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On October 17, 2008, Governor Edward Rendell signed the Home Improvement Consumer Protection Act into law, which provides significant protections for home improvement consumers but significant regulation for businesses involved in home improvement contracting. The Act becomes effective on July 1, 2009. The Act applies to “contractors”, which includes home improvement businesses that have performed \$5,000 or more in home improvement work during the previous taxable year, and home improvement retailers with a net worth of less than \$50 million. “Home improvements” are defined as jobs in excess of \$500 on buildings designed to be used, in whole or in part, as private residences and on any lands adjacent to these buildings. However, the Act does not apply to new residential construction, most landscaping work, or to conversions of commercial property into residential property.

The Act protects all consumers except those who own “three or more private residences” in Pennsylvania, in which case the consumer is only protected with respect to its primary residence and those private residences used for “personal recreational purposes.” Consequently, the Act does not protect individuals who own two or more residential rental units (in addition to their own home, which is protected) or entities that own three or more residential units.

The Act includes two significant categories of regulation: 1) Registration; and 2) Contract requirements. All “contractors” subject to the Act must register with the Pennsylvania Bureau of Consumer Protection. Most of the information the Bureau will require for registration is standard - personal name, date of birth, address, phone number, driver’s license number, social security number; and business name, address, phone number, and

BUSINESS LAW

For a Few Bad Apples: The General Assembly Passes Significant Regulation for Home Improvement Businesses



federal employer identification number. For general partnerships, corporations, limited liability companies, and limited liability partnerships, the Bureau will require identifying information for each officer, manager, general partner, and any individual owning a 5% or greater equity share. The Act requires that all contractors subject to the Act, and any officer, manager, general partner, or individual with a 5% or greater equity share in a home improvement business, report all criminal convictions related to home improvement work or other deceptive practices, the filing of any bankruptcy petition, the entry of any adverse civil judgments related to home improvement work within the past ten years, the revocation or suspension of a certificate or license in another jurisdiction, and any suspensions from involvement in government-funded, non-profit, home improvement programs within the past ten years. The Bureau will not make confidential information such as social security numbers available to the public, but has yet to specify what other information will be made available. All registration applications must include proof the registrant has \$50,000 in insurance coverage for both personal injury and property damage. Registrations must be renewed every two years.

The second category of regulation is also significant. For all home improvement contracts subject to the Act, there are strict requirements. All such contracts must be legibly written, dated, complete, and signed by the parties. Such contracts must also include the contractor's Bureau registration number, estimated project starting and completion date, a description of the work to be performed which cannot be changed without a written change order signed by the

interested parties, the amount of any down payment, the amount of any special materials costs the contractor advanced before signing the contract, contact information for the prime contractor and any subcontractors known at the time of signing, liability insurance information, and the Bureau's toll free phone number. Notably, a home improvement contract subject to the Act will only be valid if it includes "the total sales price due under the contract". It is not clear whether the General Assembly intended this provision to limit contractors' ability to work on a time and materials basis. All home improvement contracts covered by the Act must also include a "notice of rescission," which notifies protected consumers they are allowed to terminate a home improvement contract within three business days after signing "without penalty". The Act is ambiguous as to whether individuals who own and operate businesses involved in home improvement contracting have this same right. What is clear is that the Act does not give entities that own and operate businesses involved with home improvement work this right. Contractors who sign contracts covered by the Act need to be wary of this requirement. Any home improvement contract covered by the Act that does not meet all of the Act's drafting requirements is invalid and unenforceable.

The Act also allows a consumer to "void" a home improvement contract if the contract contains certain clauses, such as hold harmless and attorney's fees clauses, designed to protect the contractor. Even arbitration clauses in home improvement contracts can be voided "upon motion of either party" if they are not drafted according to the Act's detailed requirements. Paradoxically, arbitration clauses have historically been a



favorite of the law. A home improvement contract that contains a consumer waiver of any of the Act's protections can be voided by the consumer at any time.

