

Legal Updates for Businesses

On behalf of all the attorneys at Schenck, Price, Smith & King, I hope that you and your organization are experiencing a good and prosperous start to 2024.

In this edition of *Legal Updates for Businesses*, we discuss several important issues that should be on everyone's radar. Chief among them are data protection and cybersecurity. If your entity is not paying sufficient attention to these two areas, you may be putting your company's reputation and private information—and possibly those of your customers—at risk. Also covered in this newsletter are trademarks and whether they serve as source identifiers (Are certain slogans worthy of trademark?); the importance of co-insurance clauses in property insurance (Be aware of the mechanics of these clauses to ensure proper insurance coverage.); and, finally, with regard to lending, we explain how real estate liens differ from asset-based liens.

As a business owner, there are many laws and legal nuances to be aware of, for compliance purposes as well as to ensure a smooth, trouble-free operation. We are pleased to provide that guidance as your trusted advisors.

Edward W. Ahart, Esq.

Co-Chair, Corporate and Business Law and Nonprofit Organizations Practice Groups

ewa@spsk.com

Intellectual Property

Is Your Trademark A Source Identifier?

By Ira J. Hammer, Esq.

The Federal Circuit Court of Appeals reminded all of us of that a prerequisite for trademark registration is that the proposed trademark serve as a source identifier in *In re Go & Associates*.^[i] The examining attorney had denied trademark registration to the mark “Everybody vs. Racism” because the mark did not serve as a source identifier, which decision was unanimously affirmed by the Trademark Trial and Appeal Board (TTAB) and the Federal Circuit affirmed by the Trademark. The Federal Circuit also made the decision precedential.

The requirement that a trademark serve as a source identifier is not a new requirement. 35 USC § 1127 defines a trademark as a “word, name, symbol or device or any combination thereof” that is used “to indicate the source of the goods even if the source is unknown.”*Id.* Go & Associates (Applicant) sought registration of the mark for tote bags, T-shirts and other clothing, in order to promote the public interest in and awareness of the need for racial reconciliation.

The Trademark Office examining attorney refused registration finding that the mark was “an informational, social, political, religious or similar kind of message that conveys support of, or admiration for, or affiliation with the ideals conveyed in the message” but did not serve as a source identifier.

The examining attorney, in support of the decision, cited third-party uses as evidence that the mark was informational and not a source identifier. The uses included use by the NBA referees on T-shirts during their protest walkout, titles of rap songs, podcasts, church sermons, and on clothing^[ii]. In response, Applicant cited search engine optimization data allegedly showing that the mark was almost never used or searched on the internet before Applicant began using it. The examining attorney was not persuaded and concluded that the third-party uses reinforced the fact that consumers would view the mark “as a sentiment, rather than a source.” Because allowing the registration to proceed would “seriously impede the heartfelt need of citizens of the country to express that everybody should be against racism,” the examining attorney denied registration. The TTAB affirmed, and Applicant appealed.

The Federal Circuit observed that the source identifier requirement focuses on how the mark is used in the marketplace and how it is perceived by consumers. “If the nature of a proposed mark would not be perceived as identifying the source of a good or device, it is not registrable.” It found that the TTAB had properly considered all of the third-party evidence before it, including what the examining attorney found and what Applicant presented.

Claiming use of slogans on T-shirts and other clothing, even when the slogan is not a political message, will often cause examining attorneys to question whether a mark is serving as source identification or as a message. Accordingly, think carefully when adopting slogans and line up evidence that supports your argument that your slogan is a trademark. ■



[i] 2024 USApp LEXIS 1814 (Fed Cir. Jan 22, 2024).

[ii] The evidence is laid out in the TTAB decision, showing that many parties were using the slogan, typically as part of a political message.

For more information, contact Ira J. Hammer at ijh@spsk.com or (973) 631-7859.

Insurance Coverage

Navigating Co-Insurance Clauses in Property Insurance

By Thomas L. Hofstetter, Esq.

In the world of property insurance, co-insurance clauses play a pivotal role, demanding attention from both insurers, policyholders and lenders. Understanding the mechanics of these clauses is critical for ensuring adequate coverage and avoiding potential financial pitfalls.

What is Co-Insurance?

A co-insurance provision in property insurance is a policy condition that mandates policyholders to maintain coverage for a specified percentage of the property's value. Typically expressed as a percentage

(e.g., 80%), policyholders must ensure their coverage meets or exceeds this percentage threshold of coverage of the property's value.

How Co-Insurance Works

Consider a property valued at \$500,000 with an 80% co-insurance requirement. The policyholder must maintain coverage of at least \$400,000 (80% of \$500,000).

