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LEGAL UPDATES FOR BUSINESSES

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Like you, we are trying to get back into a more normal work and practice routine in this chaotic and difficult year. We hope that you and your businesses are managing through this time and beginning to see progress. The diversity of the subjects covered by the articles in this issue of our corporate and business counseling newsletter illustrates just a few of the unprecedented breadth of challenges facing business owners and managers today. Some of the issues are relatively new and may be Covid related. Others merely reflect on-going and more enduring considerations. Regardless, we are here to be a resource for you. Whenever we can be of assistance, please don't hesitate to reach out.

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Employment

New Jersey Supreme Court Compels Arbitration of N.J.L.A.D. Lawsuit Based Upon "Employee's Assent" to Mandatory Arbitration

By Michael K. Mullen, Esq.

On August 18, 2020, the New Jersey Supreme Court issued an important opinion in the matter of Amy Skuse v. Pfizer, Inc.

While commentators have identified the State Supreme Court's opinion as an important, if not precedential, opinion, it is important to keep in mind that the decision was rendered by a divided court. In a concurring opinion and a dissenting opinion, Justice Albin and Chief Justice Rabner warned that potentially more significant issues lurked in the context of arbitration agreements within the employment context.

In the case at hand, Pfizer's Human Resources Department sent an e-mail to Pfizer employees at their corporate e-mail addresses announcing Pfizer's new, five-page Mutual Arbitration & Class Waiver Agreement and included a link to that particular document. The following language appeared in bold font on the final page of the Agreement:

> You understand that your acknowledgment of this Agreement is not required for the Agreement to be enforced. If you begin or continue working for the company sixty (60) days after the receipt of this Agreement, even without acknowledging this Agreement, this Agreement will be effective, and you will be deemed to have consented to, ratified and accepted this Agreement through your acceptance of and/or continued employment with the Company.

The e-mail also included a link to a document that listed "Frequently Asked Questions," including "Do I have to

agree to this?" to which the response indicated "The Arbitration Agreement is a condition of continued employment with the Company. If you begin or continue working for the Company, sixty (60) days after receipt of this Agreement, it will be a contractual agreement that binds both you and the Company."

Pfizer wound up terminating the employment of the plaintiff a number of months after her receipt of the subject e-mails. Thereafter, she filed suit claiming that Pfizer had discriminated against her on the basis of her religious objection to be vaccinated for yellow fever.

The trial court dismissed the Complaint, thereby compelling arbitration. The Appellate Division, while criticizing the delivery of the Agreement by e-mail and the repetition of the arbitration requirement through a "training module," reversed.

The matter then proceeded to the State Supreme Court where special interest groups were active through the filing of amicus briefs.

The divided Supreme Court reversed the Appellate Division and reinstated the trial court's order dismissing the case on the basis of a binding arbitration agreement.

In his concurrence, Justice Albin noted that despite any displeasure he might have with the on-line waiver-of-rights procedure used by the employer in this instance, the totality of the evidence persuaded him that the plaintiff clearly and unmistakably understood she was agreeing to submit any disputed employment issue to an arbitrator rather than a court. Justice Albin noted arbitration cases that have come before the State Supreme Court have generally addressed whether employees or consumers had clearly and unmistakably waived their right to seek relief in a judicial forum for breach of contract or some sort of statutory violation. Judge Albin seemed to lament that such provisions have hardly been perfect, but he projected that soon employers and corporations will develop the perfect, unassailable arbitration clause. Justice Albin noted that when every employment and consumer contract contains such a clause across an entire profession or industry, when employees and consumers have no choice but to waive their rights to resolve their disputes in a judicial form in order to get a job or buy a good, a more fundamental and profound question will arise as to whether such contracts of adhesion are contrary to New Jersey's most fundamental public policy – the constitutional right of a jury trial – and therefore, somehow unconscionable and unenforceable under the Federal Arbitration Act and its state counterpart.

Chief Justice Rabner dissented from the majority's opinion in that he disagreed as to whether there was clear and unmistakable proof that Pfizer's employees assented or agreed to arbitration. He asserted that neither the "acknowledgment" of the Company policy that Pfizer elicited from its employees, nor a one-sided declaration that consent would be deemed by default, met that standard.