The Act also includes strict enforcement mechanisms and a list of violations. A violation of any provision of the Act exposes a contractor to fines and penalties under the Unfair Trade Practices and Consumer Protection Law and, in extreme cases, certain violations can result in criminal sanctions which can include lengthy license suspensions. The Act's list of potential civil violations is detailed. For example, with home improvement contracts exceeding \$1,000 in value, a contractor cannot accept a deposit exceeding one-third of the contract price plus the cost of any pre-ordered materials the contractor specially ordered for the job.

improvement need to familiarize themselves with the Act's detailed regulations within the next several months. These businesses also need to reconsider the way they contract for home improvement work. Specifically, businesses involved in home improvement will need to carefully draft contract forms so the forms comply with the Act's requirements and prohibitions. No contractor wants to render labor and materials on a job only to have the consumer terminate or void the contract "without penalty" because the contract form was not drafted properly or suffers from a minor omission. While the Act provides significant consumer protections, these protections are not without a price. Home improvement contracting has now entered the realm of highly regulated business. Unfortunately, a few bad apples may have spoiled things for the entire bunch.

ACQUISITIONS CORNER

In sum, businesses involved in home
The Return of "Buyer Beware": The Pennsylvania Superior Court Complicates Mergers and Acquisitions by Upholding a Jury's Multi-Million Dollar Successor Liability Verdict

Business purchasers may need to reconsider their approach to acquisitions. On September 2, 2008, a three-judge panel of the Pennsylvania Superior Court handed down *Schmidt v. Boardman Co. et al.*, affirming a \$4.5 million dollar jury verdict and holding that a purchaser of a company's assets can be held strictly liable for a defective product manufactured and distributed by the seller,

even though the purchaser itself did not manufacture or distribute the defective product.

In July of 1995, Sinor Manufacturing purchased most of Boardman Company's assets. At the time, Boardman was a division of TBC Fabrication. Sinor acquired the "Boardman" name and the rights to all "drawings, designs and engineering" used to produce Boardman firetrucks. In 1998, Sinor merged into a new entity known as Freightliner Specialty Vehicles, Inc.



On August 19, 2004, members of a volunteer fire department operating a Boardman firetruck were responding to an alarm in the Pittsburgh area when a fire hose came free, became caught under a parked car, and tautened with so much force that the hose lifted the parked car into the air as the momentum of the forward-moving firetruck pulled the hose tighter. The nozzle broke free from the hose and struck two young children and the mother of one of these children. Tragically, one of the young children was killed. The firetruck involved in the accident was manufactured by Boardman in May of 1995, a few months before the sale to Sinor.

The surviving victims, relatives of the victims, and the deceased victim's estate filed a products liability lawsuit against Freightliner Specialty Vehicles, Boardman, TBC, and the volunteer fire department. Boardman was granted summary judgment, and the suit against TBC was discontinued. The fire department settled with the plaintiffs. The principal claim against Freightliner Specialty Vehicles, and a cross-claim filed by the fire department against Freightliner Specialty Vehicles, proceeded to trial. The jury returned a \$4.5 million dollar verdict, finding Freightliner Specialty Vehicles and the fire department were each 50% at fault.

On appeal, the Superior Court was asked to consider the legal standard governing the "product line exception" to the general rule in Pennsylvania law that a purchaser is not responsible for the liabilities of a seller company simply for acquiring the seller's assets. After reviewing the sparse Pennsylvania caselaw on the question, the Superior Court held that a plaintiff seeking to recover under the exception must establish the following prerequisites: 1) the plaintiff's

remedies against the seller were destroyed by the purchaser's acquisition; 2) the purchaser has the ability to assume the seller's risk-spreading role; and 3) it is fair to require the purchaser to assume responsibility for the seller's defective product liability because the purchaser benefited from buying the seller's goodwill. If a plaintiff seeking to recover under the product line exception is able to establish these prerequisites, the plaintiff then must establish "it is just to impose liability on the successor corporation" by showing: 1) the purchaser obtained all or substantially all of the seller's operations; and 2) the purchaser continued to "manufacture the same general line of business" as the seller. The Court further pointed to other factors that "will always be pertinent" in determining whether the product line exception applies: 1) whether the purchaser bought the seller's name and goodwill for marketing purposes; 2) whether the purchaser maintained the same product and clientele; and 3) whether the purchaser required the seller to dissolve. While the *Schmidt* Court's formulation of the product line exception includes both redundancy and imprecision, the factors the test relies on are fairly consistent with the factors courts from other jurisdictions use as a test for the product line exception.

