VOLUME 14

FINEMAN KREKSTEIN & HARRIS, P.C.

SPRING 2004

LEGALNOTES

INFORMATION FOR OUR BUSINESS AND CORPORATE CLIENTS

IN THIS ISSUE

If you would like to receive this newsletter via e-mail, please register on our web site, www.finemanlawfirm.com

FINEMAN KREKSTEIN
& HARRIS, P.C.

1608 Walnut Street
19th Floor
Philadelphia, PA 19103
(215) 893-9300
Facsimile: (215) 893-8719

Montgomery County Office:
200 Four Falls Corporate Center
Suite 201
W. Conshohocken, PA 19428
(215) 893-9300
Facsimile: (610) 834-8550

New Jersey Address:
3 South Haddon Ave.
Haddonfield, NJ 08033
(856) 795-1118
Facsimile: (856) 795-1110

www.finemanlawfirm.com

RECENT CHANGES TO STATE DEATH TAXES; THEY MAY AFFECT YOU

Recent changes to the Estate tax section of the Internal Revenue Code have prompted a number of states, including Pennsylvania and New Jersey, to make some tax changes of their own. The changes were in response to the phase-out of the State Death Tax Credit to the Federal Estate tax.

The 2001 Federal tax legislation reduced the credit for state death taxes which were part of the calculation of Federal Estate Tax. Prior to 2001, many states had imposed a tax on death equal to the amount of the credit the IRS allowed an estate to take against Federal Estate tax, which was commonly referred to as a "Pick-Up Tax". The credit was determined by a schedule set forth in a section of the IRS Code. It had the effect of dividing the gross Federal Estate tax between the individual state in which the decedent resided and the Department of Treasury. The 2001 tax legislation phased out the State Death Tax Credit gradually from 2001 to 2005.

This change in the law has had a domino effect in many states. Some of those states, including Pennsylvania and New Jersey, stood to lose substantial revenue because their state's death tax was linked to the Federal Estate tax calculation that was being phased out by the new law.

Pennsylvania and New Jersey, as well as a number of other states enacted their own legislation to retain the death tax they would have otherwise lost. The good news is that for Pennsylvania residents, this new tax has recently been repealed because of the uproar it caused. For New Jersey residents, however, this Pick-Up Tax remains.

Unanticipated Taxes for Some Married Couples

Unfortunately, for many married couples this may have the effect of imposing a state death tax where none was anticipated after the first spouse's death.

Prior to 2001, because the Pick-Up Tax was only imposed on estates that had to pay Federal Estate Tax, estates below a certain threshold did not have to worry about such a tax. The thresh-

(continued on page 2)

CHANGES TO STATE DEATH TAX

Year	Federal Exemption Amount	Federal Credit Equivalent	State	State Exemption Amount	State Credit Equivalent	State Estate Tax with fully funded Credit Trust	Pick-Up Tax collected by State
2003	$1,000,000	$345,800	PA NJ NY	$700,000 $675,000 $1,000,000	$18,000 $17,000 $33,200	$18,000 $33,200 $33,200	$0 $16,200 $0
2004	$1,500,000	$555,800	PA NJ NY	$850,000 $675,000 $1,000,000	$25,200 $17,000 $33,200	$25,200 $64,400 $64,400	0 $47,400 $31,200
2005	$1,500,000	$555,800	PA NJ NY	$950,000 $675,000 $1,000,000	$30,400 $17,000 $33,200	$30,400 $64,400 $64,400	$0 $47,400 $31,200
2006-2008	$2,000,000	$780,800	PA NJ NY	$1,000,000 $675,000 $1,000,000	$33,200 $17,000 $33,200	$33,200 $99,600 $99,600	0 $82,600 $66,400
2009	$3,500,000	$1,515,800	PA NJ NY	$1,000,000 $675,000 $1,000,000	$33,200 $17,000 $33,200	$33,200 $229,200 $229,200	0 $212,200 $196,000

ARBITRATION CLAUSES CAN LIMIT YOUR EXPOSURE AND LITIGATION COSTS

An arbitration clause is an effective tool for businesses to use to avoid the unpredictability of the court system and reduce litigation costs. The clause requires that any dispute between the parties be decided by an arbitrator or arbitrators selected by the parties. Normally an arbitrator will be selected who is familiar with the subject matter of the dispute.

This system has many advantages. It eliminates the possibility that a judge or jury with no expertise in the subject matter will decide the fate of the parties. By selecting an experienced arbitrator, the parties assure an objective assessment of the issues and limit the potential that a decision will be influenced by a judge's or jury's sympathy.

