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The "Limited" Guaranty: A Wolf in Sheep's Clothing?

by Andrew Camelotto

New Jersey's commercial real estate market has made a strong recovery since the dog days of the Great Recession. Although today's regulatory environment still presents challenges to developers seeking debt financing, lending institutions are once again offering favorable terms for non-recourse loans secured by a stable, performing real estate asset, such as a multi-tenant building with a high occupancy rate.

To adequately secure such a loan, a lender will require a first priority lien on the real property, which allows it to take title to the property to satisfy unpaid debts should the borrower later default. In addition, since many developers hold title to property through a single-asset entity, a lender may request that the developer and other principals be personally obligated to repay the loan if the developer acts in bad faith or grossly mismanages the property. This limited guaranty, colloquially known as a 'bad boy' guaranty, thus makes the loan fully recourse to the developer under certain circumstances.

Most developers and principals will not object to providing a limited guaranty, particularly if it helps secure favorable financing terms. And why should they? They have no plans to defraud the lender or mismanage the property, and if the property becomes unprofitable due to events out of their control—such as a major tenant unexpectedly breaking its lease—they can always hand over the keys to the property and walk away. Or so one would think.

The Wolf in Sheep's Clothing

While it may be reasonable to believe that liability under a limited guaranty would only be triggered by obvious malfeasance, such as fraud, voluntary bankruptcy or intentional interference with a lender's foreclosure efforts, the list of recourse events is typically much more expansive. Examples include encumbering the property with subordinate financing, transferring interests in the borrower, failing to pay real estate taxes or insurance premiums and committing waste.

It is tempting to think that a diligent deals lawyer could simply negotiate these recourse events away, but the reality is that term sheets are often agreed on early in the loan process without legal review, with short shrift given to the key terms of the guaranty. Since brevity is not the soul of wit for the ever-evolving and expanding lender form, negotiations tend to start with a limited guaranty that contains a comprehensive list of recourse events.

Of course, how hard a lawyer negotiates any one position is always deal and client specific. However, the following two points may be worth vigorously pursuing on behalf of a developer client: 1) limiting the lender's remedies to damages for certain recourse events; and 2) allowing the client to cut off lingering liability by delivering a deed in lieu of foreclosure.

Limiting Lender's Remedies to Damages

The potential dangers lurking within the limited guaranty are better understood after digesting the court's holding in *4 Princeton Park Corporate Center v. SB Rental I*, a New Jersey Appellate Division decision. In *SB Rental I*, the borrower violated the limited guaranty by obtaining a relatively small amount of subordinate financing without the lender's consent. Years later—and long after the subordinate loan was repaid—the borrower defaulted on the original loan. The lender then foreclosed on the property to satisfy a portion of the debt, which was uncontested by the borrower. Afterwards, the lender sued the guarantors under this bad boy guaranty for the remaining debt, arguing they were liable because a recourse event had been triggered, namely, violating the prohibition on secondary financing, despite the second mortgage being paid off long before the foreclosure action. The court agreed, and found the guarantors liable for the remaining debt because, under their bad boy guaranty, a violation of the prohibition on secondary financing triggered liability for the full amount of the debt, not limited to actual losses.

To avoid such a result, the borrower's counsel should limit the lender's remedies to the actual damages suffered by the lender because of the occurrence of a recourse event. For example, while the assignment of interests in the borrower without the lender's consent may be considered a bad boy act under the loan, the act itself does not necessarily put the loan at risk. If the lender's recourse against a guarantor for such an act was limited to actual damages, then a court may not find the guarantor liable for the entire remaining debt when the assignment occurred years before the default. Forced to prove causation, the lender may choose not to pursue its potential claims against the guarantors.

Other scenarios where the lender's remedies should be limited to actual damages include the borrower's breach of a representation or warranty in the mortgage, the misapplication of rent or insurance proceeds or physical waste to the property. While the guarantors are not simply off the hook if these actions occur, revising a limited guaranty in this manner may do a better job of balancing the equities.

The Deed in Lieu of Foreclosure

After ensuring a client's interests are protected by limiting the lender's remedies to actual damages for certain recourse events, certainly the task of negotiating the limited guaranty is over, right? Wrong.

The trouble now lies with the circumstances where the borrower cannot prevent additional damages from accruing despite its willingness to forfeit the collateral to the lender. A prime example is a guarantor's promise to cover any unpaid real estate taxes or insurance premiums. Since the borrower is not afforded any common law right to compel foreclosure, the lender could choose to sit back post-default, knowing the guarantor is ultimately responsible for the accruing operating expenses. There may be no easy way off the treadmill for the guarantor.

However, the lender may be willing to agree to cut off continuing liabilities under the limited guaranty as of the date the borrower delivers a deed to the property with a title policy clear of any new intervening liens. By the lender agreeing to accept a deed in lieu of foreclosure in advance, the terms are set for a peaceful transition that limits the potential exposure to the guarantor.

Developers, with the assistance of legal counsel, should carefully negotiate limited guaranties to prevent them from becoming the wolf in sheep's clothing.

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Inside this issue

The "Limited" Guaranty: A Wolf in Sheep's Clothing? 1
by Andrew Camelotto

Directed Trusts—Jewel Inside the UTC 4
by Glenn A. Henkel

The New Jersey Estate Tax Has Been Repealed! What's Next? 6
by Glenn A. Henkel, Martin Shenkman and Richard Greenberg

Attorney Review and Termination Notices May Now be Sent by Email, Fax, Overnight Next-Day Mailing and Personal Delivery 15
by Martin Liberman

The opinions of the various authors contained within this issue should not be viewed as those of the Real Property, Trust and Estate Law Section Newsletter or the New Jersey State Bar Association.

Directed Trusts—Jewel Inside the UTC

by Glenn A. Henkel

On Jan. 19, 2016, Governor Chris Christie signed A-2915/S-2035, known as the Uniform Trust Code (UTC) as Chapter 276, P. L. 2015. This large work includes 82 provisions and results in a codification of the New Jersey trust rules. In New Jersey, trust law has been developed over 150 years and, thus, the *need* for a trust code in New Jersey was not as prevalent as other jurisdictions. In some states, there are only a few trust cases ever decided, and the UTC was commissioned to add rules where none existed. In New Jersey, the population has been making, challenging and litigating various issues related to trusts for a long time and, as such, the case law is extensive. However, this new code will put everything in one place.

The UTC was created as a project of an *ad hoc* committee of trust and estates lawyers in the New Jersey State Bar Association (NJSBA) who attempted to conform the New Jersey UTC in compliance with New Jersey's common law. This article is not about the trust code, per se, but instead about a provision added to the trust code involving the concept of a 'directed trust.'

The NJ-UTC was a product of the NJSBA, principally the Real Property, Trust and Estate Law Section. In order to obtain political support within the Legislature for the provisions, the NJSBA reached out to the New Jersey Banker's Association for its support. The bankers' lobbyists turned to their constituency to see whether the bankers should support this project or not. Typically, in other states (the UTC has been enacted in about 30 other states), bankers were significant allies in enactment. In New Jersey, the bankers requested that the bar make the trust law "more like Delaware."

