



Expansion of the Tax Bulk Sales Notification Requirements to Commercial and Residential Rental Properties

By Arnold D. Litt

N.J.S.A. 54:50-38 (the “New Provision”) was adopted on June 28, 2007, by Governor Corzine, which expanded the tax bulk sale notice required under Section 54:32B-22(c) (the “Old Provision”) of the New Jersey Sales and Use Tax Act. The Old Provision stated that a purchaser of the whole or any part of a seller’s business assets, other than in the ordinary course of business, must notify the Division of Taxation of the State of New Jersey of such sale or transfer at least 10 days in advance of closing thereunder, whenever the Seller is required to collect a sales or use tax. Failure to provide such notice resulted in the purchaser becoming liable for the amount of past sales tax obligations of the seller. N.J.S.A. 54:50-38 now expands the tax bulk sale notice and makes it applicable to any transaction in which a seller makes a bulk sale, not just when the seller is required to collect and remit sales or use tax. Failure to comply with the notice requirement results in the purchaser becoming liable for all State tax obligations of the seller, not just sales and use tax. The business assets will be subject to a first priority right and lien for such taxes.

It would thus appear that even in connection with the sale of commercial real property on which there is an apartment house, for example, owned by the Seller of the real property, the sale of such property would be subject to the expanded requirements of

N.J.S.A. 54:30-38. It also appears that it doesn’t matter whether or not the “business” is owned by the Seller, so long as he realizes income therefrom, even rental income. Sellers, purchasers and their attorneys need to become familiar with these provisions, and if

necessary, file the appropriate notice forms.

Should you have any questions with regard to the above, or require copies of the applicable forms, please feel free to contact Arnold D. Litt, Real Estate Group Chairperson.

Insurance Companies Canceling Policies

By Daniel Y. Gielchinsky

As the economy continues to suffer, many insurance companies find themselves struggling to meet their projected income goals. As a result, many insurance companies have been focusing their efforts on canceling policies that they no longer view as profitable. Most often, these insurance companies look for technical defaults of an insurance policy, such as a delayed or late payment, and use the technical default as an excuse to cancel their policies.

Can they do this? The short answer is yes. Once a policy of insurance has been issued, except for reasons specifically stated in the policy, it may not be cancelled. State law limits what a company can include in the cancellation provisions of its policies. Most, if not all, policies are subject to cancellation for failure to timely make required pre-

mium payments, as well as for misrepresentation or fraud by the policyholder.

Property and liability policies are typically issued for a “term”, such as six months or one year. The limitations on cancellation apply only during the term. Insurance companies are able to elect to discontinue these policies at the end of the term for any reason, except a reason that would be prohibited by law. An insurance company is typically required by law to give the policyholder written notice that they intend to non-renew a personal auto or homeowner’s policy at least 30 days prior to the end of the policy term.

We are seeing frequent cases of business and real estate related policies

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News from Herten Burstein

- **Michael I. Lubin** has been named a Fellow of the Litigation Counsel of America (LCA).

Mr. Lubin concentrates his practice in the areas of civil and chancery litigation and appeals. He has practiced law for 36 years, is licensed in New Jersey and New York and has been Certified by the Supreme Court of New Jersey as a Civil Trial Attorney.

The Litigation Counsel of America is a trial lawyer honorary society composed of less than one-half of one percent of American lawyers. Fellowship in the LCA is by invitation only, and selections are based upon effectiveness and accomplishment in litigation, both at the trial and appellate levels, and superior ethical reputation.

Thomas J. Herten is a Founding Fellow of the Litigation Counsel of America.

- **Andrew T. Fede** published an article that appears in the October 2008 edition of the *New Jersey Lawyer Magazine*. The article is titled "Telephonic and Email Communications and the Open Public Meetings Act." It discusses legal issues that arise when public officials discuss the public's business using electronic communications technology that was not in existence when statutes such as the Open Public Meetings Act were adopted. Mr. Fede is the Borough attorney for Norwood.

- **Daniel Y. Gielchinsky** has joined the 2008-2009 session of the Bankruptcy Inn of Court as a Barrister. Dan continues to serve the Morris Pashman Inn of Court as Barrister as well. In addition to practicing in the commercial litigation and land use fields, Dan is the partner responsible for handling bankruptcy matters within the firm.

- **Gerald C. Escala** was a panelist at the ICLE seminar on "Contested Guardianships" last month (October) in New Brunswick.

- In the November 2008 issue of OP-ERA NEWS, **Gerald C. Escala** authored an article on Backstage Tours at the Metropolitan Opera House, Lin-

coln Center, New York, where he volunteers several times a month as a tour guide (backstage).

