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LEGAL UPDATES FOR BUSINESSES

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Managing any businesses today is so challenging with so many legal requirements that govern all aspects of business life. Whether dealing with the myriad challenges of a real estate transaction, complying with HIPPA or corporate related requirements, or facing a jury when issues must be decided in the courts, today's business operators and owners have a great deal to consider. In this edition of our *Legal Updates for Businesses*, we highlight some of these issues for you and hope you find this publication helpful. We at Schenck Price are here to help guide you in the management of your businesses. Please reach out to us anytime if we can be of assistance.

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Commercial Real Estate

Potential COVID-19 Relief for Commercial Property Owners Being Considered by New Jersey Legislature

By Jason A. Rubin, Esq.

The COVID-19 pandemic had a widespread impact on business owners across all industries over the past few years. However, while many of the government programs enacted during the pandemic such as the Paycheck Protection Program and the Main Street Lending Program provided some form of relief for business owners in many sectors, a large segment of owners of commercial real estate were unable to realize the most beneficial aspects of these programs. These assistance programs required that a certain portion of the funds be used towards payroll, rent and other enumerated operating expenses. Many large institutional real estate investors qualified for those programs, and the funds they received as a result were instrumental in their ability to maintain operations through a challenging real estate leasing market. However, for smaller commercial real estate owners who may not have met the required thresholds for these overhead expenses, the government programs enacted to counteract the devastating impact of COVID-19 were either inapplicable or not impactful. Despite this, smaller commercial real estate owners provided rent forgiveness both voluntarily as a proactive measure to assist their tenants maintain occupancy, and as a necessity when their tenants were faced with significant rent arrearages that if required to be repaid would potentially jeopardize the tenants' ability to maintain a viable ongoing concern.

In an effort to partially offset the losses of commercial real estate owners who provided rent forgiveness to their commercial tenants, State Assembly member Aura Dunn (R) from New Jersey Assembly District 25 (Morris and Somerset Counties) sponsored and introduced Bill A50 on January 1, 2022. The bill is currently being considered

by the Assembly Commerce and Economic Development Committee.

The bill if passed would allow commercial real estate owners to deduct from their Corporation Business Tax or Gross Income Tax liability the value of any qualifying rent forgiveness that the taxpayer provided to an eligible business. In order to qualify as an "Eligible Business," the rent forgiveness must have been extended to a commercial, business, trade, wholesaling, retailing or other profit-making or nonprofit organization that leases all or part of a commercial property in New Jersey.

The amount of the "Qualifying Rent Forgiveness" permitted to be taken as a deduction is limited to 33.3 percent or $5,000.00, whichever is less, of the total amount of the rent forgiveness provided for each month, up to three (3) months (or an equivalent amount for a commercial lease that is not payable to the taxpayer on a monthly basis).

In total, the taxpayer is allowed to deduct from the taxpayer's income up to $15,000.00 cumulative rent forgiveness provided by the taxpayer to each eligible business that is a commercial property tenant of the taxpayer; provided, however, the deduction is limited to $15,000.00 per commercial unit (i.e. – in the case of a turnover of the unit, the taxpayer would not be permitted to deduct $15,000.00 for more than one tenant who occupied the unit during this period). In addition, the deduction will only apply to rent forgiven during the period commencing with the issuance of Executive Order No. 103 of 2020 in which Governor Murphy declared a state of emergency relating to the COVID pandemic on March 9, 2020 through September 30, 2020.

The deduction would not apply to rent forgiveness provided by the taxpayer to any business related to the taxpayer that is deemed part of the same "controlled group" or the same "affiliated group" as the taxpayer. The bill defines "Affiliated Group" as an *affiliated group* as defined in the federal Internal revenue Code 26 U.S.C. s.1504. A "Controlled Group" means a *controlled group* of corporations as defined in the federal Internal Revenue Code 26 U.S.C.s. 1563.

The bill has been certified by the Office of Legislative Services for a fiscal note from the Legislative Budget Office to provide an estimate of the financial impact of the proposed legislation on the state budget. Once the fiscal note has been completed, the Assembly Commerce and Economic Development Committee will complete its deliberations and determine whether to progress the bill to the next step in the legislative process.

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The Importance of a Survey When Purchasing Commercial Real Estate

By Robert F. McAnanly, Esq.

When acquiring commercial real estate, every buyer should seriously consider retaining a licensed surveyor to prepare a survey of the real estate being acquired. A surveyor will conduct a site visit to determine the boundaries and other physical characteristics of the real estate. The surveyor will collect data, including the location and type of any building, driveway, easement, and minimum setback requirement, if any. That data will then be depicted by the surveyor on a signed and sealed drawing, known as a survey.