Like the corporate arena, Delaware trust law has always been viewed as progressive and 'pro management.' The *ad hoc* committee considered this request and focused on two particular aspects to Delaware law that could have been considered—qualified domestic trusts (QDTs) and directed trusts.

While beyond the scope of this article, the QDT did not seem consistent with New Jersey law. It seeks to allow 'self-settled' trusts to escape the reach of creditors, contrary to N.J.S.A. 3B: 11-1.

By contrast, the second provision of the Delaware law was particularly appropriate for New Jersey. Many states are enacting directed trusts statutes. If a settlor created a trust to provide for specific terms to bifurcate responsibility for a particular asset between two 'fiduciaries,' New Jersey law has always followed the 'probable intent' of the testator. This was such well-settled case law that it was codified in 2004.[1] Since 1986, Delaware has had a statute that gave the trustee (usually a corporate trustee) the ability to take direction from another individual serving as an investment advisor. Typically, this will allow for a lower fee for a trust that holds a 'difficult' asset, such as a residence or business. This, it was felt, would be an appropriate mechanism for New Jersey law because of the probable intent doctrine.

The bankers agreed to support the UTC assuming the NJSBA would support the directed trust statute. Thus, with the UTC, the state now also has a directed trust provision to be codified in N.J.S.A. 3B: 31-61 and N.J.S.A. 3B:31-62. The directed trust statute now gives greater authority to New Jersey clients to include provisions that authorize a trustee to direct investment functions to another individual.

The UTC already included a provision that authorized direction. This provision is now codified in N.J.S.A. 3B:31-61 (effective July 17, 2016), whereby a trust can confer upon another trustee the ability to let a trustee follow the direction of a third party. This power under N.J.S.A. 3B:31-61(c) can be as broad as the power to direct the modification or termination of the trust. However, the bill annexed an additional provision called "Powers to Direct Investment Functions," which is very similar to the Delaware directed trust statute contained in 12 Del. Code §3313.[2]

This new statute has an operative provision authorizing a trustee to be obligated to follow a third-party investment advisor "direction" or "consent." Such an 'investment advisor' is a fiduciary, meaning he or she will have typical fiduciary roles. Moreover, the statute goes on to provide that the trustee would not be liable for acts except in the cases of "willful misconduct or gross negligence on the part of the fiduciary so directed."

The gross negligence standard is broader than the Delaware statute, and it appears to be very advantageous to a trustee. Moreover, absent clear and convincing evidence, the directed trustee is not responsible for taking administrative steps to review the activities of the investment advisor and the directed trustee has no duty to monitor the conduct of the investment advisor or provide advice to the investment advisor or communicate or apprise beneficiaries with the directed investment.

Why would a directed trust provision be helpful? In some circumstances, when an individual utilizes a corporate fiduciary, there could be a concern on the part of the corporate fiduciary to the underlying assets that are particular to the family. Often, a family business or vacation residence will constitute a part of the *corpus* of the trust. By having a third-party investment advisor responsible for this particular asset, a corporate fiduciary can accept a trusteeship without the obligation to diversify. Several cases outside New Jersey in recent decades have dealt with a circumstance where the trustee was told to maintain a particular investment (such as stock in Eastman Kodak Company) and, because of the direction, the trustee did not pay attention to the decline in value.[3] Upon subsequent suit for damages by beneficiaries, the courts (again, outside New Jersey) held that a trustee was responsible for the circumstance. With a directed trust statute, a third-party investment advisor can be told to monitor the particular investment, thereby allowing the corporate fiduciary to be free from the burden of this particular asset.

If an investment advisor is named in a document as an investment advisor, be wary that the individual will continue to have fiduciary duties as related to that investment. This can be problematic if the investment is a business interest or vacation home. However, typically, the individual serving as an investment advisor will be closer to the family and will be aware of the goals and objectives of the family maintaining that asset. As a fiduciary, the investment advisor will be entitled to commissions and fees. Moreover, the use of an investment advisor in a trust does not preclude a settlor from granting an individual a 'non-fiduciary' power.

In sum, the author believes the enactment of the New Jersey directed trust statute in N.J.S.A. 3B:31-62 is a welcome addition to New Jersey trust law. For those critics of the provision who feel it can produce to a bad result, simply draft away from its use. ■

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Endnotes

1. *See* N.J.S.A. 3B:3-33.1; *See also, Fidelity Union Trust Company v. Robert*, 36 N.J. 561 (1962); *Engle v. Siegel* 74 N.J. 287 (1977); *in Re Estate of Branigan*, 129 N.J. 324 (1992).
2. *See* N.J.S.A. 3B:31-62.
3. *See generally* the seminal case of *Matter of Janes,* 90 NY2d 41, 659 NYS 2nd 165 (1997), *reargument denied*, 90 NY2d 885, 661 NYS 2d 827 (1997); *See also Matter of Hunter,* 2010 NY Slip Op. 50548(U)[27 Misc 3d 1205(A)].

The New Jersey Estate Tax Has Been Repealed! What's Next?

by Glenn A. Henkel, Martin Shenkman and Richard Greenberg

The New Jersey estate tax will be phased out. The New Jersey estate tax exemption, formerly $675,000, the lowest in the country, increased to $2 million on Jan. 1, 2017, and will be eliminated after Jan. 1, 2018.

What does this mean for those living in New Jersey? What changes to planning and documents might be advisable to consider for New Jersey (and in some cases other states, such as New York) domiciliaries? What will it mean for those that at one time lived in New Jersey but 'changed' domicile to a no-tax state? What might this repeal mean to those living in nearby states that have an estate tax (*e.g.*, New York)? What changes to planning and documents might be advisable to consider?

While this article focuses on the recent changes and planning in New Jersey, this guidance, in many instances, will be useful to practitioners in other jurisdictions as well.

A deal was reached on Sept. 30, 2016, between the governor and key legislative leaders regarding funding for the Transportation Trust Fund (TTF).

The highlights are as follows:

- TTF has been reauthorized for eight years—$2 billion per year (which aggregates $32 billion when combined with all state and federal funding).
- There was a 23-cent per gallon increase in the gas tax.
- The earned income tax credit was increased from 30 percent of the federal limit to 35 percent.
- The New Jersey gross income tax exclusion for pensioners and retirees was reportedly increased to $100,000.
- The New Jersey estate tax will be reduced in phases, and then eliminated by 2018.
- The sales tax is phased down to 6.875 percent (effective Jan. 1, 2017), and then to 6.625 percent (effective Jan. 1, 2018).

On Oct. 5, 2016, both houses of the state Legislature were called into a special committee hearing and voting session, but needed to reconvene two days later to approve the legislation. The legislation was signed by Governor Chris Christie on Oct. 14, 2016. The cuts will amount to a $1.4 billion tax cut by the time of their full implementation in 2021, according to the Governor's Office.

