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

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See you on the 21st floor!

Burke, Warren, MacKay & Serritella is delighted to announce that, in order to accommodate our own continuing growth and increasing client needs, we have expanded and improved our facilities at 330 North Wabash in Chicago. Our reception area has moved from the 22nd floor to the 21st floor. Beyond meeting our own increasing space requirements, adding convenience and comfort for visiting clients was a priority in our expansion. Visitors will enjoy new conference facilities located just steps from the reception area.

LITIGATION

Not So Fast: Firm Puts Brake on Auto Maker's Unlawful Surcharge for Infiniti and Nissan Dealers

Litigation partner Ira Levin recently achieved a signal victory on behalf of Fields Infiniti and Fields Infiniti of Lake County before both the Illinois Motor Vehicle Review Board and the Circuit Court of Cook County against Nissan North America's Infiniti Division. Levin succeeded in both forums on the Fields dealerships' challenge to Nissan's practice of imposing a surcharge on every new vehicle invoice to lower Nissan's reimbursement costs for parts used in warranty repairs. The surcharge, which Nissan has also imposed

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WEALTH AND SUCCESSION PLANNING/TAX ADVISORY SERVICES

Planning for 2013, the Fiscal Cliff and Beyond!

Greg Winters

The November elections are over, but we still have a divided government with Democrats controlling the White House and the Senate, while Republicans control the House. If Democrats and Republicans cannot come to a bipartisan agreement to avoid the fiscal cliff, the Bush-era tax cuts will automatically expire on January 1, 2013. This will result in income tax rates increasing to up to rates as high as 39.6% on ordinary income.

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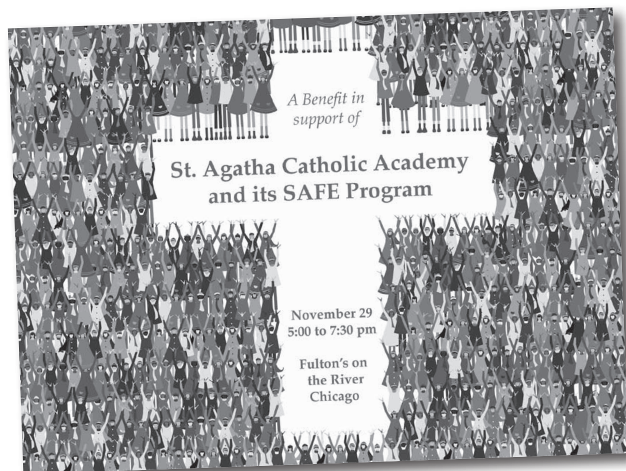
NEXT ISSUE: Internal Corporate Investigations, the Firm grows again, and more.

RELIGIOUS AND NOT-FOR-PROFIT ORGANIZATIONS

Friends of St. Agatha

Several BWM&S attorneys with support from the firm recently hosted an event in support of St. Agatha Catholic Academy and its SAFE program at Fulton's on the River in Chicago. More than 130 people took part in the celebration that featured remarks from Francis Cardinal George, Fr. Larry Dowling, pastor of St. Agatha, and the Firm's Jim Serritella. The highlight of the evening was a performance by members of the St. Agatha children's choir. Cardinal George is pictured with members of the choir.



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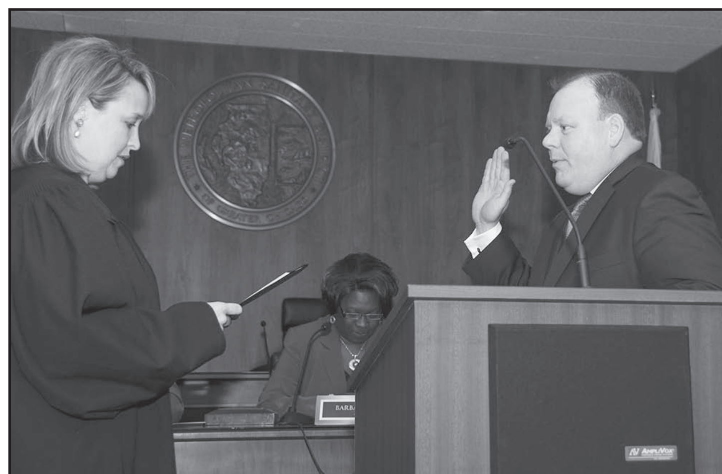
Firm's Thompson elected Commissioner of the Metropolitan Water Reclamation District

The Firm congratulates colleague Patrick D. Thompson on his recent election victory. He joins the Metropolitan Water Reclamation District (MWRD) as one of three newly elected commissioners.

The MWRD has both a storied past and important future. Known originally as the Chicago Sanitary District, it was created in 1889 to solve the region's serious public health issues spread by water-borne diseases like cholera and typhoid and has continued to evolve to focus on treating wastewater, managing stormwater, and protecting homes and businesses from flood damage. Especially important to the District's past was the great engineering accomplishment that it undertook, the reversal of the Chicago River, in 1900.

