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LEGAL UPDATES FOR BUSINESSES

October 2023

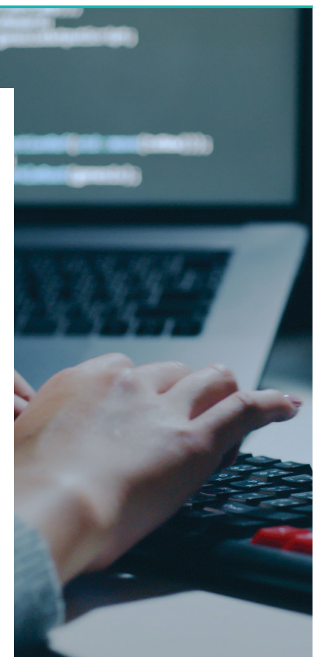
This edition of *Legal Updates for Businesses* clarifies some interesting issues many organizations face, including the legalities involved with launching a website, conflict-of-interest transactions, flood disclosure requirements, environmental remedial actions, and lending against consigned inventory.

As always, there are legal matters—many and varied—that must be given consideration in order to protect your entity from legal liability and/or potential penalties. A vital part of our job, as attorneys in Schenck Price's Corporate and Business Law and Nonprofit Organizations Practice Groups, is to continually keep current on all changes in the law and assess the implications for you, our valued client.

We are pleased to be your trusted advisor on all matters large and small. Please don't hesitate to reach out if one of our attorneys can assist—we are happy to help.

Edward W. Ahart, Esq.
Co-Chair, Corporate and Business Law and Nonprofit Organizations Practice Groups
ewa@spsk.com

Technology and Social Media



Questions You Should Ask Before Launching a Website

By Ira J. Hammer, Esq.

It seems so easy. All you have to do is pick and register a domain name, choose a vendor to operate and run the website, paste some content on the website, and you are ready to go. Beware, however, because what seems so easy at first can become a source of aggravation or later, even civil or criminal liability. Here is a list of some preliminary questions that you should ask when creating a website or engaging a third party to do so:

1. Is the content (text, pictures, videos, graphics, sound) that appears on the website originally created by website employees or is some or all of it copied or adapted from somewhere else? If it is copied or adapted from somewhere else, what proof (e.g., license) do you have that authorizes you to use the content? Only the copyright owner can give you permission to use the copyright owner's works. The problem is that determining who the copyright owner is and who has the authority to grant permission for the copyright owner is not easy to determine. Beware of websites that claim to have the right to license you to use content but have no evidence that they have been granted the authority to issue such licenses by the copyright owner.

2. What steps are you taking to protect your website against hackers and what protocols do you have in place to notify your customers and vendors in the event that there is a breach of your website's security?

3. Are you collecting personally identifiable information from your visitors or customers or other sensitive data (e.g., donor names and donation amounts)? If you are, (i) do you have their written consent to do so; (ii) what steps are you taking to protect such collected information from hackers; (iii) who are you sharing that information with, if anyone; (iv) how long are you retaining the information and (v) if asked by the visitor or customer, do you tell the inquirer what personally identifiable information you have collected regarding that visitor and, if requested to remove it, do you do so? What you are required to do by law will vary depending on where you are operating and where your visitors and customers are located.

4. What data are you collecting from visitors without their permission? Most websites collect data that does not identify the visitor to help assure that the website will run smoothly. Such data may include the Internet Protocol Address the visitor is using, the operating system and type of computer hardware that the visitor is using, and the domain name from which the visitor accessed the website and flow information (e.g., which webpages the visitor visited and how the visitor navigated through the website). Even though this is not personally identifiable information, you may still be legally obligated to inform your visitors that you are collecting this data.

5. Are you going to allow communications between visitors or between customers on the website? It is not unusual to allow a visitor to post questions to the website owner (or operator) through the website and if it is just between a single visitor and the website owner, there is limited risk. That changes if you allow visitors to post information to the website and further allow other visitors to access and copy it. In that case, you must protect yourself against visitors who post content that does not belong to them (e.g., materials protected by a third-party's copyright registration) to the website.

6. Do you have website terms and conditions and a privacy policy that match the risks posed by your website? It may seem easy to copy these from another website, but there may be differences in your respective operations that require differences in those documents.