The *Schmidt* Court did, however, depart with prior law in one regard. The Court recognized that Freightliner Specialty Vehicles "did not continue to manufacture the same exact product - *i.e.* the specific model of the fire truck that injured the Plaintiffs," but pointed to a 1979 California appellate court decision to support the idea that liability is appropriate where the purchaser continues to "manufacture the same general line of business." In reaching this conclusion, the *Schmidt* Court tiptoed around the 1981



decision in *Dawejko v. Jorgensen Steel Co.*, where the Pennsylvania Superior Court held a plaintiff must establish a purchaser continued “essentially the same manufacturing operation as the selling corporation” to recover under the product line exception. The *Schmidt* Court also disagreed with *Takacs v. Cyril Bath Co.*, an unpublished federal district court decision concluding the *Dawejko* “essentially the same manufacturing operation” test was binding Pennsylvania law.

The *Schmidt* Court’s application of the product line exception creates even more uncertainty for businesses. The record clearly established Freightliner Specialty Vehicles did not continue to manufacture the Boardman firetruck which was involved in the tragedy. Nor did the Court point to evidence establishing Freightliner Specialty Vehicles continued to manufacture or sell firetrucks previously manufactured by Boardman.

The Court, however, felt the jury’s verdict was justified. The Court emphasized Freightliner Specialty Vehicles’ purchase of the Boardman trade name and the Boardman firetruck designs, drawings, and engineering material. The Court also noted that the record contained evidence that Freightliner Specialty Vehicles continued to sell a “little mini fire truck” known as a “woods truck” or a “fire wagon”, and other “various emergency vehicles” after the Boardman transaction. The Court also suggested Freightliner Specialty Vehicles advertised firetrucks that were similar to the truck the volunteer fire department used. The Court further pointed out that Freightliner Specialty Vehicles “held itself out to be Boardman” and “advertised their products under the ‘Boardman’ tradename.” However, it is not clear from the

Court’s analysis whether Freightliner Specialty Vehicles ever manufactured firetrucks, let alone advertised firetrucks it manufactured using the Boardman name.

After *Schmidt*, it is difficult to predict when a purchaser will be liable. Does a purchaser have to continue the manufacture of a defective product to be liable under the product line exception? According to *Schmidt*, the answer is clearly “no” - if a purchaser merely continues to sell a product in the “same general line” as a defective product previously manufactured by the seller, the purchaser can be held liable. If a purchaser buys a trade name and uses the name to sell purchaser manufactured products that are similar to defective products previously manufactured under the brand name by the seller, is the purchaser liable? According to *Schmidt*, the answer may be “yes.” While *Schmidt* is broad, future decisions may limit it to its facts. For example, what happens if a purchaser corrects a defect and continues to sell the same “general” product - is the defective product and the improved product “generally” the same? *Schmidt* does not address this question.

In practical terms, *Schmidt* underscores the importance of performing due diligence before purchasing a substantial portion of a business’s assets. Prospective purchasers should research product lines they want to purchase, and if uncertain, require the seller create an escrow account or that the seller’s principals provide indemnity protection. Prospective purchasers who question whether strict liability could follow a product line may also want to consider setting aside funds to correct potential defects, and purchasing additional liability insurance.



On November 7, 2008, the Pennsylvania Superior Court denied Freightliner Specialty Vehicles' petition asking for reconsideration of the appeal by a nine-judge panel of the Court. Nevertheless, Freightliner Specialty Vehicles can ask the Pennsylvania Supreme Court to hear the appeal. The Supreme Court can hear appeals involving questions of first impression that are of substantial public importance. The Supreme Court, which is the oldest judicial body in North America, has never considered the product line exception. Now may be the time.