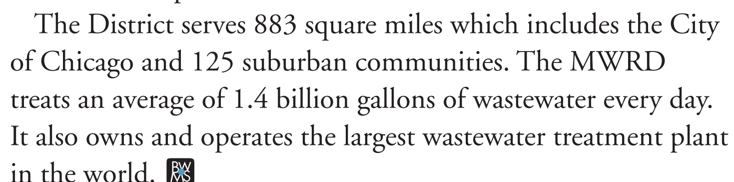
Given the scarcity of water in parts of the United States and around the world compared to the relative abundance of water in our area, the MWRD will play an important role in the management of this vital resource as we look to the future.

"I believe that water will be to this century what oil was to the last," says Thompson. "Together, the Great Lakes hold 18% of all the fresh surface water on earth. For this reason, protecting this vital resource is and will continue to be a critical issue for the Great Lakes Basin. I am thrilled to be in a position to make an impact on this issue as a MWRD Commissioner."



Circuit Court Judge of Cook County Maura Slattery Boyle reads the oath of office to Commissioner Patrick D. Thompson.

The District serves 883 square miles which includes the City of Chicago and 125 suburban communities. The MWRD treats an average of 1.4 billion gallons of wastewater every day. It also owns and operates the largest wastewater treatment plant in the world.



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Firm Attorneys Volunteer Through Lawyers in the Classroom Program

On December 7, 2012, firm attorneys Ellen Brace, Erika Harold, Alex Marks, Tiffany Sorge-Smith, and Sara Youn volunteered at Goldblatt Elementary School on Chicago's West Side to teach second grade students about the legal system and the U.S. Constitution. The attorneys presented the case of *State v. Wolf*, based on the story of the *Three Little Pigs*. The students acted as the jury and watched the mock trial as the attorneys presented their sides. After the trial was presented, the students reached an almost unanimous verdict of not guilty on behalf of Wolf.

"Even the youngest students aren't too young to start learning about how important it is to be engaged in democracy," said Jessica Chethik, director of the Lawyers in the Classroom program. "The attorneys bring in their real world experience and give the kids valuable individualized attention and help them develop their critical thinking skills."

This program, known as the Edward J. Lewis II Lawyers in the Classroom Program, is sponsored by the Constitutional Rights Foundation of Chicago, which has been placing lawyers into classrooms for more than 25 years. The program works to place over 600 attorneys into 90 different schools, working with students between second and eighth grade, in the Chicago area.

For more information about Lawyers in the Classroom, contact program director Jessica Chethik at 312/663-9057 or chethik@crfc.org.

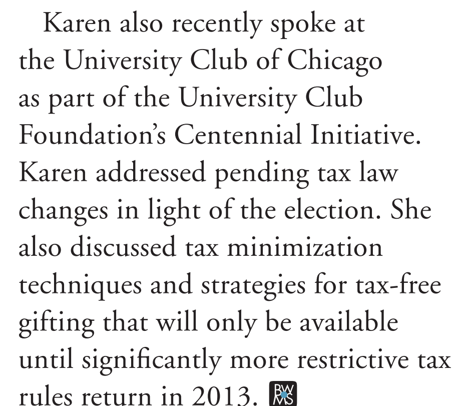
Sara Youn (top) and Tiffany Sorge-Smith work with students at Goldblatt Elementary School.

WEALTH AND SUCCESSION PLANNING

MacKay Presents on Pending Tax Law Changes

Karen MacKay recently served on a panel at an event sponsored by Villanova University for its Chicago alumni association. The discussion was titled "Congress, Politics and Taxes: What's Around the Corner and Over the Horizon?" and Karen discussed upcoming changes in the federal estate, gift, and generation-skipping transfer tax rules, and how these changes will impact individuals in their gift-giving plans and estates. John Gotanda, Dean of the Villanova School of Law, served as the moderator, and other panelists included Joseph McGowan, Vice President-Tax at Hill-Rom, and Dr. Scott Janney, Executive Director of Planned Giving at Villanova.

Karen K. MacKay



Karen also recently spoke at the University Club of Chicago as part of the University Club Foundation's Centennial Initiative. Karen addressed pending tax law changes in light of the election. She also discussed tax minimization techniques and strategies for tax-free gifting that will only be available until significantly more restrictive tax rules return in 2013.

How to Hide in a Fish Bowl:
Street-Smart Guide to Private Company Investor Disclosure

Deals involving shares and shareholders can trap companies in a maze of investor disclosure rules. Whether a firm sells shares or bonds, or requests owners' permission to vote at shareholder meetings, the law demands that an entity reveal its finances, operations and weaknesses to securities holders.

Management must fulfill obligations under the law to disclose significant information, but common business sense requires no compromise of competitive or operational advantages through excessive openness. Just as most people hesitate to disclose their private lives to just anyone anywhere, so also should a business exercise discretion.

Craig McCrohon

Privately-held companies operate under requirements that differ from those of publicly-held peers. Fortune 500 firms trading on public securities exchanges have the benefit (and the burden) of clear but copious disclosure requirements. However, non-traded private companies, regardless of the number of shareholders, can feel themselves entwined in a vague and confusing thicket of dictates from judges and bureaucrats. These smaller firms operate under general rules of fraud and fairness, as opposed to compliance with the bright-line tests applied to publicly-traded firms.