This is not a complete list of the questions you should be asking before making a website available to visitors, but it will provide you and your attorney with a good starting place to discuss the risks and potential liabilities you face from operating a website. Moreover, the terms and conditions and privacy policy that you adopt for your website will be guided by your answers to these questions. Particularly if you are using a third party to develop and operate your website, taking the time to ask these questions and making sure that you have complete answers will help you limit any liability arising out of the website.

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

Corporate and Business

Addressing Corporate Governance Issues in Conflict-of-Interest Transactions

By Daniel O. Carroll, Esq.

Under the business judgment rule, courts will normally defer to decisions made by a corporation's board of directors, however, that deference may be challenged or eliminated where a conflict of interest exists. Failing to adequately address conflicts of interest may expose directors to liability for breaches of fiduciary duties and invalidate action taken by the board. However, New Jersey statutory law expressly provides that contracts or transactions involving a corporation and one or more of its directors will not be void or voidable solely because of a director's conflict of interest if certain requirements are met. If the contract or transaction that is tainted by a director's conflict of

interest is either fair and reasonable to the corporation at the time it is approved or the conflict of interest is known or disclosed and such contract or transaction is approved or ratified by a majority of disinterested (i.e., not conflicted) members of the board, then the board's approval of such contract or transaction should be respected and not set aside.

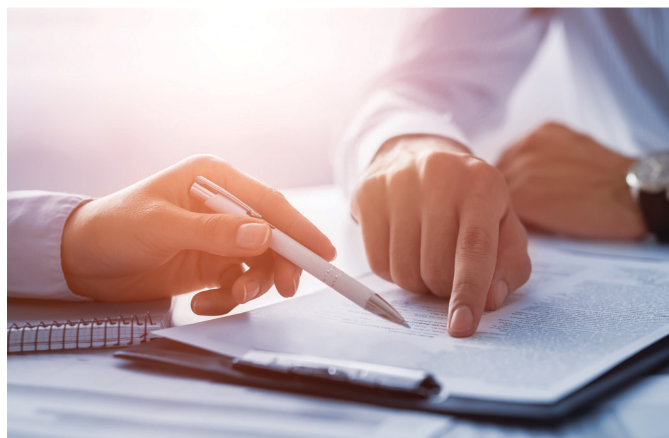
Importantly, merely following the manner for approving a conflict-of-interest transaction set forth in New Jersey statute does not provide the board's approval absolute protection from attack. New Jersey courts may still scrutinize, and even set aside, conflict-of-interest transactions where equitable bases dictate. Following the statute only means that the transaction is not voidable ***solely*** because of the conflict. In some circumstances, after a court reviews the disclosure of the conflict and the board's approval process, the court may undertake a further inquiry of the fairness of the transaction. Accordingly, boards of directors should take affirmative steps to avoid structural bias in their decision-making process and establish a record of true diligence, deliberation, and inquiry by members of the board (or committee) that are not interested or otherwise conflicted in the subject transaction or contract.

Corporations are well advised to adopt, maintain, and routinely review a conflict-of-interest policy for transactions and contracts that involve interested directors or related parties. Court cases in New Jersey and Delaware have acknowledged the importance of corporations proactively documenting steps taken by their board to identify conflicts and follow established procedures for ensuring directors with conflicts do not participate in the discussions or approval of a conflict-of-interest transaction or contract in a way that suggests undue influence or impropriety. Such measures may help avoid the board action from being later attacked and invalidated.

While New Jersey law would permit a corporation's board to approve a conflict-of-interest transaction by written consent, proceeding in such manner may not be sufficient to establish adequate deliberation, and approval by disinterested directors. For this reason, written consent of a conflict-of-interest transaction or contract should be avoided as the sole means of memorializing board action.

A best practice and a safe way to approve a conflict-of-interest transaction or contract is the use of a board committee consisting exclusively of disinterested directors. This will likely require the board to create a new special committee of disinterested board members specifically for the transaction or contract in question. Even if less than a majority of directors are disinterested, a transaction or contract may be approved provided the board can readily establish that the approval was not unduly influenced by directors who are conflicted.