The New Jersey law provides that there are no estate tax changes for 2016 decedents (leaving in place the $675,000 exemption threshold) and there is no tax for 2018 decedents.

However, for 2017 decedents, the tax imposed is based upon the prior I.R.C. Section 2011 'credit' rate chart as it existed in 2001, reduced by a 'credit' of $99,600 (the tax that would have been imposed on a $2,000,000 estate). Whether the state will be financially able to forgo the estate tax revenues in 2018 and thereafter remains to be seen, but that will be an issue for a future Legislature and a future governor.

Planning in a Decoupled State

New Jersey is one of a minority of states that retained a state estate tax after the changes to the Federal Tax Code after the Economic Growth Tax Relief and Reconciliation Act of 2001 (commonly referred to as the first 'Bush tax cuts'). As a result, planning in New Jersey has been complex and quite different from states that had not decoupled. Since 2002, New Jersey imposed a separate estate tax. In New Jersey, spouses could leave assets tax-free to their spouse or tax-free to charity, but a tax would be imposed on transfers to others, to the extent the value of those transfers exceeded $675,000. While the New Jersey estate tax rate has been much lower than the federal rate, it was and is still significant, with the marginal rate reaching 16 percent, and as a result has caused issues with respect to inter-spousal estate planning for New Jersey clients.

Beware: In addition to the estate tax, New Jersey also imposes an inheritance tax. However, the inheritance tax does not generally apply to transfers to a spouse, child, or grandchild, who are referred to as 'Class A' beneficiaries. Unfortunately for taxpayers, the recent legislation does not appear to have changed the New

Jersey inheritance tax, which generally subjects transfers to siblings at a rate of 11 percent and to many others at a 15 percent rate. The New Jersey inheritance tax may thus remain a costly trap for unsuspecting taxpayers.

Another issue to consider is that since the federal American Taxpayer Relief Act of 2012 (signed Jan. 1, 2013), the federal government has permitted 'portability' of the federal estate tax exemption. Portability was designed with an eye toward eliminating the need for the complexity of traditional 'by-pass/credit shelter/family trust' planning used to shelter assets by preserving the estate tax exemption of each spouse of a married couple. In general terms, 'portability' of the estate tax exemption allows one spouse to inherit the assets of their deceased spouse without using the exemption permitted for non-marital and non-charitable transfers, while also inheriting the unused exemption. The technical term for this 'unused' exemption is the deceased spouse unused exemption (DSUE). Previously, in the context of planning for New Jersey domiciliaries, the low New Jersey exemption created estate planning challenges, necessitating the need to evaluate or employ complex options to maximize the benefits of the first spouse's DSUE.

Wills and Revocable Trusts May Have to be Updated

A common approach taken in wills (or revocable trusts when used as the primary dispositive document), is to incorporate a credit shelter trust and a marital disposition (either outright or in trust). The purpose of the credit shelter trust was generally to make assets available to the surviving spouse but to avoid them being included in the surviving spouse's estate for estate tax purposes.

In New Jersey, this was often addressed with a state tax exempt level credit shelter trust of $675,000, a 'gap' trust funded with the difference between the federal exemption and the New Jersey exemption (formerly $675,000). The excess above the federal exemption would be bequeathed to a qualified terminable interest property (QTIP) trust or other marital deduction-qualifying bequest. The estate, post-death, could then determine how to characterize the gap trust. For smaller estates, some practitioners may have relied on outright bequests and the provision of a disclaimer credit shelter trust. While this type of dispositive scheme might appear to not require any modification, that conclusion may stem from too superficial of an analysis. With this backdrop, practitioners must evaluate what might need to be done to update documents for the recent legislative developments.

Here are some thoughts:

- What might need to be done to modify an existing will (or revocable trust) will depend on what provisions the document contains. Consider that the credit shelter trust and related planning could be structured in a number of ways:

  Fund the credit shelter trust with the amount that will not create a federal or state estate tax. For example, if the New Jersey estate tax exemption was $675,000 and the federal exemption $5 million, then $675,000 would be transferred to a credit shelter trust. But now that the New Jersey exemption has increased to $2 million, that amount, not $675,000, should pass, without further need for change, into the credit shelter trust. In 2018, if the New Jersey estate tax is repealed, the amount necessary to fund the credit shelter trust might increase to the federal exemption amount, which is $5 million inflation-adjusted—$5,490,000 in 2017.

  A key consideration for many people is what they anticipated their will accomplishing when it was written. If the credit shelter trust included children or other heirs (especially from a prior marriage), the result might not be the intent for them to have so much value directed to a trust for their benefit. Others might have only used a trust to reduce state estate taxes, which would no longer be relevant. The key issue is determining what the objectives were when the document was completed, what the client's current objectives are, and what the result of the provisions and new law may be.
- Some older wills might stipulate funding the credit shelter trust with a specific dollar amount (*e.g.*, $600,000 for very old wills, or perhaps $675,000 to fund the New Jersey lower exemption amount). In these cases, one might need to modify the will to reflect the client's current intent. There may be no need or desire for a credit shelter trust under the new scenario (for smaller estates now desirous of the protections of a trust), or perhaps a higher amount might be warranted. These wills, in particular, should be updated. For smaller estates, a disclaimer or other approach may be preferable.
- Other older wills might stipulate funding the credit

shelter trust to the maximum amount that will not create a federal estate tax. Under current New Jersey law, and through 2018 when the New Jersey estate tax is repealed, this type of formula could trigger a New Jersey estate tax, which might not be intended or desirable. In these instances, it has been and continues to be imperative to revise the document immediately, to avoid an unintended state estate tax. If the testator who signed the will does not have capacity to sign a will, perhaps the title (ownership) of assets can be modified to avoid the tax, or a reformation proceeding may have to be brought in court to modify the document to reflect current law.

- For smaller estates, the entire estate might be bequeathed outright to the surviving spouse, and the surviving spouse might be given the right to disclaim (renounce) any portion of that bequest by placing it into a credit shelter trust. This might avoid any tax issues. This is because the surviving spouse can simply opt to retain all assets on the first spouse's death, and not trigger the transfer of any assets into a credit shelter trust. In this way, whatever the New Jersey estate tax exemption may be, the surviving spouse can control the tax consequences. While a disclaimer might provide ultimate flexibility, for many it is an overly simplistic and inadvisable plan, as there is no protection afforded to the assets passing outright to a surviving spouse. With the incidence of elder financial abuse, divorce, lawsuits, etc., protecting the inheritance, not tax planning, could be of paramount importance. Estate planning is not only about reducing taxes.
- Some wills or trusts use a Clayton QTIP approach, in which assets are bequeathed to a marital or QTIP trust and the executor may elect which portion qualifies for the marital deduction with the remaining non-elected portion passing to a credit shelter trust. In some instances this might remain a viable technique, in others not.
- For clients who are ill or of advanced age, a more complex approach might be desirable to provide flexibility, not only for the implications of the New Jersey repeal but also to reflect possible changes to the federal estate tax laws that might be implemented by the Trump administration.