Parties Set Ground Rules

By choosing arbitration, the parties also have the ability to set their own ground rules. For example, if the parties choose to have three arbitrators, they can require that the verdict be unanimous or by simple majority.

This flexibility can save the parties considerable expense. Instead of enduring the liberal discovery rules which are available in our court system, the parties can design their own discovery rules to streamline the process and limit their litigation expense and achieve a quicker resolution.

At first blush, one might think that court system would frown upon this process as an unwarranted invasion of its jurisdiction. However, the courts have taken the opposite approach. Judges welcome the opportunity to decrease their case loads. They also appreciate the need to allow alternate means to decide issues which may be beyond the understanding of the average juror. Consequently, a fairly drafted arbitration clause, one which, at the very least, shares equally the costs of the arbitration proceeding and allows each party the opportunity to select the arbitrator, will usually be approved by the court.

Bankruptcy An Exception

In certain circumstances, courts might take a less favorable view of an arbitration clause. For example, enforcing an arbitration clause in a bankruptcy case can be more difficult. Although the bankruptcy judges have wide discretion, they normally will only enforce arbitration clauses in "non-core" proceedings. An example of a non-core proceeding is a claim brought by a debtor's estate against a third-party based entirely on state law and arising out of a contract providing for binding arbitration.

However a recent decision may signal an erosion of the court's support for enforcing arbitration clauses even in that context. In this case the debtor filed a Chapter 13 petition in bankruptcy. During the bankruptcy, the debtor brought a claim to undo the loan for alleged violations of the federal truth and lending act and predatory lending practices. In response to the debtor's claim, the lender requested that the bankruptcy judge enforce the arbitration clause for this traditionally non-core dispute. The bankruptcy judge refused, holding that enforcing the arbitration clause would defeat some important purposes of the bankruptcy code such as preservation of an estate's assets, protection of all creditors' interests and the restructuring of the debtor-creditor relationship.

Whether this case signals a retreat from the bankruptcy court's willingness to enforce arbitration clauses is unclear. What is clear is that judges outside the bankruptcy arena are very receptive to enforcing arbitration clauses, allowing businesses to use this mechanism to limit their exposure and litigation costs.

For further information contact Jay Barry Harris at 215-893-8704

RECENT CHANGES TO STATE DEATH TAXES; THEY MAY AFFECT YOU

(continued from page 1)

old was the amount of the Federal Estate Tax exemption. That is no longer the case.

The Federal Estate Tax exemption is currently $1,000,000, and increases to $1,500,000 on January 1, 2004, and to $3,500,000 by January 1, 2009. However New Jersey's estate tax exemption is only $675,000. The practical effect of the difference between New Jersey's exemption and the Federal exemption is that certain estates will now be subject to a Pick-Up Tax despite the fact that the estate is exempt from Federal Estate Tax.

If your estate plan directs your executor to fund the credit shelter trust to the fullest extent of the available Federal exemption, and the size of both the taxable estate and the Federal exemption exceed the amount of the state exemption, then the estate could pay a substantial Pick-Up Tax. The amount of such a tax is reflected in the far right column of the table set forth below. As you can see, the amount of the Pick-Up Tax increases dramatically as the Federal Estate Tax exemption increases.

You should note that the Pick-Up Tax may be able to be deferred or avoided altogether in some cases. To do so it will be necessary to recreate certain estate plans so that the surviving spouse may have the flexibility needed to make decisions based upon the facts that exist on the date of death to have the flexibility to mitigate or avoid such a tax altogether. It is important that you contact your attorney to review and update your estate plan based on these recent changes.

For further information contact David White at 215-893-8742

DON'T LOSE THE HOME-FIELD ADVANTAGE IN POTENTIAL LITIGATION!

A purchase order for finished drive assemblies was mailed to a vendor specifying the terms of the sale, and requiring that any disputes be submitted to arbitration in Vienna, Austria. The purchaser required that the order be signed and returned as an acknowledgment. The vendor did not sign the acknowledgement form, but manufactured and shipped the finished drive assemblies, along with an invoice with "Conditions of Sale and Delivery," one of which included a choice of forum in Chicago, Illinois. This "choice of forum" clause is one which specifies where a potential dispute should be litigated.

The court found that the vendor, through its course of conduct and subsequent invoice, accepted the essential terms of the offer, and that the purchaser did not communicate its unwillingness to proceed with the contract without those terms. Instead, since both parties had different terms with regard to the choice of forum clause, both clauses would be "knocked out," though the remainder of the contract could be completed.

The litigation for non-payment was allowed to proceed in Allegheny County Pennsylvania.