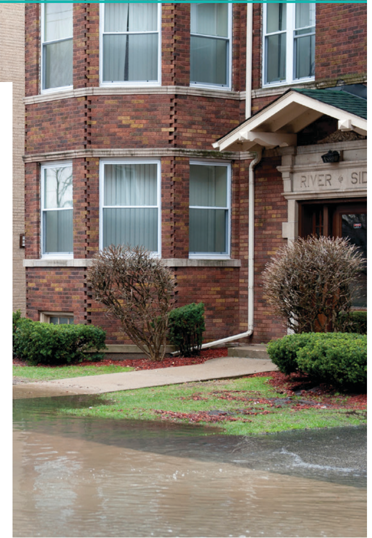
Additional best practices that boards may use to help establish a record of unbiased deliberation and fairness in the decision-making and approval process include (1) routinely using and reviewing conflicts-of-interest questionnaires, and (2) engaging outside independent consultants to render fairness opinions and valuations for disinterested directors to rely on when taking action to approve transactions or contracts with complex fact patterns.



Taking steps to establish a procedure for directors to follow will help corporations diminish the taint of conflicts. Implementing procedural safeguards, with the intent of purging conflicts of interest from board action and approval, should protect the board of directors from being second guessed and allow the board to fully exercise its corporate management authority. Finally, maintaining a record of these procedural safeguards will provide courts with a sound basis for affording a corporation's board of directors the benefits of the business judgment rule.

For more information, contact Daniel O. Carroll at *doc@spsk.com* *or (973) 631-7842.*

Commercial and Residential Real Estate



New Flood Disclosure Requirements for Real Estate Landlords and Sellers

By Jason A. Rubin, Esq.

New Jersey recently became the 30th state in the United States to require disclosures from landlords and sellers of commercial and residential real estate regarding past flood damage to prospective buyers and renters. Incidents of flooding following moderate to severe weather events has the potential to cause significant damages to the owner or tenant of both residential and commercial properties. Data on flood damage incurred by commercial properties is scarce. However, according to to a 2022 report prepared by Millman Inc. commissioned by the National Resources Defense Council, there were 7,944 homes purchased in New Jersey in 2021 that were estimated to have been previously flooded. The expected annual flood damages for these homes was estimated to be over $18 million. According to the Millman report, over the course of a 15-year mortgage, the average expected damages to previously flooded homes equate to $25,175, and for a 30-year mortgage, the average expected damages to previously flooded homes equate to $50,351. Further accentuating the risk to homeowners, Millman Inc. estimated that less than 4% of homeowners in the United States carry flood insurance coverage.The new disclosures are designed to help renters and purchasers of real estate better analyze and assess the potential risks and costs of a flooding of the new property they are renting or purchasing.

Assembly Bill No. 4783 amends *P.L. 2001, c.313*, and supplements *P.L. 1960, c. 39 (C. 56:8-1, et seq.)* and was signed into law by Governor Murphy on June 30, 2023. The legislation requires landlords of all new leases and lease renewals, both residential and commercial, to provide specific disclosures regarding past flooding at the property as well as the potential for future flooding following water events. The law directs the New Jersey Department of Community Affairs (DCA) to prepare a Model Notice providing confirmation from the landlord whether any portion of the property: (i) is within the 100-year flood plain, (ii) is within the 500-year flood plain or (iii) "experienced flood damage, water seepage or pooled water due to a natural flood event, such as heavy rainfall, coastal storm surge, tidal inundation or river overflow," and if so, how many times those events have occurred. The law requires the New Jersey Department of Environmental Protection (NJDEP) to create a searchable website which allows owners to confirm whether their property is in such a flood plain. The notice would need to be signed by the tenant prior to or contemporaneously with lease execution either as a separate form or rider to the lease.

A failure by the landlord to provide their tenant with the notice and secure an executed copy would allow the tenant to terminate the lease and receive a return of all rent and other amounts prepaid for any period following termination. Tenants would also be allowed to seek damages from the landlord for costs incurred from flooding in certain instances.

In addition, the law places new obligations on the sellers of residential and commercial real estate. The law requires the DCA to update the Property Condition Disclosure Form generally attached to residential real estate contracts to incorporate new statements addressing various flood-related disclosure such as whether the property is in a 100- or 500-year flood plain, is mandated by federal law to be covered by flood insurance, or has a history of flooding. In addition, the new disclosures will require the owner to

confirm whether they have ever received flood assistance from FEMA or filed a claim for flood damage to the property with their insurance provider. The new Property Disclosure Form will be required for all sales or exchanges of real property "before the purchaser becomes obligated under any contract for the purchase of the property." The law does not specifically enumerate remedies to a purchaser should the seller fail to provide the Property Disclosure Form but a failure to do so would arguably expose the seller to various claims, including fraud.

