

BWM&S

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

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LITIGATION

ILLINOIS SUPREME COURT RULES IN FAVOR OF LENDERS IN DOCUMENT PREPARATION FEE CLASS ACTION LITIGATION

In a significant victory for lenders originating residential mortgage loans in Illinois, the Illinois Supreme Court ruled that the charging of a document preparation fee for the lender's preparation of loan documents does not constitute the unauthorized practice of law. In doing so, the high court put an end to the nearly 40 document preparation fee class actions filed in Illinois against numerous residential mortgage lenders primarily by plaintiffs' class action firm, Edelman, Combs, Latturmer & Goodwin. In each of those cases, plaintiffs' counsel

claimed that the lenders engaged in the unauthorized practice of law by charging plaintiffs a document preparation fee for preparing the notes, mortgages, and related documents for plaintiffs' loan transactions. Plaintiffs also asserted claims for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act and restitution. BWM&S attorneys, LeAnn Pedersen Pope, Chair of the firm's Class Action Defense Group, and Jay Dobrutzky, represented Chase Manhattan Mortgage

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BANKRUPTCY

NEW LEGISLATION SIGNIFICANTLY ALTERS BANKRUPTCY LANDSCAPE

Chapter 13 filings to replace many Chapter 7 filings

Thousands of Americans wanting to eliminate their debts in bankruptcy court will soon need to work out repayment plans instead under the recently enacted Bankruptcy Abuse Prevention & Consumer Protection Act of 2005. According to the *Wall Street Journal*, the legislation is a huge victory for credit card companies and retailers.

The bill makes it more cumbersome, more costly and more time-consuming for consumers to eliminate their debts through federal bankruptcy protection.

In 2004, there were 1.6 million non-business bankruptcy filings, down slightly from 2003, according to the U.S. Bankruptcy Court, but nearly six times higher than the roughly 250,000 filings in 1992.

Taking effect October 20, 2005, the legislation, which had been debated by Congress for nearly a decade, will set up an

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The Chicago Children's Museum located at Navy Pier is one of the most popular organizations of its kind. It creates a "community where play and learning connect." The museum serves early learners and their families from all of Chicago's neighborhoods and beyond. BWM&S is a corporate supporter of the Chicago Children's Museum.

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BWM&S EXPANDS ITS CORPORATE AND REAL ESTATE PRACTICES

Burke, Warren, MacKay & Serritella is pleased to announce the addition of John J. Kobus, Jr. to its corporate and real estate law practices.

Kobus previously practiced with Kirkland & Ellis's mergers & acquisitions and venture capital groups and most recently with a boutique corporate firm in Chicago.

"I am excited about my new venture and the opportunities that Burke, Warren will provide for me and my clients," says Kobus. "The firm offers a unique opportunity to provide sophisticated legal services in an environment designed to meet the legal needs and cost expectations of middle

market and entrepreneurial organizations and their owners and employees."

John graduated from the Augustana College at Rock Island, Illinois with a B.A. in Accounting and Finance in 1992. He received his J.D. degree, *cum laude*, from Valparaiso University School of Law in 1995 where he was an Articles Editor of the Valparaiso University Law Review. John is admitted to practice in Illinois and is a member of the Illinois State and American Bar Associations.

John hails from the Chicago area and is currently a resident of the Andersonville neighborhood on



John J. Kobus, Jr.

Chicago's north side. He is married and a recently minted father. He and wife Celia are the parents of 8-month-old daughter Alyssa. You

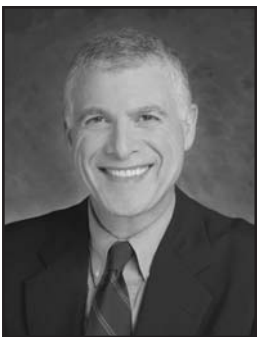
may also find John among the early morning bicycle riders and runners throughout the area. He is preparing for a century bicycle event later this summer. John can be reached at (312) 840-7093 or jkobus@burkelaw.com. **B**

CORPORATE

RICHMAN APPOINTED COUNSEL

The firm's Ken Richman was recently appointed General Counsel to the Elevator Contractors of America (ECA).