When the parties have not agreed in advance where a dispute should be litigated, the plaintiff chooses where the case is tried. Do not loose the home field advantage through inattention to this important detail. This could very well have a negative impact on how the litigation eventually is decided.

For Further Information, call
Drew S. Dorfman at 215-893-8705

SUBLEASING IS HOT! BUT IS IT RIGHT FOR YOU?

Office and warehouse space available for a sublease is at record high levels. Many business owners are interested in subleasing because a sublease often provides a fast solution to their space problems. Further, subleasing often avoids the pitfalls, costs and time delays of constructing tenant improvements.

However, a sublease increases the number of legal issues since there are now three, not two parties involved: the prime landlord, the sublandlord and the subtenant. The subtenant is confronted with the prime landlord, who does not want to amend it's prime lease, and a sub-landlord who may have excess space or financial issues at stake. Despite the urge to rush into a sublease that sounds too good to be true, a subtenant must analyze the situation, and carefully investigate the facts to see if its space needs are properly being met. Here are some steps you should take to see if subleasing will be an effective solution for you:

1.Thoroughly review the existing lease.

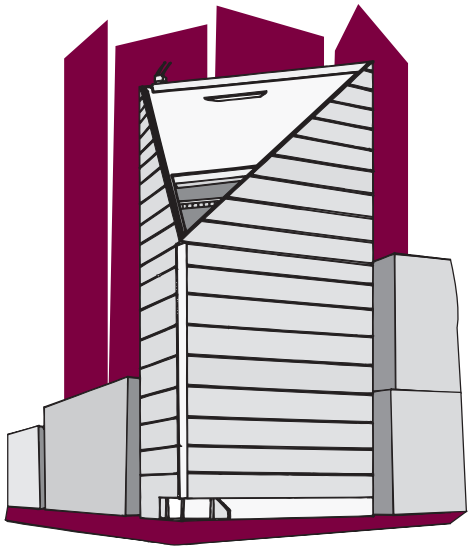
The first step always is to review the existing prime lease. Most leases contain substantial provisions regarding subleasing the premises, and it is important to comply with these provisions to have the sublease approved.

In addition to the sublease approval clause in the prime lease, it is important to look for provisions regarding the use and occupancy and continuance operation requirements of the prime lease to make sure that the subtenant does not violate the terms of the prime lease.

One of the key provisions of the prime lease that the sub-tenant must review, is the term of the prime lease and available options to renew. Often the term of the sublease will not satisfy the subtenant's leasing requirements. This may require that the subtenant discuss extending the occupancy after the sublease with the prime landlord.

2. Assess the property to see if it's really right for you.

It is critical that the subtenant assess the existing condition of the premises to determine if additional construction is required, and if so, who will pay for such improvements. This will require not only a review of the existing structure, but also an investigation into telecommunication, electrical, heating, air conditioning, plumbing and heating requirements of the premises. In addition, there may need to be an investigation into the environmental risks that the subtenant assumes. The subtenant must also review the premises and the operation



of the premises to make sure that it is in compliance with laws, in order for the subtenant to properly operate its business.

3. Check all approvals that are required.

Many leases require lender approval of any sublease. The subtenant must be assured that the landlord, by approving the sublease, has the authority to approve the transaction without additional approvals.

It is important for the subtenant to understand the intricacies of the sublease, and many of the surrounding issues that make the process difficult and complex. Without a thorough review of these issues, your expectations as a subtenant may not be fully met.

For more information contact
Scott H. Mustin at (215) 893-8741.

To improve efficiency for our clients,

WE ARE MOVING!

As of May 1, our Center City and Conshohocken attorneys and staff will be located at:

United Engineers Building
30 S. 17th St., 18th Floor
Philadelphia, Pa. 19103

ALL PHONES AND FAX NUMBERS REMAIN THE SAME!

LEGAL BRIEFS

Here are some recent questions we have received, along with some brief answers:

Are There Limits on Punitive Damage Awards in Civil Litigation?

Yes. Providing some comfort to business owners concerned with excessive jury verdicts, the Supreme Court recently overturned a $145,000,000.00 verdict against an insurance company saying it was overly excessive since only $1,000,000.00 in compensatory damages was awarded in the case. The Court said that the ratio of punitive damages to compensatory damages should not exceed a single digit ratio between punitive and compensatory damages.

Can A Buyer Or Seller Of Residential Real Estate In New Jersey Attempt To Break The Sales Agreement During The Three-Day Attorney Review Period?

