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Commentary:

Should the New Jersey Bulk Sales Act Apply to Residential Closings?

by F. Bradford Batcha

Despite recent amendments to the New Jersey Bulk Sales Act, there still exists a major economic risk for anyone buying a home in New Jersey. The act was originally created in 1966 as a part of the Sales and Use Tax Act to assist the state in collecting tax revenue by requiring the buyer of any business assets to notify the state in writing 10 days prior to the closing.[1] The state would then issue a tax clearance letter permitting the sale or would issue an escrow letter requiring certain funds be withheld from the seller's proceeds in order to satisfy any tax obligation of the seller.

In 2007, the act was expanded beyond sales and use tax to cover all state taxes and, therefore, applied to all real estate holdings.[2] The theory was that except for a personal residence, all real property is generally held for investment and, therefore, is a business asset. Since that time anyone purchasing real property, which had been used as a business asset, must also comply with the act and submit notice to the state 10 days prior to a closing. In practice, the notice requirement can be a major pitfall for an unsuspecting buyer who is not aware of the law. While purchasers of commercial property tend to be both sophisticated and represented by counsel, that does not hold true in the world of residential real estate in New Jersey. In fact, most residential buyers are unaware of the law and often, especially in South Jersey, are not represented by counsel.

While many risks of purchasing residential property can be avoided by obtaining a thorough home inspection and purchasing title insurance, unless the buyer has an attorney, they are unlikely to be aware of the notice requirements of the act. Failing to file the bulk sales notice leaves the buyer personally responsible for all of the seller's tax liability to the state of New Jersey. This liability is not limited to possible capital gains tax from the sale, but rather it covers any and all tax liability of the seller, including payroll tax, sales tax or income tax the seller may owe at the time of the sale. And,

it is not even capped by the sale price of the property. Failing to comply with the notice provisions of the act is a personal obligation of the buyer and, therefore, does not create a lien on the property. Since it is not a lien, title insurance companies do not insure against this risk, because it does not affect title. Therefore, a title company would not require a buyer to file the required notice prior to closing.

Fortunately, in 2011, an exemption was created for residential properties of one and two families that were owned by an individual, married couple, trust or estate. The exemption eliminated the need to determine if these properties were, in fact, a business asset. It also reduced the need to send in the notice for thousands of residential transactions each year. Unfortunately, the Bulk Sales Division interpreted the word 'individual' to mean single individual. This meant that if there was more than one individual who owned a residential property, except for married couples, the property was subject to the act under the theory that two or more individuals were a business partnership. This interpretation of the act identified any true partnerships where two or more individuals owned residential property for business investments. However, the interpretation was so broad that it also covered property owned by related individuals (siblings or parent/child) who may have lived together or inherited property. Thus, there was still a burden on many buyers to send out the bulk sales notice as a prerequisite to the purchase of residential real estate. The 2018 amendment expanded the exemption to include 'individuals,' so that now unmarried individuals, multiple individuals, trusts or estates or any combination of these are exempt from bulk sales reporting. The 2011 and 2018 amendments to the act represent significant progress towards exempting all residential properties; however, those residential properties that are owned by limited liability companies (LLCs) or corporations are still subject to the act.

The author's main objection lies with the remedy for failing to send out the notice. Certainly, the purpose of the remedy is to create a deterrent for buyers so they will not neglect to send in the required notice. While the act does incentivize those who are sophisticated enough to understand the law to send in the proper notice prior to closing, most residential buyers are lay people who lack any knowledge of the act and may find themselves subject to the draconian remedy of becoming responsible for the seller's tax liability. If the act had made these obligations a lien on the property, then title companies would insist on obtaining a bulk sales clearance letter prior to closing and could insure a buyer against any liability under the act. As it stands, since this is not a lien, title companies do not require that the act be complied with in order to insure insurance on residential properties.

This highlights the differences in closing practices for residential properties between northern New Jersey and southern New Jersey. In North Jersey, residential buyers are typically represented by attorneys who are well versed with the details of the act and send out the notices as required. However, in South Jersey it is customary for buyers not to engage attorneys to represent them in the purchase of residential property. Thus, in South Jersey there is no professional who is looking out for the buyer's interest with respect to complying with the act and sending out the required notice in advance of closing.

Take the following example: A couple from South Jersey who saved their entire life to purchase a new construction home chooses not to retain an attorney. Their title company does not mention the notice requirement of the act prior to the purchase. The seller is a builder holding title as an LLC, which is common for builders. This particular builder has not paid payroll or income taxes and stands to make a significant capital gain on this sale. All told, the builder's tax obligations exceed $100,000. Under the act, if the buyer fails to send the required notice to the state 10 days prior to closing, they would become personally responsible for the $100,000 tax debt of the builder. As a practical matter, the author is unsure if the Bulk Sales Division has ever pursued an innocent buyer similar to the one described in this example. Nevertheless, this is the state of the law for an unsuspecting buyer.

