

# BWM&S

BURKE, WARREN, MACKEY & SERRITELLA, P.C.

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BWM&S BULLETIN

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## ESTATE PLANNING

### VIABILITY OF FAMILY LIMITED PARTNERSHIPS



*Karen MacKay*



*Stephanie Denby*

W ealthy families often use Family Limited Partnerships or Limited Liability Companies (FLPs) to accomplish business goals and, simultaneously, reduce their estate and gift tax exposure when FLP interests are passed from one generation to the next.

FLPs are both popular and sophisticated structures. These very versatile entities are tailored to complement the specific nature of the assets, as well as how the family intends to manage the assets.

The IRS sometimes takes a hostile stance when FLPs are used to reduce estate and gift taxes. In a few recent cases, the IRS has prevailed in eliminating tax benefits when FLP interests have been transferred. Typically, the IRS is successful in situations where the FLPs were not structured appropriately or when the

clients have failed to properly administer the FLPs.

What follows are a few points that should kept be in mind by those who have established FLPs or are considering the strategy:

- Remember that an FLP is a business entity and must be operated like a business.
- Make sure the appropriate business entities are registered with the Secretary of State.
- Know and respect the rules of administering your FLP.
- As the FLP general partner or manager, be sure to act as a fiduciary on behalf of all the partners.
- Make sure all distributions are made on a pro rata basis.
- Make sure that all property contributed to your FLP is properly titled.
- Do not commingle FLP assets with personal assets.

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### AND THE SHOW MUST GO ON

Several years ago, firm founder Dick Burke was retained by the City of Chicago to initiate a foreclosure on a mortgage loan of one of Chicago's most treasured landmarks — The Chicago Theatre and the adjoining Page Brothers Building. As a result of the litigation, the Chicago Theatre filed for Chapter 11 bankruptcy relief. A plan of arrangement was negotiated by Dick Burke and BWM&S attorney Gerry Ring. As a result, the property emerged from bankruptcy court with a new board of directors designated by Mayor Richard M. Daley. Pursuant to the plan, the City took title to and possession of the Theatre.

During the summer of 2003, BWM&S attorneys Doug Wambach and Dan Hardwick were retained to complete the transfer of the Theatre to the City of Chicago. As a result, the City was recently able to sell the Theatre to a new operator, helping ensure the Theatre's place among Chicago's most important cultural assets.

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## BWM&S GOES ON OFFENSE WITH CLASS ACTION DEFENSE



*Danielle Szukala*

**B**WM&S is pleased to announce the recent addition of Ms. Danielle Szukala to its team of litigators who focus on class action defense matters for financial services clients across the United States.

“It is with a great deal of excitement that I have joined Burke Warren’s class action defense team,” says Ms. Szukala.

“Over the past few years, I have gained invaluable experience in class action defense cases in the financial services arena and I look forward to further concentrating my practice in that area. Moving to Burke, Warren allows me to step into a situation where I can provide substantive support for the firm’s regional and national clients. Additionally, the move provides me with the opportunity to work with and learn from well-respected attorneys. I have no doubt that I have joined an excellent practice, and it is an honor for me to be a part of it.”

Prior to joining the firm, Ms. Szukala practiced law as a litigator for a large Chicago-based firm.

Ms. Szukala has been involved in the defense of financial institutions against a variety of state and federal claims, including

claims under the Truth in Lending Act, the Fair Housing Act and claims for violations of state consumer fraud statutes. Ms. Szukala has also represented a wide range of clients in other litigation matters, ranging from corporate clients such as manufacturers, to individuals requiring pro bono representation with respect to immigration and small criminal matters.

Ms. Szukala received her undergraduate degree, with honors, from the University of Iowa, graduating in 1996 with a double major in Journalism and History and a minor in Dance. Ms. Szukala was awarded her J.D. degree, with high distinction, from the University of Iowa College of Law in 1999, where she was a Note and Comment Editor on the *Journal of Gender, Race & Justice*. She is admitted to practice in both state and federal court in Illinois and is a member of various bar associations.

Ms. Szukala co-authored recent publications which include *Recent Trends in Federal Preemption of State Law Claims Under the Federal Home Owners’ Loan Act of 1933*, THE BANKING LAW JOURNAL (July/August 2002) and *Federal savings associations should raise preemption defense against state law claims at early stage of litigation*, CONSUMER FINANCIAL SERVICES LAW REPORT (June 5, 2002).