There are many other variations, but certainly the safest approach is to review how each client's documents are structured. With so many variations and ancillary considerations (asset titles, asset protection, divorce planning, and other concerns), relying on an old document, even if one believes it was drafted to account for the repeal of the New Jersey estate tax, is simply not prudent. The real challenge for practitioners will be to convince clients to spend the money on an update meeting. This will be particularly difficult for those clients who believe (correctly or not) that their estate is below the federal exemption.

Credit Shelter Trust Planning and the Impact of the New Jersey Estate Tax Repeal

Building flexibility into the client's plan is essential. This is not only because the values of assets may fluctuate after the execution of the estate planning documents, but also due to the fact that tax laws are now quite sensitive and highly subject to the political winds of change. Many plans have involved the use of a trust for the surviving spouse that can allow for the 'sheltering' of assets from the potential taxation at the passing of the survivor. This trust, as noted briefly above, was often modified to address the New Jersey estate tax.

The following is a general discussion of the fundamentals of credit shelter trusts, setting the foundation for a review of what impact New Jersey's repeal could have on such trusts for estate planning purposes. The credit shelter trust (sometimes referred to as either a bypass trust, residuary trust, or family trust) has historically been utilized when considering a plan for a married couple, in order to preserve (before portability) the estate tax exemptions of each spouse.

The credit shelter trust can generally:

- Allow the survivor to be sole trustee (with a HEMS standard)
- Grant the survivor the right to all income
- Grant the spouse the right to receive principal for health, maintenance and support in reasonable comfort (the so called 'ascertainable standard'), or a discretionary standard with an independent trustee
- Grant the spouse a right to withdraw the greater of five percent or $5,000 (whichever is greater)
- Grant a power to re-allocate funds in the trust among a 'special' or 'limited' class, called a limited power of appointment (LPOA)

Even with all of these powers being granted to the surviving spouse, the *corpus* of the credit shelter trust should not be 'included' in the taxable estate of the surviving spouse. This would hopefully generate an

estate tax savings by 'sheltering' the credit (or exemption amount) of the first spouse to pass away. In other words, if the exemption of one spouse is sheltered by one exemption, the survivor's exemption is available to shelter additional assets from tax. The trust can be crafted with fewer powers and rights, depending on the family situation. However, because the trust was not included in the estate of the survivor, the basis of the assets transferred would not be adjusted or stepped up. For many moderate-wealth taxpayers domiciled in New Jersey, even if the increase in the federal estate tax exemption may have obviated worries about the federal estate tax, the continued risk of a New Jersey estate tax may have justified the use of such a trust. Once the estate tax repeal is fully implemented in 2018, assuming there is no potential federal estate tax for the client, the credit shelter trust will no longer protect the taxpayer from estate taxes, but instead may serve to deny the taxpayer a step-up in cost basis.

Another approach to crafting a trust could be to provide that the surviving spouse is the sole beneficiary of the trust, that the survivor has the right to all income of the trust (in a manner that the requirements for a 'qualified income interest for life' are met). Under Code Section 1014(b)(10), a family can choose to place assets in a trust when the first spouse passes and, if a QTIP treatment is elected under §2056(b)(7), the trust can receive 'step up' in basis at the death of the surviving spouse. Thus, this plan would give the surviving spouse/surviving parent the option of determining whether or not it is better to utilize a credit shelter trust to remove assets from the survivor's estate, or elect QTIP treatment and portability at the death of a predeceased spouse. More specifically, Code Section 1012 defines the 'basis' of an individual's asset for purposes of resale as cost.

Under Code Section 1014, the basis is 'stepped-up' or adjusted to the fair market value at the time of a decedent's passing.

In the event a married couple holds assets and has the option of placing assets in a trust in order to capture the estate tax exemption of both spouses, the basis would be adjusted or stepped-up to the fair market value on the date of death of the first or predeceasing spouse. However, the basis would not receive a second step-up at the death of the surviving spouse. If there is substantial appreciation between the first death and the second, that appreciation would not be subject to estate tax; however, it would be subject to an income tax upon liquidation of the underlying investments. Once the New Jersey estate tax is fully repealed, the calculus for many taxpayers will change. The marginal aggregate federal/state estate tax rate will be lower and the relationship of the marginal estate tax rate to the capital gains rate will shrink. Thus, the benefit of a basis step-up versus estate tax exclusion will change.

As a result of the opportunity to receive a second step-up in cost basis, planners have recommended that clients forego the use of a credit shelter trust for the benefit of the surviving spouse/surviving parent, because portability affords the family the right to receive the benefit of the federal estate tax exemption while simultaneously receiving an opportunity to receive a second adjustment or a step-up in the cost basis of all assets at the death of the surviving spouse/surviving parent.

Flexibility Planning

Incorporating this type of plan into a couple's estate plan provides, at the time of the death of the first (or predeceasing) spouse, the executor with the option of determining, when filing an estate tax return, whether or not to incorporate the benefits of Code Section 2056(b)(7), which would grant the estate a 'marital deduction' over assets held in trust. In that event, the estate tax rule would treat the inherited assets as if they were owned by the surviving spouse. In that event, the DSUE can carry over to the surviving spouse. However, for income tax purposes the family would be afforded the opportunity to receive a step-up in cost basis occurring at the second death.

By contrast, should the family choose to utilize the alternate approach, whereby the credit shelter trust is funded with assets which are then excluded from the estate of the surviving spouse? In that case, no election to qualify under Code Section 2056(b)(7) for the marital deduction would be made. Setting forth a plan that calls for the creation of a credit shelter (or family) trust in the will, a planner can be assured that the decision can be left for a later date to determine whether or not the portability and second step-up approach is warranted or whether the credit shelter plan (with the removal of all appreciation from the estate of the surviving spouse) would constitute a better approach.

One of the difficulties with the possible use of portability for estates that will not be 'taxable' under the federal law (because the combined estate is less than the federal $5,490,000 exemption—the 2017 threshold) is

that there are many assumptions that need to be considered to determine whether a family plan should shelter the estate tax exemption from tax or not. These include:

- How long will the surviving spouse live?
- How much will the assets appreciate?
- To the extent assets appreciate, will they be sold to incur the income tax?
- Will the family continue to reside in a state subjecting the estate of the surviving parent to tax?
- What will the income tax rates be on any future sale?
- Will the estate tax be reinstated at a state or federal level?