It seems to the author that the fair approach would be to exempt all residential one- and two-family properties regardless of the legal status of the seller, so the unsophisticated buyer will not become the target of a collection action from the state of New Jersey for the tax obligations of a derelict seller. If all one- and two-family residential properties were exempt, then only buyers of three or more family residential properties and commercial properties would be subject to the act. Those buyers are often more sophisticated and, more importantly, are generally represented by attorneys who will protect their interests.

The Bulk Sales Act is an effective way to collect tax dollars due to the state of New Jersey, but in the context

of residential real estate, an unsuspecting buyer can get stuck paying the tax debts of a derelict seller. The author believes the law should be revised to protect the innocent purchaser. Fortunately, the law has already created an exemption for all sellers of one- and two-family homes who are individuals, trusts or estates or any combination. In addition, many of the LLCs and corporations who sell properties are also exempt, since they are selling in the 'ordinary course of business.' The only remaining sellers subject to bulk sales notice are LLCs and corporations who do not meet the ordinary course of business exemption. It is often difficult, even for a sophisticated attorney, to determine if the ordinary course exemption is met. The risk is that if the attorney makes the wrong call, their client becomes liable. For this reason, most attorneys will err on the side of caution and file the notice, except in clear cases where the seller is a major known developer with multiple sales in the ordinary course of business.

The bottom line is that there are now only a limited number of residential sales that are subject to the Bulk Sales Act. However, they do exist, and the risk remains that a buyer will either not understand their obligation to send out the notice or will be convinced by a self-serving seller that they are exempt from the act. In either case, an innocent buyer could fall victim to the draconian remedy of the current Bulk Sales Act. For this reason, the author believes the act should be amended so that all one- and two-family residential properties should be exempt from the act, regardless of the ownership entity of the seller. The buyer's ability to purchase a home without the risk of becoming personally liable for the tax debts of a delinquent seller should outweigh the state's interest in collecting tax from corporate sellers of residential property in New Jersey. ■

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Endnotes

1. *See* N.J.S.A. 54:32B-22(c).
2. *See* N.J.S.A. 54:50-38.

Inside this issue

Cybersecurity Considerations in Real Estate Transactions

by Michelle Schaap

Cybersecurity is a critical consideration for any and all transactions that involve the transfer of financial and/or confidential, proprietary information. Once a project is financed, or purchased, a developer will also need to address how the drawings for the project are secured. If the project will include software and/or artificial intelligence in its operation, the developer will need to undertake due diligence on the security features of these systems. Finally, in its role as an employer and/or landlord, a real estate developer must consider its statutory obligations to protect sensitive data.

Project Transaction

A company's acquisition, sale or lease of property may be part of a larger transaction, which could have positive or negative connotations for parties beyond the real estate component. While the ultimate transaction closing may be of public record (by the recording of a deed or lease), keeping this information confidential until the time of the closing may be critical to either or both parties to the transaction, and is likely a requirement in the deal documents.

If a business is planning to close its operations in a specific location, advance notice of the pending sale of the offices may create issues for that company (including without limitations triggering morale concerns, let alone Worker Adjustment and Retraining Notification (WARN) Act notice obligations, for its employees). Conversely, if an enterprise is expanding into a new market, the company may want to keep this information confidential until it is prepared to announce the move publicly.

Were either side of the transaction, or its advisors, to experience a cybersecurity 'event,' the use of this confidential information by a third party could materially adversely impact either or both parties to the transaction in a variety of ways, including stock values (if it is publicly traded) and customer relationships, where an office closing had not been announced. A breach may also reflect a broader security issue, which could impact a larger overriding transaction, such as a merger.

Further, where payment instructions are transmitted electronically, cybersecurity is paramount. There have been several cases involving the loss of closing proceeds due to false wiring instructions after the original electronic transmission of correct wiring instructions. Using unsecure means to transmit or confirm wiring instructions opens the door to a bad actor accessing credentials or information, and then sending new instructions that 'appear' to be authentic. Too often, people accept such changed information without verifying the source by telephone, thus allowing millions of dollars to be stolen through reliance upon misinformation.

If, indeed, the real estate transaction is part of larger transaction, and one of the parties has a security breach, the same would likely need to be disclosed to the other party, which could significantly impact the deal terms and purchase price. If a breach were not disclosed prior to closing, the compromised party is likely in breach of representations and warranties in the agreement.

