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

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HEALTH CARE

PUNCH LIST HELPS EMPLOYERS NAVIGATE NEW HEALTHCARE LAW

What you need to know

There has been so much political hyperbole associated with the new health care reform legislation (known formally as the Patient Protection and Affordable Care Act, or "ACA") that it's hard to separate fact from fiction. Equally challenging for entrepreneurs and their organizations, the glut of information and misinformation on ACA distorts and obfuscates answers to the immediate operational question concerning health care benefits — what do we need to do in 2010-11 to comply with ACA and properly position ourselves for the future?

Here's a short punch list of those things small and mid-sized employers who are not self-insured should pay attention to between now and your next healthcare insurance renewal to adjust to ACA:

Continued on page 2

The firm's Religious & Not-For-Profit Practice hosts "Religious Displays on Public Property – An informed discussion of Religion and the Law" in Chicago on November 3. A panel of municipal, ACLU and firm attorneys including Jim Serritella and Jim Geoly will discuss issues such as: Can a government create space for religious expressions on the public square? When do government attempts to avoid religious endorsements create impermissible burdens on freedom of expression and freedom of religion? For more information, please contact Jim Serritella at 312/840-7040 or jserritella@burkelaw.com.

BWM&S

FIRM SHARES GREEN LEASE KNOWHOW

A "green lease" is a commercial lease between a landlord and a tenant in a "green" building. The firm has been asked on several occasions to brief commercial broker and property management groups on some of the key factors that make green leases unique.

Doug Wambach

John Stephens

"Green buildings" are buildings (commercial, industrial, retail and residential) that have achieved a certification from one of the organizations that have developed standards for determining levels of sustainability. The most prevalent is the LEED rating system.

LEED, Leadership in Energy and Environmental Design,

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NEXT ISSUE: Year-end estate and tax planning, bank director liability, the firm grows again and more.

FIRM BUCKS TREND

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1. **Decide whether or not to keep your "grandfather" option open.** Under ACA, employers have the option to keep the health plan they have (being "grandfathered") or adopt new ACA compliant health plans. But if you want to be grandfathered in the future, you need to continuously keep the plan you had on March 23, 2010 and not:
   - Significantly cut benefits;
   - Lower co-insurance levels;
   - Raise co-payments;
   - Raise deductibles;
   - Lower employer premium contribution amounts; or
   - Change insurance companies.

Whether or not it makes sense for you to be grandfathered depends on a number of factors unique to the situation in your organization. But keep in mind that once you change the plan that existed on March 23, 2010, the option to be grandfathered is forever lost. So do the cost/benefit analysis with your insurance broker and CFO before your next insurance renewal.

If your current carrier is proposing a premium increase in excess of 6%, there's a good chance you can do better on rates with a competitor.

2. **Pay attention to the new rules on HSAs and HRAs.** There is plenty of hype over high profile ACA mandated benefit changes (and the costs therefore) like elimination of lifetime coverage limits, coverage for children until age 26, etc. But pay some attention to new rules and likely cost increases applicable to high deductible plans and their associated HSAs and HRAs. For example, funds held in these accounts (and in FSAs) can no longer be used to pay for over-the-counter drugs not prescribed by a physician. Funds wrongly paid out of these accounts (and FSAs) will result in much stiffer tax penalties. Further, most healthcare companies have come to the same conclusion most of us have — the high deductible plans have been great bargains and are underpriced. So expect meaningful premium increases for the high deductible plan options.

Ken Richman

3. **Make sure you take advantage of available tax incentives.** The structure of ACA relies on a series of tax incentives and disincentives to reduce the number of uninsured Americans. The majority of these tax changes start arriving in 2014, but some start in 2011. For example, companies with 25 or fewer employees that meet average payroll ceiling requirements are eligible for tax credits related to offering employees healthcare coverage. Talk with your accountant to make sure you take advantage of available 2011 ACA tax incentives.

4. **Shop your coverage.** Insurance rates will go up in 2011 because healthcare provider costs are still rising and healthcare plans are adding expensive benefits mandated by ACA. But other factors push back against rate increases. For example:
   - The recession has made the health insurance market increasingly price competitive;
   - The federal government is subsidizing the efforts of state regulators to withhold approval for rate increases;
   - Insurers with aggressive rate hike histories may be disqualified from participation in the insurance exchanges (and the millions of new insurance buyers on those exchanges) coming in 2014; and
   - Many healthcare companies are aggressively cutting costs to meet ACA's mandates for medical loss ratio (i.e., the maximum amount of money per premium dollar that the healthcare companies can spend on administrative costs and profit).