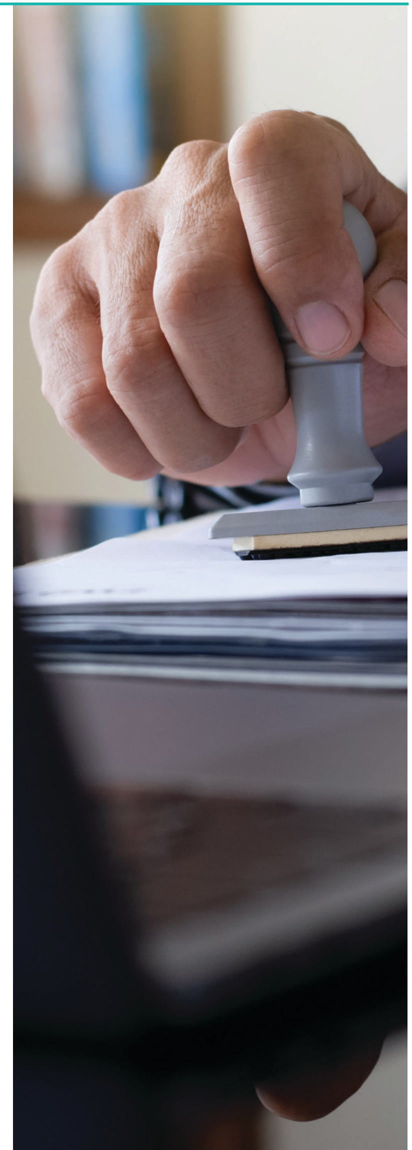
The new law will be effective 90 days after the regulations are put into effect, implementing the requirements of the law and the preparation of the Model Notice and forms and development of the searchable flood plain website, by the appropriate state agencies. At that time, necessary further guidance will be provided to allow commercial and residential sellers and lessors of real estate the information and resources they need to comply with this law in their future lease and sale transactions.

For more information, contact Jason A. Rubin at jar@spsk.com or (973) 540-7306.

Environmental

Expediting Your Project With the NJDEP—Prioritizing Five Types of Remedial Action Permit Applications

By Ryan E. Gallagher, Esq. and Heidi S. Minuskin, Esq.



In the post-COVID-19 era, numerous businesses and sites have seen significant delays from the New Jersey Department of Environmental Protection (NJDEP), resulting from backlogs of Remedial Action Permit (RAP) applications related to environmental cleanups. To address this situation as of July 3, 2023, the NJDEP has advised that it will prioritize five types of Initial RAPs.

The Prioritized Initial RAP applications focus on implemented remedial actions to determine whether certain applications can be expedited. The NJDEP has enumerated the five Prioritized Initial RAP Applications as follows:

Prioritized RAP Type 1: An Initial Soil RAP Application where the restricted use soil remedial action does not include an engineering control.

Prioritized RAP Type 2: An Initial Soil RAP Application where a presumptive remedy listed in Table 5-1 of *N.J.A.C. 7:26E-5.3* is used but is not required.

Prioritized RAP Type 3: An Initial Soil RAP Application where an alternative remedy pursuant to *N.J.A.C. 7:26E-5.3* has been pre-approved by the Department.

Prioritized RAP Type 4: An Initial Soil RAP Application where historic fill is the only area of concern being addressed by the RAP Application. Prior to submitting the RAP Application it is necessary that either: (i) a Preliminary Assessment Site Investigation (PA/SI) was conducted that indicates that all

of the Areas of Concern (AOC) at the site have or will be addressed with a final remediation document; or (ii) sampling that was conducted for the historic fill AOC has been submitted to the Department.

Prioritized RAP Type 5: An Initial Ground Water RAP Application for Monitored Natural Attenuation (MNA) where the extent of the Classification Exception Area (CEA) is limited to the property boundaries and no receptors are impacted.

If your site meets the requirements/conditions noted above, same would be entitled to have its Initial RAP Application prioritized. If your site has already submitted its Initial RAP Application, the site may still submit the Addendum to same for consideration by the NJDEP. Note, however, that the NJDEP will not accept any variances to these Prioritized RAP requirements/conditions.