QTIP Election

Following the decoupling of the New Jersey estate tax from the federal Tax Code in 2002, practitioners have grappled with the possible impact of I.R.S. Revenue Procedure 2001-38, 2001-24 IRB 1335, 2001-1 C.B. 1335 (Rev. Proc. 2001-38), on New Jersey estate tax planning. Specifically, at issue in Rev. Proc. 2001-38 was a situation where trust assets would be sheltered from estate tax by exemption. The ruling held that the QTIP election would be ignored and the surviving spouse would not be subject to estate taxation on the trust *corpus* if no federal estate tax benefit will be achieved. Practitioners worried that if a New Jersey decedent funded a New Jersey bypass trust to $675,000 and a QTIP was used for the remaining estate to qualify for the state estate tax marital deduction, would that QTIP qualify, since there was no reduction in federal estate tax? Under some interpretations of Rev. Proc. 2001-38 it was not certain that such a QTIP would qualify for the federal estate tax marital deduction, and hence for the New Jersey estate tax marital deduction. Once the New Jersey estate tax is repealed, this issue would be obviated. However, the concerns about funding a New Jersey state-only QTIP have been obviated by a recently introduced revenue procedure.

On Sept. 27, 2016, the IRS announced Revenue Procedure 2016-49 (Rev. Proc. 2016-49), which essentially reversed Rev. Proc. 2001-38. In effect, this new rule indicates that when an estate is filing an estate tax return, the QTIP election will be respected, even if the election to be made is not necessary in order to avoid federal estate taxes. Rev. Proc. 2016-49 provides a procedure by which the IRS will disregard the QTIP election and treat it as null and void. Under §4.02 of that ruling, the taxpayer must file a Supplemental Form 706 and notify the IRS of the taxpayer's request to treat the prior QTIP election as null and void. Without the request to nullify the QTIP election, it would generally be respected. Moreover, the ruling indicates that where a portability election is made, the QTIP election will be respected. Thus, for existing New Jersey-only QTIPs, and for New Jersey-only QTIPs formed prior to 2018, the issue raised by some commentators has been obviated by Rev. Proc. 2016-49.

Disclaimer Trust Planning: More Likely in Many Situations

With the repeal of the New Jersey estate tax for many taxpayers, a disclaimer plan will become the default planning approach for moderate-wealth taxpayers. Unfortunately, the default plan for most taxpayers below the federal exemption may be 'I love you' wills, outright bequests with no trusts. The move to simplistic wills may well fuel a growth in clients using online legal services rather than attorneys, or a general practice attorney rather than estate-planning specialists. The result will likely be a significant decline in the use of trusts and the protective benefits they afford.

For clients of moderate wealth who use counsel, there will likely be a greater reliance on the use of a disclaimer trust. For example, if a husband and wife have been married for a long time and the children are 'common children' of the marriage, such that it could be anticipated that a surviving spouse would not be expected to disinherit the children of the predeceasing spouse, then a disclaimer trust may provide the greatest opportunity for flexibility. Disclaimer trusts, however, are ineffective in achieving non-tax planning objectives.

A disclaimer trust estate plan would devise the entire estate to the surviving spouse. If the inheritance is 'disclaimed' by the survivor, the will or revocable trust can direct the inheritance to a trust for the spouse as permitted by I.R.C. § 2518. By granting a surviving spouse this option, the surviving spouse can choose whether funding the trust with the estate is appropriate based upon a variety of circumstances at that time, such as: 1) the size of the combined estates at the first death; 2) the applicable federal estate tax exemption; and 3) the likelihood the surviving spouse will reside in a state with a state estate tax.

While all of these uncertainties may remain at the death of the first spouse, this flexible plan is premised on the assumption that one may know more at that time

than when the wills and estate plan were drafted. Without the New Jersey estate tax and with the potential of a high federal estate tax exemption, this will be a plan that will retain its popularity. If the couple plan to utilize a 'disclaimer' trust option, it is still important to title the assets to divide the family estate equally between the husband and wife. While a one-half interest in real property can be disclaimed pursuant to both Treasury Regulation § 25.2518-2(c)(4)(ii) and N.J.S.A. 3B:9-2, other intangibles should be divided between the spouses.

Using this type of plan will provide for greater ease of administration if the couple has a plan in mind regarding how the disclaimer trust will operate at the death of either spouse. Some estate planners dislike the use of disclaimer trusts because they are concerned that a surviving spouse, in an emotional state, may be unwilling or emotionally unable to make the required evaluation of the need to disclaim in the short time permitted. Others feel that if properly addressed in the planning phase, the surviving spouse will be able to carry through with this task as an entirely financial matter (not emotional). As a general rule, the disclaimer must be completed and filed (in the county surrogate's office) within nine months of death. For real estate, it must also be filed in the recorder of deeds. Note that the New Jersey disclaimer statute does not require the disclaimer be filed within nine months. The only limitation under New Jersey law is that the disclaimant cannot accept the property.[1] For federal tax purposes, the disclaimer must be completed within nine months.[2]

If the disclaimer meets the requirements of Code Section 2518, it is a 'qualified disclaimer' (a tax-sensitive term). In such instances, the transfer is not treated as a gift by the disclaimant for gift tax purposes, and it is treated as a gift/bequest directly by the decedent as if the disclaimant had predeceased. The nine-month time frame is usually a sufficient period of time to deal with the emotional aspects of death of a loved one and make a rational financial choice—particularly if it has been considered earlier in the planning phase. Certainly, it is not something that must be considered shortly after the first spouse's death. However, assuming the spouse does not retitle assets into his or her individual name (which tends to be a natural desire), there should be adequate time to meet, discuss the financial options and make an informed choice about whether or not to execute on the disclaimer trust plan.

This planning option provides substantial flexibility. Obviously, the couple must be confident that the surviving spouse will carry through with the testamentary desires of the predeceasing spouse. Thus, it may not be appropriate in the second marriage, where there are alternate heirs (*i.e.*, children of a previous marriage). If the spouses have planned to leave their entire estate to the survivor, or the purpose of establishing a trust was simply related to the tax opportunities, then this type of plan may need reconsideration.

Another consideration is whether the surviving spouse will need the entire balance of the funds received from the predeceasing spouse. There are two mechanisms to consider in connection with this plan. First, if the surviving spouse feels he or she does not need the entire estate, the survivor can also, likewise, disclaim an interest in the disclaimer trust, either in whole or in part. Thus, for purposes of testamentary disposition, this will be treated as if the property passed directly from the predeceasing spouse to the alternate heirs (presumably children or grandchildren). An alternate plan would be to devise the disclaimer trust in a fashion that allows principal to be used for the benefit of the heirs in addition to the surviving spouse. This is explicitly permitted by I.R.S. Treasury Regulation 25.2518-2(e)(2), assuming the power of distribution is limited by an ascertainable standard.

The challenge for many New Jersey practitioners post-repeal of the New Jersey estate tax is to convince clients with wealth levels under the federal exemption of the need for better planning. The threat of a New Jersey estate tax clearly was a driver pushing clients to estate planners. Absent that starting in 2018, practitioners will have to educate clients about a range of considerations that would justify the cost of professional planning. These might include:

With increased longevity, the likelihood of remarriage following the death of a prior spouse will increase. The need for trusts on the first death to protect those assets is more important than most realize.

