 540-7312.

Schenck, Price, Smith & King, LLP Corporate Practice Group

Edward W. Ahart, *Chair* | 973-540-7310 | ewa@spsk.com
Daniel O. Carroll | 973-631-7842 | doc@spsk.com
Deborah A. Cmielewski | 973-540-7327 | dac@spsk.com
Richard J. Conway, Jr. | 973-540-7328 | rjc@spsk.com
Douglas R. Eisenberg | 973-540-7302 | dre@spsk.com
Cynthia L. Flanagan | 973-540-7331 | clf@spsk.com
Brian M. Foley | 973-540-7326 | bmf@spsk.com
Michael A. Gallo | 201-225-2715 | mag@spsk.com
Jeremy M. Garlock | 973-540-7358 | jmg@spsk.com
Heidi K. Hoffman-Shalloo | 973-540-8234 | hkh@spsk.com
Thomas L. Hofstetter | 973-540-7308 | tlh@spsk.com
Michael J. Marotte | 973-631-7848 | mjm@spsk.com
Michael L. Messer | 973-631-7840 | mlm@spsk.com
Sean Monaghan | 973-631-7856 | sm@spsk.com
Michael K. Mullen | 973-540-7307 | mkm@spsk.com
Sidney A. Sayovitz | 973-540-7356 | sas@spsk.com
John E. Ursin | 973-295-3673 | jeu@spsk.com
Farah N. Ansari | 973-540-7344 | fna@spsk.com
Amy Buck Faundez | 973-540-7350 | abf@spsk.com
Ira J. Hammer | 973-631-7859 | ijh@spsk.com
Sharmila D. Jaipersaud | 973-631-7845 | sdj@spsk.com
Jason A. Rubin | 973-540-7306 | jar@spsk.com
Jason Waldstein | 973-540-7319 | jjw@spsk.com
Wendy Z. Greenwood | 973-540-7301 | wzg@spsk.com
Meghan V. Hoppe | 973-540-7351 | mvh@spsk.com
J. Nicole Knox | 973-540-7312 | jnk@spsk.com
Divya Srivastav-Seth | 973-631-7855 | dss@spsk.com