Many people view a survey as an unnecessary expense. Often, they will not obtain a survey unless their lender requires one. The lender may not require a survey if it is able to obtain what is called a "no survey survey endorsement" to its loan policy of title insurance. While that endorsement may adequately protect the lender, its coverage does not normally extend to the new owner of the real estate.

"Big box" retailers will usually obtain an ALTA/ASCM survey which depicts the real estate to be acquired, in minute detail. That type of survey can be very costly and time-consuming to prepare. Most buyers of commercial real estate will not need such a survey. All buyers should, however, require that a survey include the following minimum components:

1. A complete perimeter "metes and bounds" description, together with a reference to the "filed map" description (a filed map is a map, recorded by an earlier developer, which remains of record in the county recorder's office), if any.

2. Depiction of all exceptions noted in buyer's title commitment, to the extent that they can be plotted. These would include items such as access easements, utility easements, conservation easements and building setback requirements.
3. The exact location and dimensions of all buildings, fences, driveways, and other improvements located on the real estate to be acquired. The survey should also depict any such improvements on neighboring property, if located within five (5) feet of the common property line.

Failure to procure an accurate survey and to ensure that the title agent "reads" the survey into the owner's title policy (effectively removing the standard survey exception) can expose the buyer to unforeseen problems. Certain issues that would be identified by an adequate survey include the following:

1. **Encroachments.** A building or other structure may extend from your property onto another property, or from that other property onto your property.
2. **Access.** The survey may reveal that access is only across property of another, alerting you to the need for an access easement.
3. **Conservation Easement or Restriction.** Conservation easements and other third-party restrictions may prevent you from developing all or a portion of the property that you are purchasing. To better understand those restrictions, you will want to review a depiction of the easement on a survey.

Unless you obtain a survey prior to acquisition of commercial real estate, it can be difficult to understand the nature and scope of these and other potentially negative "clouds" on title.

The above situations represent just a small sampling of the possible adverse issues that may exist unnoticed, in the absence of an accurate survey. If you would like more information on this topic, please feel free to call the undersigned or one of the many other experienced attorneys in our Corporate, Real Estate and Banking departments.

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Land Use

Buyer Beware – Of Easements

By John E. Ursin, Esq.

Technology, the pandemic, and the ever-increasing demand for efficiency have made real estate closings move faster and, often, fully remote. A closing is commonly consummated without any in-person conferences between the buyer and their attorney. In a fast-moving, remote setting, additional caution and diligence is required in reviewing title searches and, particularly, the easements that burden the property. Whereas previously the buyer and their attorney would review the title search in-person, it is now frequently sent in as a 100-page PDF.

There are many different types of easements. Many appear standard or non-material, but only a careful analysis can determine if they impair the value of the property. When a title company has disclosed and excluded the easement in the title commitment, the purchaser of the property is on notice of the existence of the easement and the title company will not be insuring any negative impact due to the easement. A few examples will illustrate the importance of careful analysis.

Right-of-way easements are common. Most right-of-way easements are described as a distance from the center line of the road. The right-of-way easement reserves a government's right to make changes to the road that may invade the property. A ROW might be 50 feet wide where there is only a 22-foot paved roadway. This means that up to 25+ feet of the property might be encumbered by the ROW easement. For a homeowner, this might restrict the ability to build a retaining wall or having to remove an existing structure in the ROW in the future if the road is expanded or realigned. For a commercial property, it is common for parking spaces to be located all or partially in the ROW. This means that commercial property could lose a material number of parking spaces, which, in turn, then limits the use.

Similarly, utility easements exist on nearly every property for power lines on poles as well as water and sewer pipes underground. These easements are necessary and benefit

the property. However, they must be carefully evaluated. Often utility easements have a right of access to service the power lines or pipes. A buyer should carefully evaluate how much notice is required to enter the property and whether the access is defined. Older utility easements might not define the location of the right of access. This essentially means that the utility company might have the right to enter and exit the property from any point they chose. For a homeowner, this might have significant privacy impact. For a commercial property owner, this might interfere with customers or business operations.

Underground utility easements can often have a significant impact on development of property. Underground utility easements may prohibit using sections of the property or require more expensive construction in the areas crossing the utility easement. This can significantly impair a property's development potential and value.

Stormwater easements create a right to direct water onto property. It might be from a neighboring property following an obvious watercourse with only a minor impact or it might be from a road catch basin discharging all the stormwater from the surrounding area.

It is also increasingly common to see conservation easements on portions of property, particularly in farmland and on commercial property where a portion of the property is environmentally sensitive. Conservation easements can vary widely in what is permitted and not permitted and may dramatically limit development potential and value.

A buyer of real estate must beware and take the time to review the title search and commitment with their attorney.

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Corporate

Statutory Procedures to Ratify Defective Corporate Acts

By Richard J. Simeone, Jr., Esq.