Example:

- Property Value: \$500,000
- Co-Insurance Requirement: 80%
- Minimum Required Coverage: \$400,000

Common Pitfalls

Underestimating Property Value:

Failing to regularly assess the property's value can lead to inadequate coverage. Property values may increase over time. Accordingly, it is essential that policy coverage be maintained in a sufficient amount to insure the appropriate amount of a property value to avoid potential gaps in coverage.

Consequences of Underinsurance:

Imagine a scenario where the policyholder insures the property for only \$300,000 instead of the required \$400,000. The co-insurance "penalty" comes into play.

Example:

- Insured Coverage: \$300,000
- Required Coverage: \$400,000
- Co-Insurance Ratio: $(\$300,000 / \$400,000) = 0.75$

In this case, the insurer would only pay 75% (\$300,000) of the claim, leaving the policyholder responsible for the remaining 25% or a \$100,000 "penalty" for under insurance.

Tips for Policyholders

Regular Valuations:

Periodic property valuations ensure coverage aligns with current market conditions and property values, minimizing the risk of underinsurance.



Engage With Insurers and Lenders:

Communication with insurers and potential lenders taking property as collateral is critical. Discuss coverage needs, property improvements, and any changes that might impact the value of the insured property. Lenders may have insurance parameters in their commitment letters or in their loan documentation. Some lenders may not permit policies that have co-insurance provisions. Failure to meet these requirements may cause a delay in loan closings or cause a default in a lender's loan covenants.

Consider Inflation Protection:

In an effort to maintain appropriate insurance coverage, some policies offer inflation protection endorsements, adjusting coverage limits to account for inflation and market changes. Insurers should be questioned whether such endorsements are available.

Navigating co-insurance clauses is an important consideration between insurers and policyholders (and perhaps a policyholder's lender). A thorough understanding of these clauses, coupled with proactive measures, ensures that property insurance serves its purpose effectively, providing financial security in times of need. Regular assessments, open communication, and staying informed are key components of a successful strategy to manage co-insurance effectively. ■

For more information, contact Thomas L. Hofstetter at tlh@spsk.com or (973) 540-7308.

Corporate and Business Law

New Jersey Passes Data Protection Act

By David B. Bailen, Esq.

On January 16, 2024, Governor Murphy signed Senate Bill (SB) 332, the New Jersey Data Protection Act (the Act). The Act aims to protect and better maintain the security of consumers' personal information. The Act will become effective one year after the date of Governor Murphy's signature.

Applicability

The Act applies to all individuals or entities, referred to as "controllers" or "processors" in the Act, that:

1. "conduct business in [New Jersey] or produce products or services that are targeted to residents of [New Jersey]" and
2. "control or process the personal data of at least 100,000 consumers, excluding personal data processed solely for the purpose of completing a payment transaction; or control or process the personal data of at least 25,000 consumers and the controller derives revenue, or receives a discount on the price of goods or services, from the sale of personal data."

Data Protected Under the Act

The Act applies to New Jersey residents' (Consumers) personal data (Personal Data). Consumers include residents "acting only in an individual or household context," but excludes those acting in a "commercial or employment context." Personal Data includes "any information that is linked or reasonably linkable to an identified or identifiable person," but excludes "de-identified data" and "publicly available information." The Act protects sensitive data as well, which is broadly defined under the Act.

Controller Obligations

Some of the notable obligations imposed on controllers include:

1. Providing "a reasonably accessible, clear, and meaningful privacy notice" to consumers, which must include several elements;
2. Limiting collection of Personal Data to what is "adequate, relevant, and reasonably necessary in relation to the purpose for which such data is processed;"
3. Taking "reasonable measures to establish, implement, and maintain administrative, technical, and physical data security practices to protect the confidentiality, integrity, and accessibility of personal data and to secure personal data during both storage and use from unauthorized acquisition;"
4. Conducting a data processing assessment when processing data that "presents a heightened risk of harm to a consumer;"
5. Not processing "sensitive data concerning a consumer without first obtaining the consumer's consent,"



6. Providing a mechanism for a consumer to revoke consent and cease processing the data as soon as practicable, but not later than 15 days after the revocation is received;
7. Including language in contracts with subcontractors, requiring such subcontractor to “meet the obligations of the processor;” and
8. Within six months following the effective date of the Act, controllers processing Personal Data for the purpose of targeted advertising, must allow consumers to exercise the right to opt-out of such processing.