The stakes are high. If an investor convinces a judge that the company withheld or misstated information, the firm can be held liable for at least the return of the investment. If one shareholder proves liability, often all shareholders can receive compensation from the firm. The worst case scenario can include both bankruptcy for the company and personal liability for management.

The When of Disclosure

Securities laws apply when firms take certain actions, including selling stocks or bonds, sending letters to securities holders, requesting permission to vote shares on behalf of owners, delivering periodic financial statements, or repurchasing stock from current shareholders. Apart from these actions, a firm can function in a secure zone of corporate silence.

The Why of Disclosure

The threat of a law suit based on fraud underlies the rationale and scope of most corporate disclosure. The elements of such claims establish the parameters of appropriate privacy. First, any misstatement must be material. That is, was there "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available." Second, the company must be shown to have intended to deceive investors; "intent," however, can arise from innocent recklessness, where the company should have known that its statements would mislead.

Unfortunately, even after thousands of rulings over the years, judicial standards offer little more guidance than a Zen riddle. Both courts and government agencies retreat to the "standard" that the relevance of any company statement or action depends on the facts and circumstances of the company, the market, and the current and potential investors. For instance, a large, complex company may require more explanation than a single-asset or single-product firm. Similarly, if the firm approaches dozens or hundreds of unsophisticated potential purchasers, disclosure must be clear and complete. On the other hand, if a company targets only sophisticated institutional venture capital investors, disclosures can be limited, and liability limited, since the venture fund's staff usually completes its own thorough due diligence.

Rulings, pronouncements, law suits and regulatory commentary offer the tea leaves about disclosure standards, methods and timing. By following a few principles, companies can better gauge what to share in public and what to retain in private.

The How of Disclosure

Companies should appreciate what documents and communications trigger liability. Fraud claims arise from any medium of communication. Most commonly, when a firm sells shares or bonds, a prospectus or private placement offering memorandum provides the information about the company and a transaction. Sales materials might also include PowerPoint slides. Speeches can expose management to claims of false statements as much as the black and white text of any offering document. Less common, but just as legally lethal, advertisements can trip over the rules regarding accuracy and completeness.

Executives can manage the challenge through two practical approaches. First, each recipient of offering materials can be required to execute a confidentiality agreement. For existing shareholders, this could be included in a shareholder's agreement that survives as long as the investor holds an interest in the firm.

Second, the company could simply target fewer potential purchasers, and instead contact only serious corporations and venture funds. This allows the company to skip the mass mailing of the prospectus to distant "contacts," many of whom are more likely to abuse the information than purchase shares.

A third option is less practical: simply hide the information. Companies can get away with this practice when shareholders are repaid with a fair return. The risk arises in the common instance where investors lose some or all of an investment. In such cases, the "disclosure safety net" may become the difference between financial life and death for the firm.

The What of Disclosure

The bottom line — what can management say? What should they say? What should they omit? Following are basic categories of disclosure which would be included in a prospectus to stock purchasers. A supplemental letter to shareholders would include only those facts new to shareholders and relevant to the action taken, such as voting on director appointments.

- ***Business basics.*** For a stock or bond offering prospectus, documents should almost always address the following business basics: business description; competition; market; assets; intellectual property; suppliers; customer concentration; method of production; marketing plan and strategic relationships; significant industry-specific regulations; research and development; liquidity and the period of time until the firm will need more cash; expectations of timing of cash-flow positive operations; future capital investments; company history and basic organization; milestones regarding product development, distribution or sales; management biographies, including directors; and inside deals and arrangements with officers, directors, significant shareholders and their families, or entities that any of these persons control; management compensation and employment terms; uses of funds of offering, including expenses and commissions related to the offering.
- ***Contingent liabilities - meaning of maybe.*** Among the thorniest of issues is the description of events and liabilities with uncertain outcomes. Top of the list — litigation. First, assess the worst case or best case scenario. Regulators have used a rule-of-thumb disclosure standard of ten percent of the assets of the entity. Second, consider the likelihood of the outcome. Generally speaking, the likely outcome will fall into one of three categories — highly likely (95 to 99 percent), highly unlikely (zero to five percent), or "your guess is as a good as mine." If the litigation is material and the result other than highly unlikely, then disclosure may be prudent. Other contingent liabilities to consider include negotiations of significant transactions.
- ***Proof is in the exhibits.*** Private company offering guidelines do not require that companies provide specific exhibits such as bylaws, articles and significant agreements. However, for smaller privately-held firms, providing these documents is an efficient means of ensuring adequate disclosure without risk of omitting a critical sentence in the offering documents. Early-stage companies often make everything available, given the relatively small number of documents. Smaller firms might follow regulators' large-company guidelines when selecting which exhibits to provide or to make available at the firm's offices.
- ***Measure of materiality.*** Nothing frustrates management more than the "it depends on the facts and circumstances" proviso of the disclosure laws. Regulators and courts, however, have provided hints about quantitative benchmarks for disclosure. For example, for contingent liabilities, firms might use a standard of ten percent of assets; for material contracts, one to five percent of revenue; for everything else, a standard of one to three percent of revenue should work. Firms can often omit the truly routine low-dollar contracts, such as basic agreements relating to administration and office management. Note that practically any agreement with a non-competition covenant or other non-quantifiable but significant obligation should be disclosed, especially for smaller companies.

