

THE SOLO & SMALL FIRM CONFERENCE

"HOT TIPS" – August 1, 2013

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1. Article 9 of the UCC Amended. Article 9 of the Uniform Commercial Code was amended, effective July 1, 2013. The most important amendment is that an “individual debtor’s name” for financing statement filing purposes has now been defined. It is the name shown on his or her Pennsylvania driver’s license or, if there is no driver’s license, the non-driver’s license identification card of the debtor. If the debtor has neither, then a financing statement showing the debtor’s surname and first name will suffice. The lesson is simple: If you represent a creditor in any secured transaction, get a copy of the debtor’s driver’s license.

2. Small Estate Settlement by Petition is Extended. The cap for allowing the settlement of estates by petition has been \$25,000.00. However, three weeks ago, Governor Corbett signed into law Act 35, which changes the \$25,000.00 cap to \$50,000.00. The Act also raises the limit on the amount to be paid to funeral directors from \$4,000 to \$10,000. Also, in the past, banks could hold up payment because the law said the bank “may” pay amount upon the death of the depositor or certificate holder; the “may” has been changed to “shall.” This should make it easier for all of you who handle small estates for clients.

3. Two New Laws Regarding Non-Profit Entities. On July 9, Governor Corbett signed two new pieces of legislation relating to non-profit entities. First, the PA Nonprofit Corporation Act of 1988 has undergone its largest updating since the Act was passed twenty-five years ago. Many of the provisions now more closely trace the Pennsylvania Corporations Act relating to for-profit corporations.

In addition, Pennsylvania now has a new statute to cover unincorporated nonprofit associations. The Uniform Unincorporated Nonprofit Association Act (“UUNAA”) has been adopted, and will become effective on September 7, 2013. Since the vast majority of parent-teacher organizations, sports booster clubs, neighborhood organizations and local chapters of national organizations are not formally organized, the adoption of the UUNAA will probably have a greater impact than the changes to the Nonprofit Corporations Act. For those of you who are concerned about new registration or filing requirements take heart: There are still no filing requirements for this type of entity. The law was passed to help with internal governance, liability and fiduciary duty issues.

4. Seller Financing for Residential Mortgages Restored. Through 2008, Pennsylvania's Mortgage Licensing Law allowed sellers to finance the sale of two residential pieces of real estate each year without having to be licensed. In 2009, the law was amended so that sellers would have to be licensed if they financed a sale to anyone other than an "immediate family member." Effective September 1, 2013, the old rule will be reestablished, and even enhanced, so that a seller can finance up to three residential real estate sales in a calendar year, without becoming licensed.

5. "Account Stated" Claim Rejected in Credit Card Collection Suit. Over the past several years, defendants have been successful in fighting credit card collection claims by requiring proof of an original cardholder agreement. Citibank tried to avoid that requirement by using an "Account Stated" theory, rather than a contract theory, to move its case forward based on monthly statements alone. Citibank's theory was rejected by the Court (C.P. Lancaster). The Court's opinion stated that, in order for an "Account Stated" complaint to withstand preliminary objections, the plaintiff must prove that there was an affirmative consent by the defendant (whether implied or expressed) that the monthly billing statement was a final statement, and that the defendant accepted the statement as being a final determination of the amount owed.

6. Parenting Coordination Eliminated in Pennsylvania. In 2008, the Pennsylvania Superior Court gave its blessing to "Parenting Coordination," as a means of having minor custody disputes decided by a third party without judicial input. At the end of May, 2013, the PA Supreme Court adopted a Rule of Civil Procedure in which it stated that "[O]nly judges may make decisions in child custody cases. Masters and hearing officers may make recommendations to the Court. Courts shall not appoint any other individual to make decisions or recommendations or alter a custody order in child custody cases."

7. Extension Available for Third-Party SDB Certification. Last year, we advised you that the entire Woman Business Enterprise (WBE) and Minority Business Enterprise (MBE) designation and application process had been replaced by a single Small Diverse Business designation and a two-part certification process. The first part of the process was self-certification. It was fairly easy and most entities were able to comply during the one-year period provided. The second part of the process, third-party certification/verification, has been a problem: Pennsylvania authorized less than a half-dozen third-party certifiers, who are trying to process thousands of applications – and each application has scores of pages of required documentation. A few weeks ago, the PA Bureau of Small Business Opportunities sent out extension affidavits, which will allow applicants to maintain their self-certification status while the third-party certification process is being completed.