The ECA is the voice of independent union elevator contractors. The association is comprised of



Ken Richman

entrepreneurial elevator contractors who provide maintenance, renovation and modernization services to thousands of property owners and managers across the country.

Headquartered in Bloomington, MN, ECA acts as the union contract

bargaining representative and administrator for its members and provides advice and assistance.

Richman will assist the ECA with its primary function as the multi-employer collective bargaining representative for its member companies in national contracts talks with the Independent Union of Electrical Contractors.

For more information, please contact Ken Richman at (312) 840-7002 or krichman@burkelaw.com. **B**

ESTATE PLANNING

EQUALITY VERSUS EQUITY CONSIDERATIONS IN ESTATE PLANNING

BWM&S's Karen MacKay spoke at the 48th Annual Estate Planning Short Course on April 28 in Chicago. In her presentation, entitled "Equality versus Equity Considerations in Estate Planning," Karen offered advice on how to benefit children for estate planning purposes when the primary asset is a family owned business. Specifically, she addressed circumstances where some children are actively involved in the business while others are not, and the various planning strategies and techniques that exist to treat children fairly in such situations.

According to Karen, business owners can transfer voting interests to children who are actively involved in the business, then equalize treatment among the remaining children by transferring, or providing for the distribution to them, of other assets such as marketable securities, real estate or other non-business properties. If equalization is not possible, the business owner might choose to recapitalize the business to create voting and non-voting interests. The voting interests could be transferred to the actively involved children, with the non-voting interests to be transferred to the other children.

BWM&S's Jonathan Michael will deliver a similar presentation later this month in Champaign-Urbana. For more information, please contact Karen MacKay at (312) 840-7009 or kmackay@burkelaw.com or Jonathan Michael at (312) 840-7049 or jmichael@burkelaw.com or your BWM&S attorney. **B**

NEW LEGISLATION

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income-based test for measuring a debtor's ability to repay debts.

Individuals with limited assets or income could still file a Chapter 7 bankruptcy, which, if approved by a judge, discharges debts entirely after certain assets are forfeited.

Individuals with incomes above his or her state's median income who can pay at least \$6,000 over five years will be forced into a Chapter 13 repayment plan.



Edward Lesniak



Gerry Ring

In addition, the new law requires those seeking bankruptcy protection to first obtain credit counseling before filing bankruptcy. Moreover, the minimum time period between Chapter 7 filings has been increased from 6 years

to 8 years.

The rules regarding exemptions have also been changed. For example, Florida, Iowa, Kansas, South Dakota and Texas allow unlimited homestead exemptions, which enable wealthy individuals to protect their expensive homes from creditors. The new law still allows for the bankrupt to take advantage of state homestead exemptions, but they would be

limited to \$125,000 if the debtor purchased the residence less than 40 months before filing for bankruptcy.

Regarding other exemptions, a transfer of assets to a self-settled trust can be avoided by the bankruptcy trustee if the transfer occurred within 10 years prior to the filing of the petition and if the actual intent of the transfer was to hinder, delay or defraud creditors. Retirement funds are exempt under the new law, except that the exemption for IRAs and SEPs is limited to \$1,000,000

To speed up business bankruptcies, the measure specifies that companies filing for Chapter 11 protection will have a maximum of 18 months to offer a reorganization plan. The bankruptcy code currently gives business filers the exclusive right to

file their own reorganization plans within four months, but judges routinely grant multiple extensions that allow reorganizing companies to control the process for years.

A new provision also requires companies operating under bankruptcy protection to commit within 210 days after the filing whether to continue lease arrangements.

From more information, please contact Edward Lesniak at (312) 840-7007/elesniak@burkelaw.com or Gerry Ring at (312) 840-7014/ gring@burkelaw.com or your BWM&S attorney. **B**

Chapter 7 Bankruptcy - The most common type of bankruptcy proceeding.