Project Plans

Designs and drawings for a project should be properly secured, both at rest and when transmitted between and among project team members. If plans for a new project are shared over an unsecure site or file share resource, plans could be compromised. Such a breach could lead to any number of dangerous consequences, including sabotage or break-ins at the building through known points of attack, or alteration of the plans, creating project delays, unconstructable drawings or structurally unsound structures.

If the project is being constructed for a business in, for example, the healthcare or financial services industry, consideration should be given to secure physical environments in the design and construction of the project.

Project Systems

If the project is to be constructed with 'smart systems' (whether for elevator operations, HVAC monitoring and maintenance or otherwise), the vendors for these products, and the software itself, must be properly vetted for security considerations. If security systems will be installed, developers should ask whether the systems were developed with privacy in mind. If systems are to be maintained and/or monitored remotely, consideration must be given as to who will control the access credentials to these systems. Many systems have default passwords that are readily available on the internet; if a developer is unaware of these settings on its newly installed systems, then it will be leaving the proverbial backdoor open to any savvy bad actor.

If buildings will have 'smart' operating systems, the real estate developer must also consider redundancies and back-up systems if the primary system is compromised. Further, protocols will need to be established for applying patches and new releases during the lifetime of the subject system. When systems are retired, if they stored data, the responsible project owner will need to first securely dispose of or destroy that data.

Project Participant as the Controller of Personal Data

The foregoing discussion does not touch on statutory obligations associated with data protection. In New Jersey, there is legislation pending that, once adopted, will require any business (regardless of the industry) to adopt and enforce written 'reasonable' measures to secure personally identifiable, sensitive information maintained by the business.[1] Under current New Jersey law,[2] if a party that holds personal data (e.g., name plus Social Security number, or other certain data) experiences a data breach, that party must provide notice to the impacted persons. If third parties will have access to the developer's sensitive data, the developer should vet the practices of those third parties (and under the pending New Jersey legislation the developer will be required to undertake this due diligence).

In short, cyber and data concerns permeate all business, whether brick and mortar or on line. A real estate developer, or any other business person, who ignores cyber and data security consideration will be at risk for compromise, in the deal negotiation, in the construction phase, operationally and as a controller of sensitive data. ■

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Endnotes

1. S. 2692/A. 1766 (2018).
2. N.J. Stat. § 56:8-163.

Potential Claims for Wrongfully Extending Life: Use of Advance Healthcare Directives as Bases for Tort Claims—A Review of a New Jersey Trial Court Decision

by Rebecca Varghese

Often referred to as living wills, advance healthcare directives have been reaffirmed as being an extraordinarily and fundamentally powerful tool in ensuring that a patient's wishes—and a patient's wishes alone—control end-of-life decisions and treatments. While healthcare directives are commonplace in estate planning generally, medical practitioners' adherence to these directives is a changing landscape in tort law. For example, in *Koerner v. Bhatt*,[1] Morris County Superior Court Judge W. Hunt Dumont declined to grant summary judgment in favor of physicians employed by Morristown Medical Center and its parent company, Atlantic Health System (defendants), in a 'wrongful life' case involving a now-deceased patient named Suzanna Stica.

Prior to her admission to Morristown Medical Center in Nov. 2011, Stica signed two orders: one do not resuscitate order and one do not intubate order. Directives of this type are enforceable under New Jersey's Advance Directive for Health Care Act.[2] Stica visited Morristown Medical Center because she was having trouble breathing, and went into cardiac arrest while at the hospital. The defendants resuscitated her, and although she was successfully revived, she was left intubated and confined to a wheelchair. While Stica lived for six months following her resuscitation, she suffered from depression, dementia, bowel problems and bladder complications, and experienced trouble communicating and speaking. The executor of Stica's estate, Suzanne Koerner, filed suit against the defendants for disregarding Stica's orders to withhold life-sustaining treatments such as intubation and resuscitation. The defendants filed for summary judgment, and claimed immunity under the Advance Directive for Health Care Act.