Elder financial abuse is burgeoning. The use of online document preparation services is unlikely to provide the independent guidance to address this significant risk.

Life Insurance Trusts May Need to be Revisited

Some taxpayers may have life insurance trusts that were created to hold life insurance to pay an estate tax. Even if the increases in the federal estate tax exemption eliminated the federal estate tax, some taxpayers may

have retained an insurance trust in place to fund the New Jersey estate tax. If the New Jersey estate tax is, in fact, repealed, perhaps there is no longer an estate tax justification for the insurance trust, but for some estates the New Jersey inheritance tax may still support such a plan, if the inheritance tax is not also repealed. While in many instances insurance trusts and life insurance serve a range of other purposes, if the elimination of the New Jersey estate tax eliminates the last relevant purpose, options could be explored for both the insurance coverage and the trust owning it.

Life insurance may have been purchased to pay an estate tax that might be eliminated, but insurance may also provide long-term care benefits, an alternative asset class to provide ballast for other investments that are more risky, a fund to borrow against in retirement, and more.

Durable Power of Attorney (and Revocable Trusts) Gift Provisions Might Warrant Reconsideration

If a taxpayer's power of attorney has a gift provision and the sole purpose of that gift provision was to save estate tax, then the power of attorney (or revocable trust if that too had a gift provision) should be reevaluated. If there is no other purpose for the gift provision, consideration should be given to revising the document to reduce or eliminate the gift provision. Given the incidence of elder financial abuse using a durable power of attorney, if there is no reason to retain a gift provision, it may be preferable to revise the document and eliminate it.

Title to Assets Should Be Revisited

Some taxpayers intentionally divided assets so that either spouse could have assets to fund a credit shelter trust no matter who died first. If this was done for taxpayers with estates under the federal estate tax exemption, it may be feasible to again change the ownership of assets back to whatever would be preferable without regard to the estate tax. For example, if a couple in New Jersey had a $5 million estate, they were well below the federal estate tax exemption. They may have divided assets to fund a bypass trust under each of their wills. Assume the wife was a physician and the husband a teacher. It might be preferable to have all assets in the husband's name, to minimize liability exposure in the wife's name. The repeal of the New Jersey estate tax might warrant changing the title to those assets back to only the husband's name.

A better but more complex approach might be to use some of the assets to fund an *inter-vivos* QTIP trust to provide protection and more control over the disposition of the assets. If the *inter-vivos* QTIP is formed in a state that permits self-settled trusts, or has express language permitting a bypass back to the grantor spouse, on the death of the first spouse the assets will return to the settlor spouse in a bypass trust, thus permitting both spouses to benefit from the assets while providing asset protection. The practical issue is that, absent the threat of a federal or state estate tax, will the couple undertake the planning?

The title to assets can be relevant to estate tax planning, and in particular to obtaining an increase (step-up) in cost basis on death (if the first to die holds the assets, the cost basis will be increased and the survivor can sell those assets without a capital gain). Assets might be retitled into the name of the spouse who is anticipated to die first, but not within one year of the spouse's death (unless further planning is undertaken). Alternatively, a community property trust could be created in Alaska, South Dakota or Tennessee, so that, whichever New Jersey (a non-community property state) spouse dies first, arguably all assets should qualify for basis step-up. If the appreciation potential in the estate is large enough, perhaps this might be advisable.

Be cautious about a myriad of ancillary issues before changing the title to assets. What are the matrimonial implications to retitling assets? Even if there are arguably only limited legal implications because of equitable distribution, might there be a strategic impact? Should a post-nuptial agreement be created to address the retitling of assets?

Changing the title to a house might affect property taxes (*e.g.*, senior citizen or veterans benefits), insurance coverage, and other matters.

Changing a legal document such as a will, without addressing title to assets, may accomplish nothing. Taxpayers need to understand that the elimination of the tax does not eliminate the need for planning and follow-up. For professionals of all stripes, this is going to be a hard sell: "I need to bill you to do work that may not save your heirs taxes." The key to this pitch will be all advisers echoing the same mantra. But will all players on the team really cooperate? Will wealth managers really do the right thing and push clients back to their estate planners?

New Jersey Inheritance Tax Trap

Will the New Jersey inheritance tax also be repealed? It does not appear so. Perhaps the revenue loss from both the repeal of the estate and inheritance tax at one time was deemed too costly. This will remain a trap for the unwary. Taxpayers will likely assume that since the estate tax has been repealed, there remain no New Jersey death taxes, until their estates are tagged with a costly New Jersey inheritance tax. For those taxpayers bequeathing assets to beneficiaries subject to inheritance tax, gifts prior to death, and/or retaining life insurance to pay inheritance tax may be worthwhile.

Perhaps durable powers of attorneys (and/or revocable trusts if those are the primary dispositive document) should be revised to permit or restrict advancement of testamentary gifts that might trigger a New Jersey inheritance tax. In New Jersey, inheritance tax is imposed on gifts within three years of death, unlike the federal rule upon which the New Jersey estate tax was based.

Personal Goals Become More Important

Estate planning should never be only about reducing estate taxes. There are a myriad of important personal goals that should be considered. One-dimensional planning is rarely effective. Plans that were implemented merely to avoid New Jersey estate tax for taxpayers with estates under the federal exemption should be revisited to assure that robust and broad-based planning was addressed, and that the plan was not merely a tax fix that is no longer effective. Did the documentation and planning address personal goals and issues? Was later life planning addressed, if relevant? What steps were taken to reduce the risks of elder financial abuse? Does the client have religious goals or personal financial objectives for heirs that were overlooked in the focus of planning on taxes?

Does New Jersey Repeal Matter to the Ultra-Wealthy?

The New Jersey repeal does matter to the ultra-wealthy. Many estate plans for wealthy persons domiciled in New Jersey might have funded three trusts: a New Jersey credit shelter trust up to $675,000, a gap trust with the difference between the federal estate tax exemption in the year of death, and a QTIP for the remaining estate. The issue was how the gap trust might be characterized for estate tax purposes. Once the New Jersey estate tax is fully repealed, there will be no detriment to fully funding a bypass trust to the federal estate tax exemption. Until that time, the multiple trust approach might still make sense.

For some wealthy taxpayers, an outright bequest might have been provided to the surviving spouse. The surviving spouse may have, according to the plan, intended to receive all assets outright from the deceased spouse and then make a gift to a self-settled trust. In that way, no New Jersey estate tax would be incurred and the full federal exemption for the first to die spouse could be used. This plan still has an advantage in that the irrevocable trust using the exemption will be a grantor trust regarding the surviving spouse, providing ongoing tax burn for his or her estate. However, the calculus of the advantages and risks of that plan will change substantially if the New Jersey estate tax is repealed. It may be preferable to have the will or revocable trust of the first-to-die spouse fully fund a credit shelter trust on death and avoid the risk of the surviving spouse not carrying through on the intended plan, creditors of the surviving spouse reaching the assets bequeathed outright, etc.