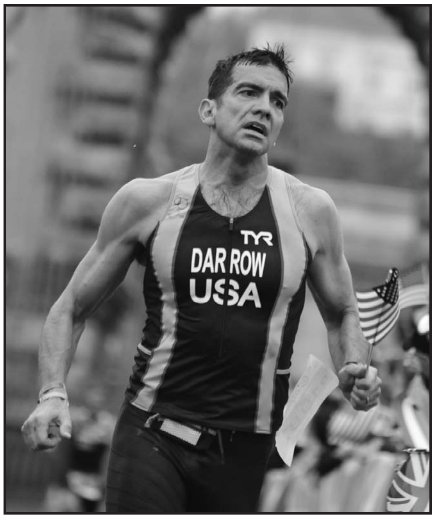
So rates will go up in 2011, but absent bad experience or other unusual circumstances, not nearly as much as suggested in the press. If your current carrier is proposing a premium increase in excess of 6%, there's a good chance you can do better on rates with a competitor.

Ken Richman serves as general corporate counsel to privately held businesses and represents business owners and their families in a broad variety of personal and business planning matters. Ken also consults with healthcare providers and insurers on labor and employee relations, patient satisfaction, and customer service issues and initiatives. Ken can be reached at 312/ 840-7002 or krichman@burkelaw.com.

Attorneys Compete in Sporting Challenges

We all have lives outside of our professional worlds. Two firm attorneys take their non-work activities seriously, one recently traveling to Hungary and the other to Colorado to participate in events they enjoy.

John Darrow, a health care and corporate partner, competed in the 2010 International Triathlon Union Sprint Triathlon World Championship in Budapest, Hungary, on September 11.



John Darrow in Budapest.

Darrow represented the United States as part of Team USA, which for triathlon is a team of age group/amateur athletes who compete in the International Triathlon Union's World Championships. No more than 16 triathletes per age group were invited by USA Triathlon to represent the U.S. The triathlon also made for an interesting way for John to take in the sights of Budapest. The event began with a swim in Lágymányosi Bay which is connected to the Danube River, continued with a bike ride along the Danube and finished with a run over the Széchenyi Chain Bridge and into the city's Roosevelt square. The course passed by several Budapest sights that are part of the UNESCO World Heritage. World Heritage sights are places that are deemed to have special cultural or physical significance.

"This was an incredible, once in a lifetime experience," said John. "It was exciting to meet and compete against athletes from around the world, and inspiring to race wearing the Team USA jersey. The highpoint was seeing my family cheering me on as I neared the finish line."

John Kobus, a corporate partner, is a dedicated cyclist. This summer he joined a group of riders called the "Bankers Group" in their annual "Vail to Aspen" ride.

John was one of 20 riders who departed from Vail on a Friday morning in August. En route he encountered Battle Mountain Pass (3.5 miles, 8% average grade), Tennessee Pass (5 miles, 5% average grade) and Independence Pass, elevation 12,095 (approach, 10.8 miles, 5% average grade, final climb, 4.5 miles, 9% average grade).

Biking the nearly 100 miles from Vail to Aspen is no easy task, especially when climbing a total elevation of 12,374 feet, well over two miles. Together with three other companions, John made the return trip the following day.

John Kobus

"The best rides are the ones where you think you have bitten off more than you can chew, live through it and then want to do it again," says John. "Spending more than 13 hours in the saddle over almost 200 miles in 2 days, while certainly a mouthful (especially if you have been to the top of Independence Pass), was definitely one of my best rides."

John Darrow can be contacted at 312/840-7003 or jdarrow@burkelaw.com. John Kobus can be contacted at 312/840-7093 or jkobus@burkelaw.com

Ed Lesniak Spoke at Chase Bankruptcy Summit in Dallas


Ed Lesniak

For the second year in a row, Ed Lesniak was asked to present at the Chase Bankruptcy Summit in Dallas, TX, that took place on September 13 and 14. The Bankruptcy Summit is a meeting of representatives of JPMorgan Chase Bank, N.A, including several of its in-house counsel, and various other counsel Chase retains. Ed's presentation entitled "Excuse Me, Is That Your Mortgage?" focused on current developments in consumer bankruptcy law related to the types of legal challenges that borrowers are making to the ownership rights of a lender's loan documents.

Distant Thunder — The 2010 Financial Reform Impact Beyond Wall Street:

How smaller banks on main street dodged major reforms aimed at Wall Street

For smaller banks beyond Wall Street, last summer's financial reform has produced more smoke than fire. While mega-banks lament the loss of lucrative and exotic stock and bond businesses, main street banks avoided regulation under the more onerous proposals. So far, the reform law — known as the *Dodd-Frank Wall Street Reform and Consumer Protection Act* — has not yet affected smaller non-money centers in ways anticipated before its passage.