TAX TAKES

Federal Emergency Economic Stabilization Act of 2008

In October, the Emergency Economic Stabilization Act of 2008 became law (the Act). To ensure passage by a divided Congress, the law is loaded with provisions, especially those benefiting special interests. An exhaustive review would not be of much value to the average business owner, so below are some highlights of the Act that have a more general application:

Business Tax Incentives

The Act contains several new provisions benefiting businesses as well as some extensions of current beneficial provisions:

- ❖ The research tax credit was extended.
- ❖ Certain qualifying restaurant improvements and leasehold improvements are eligible for 15-year rather than 39-year depreciation.

- ❖ The New Markets Tax Credit higher investment limit was extended (the New Markets Tax Credit encourages taxpayers to invest in or make loans to small companies in distressed areas).
- ❖ The provisions allowing immediate deduction of environmental clean-up costs was extended.
- ❖ For machinery and equipment used in farming which is put into service in 2009 or 2010, an expedited five-year depreciation period is permitted.

Alternate Minimum Tax Relief

A temporary increase of the exemption applies for 2008. The AMT exemption for 2008 is \$69,950 for married couples filing jointly, \$46,200 for singles and \$34,975 for married couples filing separately. This temporary increase, only applicable to 2008, is intended to insulate middle-income taxpayers from the AMT.

The Act also allows taxpayers to take nonrefundable personal credits to reduce their AMT liability and also removes limits in the AMT on taking personal credits against regular tax liability. Personal credits now include the dependent care credit and the education tax credit, in addition to the previously allowed adoption, child and saver's credit.

Extension of Individual Tax Breaks

The Act extended several provisions benefiting individuals (although the extension of many of these every year has become expected):

- ❖ Deduction of state general sales taxes in lieu of state income taxes.



- ❖ Above the line higher education tuition deduction.
- ❖ Additional standard deduction for real property taxes for non-itemizers.
- ❖ Above the line teacher classroom expense deduction.
- ❖ Tax-free distributions from IRAs for charitable purposes.

Deferred Compensation Compliance Deadline (December 31, 2008) may Finally be for Real

Section 409A of the Internal Revenue Code was enacted in 2004, but the IRS, due to an inability to decide how to implement it, extended Section 409A's compliance deadlines several times. No extensions are expected to the current December 31, 2008 compliance deadline.

Section 409A dramatically changed nonqualified deferred compensation plan law, and implemented significant new rules and penalties. In the first place, Section 409A's definition of nonqualified deferred compensation is so broad that it applies to essentially any employment contract, bonus plan, severance pay plan or other arrangement if the employee may receive compensation in a future year. Section 409A implements a strict list of what events allow for payment of deferred compensation. Section 409A also disallows or restricts some plan features that were commonly found in nonqualified deferred compensation arrangements, such as the right to accelerate payments or the right to make subsequent elections changing the time or form of payment.

Failure to comply with the deadline will result in adverse consequences. The deferred income will be treated as currently taxable,

including income deferred in prior years. There is also a 20% excise tax on the deferred income. Also, interest on the prior year deferral will be included in the taxable income.

Therefore, before December 31, 2008, companies should take stock of any employment or employee agreements and plans outstanding to determine if they need changes before the deadline to make them compliant with Section 409A.

Other Tax Law Changes

Tax Credit for Eligible Home Buyers

Under the Housing Assistance Tax Act of 2008, eligible "first time" home buyers who purchase a principal residence between April 8, 2008 and July 1, 2009, can receive a refundable tax credit up to \$7,500 (or 10% of the home's purchase price, if less). The credit may be available to a taxpayer even if the taxpayer has previously owned a home. It includes buyers who have not owned a principal residence in the United States for three years before the purchase.

Home Sale Exclusion

If a taxpayer plans to make a second or vacation home into his or her principal residence, the taxpayer may wish to do so before January 1, 2009. After that date, if a taxpayer converts a vacation home into his or her personal residence, the taxpayer may not be able to fully exclude capital gains taxes.