Therefore, it is beneficial for sites to note whether their RAP Applications can be prioritized by the NJDEP in order to ensure compliance with applicable deadlines and laws.

For more information, contact Ryan E. Gallagher at rg@spsk.com or (973) 798-4953 or Heidi S. Minuskin at hsm@spsk.com or (973) 798-4949.

Banking and Finance

UCC Consignments and Lending Against Consigned Inventory

By James A. Dempsey, Esq.

Until recently, with the increase in retail bankruptcies and the after-effect of supply chain issues arising during COVID, there has not been a great deal of discussion in commercial finance regarding consignments under the Uniform Commercial Code (UCC). A consignment is defined in the UCC as a "transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale" (*UCC §9-102*). The "merchant" (i) must deal in goods of that kind under the name other than the name of the person making delivery, (ii) is not an auctioneer, and (iii) is not generally known to its creditors to be substantially engaged in selling the goods of others. Further, the goods must have an aggregate value of $1,000 or more at the time of delivery, the goods may not be consumer goods, and the transaction cannot create a security interest that secures an obligation.

A person delivering the goods is the consignor, and the recipient, the consignee. The consignor is the owner of the goods until a sale is consummated. In any consignment arrangement, there should be a well-drafted consignment agreement in place to protect the consignor and the consignee. One of the more important terms in a consignment agreement is the obligation of the consignee to remit proceeds of any sale of goods to the consignor as it is likely that a buyer of the goods dealing with the consignee will pay the consignee. The proceeds of the sale remain the property of the consignor. Consignments can also be governed by common law, but this article will focus on UCC consignments.

So now comes the more interesting issue regarding the interplay by and among, the consignor, consignee, the consignee's lender, and the lender of the consignor as to rights and security interests in the consigned goods. In order to perfect its security interest in goods, the consignor needs to properly file a UCC Financing Statement against the consignee.

A UCC search should also be performed against the consignee to determine if there are liens against inventory filed by a secured creditor. In cases where the transaction is a true consignment, the security interest created in the inventory is deemed a purchase money security interest, but certain steps need to be taken to comply with the protections of a purchase money security interest that we will not elaborate in this article, although important.

The concern of a lender dealing with consignment inventory of its borrower is two-fold—how to protect its security interests in such inventory and how to accommodate its borrower that deals in consignment inventory to allow advances under its credit line to be made against such inventory.

With some ongoing due diligence and properly drafted loan agreements, that should include covenants requiring consignment reports, sales, lien searches, and timely filing of UCC Financing Statements to name a few, a lender can accomplish both of these goals by providing financing on consigned inventory to its borrower, and more importantly, protecting its security interest in such consigned goods.

For more information, contact James A. Dempsey at jad@spsk.com or (973) 540-8898.

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

Edward W. Ahart, Co-*Chair* | 973-540-7310 | ewa@spsk.com

Michael J. Marotte, *Co-Chair* | 973-631-7848 | mjm@spsk.com

Farah N. Ansari | 973-540-7344 | fna@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

James A. Dempsey | 973-540-8898 | jad@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

Joseph Maddaloni, Jr. | 973-540-7330 | jmj@spsk.com

Heidi S. Minuskin | 973-798-4949 | hsm@spsk.com

Michael K. Mullen | 973-540-7307 | mkm@spsk.com

Jason A. Rubin | 973-540-7306 | jar@spsk.com

Mark K. Silver | 973-798-4950 | mks@spsk.com

John E. Ursin | 973-295-3673 | jeu@spsk.com

Jason J. Waldstein | 973-540-7319 | jjw@spsk.com

John P. Allen | 973-540-7303 | jpa@spsk.com

Jennifer A. Golub | 973-539-5203 | jgolub@spsk.com

Ira J. Hammer | 973-631-7859 | ijh@spsk.com

Robert F. McAnanly, Jr. | 973-540-7312 | rfm@spsk.com

Benjamin (Jamie) G. Taub | 973-967-3221 | jgt@spsk.com

Carly M. Clinton | 973-798-4961 | cmc@spsk.com

Ashley M. Fay | 973-798-4962 | amf@spsk.com

Ryan E. Gallagher | 973-798-4953 | rg@spsk.com

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