8. ROBS + Long Term Loan Guarantee = Tax Liability. Because financing has been difficult to come by for start up businesses many people becoming franchisees and other small business owners have turned to using a rollover of their IRAs to finance their start up businesses. The IRS has taken a dim view of the practice, but has been largely unsuccessful in attacking the program. However, a recent Tax Court decision (*Peek v. Commissioner*; May, 2013) has demonstrated that there is a limit to the use of a ROBS program. In the *Peek* decision, the Court ruled that the rollover of an individual's IRA funds into a corporate retirement plan was not a problem in and of itself; however, when combined with the fact that the individual also

personally guaranteed a large loan extending far beyond the startup time and costs of the business, the entire transaction would be a “prohibited transaction.” In this case, the individual was hit with back tax, interest and penalty charges of over a half-million dollars.

9. Employer Penalty Provisions of Health Care Reform Act Delayed Until 2015. While the Health Care Reform Act has withstood various attacks on legislative and judicial fronts since its passage, the Obama administration has reined in its effect all by itself: Though not changing the provisions of the requirements of the Act, the Treasury Department has delayed enforcement of the Act’s employer penalty provisions for at least one year.

10. Six Month Maximum Sentence for First or Second DUI. In Philadelphia, a man was convicted of a DUI offense for refusing to submit to breath testing. The offense is punishable by up to five years under one section of the Pennsylvania Criminal Code. However, a different section of the Code states that an individual who has no more than one prior DUI offense and commits a second DUI may be sentenced to a term of imprisonment not to exceed six months. In a case of first impression, the Superior Court of Pennsylvania ruled that the second provision takes precedence over the first provision. [Thanks to Steve Fairlie and Liz Lippy of Fairlie and Lippy for the information relating to this tip.]

11. Cowabunga! It has been the law for some time that a livestock owner is strictly liable for damages when the livestock trespasses upon another person’s property. However, there will not be strict liability if the livestock wanders onto public land or a street. If a livestock owner allows livestock to wander into the street, and someone driving a car hits the livestock and is injured, the livestock owner will be able to present evidence that the driver of the car was speeding or driving recklessly as a means to defend the suit.

12. Bystanders Injured in Police Chases Have an Expanded Cause of Action. Over the past several years, the defense of “governmental immunity” in claims against police departments has been eroded. Drivers and passengers of vehicles, and even bystanders, who were injured by police during a chase have been able to pursue their claims. In June, 2013, the Commonwealth Court ruled that a bystander injured in a Harrisburg police chase could press a claim against the police for injuries sustained – even though it was not the police car which struck the bystander. Since the bystander alleged that the police were negligent in failing to train and supervise the officer which allegedly negligently operated the police cruiser, the bystander could maintain a claim against the Harrisburg Police Bureau.

13. Probable Cause Required to Track Cellphone Data. In a case of first impression, the Pennsylvania Supreme Court ruled (June 28, 2013) that, in order to use real-time data to track a suspect’s cell phone, law enforcement personnel must have “probable cause.” In its opinion, the Court rejected the Lackawanna County District Attorney’s argument that there is “probable cause” once someone becomes a “criminal suspect.”

14. Evidence of Deed or Mortgage Enough to Trigger Title Insurance Discount. Last year, we reported in the “Hot Tips” session that the entire title insurance premium ratings system had been changed, and that there would be an elimination of discounts on title insurance premiums. However, there are still instances in which the old regulations apply. Under the

former regulations, if a property had been insured for title within ten years of the instant transaction, then a ten percent discount on the title insurance for the instant transaction would apply. In a case of first impression decided a few weeks ago, Judge Wettick of the Allegheny Court of Common Pleas, had to determine whether demonstrating that there was a deed or mortgage recorded within the last ten years would be enough proof to demonstrate that there was title insurance obtained as well. Judge Wettick, citing the fact that title insurance is virtually universal in transactions such as the one at hand, ruled that a recorded deed or mortgage would be enough to show that a title insurance policy had been issued, even though no title insurance policy could be found. Though title insurance companies are concerned about the ruling, the fact that the discount rate has been effectively eliminated may minimize their concerns.