Impact

Due to the broad nature of the Act, many businesses will need to implement new compliance policies and procedures, even if already in compliance with other states' data protection laws. Given the complexity of the Act and the other data protection laws that have and will be passed across the nation, it is highly advisable to obtain expert guidance to ensure your business is in compliance with these laws. ■

For more information, contact David B. Bailen at dbb@spsk.com or 973-798-4963.

Health Care Law

Cybersecurity Performance Goals Aim to Safeguard the Health Care Sector

By Deborah A. Cmielewski, Esq.

“Ransomware,” “phishing,” “hacking,” “cyberattack” . . . Hardly a day goes by that we don’t hear these words (and hear them over and over and over again in the news). The majority of us have received at least one notice in the mail over the past several years advising that our personal information has been breached or was potentially compromised. With its plethora of valuable data, it’s no secret that the health care sector is particularly vulnerable to cybersecurity incidents. In addition to sensitive personal information, medical records contain a vast amount of financial information that is extremely enticing to cybercriminals. Social security numbers, dates of birth, and other patient demographic information contained in a medical record can generate substantial returns on the black market. Therein lies the problem.

In a move to help health care organizations prioritize these critical issues, the United States Department of Health and Human Services (HHS) recently published Healthcare and Public Health (HPH) Cybersecurity Performance Goals (CPGs). The CPGs aim to help health care organizations bolster their cybersecurity practices; guard against cyberattacks; and employ



mitigation techniques, if an attack actually happens. While the CPGs are voluntary at this time, it is suspected that HHS may be laying the foundation for formal rulemaking at some time down the road. HHS Deputy Secretary Andrea Palm noted that the CPGs represent a “step forward for the sector as we look to propose new enforceable cybersecurity standards.”

The CPGs consist of two distinct categories, including “essential” and “enhanced” goals. Essential goals set minimum safeguards designed to address common cyber vulnerabilities and include such items as reducing risk from common threats to e-mail; delivering basic cybersecurity training to the

workforce; deploying strong encryption; and revoking credentials for workforce members who are terminated. Many of these goals are straightforward, require no additional costs and are already in use by healthcare organizations. Enhanced goals help entities to pinpoint and refine their cybersecurity capabilities; these include such items as collecting centralized security logs; establishing a process to discover and address known threats and cyber vulnerabilities; and segmenting mission-critical assets in an organization's network.

The media is saturated with news stories about health care organizations falling victim to cyberattacks. The inability of a physician or hospital to access medical records due to such an incident can mean the difference between life and death for a patient in urgent need. HHS is hopeful that the CPGs will offer a solid foundation for cyber preparedness and assist healthcare organizations in prioritizing data protection and furthering patient safety. ■

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

Commercial Real Estate

A Comparison of Real Estate and Asset-Based Liens

By Michael A. Gallo, Esq.

The most common liens taken by a lender in commercial transactions are liens against real estate and liens against the assets of a borrower. Commercial loans are generally granted by lenders or finance companies to businesses, although they can also be granted to individuals.

When a lender grants a loan to a borrower, the lender usually wants some type of collateral to secure its loan. Real estate and company assets are the usual type of collateral that lenders are looking for (although there are other forms of collateral such as CDs, pledge of securities, assignment of insurance proceeds and the like). The lien taken by the lender

depends on the type of deal involved. When a borrower is a real estate type of entity (usually when its only assets are its real estate), the lender will lend an amount to the borrower based on the value of the property. As a rule of thumb, the lender usually lends an amount up to 70% to 75% of the appraised value of the property (i.e., for property appraised at \$1,000,000 the lender will lend up to \$750,000). Some lenders will only lend on real estate if it's what we call owner occupied, meaning the property is occupied by the borrower itself or a related entity. Other lenders will lend on investment property (one with one or more different tenants). Real estate loans are then secured by a mortgage from the borrower in favor of the lender. Interest rates and terms for these types of loans may vary depending on the strength of the tenants or the borrower. In today's environment, many lenders are shying away from investment real estate in favor of owner-occupied real estate.

In conjunction with the real-estate-type loans, the lenders, more often than not, will take from the borrowers an assignment of leases, as additional collateral, whereby the borrower assigns the leases and rental payments to the lender.



The lender allows the borrower to collect the rents until an Event of Default occurs. Upon a default, the lender has the option to notify the tenants to pay the rent directly to the lender. The above-mentioned mortgage and assignment of lease must be recorded at the County Clerk's Office in the county where the property is located in order to perfect the lenders lien against the property.

On loans not involving real estate such as lines of credit or asset-based loans where the lender lends money to the operating company, the lender usually requires collateral to secure its loan. There are also other types of loans not covered in this article such as vehicle loans, government-insured loans, and participations.