When forming a new corporation to begin a business venture, owners without legal representation are sometimes unaware of, and therefore fail to follow, required corporate formalities. Such failures may result in the commission of what are legally known as defective corporate acts. The issuance of more shares of stock than are authorized by the corporation (putative stock) is a common example of such defective corporate action. Unfortunately, defective corporate acts often come to light during the due diligence phase of a corporation's sale or a financing round, when the timing to correct such issues is critical. Prior to the passage of legislation by some states to allow corporations to remedy past defective corporate acts by ratification and validation, there was no definitive solution to this problem.

In most jurisdictions, including New Jersey, there is no statutory remedy for defective corporate acts. A minority of others, led by Delaware, have promulgated a statutory remedial process. The Delaware General Corporate Law ("DGCL") provides for the ratification and validation of defective corporate acts in Sections 204 and 205. Respectively, they set forth the processes under which the corporation itself may cure the defective action, or a party may seek relief from the courts. This note focuses on the former.

Prior to the passage of DGCL Section 204, the law in Delaware was ambiguous as to whether various forms of defective stock issuances were uncurable (void) or subject to cure (voidable). DGCL Section 204 brought clarity to the issue and delivered relief to companies by outlining a step-by-step process to cure defective corporate actions, regardless of whether void or voidable. In order to ratify the defective corporate act, the board must adopt resolutions stating: the defective corporate act or acts to be ratified; the date of each defective corporate act or acts; if such defective corporate act involved the issuance of shares of putative stock, the number and type of shares of putative stock issued and the date or dates upon which such putative shares were purported to have been issued; the nature of the failure of authorization in respect of each defective corporate act to be ratified; and that the board of directors approves the ratification of the defective corporate act or acts.

In addition to the foregoing requirements for ratification, Section 204 requires notification to the holders of record

of both valid and putative stock as of the time of the defective corporate act, as well as at the time the corporation's board ratifies the prior act. The notice must contain a copy of the resolutions adopted by the board and a statement that any claim by a party contesting the ratification must be brought within 120 days of the validation of the ratification.

Once the defective corporate act has been ratified, the corporation will be required to file a Certificate of Validation with the Delaware Secretary of State, if a filing would have been required at the time of the defective act. Also, if shareholder approval would have been required at the time of the defective corporate action, then shareholder approval by vote at a meeting or by consent, will be required at the time of ratification.

In addition to the handful of states that have adopted ratification and validation statutes following Delaware's passage of Sections 204 and 205, in 2015, the American Bar Association revised the Model Business Corporation Act ("MBCA") to provide for ratification and validation. As of January 1, 2022, New Jersey was not a state that had enacted the MBCA.

Remembering that the issuance of putative stock by a corporation is merely one example of possible corporate acts that may be considered defective because of the company's failure to follow the required corporate formalities, the owners, officers and directors of all corporations and limited liability companies are strongly encouraged to pay serious attention to the required formalities. Further, because Delaware is one of the few states that have provided a statutory remedy to correct these defects, companies in New Jersey and elsewhere where there is no statutory correction process, should be mindful that resolving these issues in litigation is nearly always expensive and full of uncertainty as to the ultimate outcome.

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HIPAA

HIPAA Right of Access Initiative: No End in Sight

By Deborah A. Cmielewski, Esq.

Since the inception of the Health Insurance Portability and Accountability of 1996 ("HIPAA") Right of Access Initiative (the "Initiative") in early 2019, the Office for Civil Rights ("OCR") of the United States Department of Health and Human Services ("HHS") has been relentless in its enforcement activities. In just three (3) short years, the OCR has completed a total of forty-one (41) enforcement actions, with absolutely no end in sight. Nevertheless, entities subject to the HIPAA right of access rules have persisted in their failure to comply with the Federal requirements. The OCR has continued to impose civil monetary penalties and onerous Corrective Action Plans to both curb this behavior and illustrate the necessity for individuals to have appropriate access to their health information.

Recognizing the need for a more patient-centered health care system where individuals can monitor their health conditions, correct errors in their health records, and comply with treatment plans, the OCR launched the Initiative in early 2019. The goal of the Initiative was to advance the fundamental rights of patients to receive copies of their medical records in a prompt manner at a reasonable cost. Subject to limited exceptions, the HIPAA rules require healthcare providers and health plans to respond to a record request within thirty (30) days. An entity receiving a request may obtain a thirty (30) day extension to respond, but it must furnish a written explanation for the delay and set a date that it expects to provide a response.

In September of 2019, the OCR announced its first settlement under the Initiative, requiring Bayfront Health St. Petersburg ("Bayfront") to pay $85,000 for failure to promptly respond to a mother's request for records concerning her unborn child. The associated Corrective Action Plan included the requirement for Bayfront to develop, maintain and revise its policies and procedures; furnish them to HHS for review, comment and approval; distribute the policies and procedures to its workforce; develop and administer a training program; identify and train business associates involved in fulfilling access requests; and provide ongoing reports to HHS, all within strict time frames.