It is a liquidation type of proceeding (as opposed to a reorganization proceeding). All of the debtor's assets, with the exception of "exempt" property, will be sold, and the proceeds will be used to pay debts. If the proceeds are not enough to pay off all the debts, unpaid amounts on "dischargeable debts" will be discharged.

Chapter 13 Bankruptcy -. Chapter 13 bankruptcy is filed by individuals who want to pay off their debts over a period of three to five years. This type of bankruptcy appeals to individuals who have non-exempt property that they want to keep. It is also only an option for individuals who have predictable income and whose income is sufficient to pay their reasonable expenses with some amount left over to pay off their debts.

Chapter 11 Bankruptcy - Typically used for business bankruptcies and restructuring. It is not commonly used by individual consumers since it is far more complex and expensive to pursue. It allows businesses to reorganize themselves, giving them an opportunity to restructure debt and get out from under certain burdensome leases and contracts. It can also be used to maximize sale value by selling all or parts of the business as a going concern. Typically a business is allowed to continue to operate while it is in Chapter 11, although it does so under the supervision of the Bankruptcy Court. **B**

BULLETIN

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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. ©2005 Editor: Cy H. Griffith, Director of Marketing; Legal Editor: Jay S. Dobrutzky, Esq.

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ILLINOIS SUPREME COURT

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Corporation in two of those cases, which had been consolidated with numerous other similar cases for appeal.

Under Illinois law, the lenders' preparation of notes and mortgages constituted the practice of law. However, the Court agreed with the lenders that this conduct fell within a well-recognized exception to the prohibition against the unlicensed practice of law known as the *pro se* exception. Under the *pro se* exception, a party that is not licensed to practice law may perform legal services so long as it does so on its own behalf in a transaction to which it is a party. Again siding with the lenders, the Court dismissed the plaintiffs' argument that the lenders' charge of a document preparation fee for this conduct transformed the lenders' permissible practice of law into the unauthorized practice of law. Citing a previous ruling by the Illinois Supreme Court, the Court reaffirmed that it is the nature of the conduct at issue that determines whether it constitutes the unauthorized practice of law, regardless of whether a fee is charged for legal work performed by a non-lawyer.

In its ruling, the Court noted that plaintiffs' complaints were remarkable for what they did not allege. For example, plaintiffs did not allege that



LeAnn Pope



Jay Dobrutzky

the lenders offered legal services to borrowers, or offered legal advice to the plaintiffs, or hindered the plaintiffs from retaining attorneys to represent them in connection with their loan or refinance. Nor did plaintiffs allege that the lenders improperly

prepared any of the documents at issue, or that the documents caused them any harm at all. Plaintiffs did not even claim that the lenders had failed to disclose the fee. Indeed, because the HUD-1 settlement statements attached to plaintiffs' own complaints showed that the fee was fully disclosed, the Court also ruled that plaintiffs could not now be heard to complain that they paid the fee involuntarily. The Court also ruled that, because the fee was clearly disclosed apart from fees for legal services, plaintiffs had no basis for arguing that they paid the fee under the mistaken belief that the documents were prepared by an attorney.

Responding to the decision, BWM&S attorney LeAnn Pope said: "The court made the correct decision in favor of mortgage lenders in Illinois. These cases were not about borrowers who were misled in any fashion by the document preparation fees, which were clearly and appropriately disclosed on the HUD-1 settlement statements. Rather, these cases were just another example of another wave of class actions against the mortgage lending industry for the sole benefit of plaintiffs' attorneys." Added BWM&S attorney Jay Dobrutzky: "By affirming the decisions of both the trial and appellate courts, the Supreme Court has now made a lender's right to fill out mortgage loan forms without involving an attorney the law in Illinois. That is a favorable result for both our client, and for mortgage lending in general."

BWM&S maintains a national class action practice representing mortgage lenders, brokers and servicers in class actions filed across the country. For more information about the document preparation fee litigation, or the numerous other types of class actions currently directed against the lending and servicing industry, please contact LeAnn Pope at (312) 840-7013 or lpope@burkelaw.com or Jay Dobrutzky at (312) 840-7089 or jdobrutzky@burkelaw.com. **B**