Energy Incentives

The Energy Improvement and Extension Act of 2008 extended a \$500 tax credit for the



costs of making certain energy-efficient improvements to a principal residence. These improvements include energy saving exterior doors and windows, insulation and the installation of equipment (such as furnace or water heater) that meets standards for energy efficiency. If a taxpayer installs solar equipment in his or her home, the taxpayer may qualify for a tax credit. The credit originally expired December 31, 2007. It will be available again for 2009 (but not for 2008).

A taxpayer may also qualify for tax credits if he or she buys a new vehicle powered by fuel cells, advanced lean-burn technology or alternative fuels in 2008. The purchase of certain qualified hybrid vehicles may also earn a credit.

Numerous energy credits and deductions were also added and or extended for businesses. For example, in 2009, employers can reimburse employees who ride bikes to work for expenses of up to \$20 a month on a tax free basis.

ESTATE CORNER

Increase in Annual Gift Exclusion

The annual exclusion amount for 2008 is \$12,000. This is the amount of unconditional present interest gifts a taxpayer can give to as many individuals he or she chooses without incurring any gift tax or using any of the taxpayer's lifetime exclusion amount. Gifts over this amount count towards a taxpayer's lifetime exclusion amount. In order to qualify as a gift in 2008, the beneficiary must receive the gift (and cash any checks) prior to the end of the year. A taxpayer can double the annual exclusion amount for 2008 to \$24,000, if his

or her spouse elects to split the gift with the taxpayer. In 2009, the annual exclusion amount will increase to \$13,000 per donee or \$26,000 for gifts split with the taxpayer's spouse. A taxpayer can also pay eligible educational and medical expenses without the payment being treated as a taxable gift as long as the payment is made directly to the provider.

Increase in Transfer Tax Exemption

During a taxpayer's lifetime or at death, a taxpayer can transfer up to the exemption amount (\$1 million during life and the "applicable exclusion amount" at death) free of federal estate taxes. For 2008, the "applicable exclusion amount" is \$2 million. For 2009, it is \$3.5million. Thus, if a taxpayer's taxable estate is equal to or less than the applicable exclusion amount, less any lifetime taxable gifts, no federal estate tax will be due when the taxpayer dies. If a taxpayer's estate exceeds this amount, however, it will be subject to the federal estate tax. The estate tax rate will be 45% in 2009 and then will be repealed in 2010. The federal estate tax is currently scheduled to return in 2011 at the rate of 55% on any assets over \$1 million. In order to avoid potential estate taxes in the event the law is not changed, it is important to consider taking advantage of annual exclusion gifting and lifetime exemption gifting in 2009 before the tax law is changed. It is important to update estate planning documents and take advantage of all tax saving opportunities before Congress enacts new tax legislation in the coming year. While it is not clear what changes lie ahead, many think (and President-elect Obama's campaign platform proposed) that the 2009 exemption amount of \$3.5



million and tax rate of 45% will likely continue indefinitely.

ENVIRONMENTAL REALM

Asbestos Notification: A Trap for the Unwary

Asbestos is a naturally occurring mineral that was widely used as an insulator up until the 1970s due to its heat resistance and pliability. Asbestos has been shown to present a danger when it is *friable*, meaning when it is flaking and prone to becoming airborne and inhaled. Asbestos is dangerous when inhaled because of its physical structure -- instead of breaking along its fibrous length, it tends to break apart in smaller and smaller strands. When inhaled these strands become splinter-like and become lodged in tissue in the lungs. Because the body cannot break them down, they persist in the tissue and are believed to cause two diseases -- asbestosis and mesothelioma. Both diseases are deadly and painful.

When lawyers speak of asbestos liability, they normally mean asbestos tort litigation, which has proven to be massive, both in terms of the volume of plaintiffs and the financial impact upon defendant companies. Advertisements for plaintiffs counsel still appear on daytime and late night television, more than 20 years after the mineral's wide spread use was discontinued. Many corporate bankruptcies can trace their roots to this harmful mineral. Environmental regulation of asbestos, however, is less well known and contains traps for the unwary.