If the lawyers representing the buyer and seller in a residential real estate transaction give their final OK during the three-day attorney-review period, a subsequent attempt to break the agreement will not be valid even if the three-day period has not ended.

The Appellate division of the Superior Court of New Jersey recently held that the attorney-review period is designed to give the parties an opportunity for lawyers to review a form agreement prepared by a real estate agent. Once the parties have had the opportunity for their attorneys to review the documents, they cannot renege, even if time remains in the three-day period.

Do business owners have any recourse if their insurance companies fail to settle a case?

A Philadelphia jury recently awarded $3,000,000.00 to a real estate broker who was subject to a multi-million dollar verdict in a defamation case because her insurance company and the lawyer it provided to represent her refused to offer enough money to settle the case.

The plaintiff had an 11.4 million dollar verdict entered against her in a defamation case in 1999. Plaintiff, who had a $1,000,000.00 policy claimed that she wanted to settle the underlying case along with three other defendants who did settle, but that her insurance company refused to offer enough money to resolve the matter. The plaintiff later sued her insurance company, and her attorney, alleging that the verdict and publicity it caused had harmed her business. The suit alleged that the insurance company had breached its contract with her and engaged in bad faith in refusing to settle the case and that the lawyer provided to defend her had committed malpractice.

Pennsylvania law allows bad faith actions against insurance companies for egregious behavior towards its insureds. The award did not include the pending bad faith claim that will be decided by the trial judge. Pursuant to Pennsylvania law, a bad faith claim is tried before the trial judge who has the power to award interest and punitive damages as well as attorney's fees.

Can Business Owners Look To Their Insurance Companies For Coverage In Lawsuits For Alleged Violations Of Provisions Of The Americans With Disabilities Act?

Across the country, federal and state protection agencies, and advocacy organizations are threatening the filing of a lawsuit or filing lawsuits against businesses for failure and/or refusal to provide disabled persons with access to their business establishments, in violation of the Americans with Disabilities Act. As a result, businesses are looking to their insurance polices for coverage. The only published opinion on this matter is in California, where the Court of Appeals, Second Appellate District held that under an "occurrence" policy, the insured's maintenance of premises which are not accessible to the disabled in violation of the ADA does not constitute an "accident" because the business chose to maintain the premises in a manner that is inaccessible to the disabled. Thus, the insurance company had no duty to defend or indemnify.

For further information contact Michael Saltzman at 215-893-8730

FINEMAN KREKSTEIN & HARRIS ATTORNEYS

Lee Applebaum
(215) 893-8702
lapplebaum@finemanlawfirm.com

Phinorice J. Boldin
(215) 893-8735
pboldin@finemanlawfirm.com

Drew S. Dorfman
(215) 893-8705
ddorfman @finemanlawfirm.com

June J. Essis
(215) 893-8712
jessis@finemanlawfirm.com

S. David Fineman
(215) 893-8701
sdfineman@finemanlawfirm.com

Krista Frankina Fiore
(215) 893-8723
kfiore@finemanlawfirm.com

Jay Barry Harris
(215) 893-8704
jharris@finemanlawfirm.com

Elyse L. Glazer
(215) 893-8727
eglazer@finemanlawfirm.com

Michael H. Krekstein
(215) 893-8740
mkrekstein@finemanlawfirm.com

Gary A. Krimstock
(215) 893-8722
gkrimstock@finemanlawfirm.com

Jason T. LaRocco
(215) 893-8718
jlarocco@finemanlawfirm.com

Michelle K. Malloy
(215) 893-8720
mmalloy@finemanlawfirm.com

Scott H . Mustin
(215) 893-8741
smustin@finemanlawfirm.com

Hema B. Patel
(215) 893-8743
hpatel@finemanlawfirm.com

Richard J. Perr
(215) 893-8724
rperr@finemanlawfirm.com

Michael S. Saltzman
(215) 893-8730
msaltzman@finemanlawfirm.com

Carol A. Tino
(215) 893-8744
ctino@finemanlawfirm.com

David R.White, Jr.
(215) 893-8742
dwhite@finemanlawfirm.com

OF COUNSEL:

Norman S. Berson
(215) 893-8710
nberson@finemanlawfirm.com

Alan Morris Feldman
(215) 893-8746
afeldman@finemanlawfirm.com

Stephen H. Frishberg
(215) 893-8717
sfrishberg@finemanlawfirm.com

Robert J. Klein
(215) 893-8729
rklein@finemanlawfirm.com

Lowell F. Raeder
(215) 893-8752
lraeder@finemanlawfirm.com

Richard A. Rubin
(215) 893-8737
rrubin@finemanlawfirm.com