- **Thomas J. Herten, Terry Paul Bottinelli, Arnold D. Litt, Steven B. Harz, Andrew T. Fede, Michael I. Lubin and Gianfranco A. Pietrafesa** have been selected by their peers as 2009 "Super Lawyers." The list of 2009 Super Lawyers will appear in a future issue of *New Jersey Monthly*.

- Our firm is proud to note that our member **Steven B. Harz** was also designated a national "Super Lawyer" as one of the top labor and employment lawyers in the country in the December 2008 issue of Super Lawyers—Corporate Counsel Edition.

- **Terry Paul Bottinelli** has been re-appointed to the Supreme Court Arbitration Advisory Committee for its 2008-2010 term.

Bank Violates Truth in Lending Act

A husband and wife who operated a day-care business out of their home decided to take out a new mortgage on the home. Over the 10 years that they had owned the business they had taken corresponding deductions and depreciation on their tax returns to account for the business run from the home. As calculated for tax purposes, approximately 17% of the home was devoted to the day-care business, even though during the hours when the day-care business was open about 52% of the home's square footage was devoted to that use.

The homeowners came to realize that their lender had dramatically increased their monthly payments and had sent the loan documents to them when it was too late by law for them to change their minds (more than three days after they signed the papers). They sued the bank under the federal Truth in Lending Act (TILA), asking that the loan transaction be rescinded. Among other things, TILA requires lenders to provide particular disclosures to borrowers of "high-rate" loans when points and fees exceed 8% of the amount borrowed. The bank had not made these disclosures to the borrowers at least three days ahead of the

transaction, as required by TILA.

The bank's response was two-pronged. First, it argued that TILA did not even apply to the case because of an exemption in the law for extensions of credit primarily for business or commercial purposes. Second, the bank took the position that the points and fees that the homeowners were required to pay could not count toward the 8% threshold because the homeowners had folded those costs into the loan instead of paying them up front in cash. A federal trial court sided with the homeowners on both points, allowing their case to go to trial.

Regarding the bank's claim that the "business purposes" exception in TILA should apply, the key fact was that, properly calculated, only a small percentage of the home was devoted to the business, thus defeating any attempt to argue that the loan was primarily for business or commercial purposes. As for the fact that the points and fees were financed, not paid in cash, this method of payment was of no consequence for purposes of meeting the 8% threshold. The applicable statutory language says only that the

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Age Discrimination in Employment

When the federal government required one of its defense contractors to reduce its workforce, the contractor first evaluated its employees based on the criteria of “performance,” “flexibility,” and “critical skills.” After adding points to scores for years of service, the employer arrived at a list of 31 employees to be laid off. On their face, the criteria were age-neutral, but all but one of the employees chosen to receive a pink slip were at least 40 years old, within the age group protected by the federal Age Discrimination in Employment Act (ADEA).

The laid-off employees sued their former employer under the ADEA, alleging the disparate impact form of age discrimination.

The laid-off employees sued their former employer under the ADEA, alleging the disparate impact form of age discrimination. Disparate impact refers to the use of policies or criteria by an employer in making employment decisions that are not overtly based on age, but which, when applied, allegedly have a disproportionate impact on older individuals. (The other type of employment discrimination, known as “disparate treatment,” asserts that the employer intentionally treated applicants or employees differently because of their age.)

The plaintiffs first established, using statistical experts, that such a skewed result against older workers under the layoff criteria would rarely happen by

chance, and that the same factors that were most closely linked statistically to the older employees—flexibility and critical skills—were also the factors most influenced by the discretion of the contractor’s supervisors.

The contractor countered that it was not liable because the ADEA provides that an employer action is not unlawful if differentiation among employees is based on “reasonable factors other than age” (RFOA). A jury returned a multimillion-dollar verdict for the plaintiffs. Ultimately, the case reached the United States Supreme Court, which upheld the judgment for the plaintiffs.

The critical issue determined by the Supreme Court was whether the RFOA element needed to be proven by the plaintiffs or by the defendant employer. In other words, did the plaintiffs have to prove that there were no reasonable factors other than age underlying the employer’s decision, or did it fall to the employer to present an “affirmative defense” and prove the existence of the other reasonable factors? Examining the language of the ADEA and taking note of a previous ruling where a similar provision in the

law was in the nature of an affirmative defense, the Court ruled that RFOA is an affirmative defense that the employer must prove and, in this case, had not.

The Court’s opinion anticipated criticism, which, in fact, was forthcoming, that its decision could open the floodgates for similar claims and make it too easy for plaintiffs to prevail. It pointed out that, even before the RFOA affirmative defense comes into play, the plaintiff in an ADEA disparate impact case must isolate and identify specific performance practices by the employer that are responsible for statistical disparities disfavoring older workers. As the Court put it, “[t]his is not a trivial burden.”