Asbestos identification is not included the scope of work of a standard Phase I or Phase II environmental site inspection. The general rule is that friable asbestos should be addressed ("abated") by certified and reputable professionals and non-friable asbestos and asbestos containing material ("ACM") should be protected from disturbance. Contractors and inspectors must be certified and licensed pursuant to the Pennsylvania Asbestos Occupations Accreditation and Certification Act and federal law. The asbestos contractor must provide certain notices to EPA and/or the state, including a five-day notification to Pennsylvania Department of Labor and Industry prior to the commencement of asbestos abatement work.

Not all asbestos requirements are directed at the professionals, however. One asbestos requirement that has proven to be a trap for the unwary arises under the federal Clean Air regulations for hazardous air pollutants, which were adopted by reference by Pennsylvania in 1976. These rules require that, prior to the initiation of demolition or renovation activity, an asbestos survey must be conducted to confirm the presence or absence of asbestos and ACM in the structure. The notification requirements differ based on the amount of regulated asbestos and ACM and the activity being performed, but, if any regulated asbestos or ACM is identified, the rules require the owner of a facility and the operator of a demolition activity to provide the EPA and Pennsylvania Department of Environmental Protection (DEP) with a ten-working-day notice prior to initiation of the work. "Demolition" is defined as the wrecking or taking out of any load bearing structural feature. These requirements do not apply to private residences unless they are



owned by a business or contain five or more dwelling units.

DEP has not publicized these rules widely, so many municipalities, owners and contractors are not even aware they exist. DEP and EPA have, however, adopted an enforcement

policy that sets forth significant civil penalty amounts for failing to follow the regulations. To avoid imposition of these penalties, we encourage both owners and contractors alike to provide for surveys and, if appropriate, dual notifications.



KKAG SPEAKING OUT...

- ◆ Mark Grimm and Pat Zaepfel are co-authoring the book *“Buying and Selling a Business (6th Edition).”*
- ◆ On September 12, 2008, Mark gave a presentation entitled “An Overview of Buying and Selling a Business” for Accountant CPE.
- ◆ On May 21, 2008, Mark Grimm gave a presentation entitled “Business Succession Planning” to the Vistage Group.
- ◆ In June 2008, Rhonda Lord gave a presentation to the Pennsylvania Association of School Business Officials (“PASBO”) on 409A – New Deferred Compensation Regulations.
- ◆ In Harrisburg on November 6, 2008 and in Scranton on November 12, 2008, Pat Zaepfel gave a presentation entitled “Environmental Issues in Real Estate Transactions” at the Advanced Real Estate Issues course sponsored by National Business Institute.

We hope you find this issue of the Business Law Watch helpful and informative. If you have any questions regarding any of the subjects covered or other business law matters, please do not hesitate to call or e-mail Mark Grimm (e-mail: grimm@kkaglaw.com), Clarence Kegel (e-mail: kegel@kkaglaw.com), Rhonda Lord (e-mail: lord@kkaglaw.com), Patrick Zaepfel (e-mail: zaepfel@kkaglaw.com), or Jason Confair (e-mail: confair@kkaglaw.com) at 717-392-1100.





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KKAG has a substantial business law practice, representing businesses of all sizes.

KKAG advises businesses on mergers and acquisitions, business formation, general contracting and business counseling, financing, distribution and trade regulation, tax, technology law issues, environmental issues, as well as a full range of other legal areas faced by businesses.

D. Mark Grimm, Jr., Clarence C. Kegel, Jr., Patrick H. Zaepfel and Jason T. Confair are the primary lawyers in our business law group. Other lawyers are involved in business law work as appropriate based on their areas of expertise.

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In our trusts and estates practice, our attorneys handle all aspects of estate and gift taxes, estate and trust planning, administration and litigation, as well as all aspects of charitable trust and foundation planning, administration and litigation. For individuals, we implement plans ranging from simple to sophisticated, with advice and documents as necessary. For clients with family-owned businesses, we assist in the orderly and efficient transition of ownership, control and management from one generation to another. For banks, trust companies, colleges and other institutional clients, we handle planning for special gifts and fiduciary litigation.

D. Mark Grimm, Jr., Rhonda F. Lord and Clarence C. Kegel, Jr. are the primary lawyers in our trusts and estates law group.

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