  TIP: Many savvy early-stage clients bypass the handwringing and disclose everything, deciding it's simply not worth the trouble to separate the tiny from the small. If you try to slice the miniature onions and tomatoes, you'll only cut your finger. It may be better to simply put all of these small documents into the disclosure salad.
- ***Magnifying the fine print of governance documents.*** Offering documents should describe the dull, but financially essential, terms of the stock or debt being sold. This includes voting rights, conversion options, prepayment penalties, coupon interest rates, and all other rights and obligations of the holders that directly and materially affect the terms of the investment. Such documents include the certificate of incorporation, bylaws, shareholders agreements, promissory notes and other documents directly describing

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Do You Need to Protect Your Trade Secrets?

Many have read of the recent prosecution of Hanjuan Jin, a Motorola Software Engineer, who was this year convicted in federal court in Chicago for criminal theft of trade secrets. The case was aggressively pursued by federal prosecutors, and Jin was ultimately convicted of diverting Motorola trade secrets to a Chinese competitor. Some questions remain as to whether her four year prison sentence was sufficient. Regardless, the Jin case drives home a point for every American business predicated on technology: protect your trade secrets.

What exactly is a trade secret? Almost every state in the union has adopted, without significant modification, the Uniform Trade Secrets Act (UTSA), published by the Uniform Law Commission in 1979 and amended in 1985. The UTSA is a uniform statute promulgated to provide a legal framework to improve trade secret protection for industries in the United States. Under the UTSA, a trade secret is:

> information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Many companies in the United States prosper because of their technological edge — whether it consists of a key customer list, a method of manufacturing, a customized software program, or a formula (like that for Coca-Cola®). Clearly, one need not be a multi-national company to benefit significantly from the possession of a trade secret.

If your company derives benefit from proprietary business information, it might well be a trade secret, subject to protection under state law (and even federal law in some circumstances). To make sure your valuable information is kept safe, there are certain key steps your business can take to protect its trade secrets … before they board an airplane to China.

- **Inventory the Trade Secrets:** Every business should take the time to determine what exactly its most valuable assets are, and identify, so that it can be explained in court, the proprietary business information most important to the business. If there is information in this category that would cripple your business if lost or exploited by a competitor, it is likely a trade secret.

Fred Mendelsohn

- **Secrets Should be Kept Secret:** Should your business ever have to litigate a trade secret case, it must be able to establish that it treated the proprietary business information as a secret. What that means is that the information: (i) should only be disclosed to officers, agents, and employees who need to know it, and not to anyone else; (ii) is otherwise kept under lock and key; and (iii) is subject to policies and contracts to ensure that secrets remain secrets — confidentiality and non-disclosure policies are a must, as are employee handbook statements supporting these contractual obligations.
- **Contracts are King:** Your business should have agreements with each employee, officer, and agent who has access to your trade secrets that commit that person to never divulge, use, or even think about (except for the benefit of your business) such trade secrets, unless and until the information is available in the Library of Congress. The same holds true for third-party vendors, all of whom, if exposed to your trade secrets, should be committed to secrecy by a non-disclosure or other appropriate confidentiality agreement.
- **Internal Controls and Training:** Not only should you train your employees on the significance of proprietary information and the risks of abusing or misappropriating such information, but you must ensure that steps are taken internally to avoid inadvertent disclosure or publication of proprietary information. Keep such information under lock and key, in a safe if need be; do not allow access to computer databases with such information without securing it (password protected, encrypted, etc.); do not allow hard copies of the information to be left sitting around unreturned to a safe location after use; ensure proper penalties for violation of this category of business rules (e.g., immediate employment termination); and collect and shred any materials that disclose such information when used after dissemination beyond those who are contractually bound.
- **Don't Give People Access to Your Business:** We've all been on tours of famous businesses or factories where access is denied to restricted areas. This should be the case for your company's truly protectable trade secret

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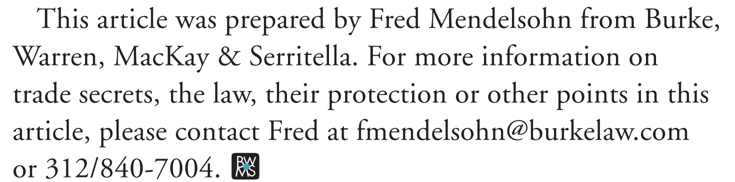
information. With each level of protection, a judge or jury will be more likely to believe that you treat your information as confidential, because it is and is treated as such, because it is valuable — very valuable.

- **Develop a "Doomsday Plan":** What if your security and protective measures are breached? Have a plan in place to readily identify and contact the members of your staff who have access to the information and any "team" needed to implement the "Doomsday Plan" (e.g. counsel, security, vendors, insurance, and public relations). Ensure you can shut down access if a breach occurs so that no one can assert that your efforts to prevent a catastrophe were less than adequate for protection of valuable, proprietary and trade secret information.