The comments of these two Justices certainly raise issues as to how precedential the Pfizer decision might ultimately be. In the meantime, however, employers would be well-served to huddle with their attorney in order to measure where their own arbitration clauses may stand given the Pfizer opinion.

Subsequent to the Pfizer decision, the State Supreme Court dealt with a challenge to an arbitration agreement in the context of a dispute between an employee and the Jenny Craig weight-loss business. Interestingly, a less-than-perfectly worded and organized arbitration agreement was upheld, leading many commentators to proclaim that New Jersey was officially a "pro-arbitration" state, even despite the reservations expressed by Justices Rabner and Albin in the Pfizer matter.

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Contracts

Contracting for Events During the Time of COVID

By Rebecca J. Rosen, Esq.

Over six months into the novel coronavirus-19 (COVID-19) pandemic, event planners continue to struggle with their contracts for canceled, postponed, and new events. And despite what some may have thought, the arch of the virus has not been a linear one, such that there is no way of

predicting what the status of COVID-19 will be, even for events planned months in advance. At the outset, the event of COVID-19 elucidated a loophole in much contract drafting that is infrequently brought to bear—lackluster *force majeure* clauses. However, as the course of the virus evolved and event planners attempted to plan regardless of the status of COVID-19, attention has been drawn to less obvious provisions such as payment schedules and postponement clauses.

Force majeure is an incident over which neither party had any control, that causes an interruption or prevents performance by either party to a contract. Hurricanes, tornados, and fires are traditional examples of *force majeure*. At the onset of COVID-19 many people asserted that a *force majeure* event was triggered under their contracts that would excuse their performance. While reliance on the terms "epidemic" or "pandemic" to trigger the *force majeure* defense has been relatively untested by the courts, those with contracts containing those terms are generally more likely to be able to enforce their *force majeure* provisions than those without them. At the same time, regardless of whether a contract contains those terms within its definition of *force majeure*, those seeking to enforce their contracts, at least at the outset of the pandemic, were generally less likely to be successful based on the undeniable effect that COVID-19 had on canceling events.

As the pandemic has continued, those planning events have been more insistent on bolstering their *force majeure* clauses, including language such as "quarantine restrictions" and "government acts" within their definitions of *force majeure*. However, these additions only add so much in value, as the doctrines of illegality, impossibility, and impracticality already provide protection to those seeking to excuse performance due to, for example, an executive order prohibiting such performance. Moreover, as State and local governments have shifted to allow for large gatherings regardless of the presence of COVID-19, *force majeure* clauses have become less relevant for those seeking to cancel or postpone their events.

Meanwhile, provisions such as payment clauses have become more important in practice. For example, those event contracts with small deposits and the majority of the payment due on or immediately before the event have been easier to "cancel", as people know that it will be difficult for the event host to recoup the balance of the payment that has not been made. Those hosting events may want to consider altering their contracts to require a greater deposit, and/or more substantial payments due sooner, to ensure they do not lose money on an event canceled at the eleventh-hour due to COVID-19 concerns. Yet another way to plan around COVID-19 that can be mutually beneficial to both parties, is the institution of a postponement clause. This can be done by including within the *force majeure* provision that, if there is a triggering event, the parties will agree to hold the event at a later date. By doing this, both parties avoid ultimately losing out on the benefits of the contract.

While COVID-19 has certainly presented new problems in contracting for events, event planners can protect their contracts by enhancing these provisions and through other creative ways of ensuring performance.

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Banking

Secured Transactions Strategies Concerning UCC Filings

By James A. Dempsey, Esq.

As we are aware, the COVID-19 crisis earlier this year is having a lasting impact on all businesses, with a particular emphasis on the financial and lending sector. While the U.S. Government has been very proactive under the CARES ACT with financial assistance to businesses, lenders and financial institutions are under increasing stress to manage portfolios and monitor financial performance at levels and frequencies probably not seen since the 2008-2009 Great Recession.