Money Meltdown Triggers D.C. Smack Down

The 2008 financial crisis exposed some extraordinary weaknesses in the U.S. financial system, especially on Wall Street. After the worst of the financial crisis, and the pounding of the last gavel on the Congressional hearings, many regulators and money-center executives concluded that, fundamentally, the problem was the gigantic and inter-connected financial firms. Each of these financial battleships was tethered to others. If one sank, they all did.

Craig McCrohon

Therefore, the focus on the law was two fold: First, identify the biggest financial ships, without which the entire system would sink. Second, disconnect institutions from each other — such as derivatives trading, insurance, lending, and certain securities dealing. Secondarily, Congress addressed a myriad of perceived smaller leaks in the financial vessel, with new laws addressing specific activities of banks, insurers, finance companies, and brokers. The heat of the financial crisis, combined with the simmering populist rage against big banks, fueled a combustible and high decibel legislative session that produced years of legislative tinkering in only a few months.

The Bottom Line for Smaller Banks

Amidst the hundreds of new laws and amendments to existing statutes are a few provisions that will directly affect independent banks throughout the country, regardless of size or location. Among the most significant are:

- **FDIC Insurance.** Locking in the increase of FDIC deposit insurance coverage of $250,000 per account. When individuals add other accounts, this limit is closer to $1 million.
- **Creation of a consumer watchdog for financial services.** This is one of the biggest changes in the law and will affect virtually every financial entity providing retail financial services. Like the Department of Homeland security after 9/11, this new uber-agency — the Consumer Financial Protection Bureau — combines the consumer financial regulatory staff of some of the largest agencies in Washington. No longer will a disparate group of federal agencies "get around" to consumer financial regulation. This agency has a mandate, a large budget, and now an aggressive leader. This agency will issue regulations regarding disclosures, collection practices, discrimination, processing, and pricing for credit cards, personal loans, bank deposits, and virtually all other services that relate to dollar bills. Bank regulators, not this new consumer super-cop, will enforce laws for banks with less than $10 billion in assets. This will be huge.
- **Another demotion for savings and loans.** Savings banks — the financial firms with the mission of financing home mortgages — suffered yet another regulatory demotion. Following the S&L crisis of the 1980s, this industry saw its primary regulator diminished and its independence severely restrained in the form of the Office of Thrift Supervision. Now, Congress has dissolved the Office of Thrift Supervision — shifting its activities to the Office of Comptroller of the Currency, which regulates all nationally-chartered banks. Many in the industry have proclaimed this as the beginning of the end for savings banks and their historical focus on mortgages. They fear that a generic bank regulator will view the savings bank focus as a liability, not a strength.
- **Second life for state regulation of banks.** Historically, banks have been either regulated by a national agency — the Office of the Comptroller of the Currency — or by the state in which the bank was headquartered. In addition, each state has been able to impose its own version of consumer or other banking laws on local branches of out-of-state banks. This was a system similar to our courts — cases may be filed in a state court or a federal court located across the street. In this case, many local banking groups fiercely — and successfully — defended these "states rights" in banking. Much to the dismay of the mega-banks centered in New York and North Carolina, Congress proclaimed the survival of many of the state powers to regulate banks and impose their laws.

- **Eliminating many benefits of "Trust Preferred Securities."** For the better part of 20 years, bank holding companies have issued stock with many elements similar to debt. However, unlike debt, bank holding companies were able to freely apply the amounts raised as capital — just as if it were regular stock, or earnings from operations. The trust preferred party, however, may be ending for all but the smallest bank holding companies. Some larger banks and thrifts get time to replace debt-like securities from counting as equity-like capital; smaller banks may retain this "magic capital" on the books through May 2010, but cannot use new trust preferred securities as capital. The smallest holding companies — those with less than $500 million in assets — may stay on the trust preferred wagon, to the extent that any market for these securities exists.

The Long Fuse of the Big Bomb

As dramatic as the passage of the law, some of the most significant aspects of the law are yet to come. The new law includes dozens of future trigger dates, including the following:

- Depending on who is keeping score, bank regulators must conduct several studies and adopt hundreds of new rules to apply the general principals of the legislation. These include regulations mandating more bank capital, restructured federal bank agencies, and processes to resolve failed banks.
- If the history of the savings and loan crisis is a guide, the large banks will lobby for additional changes to the laws as the structure of the industry changes. During good times, banks have successfully lobbied for laws permitting national expansion (the Neal-Riegle law) or addition of new lines of business (Gramm Leach Bliley). This time will not likely be any different.
- Given the incredibly open-ended nature of rule-making mandates for regulators, both lawmakers and lobbyists celebrating political victory may be rudely surprised by the unintended consequences of their work. An unknowing limit on a business line today might have disastrous consequences for a couple of critical companies in the future. Expect more laws to fix the unexpected problems of the new one.