This article was prepared by Fred Mendelsohn from Burke, Warren, MacKay & Serritella. For more information on trade secrets, the law, their protection or other points in this article, please contact Fred at fmendelsohn@burkelaw.com or 312/840-7004.

REAL ESTATE LAW

Firm Welcomes Real Estate Associate

Burke, Warren, MacKay & Serritella welcomes associate Dana White to its Real Estate group. Ms. White focuses her practice on complex commercial real estate transactions as well as counseling clients on a variety of business and real estate matters. She joins the Firm after practicing at a boutique commercial firm in Chicago.

Most recently, Ms. White represented Illinois' largest wine and spirits distributor in the acquisition and redevelopment of a 36-acre site into a 605,000 square foot office, warehouse, and distribution facility. This project presented several unique challenges including negotiating pre-acquisition site construction with the owner and utilizing local and state tax incentives such as tax increment financing to help fund this $85 million project.

Dana White

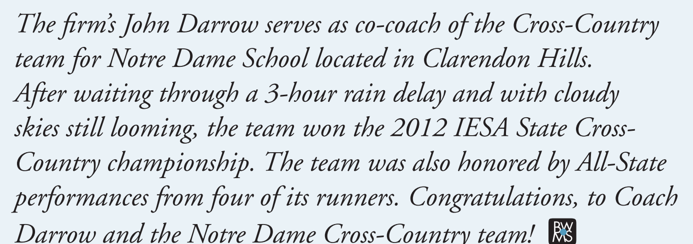
In discussing her move to the Firm, Ms. White said, "Burke, Warren offered me the opportunity to further hone my technical skills by working with well-respected and experienced attorneys while allowing me to build my own practice all within the context of a friendly, well-rounded firm culture."

Ms. White received her B.A. in English from Indiana University in 2004. She earned her J.D., *cum laude* from Loyola University Chicago School of Law in 2010. She will obtain her LL.M in tax law pending her masters thesis. Ms. White is a member of the Chicago Bar Association and its Young Lawyers Real Estate Law Committee. She also serves as a coach for the Loyola University Chicago School of Law ABA Client Counseling Team.

Prior to law school, Ms. White worked for several years in marketing and business development at a Philadelphia-based civil engineering firm specializing in major transportation projects. Her work focused on complex proposal coordination and submission for privately funded projects as well as those funded at the local, state and federal levels.

Ms. White may be contacted at 312/840-7087 or dwhite@burkelaw.com.

State Champs



The firm's John Darrow serves as co-coach of the Cross-Country team for Notre Dame School located in Clarendon Hills. After waiting through a 3-hour rain delay and with cloudy skies still looming, the team won the 2012 IESA State Cross-Country championship. The team was also honored by All-State performances from four of its runners. Congratulations, to Coach Darrow and the Notre Dame Cross-Country team!

PLANNING FOR 2013

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2012 Tax Rates	2013 Tax Rates	2012 Long Term Capital Gains Tax	2013 Long Term Capital Gains Tax	2012 Qualified Dividend Tax	2013 Qualified Dividend Tax
10%	15%	0%	10%	0%	15%
15%	15%	0%	10%	0%	15%
25%	28%	15%	20%	15%	28%
28%	31%	15%	20%	15%	31%
33%	36%	15%	20%	15%	36%
35%	39.6%	15%	20%	15%	39.6%

In addition to increases in the overall tax rate schedule, several other tax benefits will also be eliminated beginning January 1, 2013. These changes include:

- **Exemption Phase-Out** – Each taxpayer is entitled to a $3,800 (2012) tax exemption (deduction) for him or herself, his or her spouse, and each dependent. Beginning in 2013, a phase-out (reduction) of the exemptions will return for higher income taxpayers.

- **Itemized Deduction Phase-Out** – Beginning in 2013, higher income taxpayers will again be subject to the phase-out of itemized deductions.

- **Payroll Tax and Self-Employment Tax** – Both the payroll withholding tax and self-employment tax rates have been reduced by two percentage points for the last two years. Payroll FICA withholding will return to 6.2% (up from 4.2%) and self-employment tax will return to 12.4% (up from 10.4%) beginning in 2013.

- **Bonus Depreciation Expires** – Over the past several years, businesses have been able to take advantage of "bonus depreciation" that essentially allows a 50% (100% during some periods) depreciation deduction of the cost of qualified business equipment and machinery in the first year it is placed in service. This big business write-off expires after 2012.

- **Alternative Minimum Tax (AMT)** – While the AMT was originally intended to impose a tax on higher income taxpayers that were deemed to be avoiding tax via tax shelters and other legal means, it has continued to trap more and more taxpayers each year. Further, while the AMT exemption amount has been adjusted upward each of the past several years, if Congress fails to provide an increase for 2012 and 2013, the exemption amounts would revert to levels not seen since 2002. The reduction of the exemption amount would subject a significant number of additional taxpayers to AMT for 2012.