In an extension of *Berman v. Allan*,[3] discussed below, in *Koerner*, Judge Dumont denied summary judgment based on the recognition of Stica's well-established right to reject life-sustaining treatments. While *Berman* is factually distinguishable from *Koerner*, the underlying principles articulated by the New Jersey Supreme Court in *Berman* support recognition of a doctrine called 'wrongful birth.'[4] 'Wrongful life' and 'wrongful birth' cases can be viewed as the tort counterparts to 'wrongful death,' but the application and acceptance of all three is widely varied and differs from state to state. Most wrongful life and wrongful birth actions involve children born with severe physical handicaps, and are typically premised on the plaintiffs' claims that but for the defendant's negligence, another individual is forced to live an unwanted life.[5]

A defendant's negligence gives rise to damages for pain and suffering endured during this extension of life. Wrongful birth actions differ from wrongful life claims in nuanced ways; characteristically, wrongful birth claims are brought by the parents of an injured individual, and wrongful life claims are brought by the injured individual against defendants, but both are typically premised on a defendant negligently failing to disclose or discover an affliction or handicap. Doctrinal extensions of these tort actions allows for these cases to be premised on a defendant's wrongful continuation of life, as well. Wrongful birth claims have often invoked sanctity-of-life discussions from courts, and are outside the scope of Stica's case, and this article.

In *Berman*, the plaintiffs sued both as parents and as guardians *ad litem* on behalf of their infant daughter, Sharon, and brought both a wrongful birth and wrongful life claim against the defendants. The plaintiffs alleged the defendants, both of whom were specialists in gynecology and obstetrics, deviated from accepted medical standards by failing to inform Sharon's mother of the availability of a procedure known as amniocentesis. This procedure, commonly performed on expectant mothers

over 35 years of age, could have potentially diagnosed chromosomal abnormalities such as Down's syndrome. Sharon was born with Down's syndrome, and her parents were unaware of Sharon's condition prior to birth. The plaintiffs' claim for wrongful life alleged that Sharon's mother would not have given birth to Sharon had she known about her Down's syndrome.

The court was markedly uncomfortable with a legal doctrine premised on the propriety and value of Sharon's life based on her mother's assertion that Sharon should not have been born.[6]

> [W]e base our result upon a different premise—that Sharon has not suffered any damage cognizable at law by being brought into existence. […] One of the most deeply held beliefs of our society is that life—whether experienced with or without a major physical handicap—is more precious than non-life.

As for the plaintiffs' claim for wrongful birth, the court was willing to recognize that Sharon's parents had sufficiently pleaded a cause of action for the doctors' breach of duty to render competent medical advice and services, and that this breach of duty deprived Sharon's parents of decision-making.[7]

> In failing to inform Mrs. Berman of the availability of amniocentesis, defendants directly deprived her—and, derivatively, her husband—of the option to accept or reject a parental relationship with the child and thus caused them to experience mental and emotional anguish upon their realization that they had given birth to a child afflicted with Down's Syndrome.

Accordingly, the *Berman* court ultimately decided that Sharon's parents' emotional suffering was, in fact, compensable. Thus, in certain instances, the doctrine of wrongful birth encompasses the acknowledgment that healthcare professionals may not deprive patients of a choice—even if that choice means a life may terminate.

In applying *Berman*'s logic to Stica's case, in *Koerner*, Judge Dumont found the defendants violated Stica's fundamental right to refuse unwanted medical treatment by ignoring her end-of-life decisions in her do not resuscitate and do not intubate orders. This deprivation of choice is an impermissible override of patient autonomy, and such was the case with Stica's end-of-life orders. Judge Dumont held that, as a result of the defendants' actions, Stica suffered unwanted pain and lived in a diminished state for an additional six months. In addressing the defendants' defense that they were immunized by the Advance Directive for Health Care Act, Judge Dumont rejected the application of the act as a shield for Morristown Medical Center and its agents. Instead, Judge Dumont construed the act to guarantee that healthcare professionals *who comply with patient directives* are immunized from liability resulting from that compliance.

Judge Dumont's decision in *Koerner* reinforces the importance of the healthcare community complying with patients' end-of-life decisions regarding life-sustaining treatments. In order for an individual to accurately reflect their desires and wishes, he or she should execute advance directives that are both: 1) up-to-date, and 2) comprehensive in reflecting a patient's wishes for withholding or continuing treatment. Indeed, the exposure to liability for healthcare professionals who ignore advance directives serves to underscore the importance of developing a directive that families, medical professionals, and courts alike can look to for guidance to ensure an individual's autonomy is preserved in life and death.

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Endnotes

1. N.J. Super. Ct. (2017).
2. N.J.S.A § 26:2H-64; N.J.S.A § 26:2H-68.
3. 80 N.J. 421 (1979).
4. *Berman* at 432.
5. *See Procanik v. Cillo*, 97 N.J. 339 (1984); *Sylvia v. Gobeille*, 220 A. 2d 222 (Sup. Ct. 1966); *Smith v. Brennan*, 31 N.J. 353 (1960); W. Prosser, Law of Torts § 55 at 335-338 (4th Ed. 1971).
6. *Berman* at 429.
7. *Berman* at 433.