When a creditor lends money to a business, the creditor will typically be granted a security interest in the assets of that business and the creditor will file a Uniform Commercial Code ("UCC") Financing Statement in the proper jurisdiction of the debtor to obtain a secured "perfected" lien position. The general rule under the UCC is "first to file" takes priority (there are also different rules

for different collateral that will not be discussed herein). It is vitally important for a lender to be in a secured position for a number of reasons, including the potential bankruptcy filing of the debtor. Under a bankruptcy petition, the status of a lender being classified as a secured creditor is integral in a lender's ability to hopefully be paid back on some portion of its debt before other unsecured creditors. Unsecured creditors fall to the bottom of the payout food-chain, which is not the position in which a creditor wants to find itself.

While a secured lien position does not help the financial status of a debtor, it certainly may go far in facilitating a lender's repayment recovery of the debt through a liquidation of the assets of the debtor. A lender will be unable to commence this process if their lien position is anything other than first as it will have to deal with other such secured creditors. Moreover, under the UCC, a lender with a priority position may contact an account debtor (the party who owes money to a debtor for goods and/or services performed by the debtor) to directly remit payments to the lender. This strategy is a valuable tool in the reduction of debt owed to a lender as they seek to analyze their loan position and assess the risk of a default.

Finally, in the current economic environment, it is important for lenders to take a step back and review their portfolios now not only from a credit perspective, but also from a legal analysis to make sure their UCC filings are valid and effective and to determine if any other creditors have filed a competing UCC financing statement. More importantly, the creditor needs to ensure its lien position is where it should be as contemplated under the original credit approval in an effort to avoid any surprises if the credit quickly deteriorates and defaults start to arise.

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Health Law

Corporate Practice of Medicine in New Jersey

By Daniel O. Carroll, Esq. and Meghan V. Hoppe, Esq.

Corporate attorneys representing licensed professionals and their clients must be aware of unique legal issues and rules that impact the way such professionals are allowed to organize and conduct their business operations. In particular, physicians in New Jersey and their attorneys must take care to comply with the state's corporate practice of medicine ("CPOM") mandates, which prohibit unlicensed or lesser licensed individuals (directly or indirectly) from practicing medicine or otherwise controlling or influencing the treatment of patients. Fundamentally, the CPOM doctrine attempts to avoid the conflict created by non-physician shareholders who may prioritize profits and the interest of the corporation over the interests of patients and patient care.

New Jersey has promulgated statutes and regulations to ensure that only licensed professionals can practice medicine and provide medical care to patients in New Jersey. As such, unlicensed or lesser licensed individuals and general business corporations generally may not employ licensed physicians to provide medical services. New Jersey's CPOM is primarily implemented via New Jersey Board of Medical Examiners' regulations (N.J.A.C. 13:35-6.16(f)), which restrict the practice of physicians to the following professional practice forms with specific structural conditions:

1. A sole proprietorship to render services within the scope of practice of the physician's license;
2. A partnership, professional association or limited liability company, provided such entity is composed solely of health care professionals, each of whom is duly licensed or otherwise authorized to render the same or closely allied professional service within New Jersey;
3. An associational relationship with another practitioner or professional entity, whether as an employee or independent contractor, as long as quality control of the professional services is supervised and evaluated by a practitioner with an equal or plenary license. For

example, a physician with a plenary license (i.e. M.D. or D.O.) may be employed by another plenary licensed physician but may not be employed by a podiatrist (D.P.M.), chiropractor (D.C.) or certified nurse midwife (C.N.M.);

4. An employee of a general business corporation only in limited situations, for instance where the corporation is a facility licensed by the New Jersey Department of Health and Senior Services or the corporation maintains a medical clinic for the purpose of providing first aid to customers or employees; and

5. An equity or employment interest in a professional practice which is a limited partner to a general business corporation (e.g. a management company) which, in turn, has a contractual agreement with the professional practice entity.

For professional associations or professional corporations, these regulatory requirements reinforce the statutory proscriptions of the New Jersey Professional Service Corporation Act, N.J.S.A. 14A:17-1 et seq., which already restricts the organization and ownership of professional corporations to one or more persons who are each duly licensed to render the same or closely allied professional service (e.g. physicians or doctors of medicine). The statute also defines what qualifies as "closely allied professional services" and establishes restrictions on who may serve as directors and officers in certain situations.