In addition to the reduction or elimination of benefits described above, the following provisions of the heath care law are scheduled to take effect in 2013:

- **Increased Medicare Tax** – An individual is liable for Additional Medicare Tax equal to 0.9% if the individual's wages, other compensation, or self-employment income (together with that of his or her spouse if filing a joint return) exceed the threshold amount for the individual's filing status. Thus, the wage withholding rate for Medicare taxes will be 1.45% up to the income threshold, and 2.35% (1.45 + 0.9) on amounts in excess of the threshold amounts.

Filing Status	Threshold Amount
Married filing jointly	$250,000
Married filing separately	$125,000
Single	$200,000
Head of household (with qualifying person)	$200,000
Qualifying widow(er) with dependent child	$200,000

- **Surtax on Unearned Income** - A new surtax will also be imposed on the unearned income of individuals, estates, and

trusts. For individuals, the surtax is 3.8% of the lesser of:

1. The taxpayer's **net** investment income, or
2. The excess of modified adjusted gross income over the threshold amount.

Investment income includes: income from interest, dividends, annuities, royalties, rents (other than those derived from a trade or business), capital gains (other than those derived from a trade or business), trade or business income that is a passive activity with respect to the taxpayer, and trade or business income with respect to the trading of financial instruments or commodities. The surtax on unearned income would result in long-term capital gains being taxed at rates as high as 23.8% (20% + 3.8% surtax) and dividends at rates as high as 43.4% (39.6% + 3.8% surtax).

What to do? In prior years' newsletters, we have discussed the possibility ofdeferring income and accelerating deductions in order to minimize current year taxable income and taxes. In 2012, many of our clients are doing just the opposite. Instead of deferring taxes, individuals are now attempting to accelerate income in order to avoid higher tax rates in 2013 and beyond. Below are some planning strategies you might consider:

Strategy #1 – Consider realizing capital gains prior to 2013, when capital gains and unearned income tax rates increase. Additionally, if you are in a net-capital-gain position for 2012 and anticipate being in a net-capital-gain position in 2013 or beyond, consider deferring recognition of capital losses until 2013, because the losses may be more advantageous in future years when they can offset higher tax rates on capital gains.

Strategy #2 – If you participated in a transaction that would otherwise qualify for installment treatment, you might consider electing out of installment sale treatment and recognizing the entire amount of gain in 2012. This would allow you to recognize the entire gain at today's lower capital gain rate. When weighing this strategy, you should consider the impact that electing out of installment sale treatment will have on your cash flow. Alternatively, you may consider negotiating an accelerated payment of a previously existing installment sale as a means of accelerating realization of the gain into 2013.

Strategy #3 – Consider whether changes to the taxation of dividend income should impact the allocation of your investment portfolio. For example, you might rebalance your investment portfolio by increasing investments in growth assets and decreasing the number of dividend paying stocks you own. With higher rates, tax-exempt investments may produce a greater after-tax yield than taxable investments. Consult with your investment advisor before making any investment decisions.

Strategy #4 – Consider donating appreciated securities, rather than cash, to charity, to receive a charitable deduction equal to the fair market value of the securities, while also avoiding paying capital gains tax on security appreciation. Having preserved the cash, consider purchasing new investments with a "refreshed," higher basis with the cash you would have donated, lowering your exposure to the 3.8% tax on unearned income.

Strategy #5 – Consider converting all IRAs to Roth IRAs prior to 2013 in order to remove required minimum distributions from future modified AGI subject to the 0.9% surtax as well as to minimize exposure to potentially higher tax rates after 2012. Remember that conversions after 2010 are fully taxable in the year of conversion.

Tax-Free Distributions From IRAs for Charitable Purposes

We have received numerous inquiries about whether legislation has been enacted to allow the transfer of up to $100,000 from an individual's IRA directly to a charity. This provision has been in place the past several years. Unfortunately, Congress has not acted to extend this provision to 2012 or 2013. As a result, this planning option is not currently available.

Estate and Gift Taxes

2013 will likely see significant changes to the current gift and estate tax structure. The current gift and estate tax-free exemption amount is $5.12 million. This means that married couples are able to shield up to $10.24 million from gift or estate taxes. Further, the top current gift and estate tax rate is 35%. However, if Congress and the White House fail to take any action by year-end, the gift and estate tax-free exemption amount will fall to only $1 million ($2 million for married couples) and the top marginal tax rate will increase to 55%.

The generation-skipping transfer ("GST") tax is still in place. Generally, the tax applies to lifetime and death-time transfers to or for the benefit of grandchildren or more remote descendants. For 2012, the rate is a flat 35%. The tax is in addition to any gift or estate tax otherwise payable. As with the gift and estate tax, each taxpayer is allowed a $5.12 million GST tax exemption for 2012. Without further legislation, the GST exemption is scheduled to fall to $1.36 million in 2013 and the top rate is scheduled to increase to 55%.

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PLANNING FOR 2013

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Consider Lifetime Gifts that take Advantage of both the Gift Tax Exemption and GST Exemption

Many clients utilize a portion or all of their $5.12 million gift tax exemption ($10.24 million for a married couple) by structuring long-term GST exempt trusts benefiting multiple generations. Such trusts will remain exempt from all gift and estate tax as long as the trust remains in existence. Under Illinois law, such trusts can last in perpetuity, thereby allowing you to create a family "endowment fund" for your children, grandchildren and future descendants.