In the forty (40) enforcement actions that followed the Bayfront Resolution, the OCR has imposed similar terms and conditions. Most recently, on September 20, 2022, the OCR announced three (3) more settlements, all arising from complaints filed against dental practices in 2020. OCR investigated the complaints and determined that the providers had potentially violated the HIPAA right of access provision. In each of the settlements, the providers agreed to enter into a Corrective Action Plan and pay a civil monetary penalty as follows:

Entity	Civil Monetary Penalty
Family Dental Care, P.C.	$30,000
Great Expressions Dental Center of Georgia, P.C.	80,000
B. Steven L. Hardy, D.D.S., LTD	25,000

Entities subject to the HIPAA right of access rules must be prepared to respond to requests for information immediately. It is crucial to maintain updated policies and procedures and to regularly train the workforce, so that they ready at all times. Failure to heed the OCR's warning could result in dire consequences that includes a relationship with HHS for a long time to come.

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Litigation

Juries Have Been Trained to Not Give Corporate Defendants the Benefit of the Doubt

By Mark K. Silver, Esq.

It is not novel to state that the profession of law has lost the trust of the public. Members of the public have lost faith not only in the lawyers, but in the justice system as a whole. Juries are more skeptical of corporate defendants and their attorneys. One result has been the increasing number of large punitive damage awards. No single change has led to this situation. Rather, a combination of reasons has led to the current state of affairs. One of those factors is the portrayal of corporations and their lawyers in television and film.

Studies have shown that fictional programming has a much greater influence than the news on how people view the legal system. In a poll conducted of mock jurors, one responded, "I don't read the paper, but I watch *Law & Order* every week and since their stories are drawn from the headlines, that's how I keep up with current events." (Response from undergraduate student). Even more, jury research also indicates that television has a more profound influence on jurors than movies because of prolonged, serialized interaction and growth of character knowledge over time. Research also shows that "repeated information is often perceived as more truthful than new information." Information presented at the beginning (primacy) and the end (recency) of a presentation tends to be retained better than information presented in the middle. Therefore, it is fully understandable that beloved television characters who come into a viewer's living room every week shape the audience's perception.

Prior to 1986, portrayals of lawyers were few and not very realistic. The most well-known example is *Perry Mason*. *Perry Mason* ran for 9 seasons (271 episodes) and numerous follow-up movies of the week. In all that time *Mason* lost exactly one case. Then, starting with the 1986 premiere of *L.A. Law*, television producers strived to show the more "realistic" side of the law. In doing so, the TV industry launched a 40-year onslaught of corporations portrayed as the "bad guys." *L.A. Law* attacked the insurance industry. *The Practice* took on the tobacco lobby and the asbestos manufacturers. *The West Wing* demonized the oil industry for environmental pollution. *Rebel* condemned the pharmaceutical industry. Every week for the better part of four decades, the "heroes" of legal world have come into consumer homes and attempted to vanquish the "villains of big business."

So how does one combat said incessant subliminal programming? It needs to happen at the beginning of any litigation. In fact, it needs to start before litigation begins. Developing the theme of the litigation or the company's story is crucial to a successful defense. Ideally, the company can tell the jury about its history of "good deeds". Whether it is the way it treats its employees, or its safety record, or its charitable donations, a company needs to combat the image of being the villain, by showing it is the hero. Documentation and press publicity of such acts is always a plus.

In addition, in the event the case makes it to trial, your counsel needs to vet your jurors for their negative attitudes towards the legal system and lawyers, and the possibility that those attitudes will color their deliberations. Jurors who are predisposed through their own experiences to think the worst of lawyers will find confirmation in the unethical portrayals on television, but they will most likely disclose their prejudices when asked about their own experiences.

There are myriad ways to discover inherent juror bias and protect the company reputation.

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[1]Jurors have shown a propensity to also take the law in their own hands. In *In Re: Stephen Miele*, a juror was found in contempt of court and fined over $11,000 for conducting his own internet research on the Defendant and sharing it with his fellow jurors. Case No. 1:21-mc-7 (DNJ 2021).

[2]Elayne Rapping- "The History of Law on Television".

[3]Dr. Cynthia Cohen – "Media Effects from Television Show- Reality of Myth?"

[4]Aumyo Hassan & Sarah J. Barber -"The effects of repetition frequency on the illusory truth effect" (May 13, 2021)

[5]"Primacy-Recency". *ADV 382J: Fall 2001, "Theories of Persuasive Communication & Consumer Decision Making". Center for Interactive Advertising, The* University of Texas at Austin. 2001.

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