CPOM issues are likely to arise when unlicensed or lesser licensed individuals who have experience with ancillary aspects of the healthcare industry seek to participate (directly or indirectly) in the revenues generated by licensed physicians. If a licensed physician cedes too much control to such individuals, then the physician's ability to exercise professional judgment for patient care is subjugated to the control of non-physicians potentially running afoul of New Jersey's CPOM regulation and violating New Jersey's Insurance Fraud Prevention Act, N.J.S.A. 17:33A-1 et. seq. These circumstances are illustrated and discussed at length in the New Jersey Supreme Court opinion Allstate Ins. Co. v. Northfield Med. Ctr, P.C., 228 N.J. 596 (2017), where a chiropractor and his attorney were found to have violated the Insurance Fraud Prevention Act for improperly structuring a medical practice in violation of the CPOM prohibition.

When seeking to embark on new business opportunities, physicians and non-physicians alike must take care to structure such opportunities and related business arrangements in a manner that complies with New Jersey's CPOM regulations. It is essential to seek the advice of experienced legal counsel to navigate these sometimes-challenging issues.

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Environmental

New Jersey Legislature Passes Significant Environmental Justice Bill

By Michael K. Mullen, Esq.

In late August, the New Jersey Legislature succeeded in passing what is viewed by some as a landmark environmental justice bill. Additionally, many people have expressed some concerns regarding the extent of the bill, including, but not limited to, its significant permit implications.

Governor Murphy signed the legislation into law on September 18, 2020.

New Jersey has long had some statutory provisions which seek to advance the interests of "environmental justice," particularly as the same relate to New Jersey's urban areas.

Such earlier legislation was largely regarded as somewhat rudimentary and tended to focus on notice and record-keeping matters. Attempts to create more serious

environmental justice legislation in New Jersey really go back over a decade. Commentators believe that this latest bill has moved farther than any prior attempt has before. Some view the legislation as the strictest law of its kind in the country.

Under the legislation, New Jersey's Department of Environmental Protection (NJDEP) would have to consider the impact to "overburdened communities," posted by certain new facilities along with expansions of those facilities or renewals of major source permits. The legislation is slated to be effective 180 days from enactment.

This particular legislation singles out any sites that are major sources of air pollution, along with "resource recovery facilities or incinerators," along with landfills, transfer stations, sludge processing plants and scrap metal facilities. The legislation also encompasses recycling facilities receiving at least 100 tons of recyclable material per day.

The legislation defines impacted communities within Census Block Groups with either 35% or more of households qualifying as low-income, at least 40% of residents being citizens of color or at least 40% having reduced English proficiency.

Estimates forecasted by lawmakers and projected by various interest groups suggest that 300 of New Jersey's 565 municipalities could have at least one community that falls into those categories and their parameters.

Sites or proposed developments in affected areas would need to prepare an environmental justice statement and transmit it to the relevant municipality at least 60 days prior to any public hearing. Any decision as to the use or expansion of the site delayed at least 45 days following the requisite public hearing and the NJDEP would ultimately be free to deny a permit on environmental justice grounds.

Not surprisingly, passage of the legislation came despite serious opposition from many business stakeholders. Many of such stakeholders have said that the legislation is vague, with uncertain and unclear impacts. Some members of the industry have also said that they feel particularly singled out, as the bill directly targets waste and recycling facilities.

Not surprisingly, some commentators and experts with knowledge of the process have suggested the legislation could prevent the creation and continuation of a number of facilities and even several supporters of the legislation have admitted that it could hinder certain new business efforts. Experts have estimated that the costs of the environmental justice statement and the public hearing process alone could well exceed $50,000. Additionally, people are forecasting higher operational and administrative expenses associated with the new legislation.

In addition to the bill receiving significant support from impacted communities and environmental groups, it has drawn the support of Governor Murphy and Senator Cory Booker.

While the legislation, sought by the environmental justice community for some time, is viewed by many advocates as one of the strongest measures in the country to give local communities the ability to fight new power plants, incinerators and manufacturing facilities within their borders, many are concerned that the effect of the same in terms of the expansion of New Jersey's business community is hurtful, particularly in the time of COVID-19 and with so many New Jersey workers out of work.

As a postscript to the new legislative initiatives involving environmental justice, the State Attorney General's Office has recently filed twelve new environmental enforcement actions that specifically target polluters whose actions threaten the health and safety of residents in minority and lower-income neighborhoods in Newark, Orange, South Orange, Paterson, Jersey City, Elizabeth, Hillside, Fairton and Upper Deerfield Township.