If you already have taken advantage of the current $5.12 million exemption amount or you are not in a position where it makes sense to gift $5.12 million dollars, you should still continue to plan a gifting strategy going forward.

Annual Exclusion Gifts

In 2012, you may make a gift of $13,000 to any individual and certain trusts without any gift tax consequences. Married individuals may make gifts of up to $26,000. Gifts may be made outright or in trust and may be in the form of cash, securities, real estate, artwork, jewelry or other property. Giving property that you expect to appreciate in the future is an excellent way of utilizing your annual exclusion gifts because any post-gift appreciation is no longer subject to gift or estate tax. To take advantage of your annual exclusions for 2012, gifts must be made by December 31. Gifts over $13,000 or gifts that will be "split" between spouses must be reported on a gift tax return, which must be filed in April 2013. The annual exclusion amount is scheduled to increase to $14,000 in 2013 ($28,000 for married couples).

Payment of Tuition and Medical Expenses

In addition to annual exclusion gifts, you may pay tuition and medical expenses for the benefit of another person without incurring any gift or GST tax or using any of your estate or GST tax exemption. These payments must be made directly to the educational institution or medical facility. There is no dollar limit for these types of payments and you are not required to file a gift tax return to report the payments.

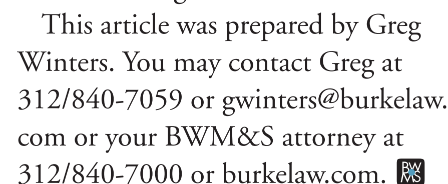
Consider donating appreciated securities, rather than cash, to charity, to receive a charitable deduction equal to the fair market value of the securities, while also avoiding paying capital gains tax on security appreciation.

Take Advantage of Today's Low Interest Rates

Interest rates remain at historically low levels. Low interest rates enhance the benefits of several gift and estate planning strategies. One such strategy is the "grantor retained annuity trust" or GRAT. A GRAT is an irrevocable trust to which a donor transfers property and retains the right to receive a fixed annuity for a specified term. At the expiration of the term, the property usually passes outright or in trust for the benefit of descendants or other named beneficiaries. The amount of the gift resulting from the transfer of the property to the GRAT is the present value of the remainder interest that passes to the beneficiaries at the end of the term. Under the valuation methods adopted by the IRS, the lower the interest rate at the time of the gift, the lower the present value of the remainder interest and the smaller the amount of the gift that must be reported to the IRS. Interests in closely-held family businesses or marketable securities with high growth prospects are often ideal properties to transfer to a GRAT. While there has been considerable discussion about disallowing "zeroed-out" GRATs and requiring a minimum GRAT term of 10 years, Congress has not taken any action in this respect. As a result, GRATs remain a very attractive planning opportunity.

Low interest rates also make sales to "defective" grantor trusts more attractive. Under this strategy, a taxpayer creates a trust, typically for his or her spouse and descendants. The taxpayer then sells assets to the trust, taking back a note requiring the trust to repay the taxpayer in installments. The trust is structured so that it is ignored for income tax purposes, resulting in no income tax consequences upon the sale. The interest paid on the note is typically at the applicable federal rate, which changes month to month based on current market rates. The lower the interest rate on the note, the greater the amount of assets that will accumulate in the trust, free of estate, gift and GST taxes.

This article was prepared by Greg Winters. You may contact Greg at 312/840-7059 or gwinters@burkelaw.com or your BWM&S attorney at 312/840-7000 or burkelaw.com.



LITIGATION

NOT SO FAST

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on Nissan dealers throughout the state, violates the Illinois Motor Vehicle Franchise Act. The latest ruling obtained by Levin opens the door to damages for Nissan and Infiniti dealers throughout Illinois, estimated to be in excess of $10 million.

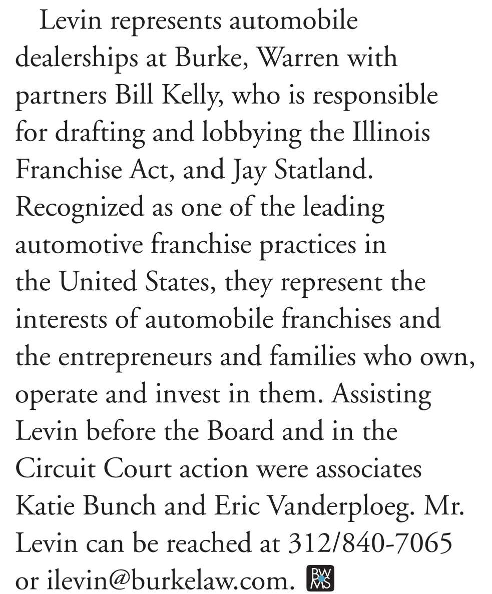
The Motor Vehicle Franchise Act prohibits manufacturers from imposing a surcharge unless they have an agreement for a uniform reimbursement rate with a majority of their franchisees. A manufacturer who has done so may then collect a surcharge only from franchisees that have not joined in the agreement. Nissan, however, was imposing the surcharge on all of its Infiniti and Nissan dealers without having the necessary agreement with any of them.