In a line of credit loan or asset-based loan, the lender provides an amount of money to the borrower based on the values of the borrower's assets. Usually these types of loans allow the borrower to borrow up to the amount of the loan and pay it back, during the term of the loan, as the borrower sees fit (although the borrower must pay interest on the amount of loan proceeds outstanding) and reborrow again within the limits of the loan. This is usually termed a revolving loan. In some cases, the lender may restrict the borrowing and re-borrowing based on a formula such as 70% or 80% of the borrower's accounts receivables or 50% or 60% of its inventory.

By way of example, in the event the borrower is owed \$1,000,000 from its customers (they are called account debtors) the lender would lend the borrower 70% to 80% of its accounts receivable (usually with a restriction that the debt of the account debtor to the borrower is not more than 90 days past due), then the lender lends \$700,000 to \$800,000 based on the formula. The same holds true on inventory of the borrower. Here, however, the value of the inventory is determined by the lender, and there may be restrictions on the maximum amount of money to be lent to the borrower based on the inventory value (i.e., the borrower may have \$2,000,000 worth of inventory which under the formula set forth in the loan documents would permit borrowing \$1,000,000, however, the lender



may still limit the borrowing based on inventory to \$500,000).

The collateral for these type of loans is generally a lien or all assets of the borrower. Sometimes lenders will require additional collateral such as a mortgage on a related entity's property, a mortgage on a principal of the borrower's home, cash deposit, and/or life insurance on the principal with a collateral assignment of proceeds in favor of the lender, or a personal guarantee from the owner(s).

In order to secure the loan to the borrower, two things are needed: (1) a security agreement and (2) a UCC-1 filing. The security agreement spells out the collateral for the loan and pledges the same to the lender, and the UCC-1 also spells out the collateral and is filed in the UCC filing office of the state of the borrower's incorporation or formation (for LLCs). Of importance is the filing in the correct jurisdiction. For example, if the borrower was formed in California but its operation is in New Jersey, in order to perfect the lien, you must file the UCC-1 in California and not New Jersey (although this being said it is good practice to also file in New Jersey even though it does not give you a lien but it does put other creditors on notice that there is a transaction between the lender and the borrower).

Remember, you must have a security agreement and a proper state filing of the UCC in order to perfect your lien.

For more information, contact Michael A. Gallo at mag@spsk.com or (201) 225-2715.

SCHENCK PRICE, SMITH & KING, LLP CORPORATE AND BUSINESS LAW PRACTICE GROUP

Edward W. Ahart, Co-Chair | 973-540-7310 | ewa@spsk.com **Heidi S. Minuskin** | 973-798-4949 | hsm@spsk.com
Michael J. Marotte, Co-Chair | 973-631-7848 | mjm@spsk.com **Michael K. Mullen** | 973-540-7307 | mkm@spsk.com
Farah N. Ansari | 973-540-7344 | fna@spsk.com **Jason A. Rubin** | 973-540-7306 | jar@spsk.com
Daniel O. Carroll | 973-631-7842 | doc@spsk.com **Mark K. Silver** | 973-798-4950 | mks@spsk.com
Deborah A. Cmielewski | 973-540-7327 | dac@spsk.com **John E. Ursin** | 973-295-3673 | jeu@spsk.com
Richard J. Conway, Jr. | 973-540-7328 | rjc@spsk.com **Jason J. Waldstein** | 973-540-7319 | jjw@spsk.com
James A. Dempsey | 973-540-8898 | jad@spsk.com **John P. Allen** | 973-540-7303 | jpa@spsk.com
Douglas R. Eisenberg | 973-540-7302 | dre@spsk.com **Jennifer A. Golub** | 973-539-5203 | jgolub@spsk.com
Cynthia L. Flanagan | 973-540-7302 | clf@spsk.com **Ira J. Hammer** | 973-631-7859 | ijh@spsk.com
Michael A. Gallo | 201-225-2715 | mag@spsk.com **Robert F. McAnanly, Jr.** | 973-540-7312 | rfm@spsk.com
Jeremy M. Garlock | 973-540-7358 | jmg@spsk.com **Benjamin (Jamie) G. Taub** | 973-697-3221 | jgt@spsk.com
Heidi K. Hoffman-Shalloo | 973-540-8234 | hkh@spsk.com **Nadine Yavru-Sakuk** | 973-798-4962 | nys@spsk.com
Thomas L. Hofstetter | 973-540-7308 | tlh@spsk.com **Ryan E. Gallagher** | 973-798-4953 | rg@spsk.com
Joseph Maddaloni, Jr. | 973-540-7330 | jmj@spsk.com

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