Ms. Szukala can be contacted at 312/840-7070 or [dszukala@burkelaw.com](mailto:dszukala@burkelaw.com). **B**

### ELECTION LAW



*John Fogarty*

Following the 2000 General Election, *Wall Street Journal* political writer, John Fund, posited that our country had crossed a “psychic barrier” marking a permanent change in how elections are decided. Increasingly, the finish line is not election night, but rather, elections are not complete until the lawyers have made their arguments and a judge or a panel of judges declares a winner. In 2000, with the outcome of the presidential election in the land in the hands of election lawyers, the nuances of election law were “discovered” by the popular media and the general public.

The practice of election law though, has been around as long as candidates have been running for office. The practice itself includes a wide variety of subject areas, such as advising candidates on the process for placing themselves on the ballot (and keeping opposition candidates off the ballot), navigating byzantine and ever-changing campaign finance laws, ensuring that the elections themselves are conducted fairly, contesting elections that have been conducted improperly, and handling libel and slander issues.

For the practitioner, the field of election law is an exciting, fast-moving pursuit that presents a number of distinct challenges. The time frames established for deciding ballot disputes or election results are very tight, obviously to ensure that government runs as smoothly as possible between elections. The pace is swift, and much is decided in administrative forums, and if appealed, proceeds quickly through the circuit courts and the appellate courts. Often, a candidate’s only remedy will be emergency, injunctive relief, perhaps in stopping election fraud, or the publication of some slanderous campaign ads. Election disputes implicate relatively straightforward statutory compliance issues as well as complex equal protection and freedom of association issues. Typically, very little traditional “discovery” is possible. Finally, adding to a practitioner’s challenge is the fact that election disputes are necessarily highly-politicized affairs. An election law attorney must understand both the mechanics and the political repercussions of the litigation process.

Knowledge of the practical aspects of election law is a critical component in the approach of any individual or organization having an interest in the outcome of an election, be it a federal, state or local election. Further, any public entity charged with properly administering an election would be presumed to possess significant election law expertise.

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## COURT UNLOCKS BARN DOOR ON EMPLOYER'S RIGHT TO MAINTAIN A STABLE WORK FORCE

For years employers have routinely included provisions in their non-competition agreements to restrict former employees from hiring away other employees.

Recently, however, a federal judge denied an Illinois employer's attempt to enforce just such a provision, ruling that it was contrary to Illinois law. Never mind that an Illinois Court had previously upheld a non-compete agreement barring a former employee from hiring away other workers. The federal judge specifically ruled that the state court had simply gotten the applicable Illinois law wrong.

A covenant not to compete must be narrowly tailored to protect a "legitimate business interest" to be enforceable. At least one Illinois Court has ruled that an employer's desire to maintain a stable work force constitutes a "legitimate business interest." But, according to the federal court, under Illinois law there are only two "legitimate business interests" that may be protected by non-competes: "near permanent" relationships with customers and confidential information or "trade secrets." The court therefore concluded that, because maintaining a stable work force is not a legitimate business interest, employers may not seek to protect that interest through their non-competition agreements.

While a federal court decision is not binding on Illinois state law, federal rulings are accorded considerable deference by state courts, which often adopt a federal court's decision. In fact, in his opinion, the federal judge here said that he was sure that the Illinois Supreme Court will confirm his ruling as soon as it gets the opportunity.

For more information concerning non-competition agreements, contact Jay Dobrutzky at 312/840-7089, Kristin Lemmon at 312/840-7078 or your BWM&S attorney. **B**



*Jay Dobrutzky*



*Kristin Lemmon*

### Some Guidelines For Making Non-Competes Work

Because non-competition agreements represent restrictions on trade — indeed, a potential limitation on an individual's ability to earn a living — they are generally disfavored by the law and closely scrutinized by courts. As a result, the law of restrictive covenants is constantly changing. To increase the likelihood that a non-compete will be enforceable, consider the following guidelines:

**Provide consideration for the agreement not to compete.** A non-compete is a contractual agreement that requires consideration to be enforceable. It should be signed at the time of hire as consideration for employment. If the non-compete is requested after hire, it should be obtained in return for some other meaningful consideration, such as a promotion or raise. Obtaining a non-compete in return for "continued employment" can be risky: if the period of continued employment is relatively short, it may not constitute adequate consideration.

**Use the "but for" test to limit restrictions to the employer's "near permanent" relationships with clients.** Unless it can be shown that an employee would not have come into contact with a customer "but for" the employment relationship, a covenant restricting competition is less likely to be deemed enforceable. If possible, try to specify by name clients that an employee agrees not to solicit for a reasonable time after leaving employment.

**Time and space restrictions must be reasonable:** Courts frown on time restrictions that exceed the time it takes to acquire and keep customers. If clients are likely to take their business elsewhere within a year, don't expect to restrict an employee's right to compete for any longer than that. Similarly, a geographical restriction should be limited to the area in which the employee was able to establish contact with customers or in which the employer conducts its business.