Language in wills and revocable trusts should be reviewed to assure that it accomplishes the planning goals during the phase-out of the tax and following the repeal.

Should the Client 'Repatriate?'

Many wealthy taxpayers established domicile in states without an estate tax (*e.g.*, Florida). Some of these clients really moved and changed their nexus out of New Jersey. Other clients may maintain that they have moved but may not have really made sufficient changes. In a few cases taxpayers merely take a position that they were no longer domiciled in New Jersey to avoid the New Jersey estate tax. In the latter cases, and perhaps in the former, these taxpayers might wish to revisit their domicile decisions and status in light of the repeal. In such cases, not only might all estate-planning documents have to be updated to reflect a New Jersey domicile, but a range of other decisions and steps might have to be modified as well.

Other Considerations Make Changes Complicated

There are a host of other considerations that should be factored into the analysis. Before documents, planning, insurance, asset title or other matters are changed, consider:

- Nothing in the tax world is certain. What changes today may change tomorrow.
- Planning should have been and should remain flexible. If current documents were not designed with flexibility in mind, perhaps they should be revised on that basis alone.
- Will the New Jersey estate tax repeal actually take effect as indicated?
- What will happen with the federal estate tax under the current administration? Will it be repealed? Will the exemption instead be increased significantly?
- Asset protection, elder financial abuse and other considerations may be relevant.
- Mobility is important to consider too. Where might the taxpayer move in the future?

Conclusion

If the New Jersey estate and inheritance tax are, in fact, repealed, it will be a welcome relief to those affected, and might actually increase tax revenues to the state of New Jersey, given how many taxpayers move out of the state (or say they do) to avoid the state's estate tax. Planning will be significantly simplified for those with estates near or under the federal estate tax exemption. In light of this, everyone should review their existing estate planning documents, title to assets, life insurance coverage and anything else affected.

The disturbing part of the repeal is taxes on the wealthiest are being reduced while sales and gas taxes that disproportionately weigh on those of more modest means, where the additional dollars involved can create a real hardship, have been increased.

The pros and cons of the estate tax repeal, coupled with the other tax changes, are debatable; the need to revisit and potentially revise estate-planning documents in light of those changes is not. ■

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Endnotes

1. N.J.S.A. 3B:9-9.
2. I.R.C. § 2518.

Attorney Review and Termination Notices May Now be Sent by Email, Fax, Overnight Next-Day Mailing and Personal Delivery

by Martin Liberman

Finally, after 33 years, the attorney review provisions set forth in all New Jersey real estate broker contracts and leases have been amended to reflect the current practice, which is customarily utilized by most New Jersey practitioners. Whereas the former notice requirements mandated that disapproval notices be sent by certified mail, telegram and personal delivery, the recent ruling from the New Jersey Supreme Court now allows for notice to be sent by email, fax, overnight next-day mail or personal delivery.

This determination now helps all New Jersey attorneys to feel comfortable in being able to send their notices by email and fax, which until recently was not the law in New Jersey. Over the years, if they 'knew the other attorney' on the other side of the transaction (and even sometimes when they did not), many practitioners did not follow the old certified mail practice, and sent their notices by email and fax only, which was not in compliance with the requirements of the law.

The infamous case of *Conley v. Guerrero*,[1] decided by the New Jersey Supreme Court on April 6, 2017, confirms that an attorney may properly disapprove of a real estate contract of behalf of his or her client by simply sending the notice via fax or by email. This updated the 1983 ruling in the case of *New Jersey State Bar Association v. New Jersey Board of Realtors*,[2] which was not as practical, and not reflective of current available technology.[3]

In this landmark decision the New Jersey Supreme Court was guided by the attorneys who represented the parties, as well as the New Jersey State Bar Association (NJSBA) and the New Jersey Board of Realtors Association (REALTORS), both of whom filed and were permitted to join in the action as *amicus curiae* for the Court.

By way of background, *Conley* was commenced in the Chancery Division of Somerset County in early 2014. The case related to a matter where counsel for the defendant, Mona Guerrero, terminated a residential contract of sale during the attorney review period, but only notified the realtors and attorney by both email and fax, not by certified mail as mandated in the case *of New Jersey State Bar Ass'n v. New Jersey Ass'n of Realtor Board*. Even after a bidding war had ensued (and where the initial buyers submitted a second amended offer to purchase the property, clearly acknowledging that there was a bidding war going on), the plaintiffs, through their counsel, claimed that since the termination notice was not accomplished by certified mail, telegram or personal delivery to the realtor in the matter, the termination notice was invalid and the first contract of sale was enforceable. The plaintiffs further claimed that strict performance was required under the 1983 decision, as well as under the Administrative Code Regulation.[4]

After an initial injunction request was denied by Chancery Judge Edward M. Coleman, of the Somerset County Court, both parties filed motions for summary judgment, since there were no factual issues in dispute. After full briefing and legal arguments were advanced, Judge Coleman granted defendant Guerrero's motion for summary judgment and held that the notice that was given by fax and email was sufficient notice, and further that the court would not allow "form over substance" to prevail. Judge Coleman ruled that it was time to update the old and antiquated law, which had been on the books since 1983.[5] Additionally, since all the parties and their counsel had received actual notice of the termination of the contract (albeit by fax and email) the purpose and intent of the 1983 decision had been met. Moreover, Judge Coleman further wrote that "…the purpose of the attorney review clause approved within the settlement in *Bar Ass'n II*, was to "protect parties against being bound by broker-prepared contracts without the opportunity to obtain adequate protection of their separate interests," citing *Levinson v. Weintraub*.[6]

In granting summary judgment to the seller, Guerrero, Judge Coleman held that "the purpose of the notice provision contained within the attorney review clause

are to ensure that other party is on actual notice in the event the contract is disapproved. In the current action, Plaintiffs, Plaintiffs' Broker and Plaintiffs' counsel knew that Guerrero disapproved of the contract prior to the conclusion of attorney review. Because Plaintiffs actually knew, the essential purpose of the notice provision was met. As a Court of Equity, in this case, we will not permit form to rule over substance."[7]

This matter was then appealed to the New Jersey Appellate Division in early 2014, and was finally heard on May 19, 2015. The New Jersey State Bar Association sought and received permission to intervene as *amicus curie*. After oral argument, the lower court's decision was affirmed in a unanimous *per curium* decision. The appellate court was asked to change the law so all attorneys would know, once and for all, that notice by fax and email (which is the commonly utilized 'modern' method of notice) would be allowed.