Levin prevailed on Fields' protests before the Illinois Motor Vehicle Review Board, and successfully defended the Board's final order before the Circuit

Ira Levin

Court of Cook County. The Court agreed with Levin that the provision requiring Nissan to have a uniform reimbursement agreement could be applied to franchise agreements that were entered into before that provision was added to the Franchise Act in 2001. The Court also rejected Nissan's argument that this application of the section unconstitutionally deprived Nissan of vested rights, since Nissan had not even adopted the surcharge until 2007, which it had no contractual right to impose in the first place. Nissan has appealed the Circuit Court's decision.

Levin sums up the significance of the Court's ruling like this: "To my knowledge, every manufacturer in this state has complied with the law except



Nissan, who somehow believed it could circumvent the Act that requires dealers to be reimbursed at their retail rate for parts used to satisfy warranty repairs. The Franchise Act is there to level the playing field with manufacturers. The ability to take on a rogue manufacturer, like Nissan in this case, is particularly important in these times, when dealers find themselves in perhaps the most competitive marketplace ever. "

Levin represents automobile dealerships at Burke, Warren with partners Bill Kelly, who is responsible for drafting and lobbying the Illinois Franchise Act, and Jay Statland. Recognized as one of the leading automotive franchise practices in the United States, they represent the interests of automobile franchises and the entrepreneurs and families who own, operate and invest in them. Assisting Levin before the Board and in the Circuit Court action were associates Katie Bunch and Eric Vanderploeg. Mr. Levin can be reached at 312/840-7065 or ilevin@burkelaw.com.

BWM&S

Firm Welcomes New Associate

Burke, Warren, MacKay & Serritella welcomes associate Eric VanderPloeg as the newest member of its litigation practice. He was a summer associate at the Firm in 2011.

Eric VanderPloeg

Mr. VanderPloeg earned his B.A. in History at the University of Iowa in 2005, and his J.D., summa cum laude, from Loyola University Chicago School of Law in 2012. While in law school, Mr. VanderPloeg served as the Executive Editor of the Illinois Symposium — an issue of the Loyola Law Journal dedicated to topics in Illinois law. In addition, he served as an editor/contributor for Loyola's Education Law and Policy Society's newsletter and tutored first-year law students in Constitutional Law. Mr. VanderPloeg was awarded the 2010-2011 Honorable Thomas R. Mulroy Award in Evidence and received CALI Awards in Appellate Advocacy, Federal Taxation and Corporate/Partnership Taxation.

Prior to attending law school, Mr. VanderPloeg managed the Chicago Loop office of a nationally recognized test preparation and admissions company. Mr. VanderPloeg previously clerked for a Chicago litigation firm, where he assisted attorneys in commercial litigation matters, landlord-tenant disputes, carrier-shipper disputes, and the enforcement and collection of state and federal court judgments. He is admitted to practice in Illinois.

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SECURITIES LAW

HOW TO HIDE

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the rights and obligations of the holders. Experienced investors and firm management usually appreciate what constitutes "material" for purposes of this disclosure: would the provision in the corporate document significantly affect them if they, themselves, purchased the investment? Or, more pointedly, whether they would put the money of their parents or their children in the shares or bonds being sold.

- ***The risk list.*** Initially mandated by statute, but now acknowledged as common industry practice, is a series of one-paragraph descriptions of risk factors. In theory, these should be customized for every offering. In practice, the following risk factors should probably be included in every offering: dependence on key personnel; regulatory restrictions on business practices; competition; intellectual property weaknesses; insufficient cash; litigation; concentration on customers or suppliers; lack of demand for new company technology; failure to develop new products; labor disputes; (for newer companies) lack of operating history; operational inefficiency and disorganization following a significant transaction; lack of market liquidity for the securities (this is commonly missed); potential per share dilution in future offerings; lack of dividends; a lack of control by purchasing shareholders when compared with current controlling shareholders.
- ***Puff the magic disclosure.*** Like a parent crowing about his kid's good grades, offering documents commonly include overly positive "puffing." Courts have often found no harm in these overly optimistic claims, such as a belief that a product will become the most profitable in the portfolio, or that a future distant market will massively boost revenues. However, beware of statements such as "best in class," "leading edge technology" or "guarantied profit." Best to keep the disclosures tempered and clinical, not ecstatic and theatrical.
- ***Show me the money - financial statements.*** No other disclosure exposes management to liability more than an inaccurate balance sheet or income statement of an entity. Accurate financials are the "must-have" attachments. If audits are financially practical, these can reduce the chances of a mistake and better insulate management and directors from shareholder liability. While two or three years of financial statements help, early-stage firms may provide one year, or skip the statements altogether in the case of a start-up.

Craig McCrohon is a partner in the firm's Corporate and Securities Practice Group, focusing on corporate transactions, securities offerings and venture capital. Please direct any questions regarding securities law or related topics to Craig at 312/840-7006 or cmccrohon@burkelaw.com.