**Treat trade secrets and confidential information as though they were secret and confidential.** A confidentiality or non-disclosure provision in a non-compete is unlikely to be enforced unless the employer kept the materials and information under lock-and-key, such as in an actual safe or beyond the reach of anyone without the necessary computer password. Courts are reluctant to protect information that the employer itself failed to take reasonable steps to secure.

**Make the non-compete's provisions "severable."** Make sure the agreement states that the parties intend enforceable provisions to be severed from any ruled to be unenforceable. However, bear in mind that courts are not in the business of rewriting non-competes to make them valid, and almost always refuse to do so. Thus, it is critical to ensure that non-competition agreements comply with current law. **B**

# BULLETIN

Burke, Warren, MacKay & Serritella, P.C.

IBM Plaza - 22nd Floor  
330 N. Wabash Avenue  
Chicago IL 60611-3607

*The Bulletin is written by the firm of Burke, Warren, MacKay & Serritella, P.C. to keep clients and friends current on developments in the law and the firm that might affect their business or personal lives. This publication is intended as a general discussion and should not be construed as legal advice or legal opinion on any specific facts or circumstances. It is meant as general information only. Consult an attorney with any specific questions. This is a promotional publication. ©2003 Editor: Cy H. Griffith, Director of Marketing; Jay S. Dobrutzky, Esq., Legal Editor.*

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## LABOR AND EMPLOYMENT LAW

### DIAL SOAP PAYS \$10 MILLION IN SEXUAL HARASSMENT SUIT CLEAN UP YOUR HARASSMENT POLICIES TO AVOID TAKING A BATH

**T**wo Illinois employers have laid claim to first and second place nationwide in an area that both companies would gladly do without. Five years ago, Mitsubishi paid out \$34 million dollars to settle a sexual harassment lawsuit filed by the Equal Opportunity Employment Commission, the EEOC's largest ever, on behalf of 486 female assembly line workers at the manufacturer's Normal, Illinois plant. Earlier this year, Dial Corp. paid \$10 million dollars to settle a sexual harassment suit brought on behalf of 91 female employees at its Aurora plant in the EEOC's second largest case since Mitsubishi. In addition to the cash settlement, Dial will be subject to on-site monitoring by the EEOC for two-and-a-half years. These problems are not ending for Illinois employers. Caterpillar, Inc. was hit by two federal discrimination lawsuits in August charging that the company permitted harassment of some black and women employees at two Illinois plants.

It is slightly ironic that the Dial facility, which produces 2.3 million bars of soap daily, would have its reputation soiled, and its coffers cleaned out, as a result of allegations by a quarter of its female employees that they have endured lewd comments, threats, and physical assaults since 1988. The Mitsubishi case involved nearly 500 female workers who claimed that they were groped and insulted on the assembly line while managers stood idly by. Whether a business is large or small, sexual harassment can spread far and wide, costing a company a tarnished public image, damaged employee relations, and crippling legal expenditures.

**The message from the cases couldn't be clearer: Every employer must have a firm sexual harassment policy that is clearly communicated and strictly enforced. This is why BWM&S offers a quick, cost-efficient, and effective on-line sexual harassment training program that provides the perfect cornerstone to any employer's sexual harassment policy. At a cost of \$25 per employee, the program pays for itself as a measure to prevent costly litigation and avoid damaging public relations. For more information and access to an on-line demo, call Martin LaPointe at 312/840-7012 or Cy Griffith at 312/840-7035. **B****

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#### ELECTION LAW

Thanks to the increasing length of the campaign trail (a trend most wish would reverse itself), election law issues are important year round. Candidates seeking state office in the November 2004 general election are already circulating their nominating petitions and collecting signatures.

Burke, Warren, MacKay & Serritella is pleased to offer its clients expertise in election law.

Burke, Warren associate, John G. Fogarty, Jr., a former staff member in the Illinois General Assembly, has handled election law cases before the State Board of Elections, Illinois Circuit Courts, and the Illinois Appellate Courts on behalf of candidates and political parties. Most recently, Mr. Fogarty and BWM&S's Doug Wambach provided the Village of Barrington Hills with advice in properly resolving a 2003 Village Trustee race which had initially ended in a tie.

To learn more about election law, please contact John Fogarty at 312/840-7087 or your BWM&S attorney. **B**

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#### VIABILITY OF FAMILY LIMITED PARTNERSHIPS

- Keep good FLP records.
- Get quality appraisals when gifting FLP interests.

By keeping these basic rules in mind and reviewing your strategy with your attorney or financial advisor on a regular basis, FLPs can continue to be viable and effective tax structures.

For more information, please call Karen MacKay at 312/840-7009 or Stephanie Denby at 312/840-7068. **B**