In affirming the lower court's decision, Judge Mitchel Ostrer wrote: "Here, defendant's right of disapproval was conditioned upon notice that complies with the specified methods of delivery. However, compliance with the condition was not a material part of the parties' agreement; it was imposed upon them by the consent judgment in *N.J. State Bar Ass'n*. Enforcement of the condition would cause a forfeiture—the loss of Guerrero's right to disapprove the contract and enter into an agreement with others. Applying that balance, the weight of Guerrero's forfeiture predominates, in as much as plaintiffs avoided the result the condition was designed to avoid—lack of actual notice."[8]

The holding of the appellate tribunal confirmed it was undisputed that notice was given to the buyers and their real estate agent, and that in this case the goal of the provision—to accomplish actual notice—was met. The court further stated "we are keenly aware that the actual notice did not avoid a dispute of litigation. But the litigation pertained not to the fact of notice, but to its legal implications."[9]

When requested by the NJSBA and defendant Guerrero to change the law and not narrowly determine the issues, the appellate court decided they would not establish a general rule that delivery to the realtor by email and fax satisfied the prescribed method of delivery, but rather stated "whether email or facsimile can satisfy the drafters of the settlement in the *Bar Ass'n, supra*, we leave to others."[10]

This matter was further appealed by a petition for certification to the New Jersey Supreme Court, and was granted on March 29, 2016.[11] In addition, the Supreme Court also granted *amicus* status to the NJSBA and REALTORS due to the importance of the decision. The matter was argued on Jan. 17, 2017, decided on April 3, 2017, and corrected on April 6, 2017.

The plaintiff buyers argued that the only methods of disapproving the contract were as set forth in the decision in the 1983 *Bar Ass'n* matter, that is, strict construction of the forms of notice. By allowing the alternative methods, the plaintiffs claim the lower courts usurped the Supreme Court's exclusive authority to regulate the rules governing the practice of law. Finally, the buyers contended the contract should be strictly enforced, since it was unfair for the court to hold realtors—but not attorneys—to the letter of the *Bar Ass'n* decision.

On the other hand, defendant Guerrero argued to the court that the common practice in real estate law had changed dramatically over the past 33 years since the *Bar Ass'n* decision in 1983. Defendant Guerrero advised that the Court should not adopt a formalistic rule that ignores the modern reality of real estate transactions, and in which email and fax are routinely used to communicate and exchange contracts. In support of this issue, Guerrero argued how it defies logic that if a contract may be enforced by email and fax delivery, then the disapproval of that same contract should be permitted in the same fashion, by email and fax. The Court was further advised that the last time a telegram was sent in the U.S. was in 2006, and worldwide in 2013.

Both the NJBSA and the REALTORS supported the defendants' position and further requested the Supreme Court take the necessary steps to reassess and modify the notice requirements that were archaic and established over 30 years ago. Both argued all future contracts should permit communications to occur by fax, email or any reputable overnight carrier. The REALTORS also urged the Court to modify the method of disapproval notices in all real estate contracts, and to apply this new law both retroactively to this case, as well as for all future matters.

After reviewing the line of cases set forth in this decision, the Court confirmed there was no controlling precedent before it. The Court advised it was influenced by the Court's decision in *Bar Ass'n* and the line of subsequent Appellate Division cases when interpreting and enforcing the attorney-review provisions. The Supreme Court also confirmed that it did not draft the language

of the settlement in the *Bar Ass'n* matter. Rather, the parties chose the three methods of communication to notify the broker of dissatisfaction with the contract.[12]

The reasoning behind the Supreme Court's decision was clear. They confirmed that notice by telegram was obsolete, that fax and email are "faster" and more "reliable" than telegrams, and, in fact, "it appears that fax and email have become the predominant, customary methods by which professionals in the industry communicate." Thus, amending the *Bar Ass'n* settlement was necessary to acknowledge customary procedure in the profession and to recognize advances in technology.[13]

Finally, the Court held that "notice of disapproval of a real estate contract may be transmitted by fax, e-mail, personal delivery, or overnight mail with proof of delivery. Notice by overnight mail will be effective upon mailing. The attorney-review period within which this notice must be sent remains at three-business days."[14] The Court also left open the door that it may need to modify the attorney review clause in the future.

So, it has now been confirmed by the Supreme Court that letters conveying a notice of disapproval may be sent by the new methods of communication. The new, amended realtors' form contract, which was modified effective after the April 6, 2017, decision, states the following:

> Attorney-Review Clause:
>
> (1) Study by Attorney.
>
> Buyer or Seller may choose to have an attorney study this Contract. If an attorney is consulted, the attorney must complete his or her review of the Contract within a three-day period. This Contract will be legally binding at the end of this three-day period unless an attorney for Buyer or Seller reviews and disapproves the Contract.
>
> (2) Counting the Time.
>
> You count the three days from the date of the delivery of the signed Contract to Buyer and Seller. You do not count Saturdays, Sundays or legal holidays. Buyer and Seller may agree in writing to extend the three-day period for attorney review.
>
> (3) Notice of Disapproval.
>
> If an attorney for the Buyer or Seller reviews and disapproves of this Contract, the attorney must notify the Broker(s) and the other party named in this Contract within the three-day period. Otherwise, this Contract will be legally binding as written. *The attorney must send the notice of disapproval to the Broker(s) by fax, email, personal delivery, or overnight mail with proof of delivery. Notice by overnight mail will be effective upon mailing.* The personal delivery will be effective upon delivery to the Broker's office. The attorney may also, but need not, inform the Broker(s) of any suggested revision(s) in the Contract that would make it satisfactory.[15]

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Endnotes

1. 228 N.J. 339 (2017).
2. 93 N.J. 470 (1983).
3. 228 N.J. 339 (2017).
4. *See, New Jersey State Bar Ass'n v. New Jersey Ass'n of Realtor Boards, Id.*, and N.J.A.C. 11:5-6.2 (g)(2).
5. *See, New Jersey State Bar Ass'n v. New Jersey Ass'n of Realtor Boards, Id.*, and N.J.A.C. 11:5-6.2 (g)(2).
6. 215 N.J Super. 273, 298 (App. Div. 1987).
7. *Conley* at 2014 WL 1058273; *Conley, Id.,* 443 N.J. Super. 62, 65-66 (App. Div. 2016).
8. *See, Del. Steel Co. v. Calmar S.S. Corp.* 378 F.2nd 386, 387-389 (3rd Cir. 1967) (stating that no legitimate interest of the defendant carrier would be served and it would "plainly be inequitable" to bar an action of the plaintiff-shipper who failed to file a written notice of claim of damages, as required by a bill of lading, where the carrier received that the shipped goods were damaged, the carrier was aware of the damage, and the shipper orally advised the carrier that a damage claim would be made). *Conley, Id*. at p. 65.
9. *Conley, Id*. at p. 65.
10. *Conley, Id*. at 67.
11. *Conley v. Guerrero*, 244 N.J. 526 (2016).
12. *Conley, supra*, 228 N.J. at 345; *Bar Ass'n*, *supra*, 93 N.J. at 476, 480.
13. *Conley*, 228 N.J. at 346.
14. *Conley*, 228 N.J. at 437.
15. New Jersey Realtors Form I- 18-Statewide 4/17/17.