These lawsuits are part of an agenda to address harms disproportionately affecting the public and the environmental health of New Jersey's low income, non-English speaking and minority residents.

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Corporate

Certified B Corporation, Public Benefit Corporations and the Impact to Corporate Governance

By Jamie Taub, Esq.

A basic tenet of U.S. corporate law is that a corporation exists to maximize shareholder wealth, and it is the primary duty of a corporation's directors and officers to achieve that goal. As succinctly explained in the oft-cited Michigan Supreme Court case over 100 years ago, Dodge v. Ford Motor Co., 204 Mich. 459, 507 (Mich. 1919):

> "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes."

Subject to certain leeway provided to directors and officers under what is known as the business judgment rule, this duty to maximize shareholder wealth has continued to this day.

However, over the past several years, there has been a growing movement in the corporate world to focus not only on the bottom line for a company's shareholders, but also the societal and environmental impact of its operations. This movement is championed by a private, non-profit organization called B Lab, as well as by several state governments that have adopted "public benefit corporation" statutes.

Formed in 2006, B Lab has developed the "Certified B Corporation" certification mark ("B Corp" for short), with the "B" standing for "benefit" working toward what they call a "B economy" consisting of more socially conscious companies. B Lab certifies companies as a "Certified B Corporation" that have committed to a social or environmental mission, agreed to take steps to legally include this mission into its governing documents, and agreed to provide biannual impact reports to B Lab to measure its social or environmental impact. This certification is available to limited liability companies as well. In addition, a certified company must convert into a "public benefit corporation" or "public benefit limited liability company" in their state of incorporation to the extent their state has a "public benefit corporation" statute as discussed below, and pay an annual fee to B Lab ranging from $500 for companies with up to $499,999 in annual revenue to $50,000 for companies with over $1 billion in annual revenue. Over 2,500 companies have become Certified B Corporations to date, including Patagonia, Seventh Generation, Method Products, and Ben & Jerry's, and you will notice the "Certified B Corporation" logo certification mark on their products.

State governments have also recognized that private companies desire to include social and environmental impacts into their decision-making process, at least in part due to lobbying from B Lab. Over the past 10 years, 36 states, including Delaware, New Jersey and New York, have adopted "public benefit corporation" or "benefit corporation" statutes. Certain states, such as Delaware, have also adopted "public benefit limited liability company" statutes. Pursuant to these "public benefit corporation" statutes, companies can initially incorporate as, or convert or merge into, public benefit corporations ("PBC"), which allow their directors to expand their focus beyond just the pecuniary interests of the shareholders. Instead, a PBC and its directors can and are, in fact, required to manage the business and affairs of the corporation in a manner that balances (1) the pecuniary interests of the shareholders, (2) the best interests of those materially affected by the corporation's conduct, including the corporation's employees, vendors, customers, the communities in which it operates and society at large, and (3) the specific public benefit or public benefits identified in its certificate of incorporation. States require the directors to take into account these and other societal factors when making business decisions, and PBC's are generally required to provide their state of incorporation and shareholders with biannual reports outlining the corporation's performance and results to accomplish their stated social or environmental mission. Given the overall change in interests between a typical corporation and a PBC, including the

changes to its director's fiduciary duties, many states require that a majority of the directors and two-thirds of the shareholders must approve a corporation converting or merging into a PBC. In addition, although a Certified B Corporation is required by B Lab to become a PBC if its state of incorporation has a "public benefit corporation" statute, a PBC is not required to become a Certified B Corporation.

One thing to note is that a PBC is not to be confused with a nonprofit company. A PBC may share some of the same public benefit interests as a nonprofit, but a PBC is still a "for profit" company that issues dividends to its investors and is governed by different laws than nonprofits. Further, becoming a PBC or public benefit limited liability company does not affect the underlying tax status of the entity, and it will still be taxed in the same manner as a normal C Corp., S Corp. or limited liability company.

While the movement toward Certified B Corporations and PBC's is still in its infancy, these alternatives in corporate structure are useful considerations for those companies, directors, and impact investors that are looking to have a legal basis to address social and environmental issues while also making a profit.

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