However, concerns about tilting the scales too far against employers should be directed at Congress, according to the Court, since it created the RFOA concept and made it a defense to be proven by employers.

For more information on this matter or any other labor or employment law issue, please contact Steven B. Harz, Labor & Employment Group Chairperson.

TILA

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points and fees must be “payable” by the consumer at or before closing. The borrowers did bear the costs of the points and fees at the time of closing, no matter whether they were being paid then, deducted from loan proceeds, or, as happened here, added to the amount to be financed over time.

Working in favor of the borrowers on both points was the fact that TILA is a remedial statute to be construed and applied so as to achieve its goals of assuring the meaningful disclosure of credit terms and avoiding the uninformed use of credit.

For more information on these issues or any other banking or land use matter, please contact Nilufer O. DeScherer.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

Generation-Skipping Trusts

If you have heard of generation-skipping trusts (GSTs) at all, you probably think of them as a way for wealthy families to shield their fortune from estate taxes. That is true as far as it goes, but GSTs can also have benefits for the less well off by protecting assets from ex-spouses and creditors and by serving as a place for appreciable assets to grow outside of taxable estates.

Although the phrase “generation skipping” sounds like an arrangement which leaves out children altogether in favor of the grandchildren, in fact what a GST “skips” is the taxation of assets put into children’s estates by their parents. In a typical scenario, grandparents who are satisfied that their children are financially secure may decide to set up a GST in favor of all of their descendants as possible beneficiaries. Successive generations eventually receive the assets without the repeated imposition of estate taxes when each preceding generation dies. The assets are taxed only once, at the time of the initial transfer to the trust.

The first generation of children can be made to benefit as well. Although they technically won’t own the assets in the trust, they can be given a right to distributions for their reasonable needs, meaning not only their support and maintenance, but also “comforts, conveniences, pleasures, and happiness.” However, discretion over whether trust funds may be used for the benefit of the child must be exercised not by the child, but by a “disinterested trustee,” that is, someone who is not a related or subordinated person as defined in the Internal Revenue Code.

There is a limit on the amount that can be transferred into a GST. Currently, the limit is \$2 million for each person setting up the trust. In other words, a married couple could place up to \$4 million in a GST. In 2009, the per-person amount is set to rise to \$3.5 million. Any amount that is transferred in excess of the limit is subject to gift or estate tax when the older generation

passes along the assets, and an additional “generation-skipping tax” is imposed when the children die and the property is transferred to the grandchildren. The potential estate tax benefits of a GST are easy to see when it is considered that each dollar over the limit is taxed at the highest estate tax rate, which currently is 45%.

If there are downsides to a GST for some people, they may be found in the fact that someone outside the family (the trustee) will become intimately involved in the family’s money matters, and that it will be necessary to file

an income tax return for the trust each year. Still, under the right circumstances and with proper planning under the guidance of a professional, these and any other drawbacks for a GST could pale next to the bottom-line advantages realized as assets are passed from generation to generation without Uncle Sam taking his cut.

For more information on generation-skipping trusts or any other estate planning matter, please contact Andrew J. Cevasco or Louis C. Tomasella.

Insurance

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being cancelled due to minor delays in making monthly premium payments. Many times, an insurance company will go so far as to reject a late payment, send back the policyholder’s check, and cancel the policy. This can leave business and property owners in a dire situation, since most mortgages require that the borrower maintain insurance on the real estate or property that is the subject of the mortgage. As these people scramble to find a new insurance policy, they often find that insurers are unwilling to underwrite a new policy for a business or person whose previous insurance policy has been cancelled for late payment or non-payment. In some instances, those businesses or person must submit their application for insurance to a pool of bidders, and often find that their premiums rise drastically, and can even double.

In the personal insurance market, individuals who have multiple policies with one insurer, such as auto and home or renters insurance, find that if

they cancel one policy, the insurance company will cancel or non-renew their other policies. This dilemma spotlights the question of whether property insurers can hold a policyholder hostage by cancelling a homeowners or renters policy if an auto policy is dropped. Although insurance companies are prohibited from tying one line of business, such as homeowners insurance, to another, such as auto, it happens more than one would assume. Many of the instances where a policyholder is threatened with cancellation by an insurance company are not reported. Further, there are no set penalties for threatening to cancel a policy.

The bottom line is that insurance policy holders should be conscientious about paying their premiums on time, and even a bit early, too avoid cancellation of their policies for technical default. In addition, close attention must be paid to being forthright in all applications for insurance coverage.

Daniel Y. Gielchinsky is the firm’s Partner with responsibility for bankruptcy matters, and is also a member of the commercial litigation and land use departments.