Craig McCrohon is a partner specializing in securities as well as mergers and acquisitions, with an emphasis on financial institutions. He served with the legal staff of the U.S. Senate Banking Committee, was the Chairman of the Chicago Bar Association Consumer Financial Services Committee, and was a member of the Illinois governor's transition team for financial regulation. He can be reached at 312/840-7006 or cmccrohon@burkelaw.com.

GREEN LEASES

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is a building certification system developed by the U.S. Green Building Council (USGBC) a non-governmental entity that focuses on sustainable building development, operations and maintenance practices. There are LEED standards for new construction and the construction of the "core and shell" of commercial buildings as well as for commercial interiors. Separate LEED guidelines have been developed for improvements made to existing buildings.

Green leases are of growing importance as a significant number of current commercial real estate developments incorporate LEED design. Elements of LEED design can be as simple as adding a bike rack or as complicated as reworking a building's electrical and plumbing systems.

The firm's energy and sustainability practice works hand-in-hand with its real estate practice on landlord and tenant issues, particularly the issues that are raised when leasing space in a green building. The practice deals with these issues on a daily basis, particularly with respect to development and leasing.

Firm green lease expertise was developed through serving clients who own, develop and lease green properties. The firm's most recent green lease presentation was to the Chicago area brokers of Australian-based UGL Equis on September 23, 2010.

"Familiarity with these issues is important because both developers and institutional property owners are seeing significant value being added to buildings that are LEED certified," says Doug Wambach, partner and chair of the firm's real estate practice. "Almost all recent commercial development activity in Chicago has been LEED certified and a substantial number of institutionally owned buildings have been or will be LEED certified."

Wambach's presentation focused on LEED for existing buildings (LEED EBOM). This area is very active as the industry is working to improve existing building stock around the US.

John Stephens, another partner in the firm, presented a segment entitled "LEED Lease Provisions — Landlord and Tenant Perspectives."

"While parties in green lease transactions generally support LEED principles, a complex commercial lease reflects the needs of the party driving the transaction," say Stephens. "Green leases can be tenant driven or landlord driven. Landlords typically want to allocate LEED costs to tenants as operating expenses. Tenants want LEED rated real estate but will not want to take on all of the LEED related costs. These transactions often come down to balancing acts factoring in company missions and more."

Members of the firm's energy and sustainability practice include Wambach and Stephens as well as Rich Lieberman, Chris Manning, Steve Schuster and Peter Vitale. More information is available at www.burkelaw.com.

CONSUMER FINANCIAL SERVICES CLASS ACTION DEFENSE

Firm Welcomes New Litigation Associates

Tiffany Sorge Smith and Shana A. Shifrin recently joined the firm's Consumer Financial Services Class Action Defense Group.

Tiffany Sorge Smith

Tiffany Sorge Smith joins the firm following three years at Kirkland & Ellis LLP. Her commercial litigation experience includes class action, contract, sales, insurance coverage, fraud, mass tort, product liability, bankruptcy, and cross-border disputes through all stages of litigation in state and federal courts. Ms. Smith's class action experience includes litigating BP Deepwater Horizon oil spill class action cases. Ms. Smith serves on the Junior Leadership Council for the National Immigrant Justice Center.

Ms. Smith received her undergraduate degree, honors with distinction, from Indiana University in 2001, with a B.A. in Political Science and minors in Spanish and International Studies. She received her J.D., *cum laude*, from Indiana University School of Law in 2007.

Shana A. Shifrin

Shana A. Shifrin practiced litigation at Jenner & Block LLP where she defended nationwide class actions. Her experience includes consumer fraud, health care insurance, RICO, professional liability, trusts and estates, and other complex commercial disputes. Ms. Shifrin's pro bono experience includes a first-degree murder trial, a petition for a stay of execution to the Supreme Court of the United States, post-conviction hearings and appeals in the Illinois Appellate Court and the United States Court of Appeals for the Seventh Circuit.

Ms. Shifrin graduated, *cum laude*, from the University of Pennsylvania in 2000, with degrees in History and French. She received her J.D. from Northwestern University School of Law in 2003. At Northwestern, Ms. Shifrin was a Senior Editor on the Journal of International Law of Business and worked in the Bluhm Legal Clinic.

The practice, chaired by LeAnn Pedersen Pope, has defended several of the country's major banks and mortgage banking companies in over 100 nationwide class action cases involving state and federal claims.

Ms. Sorge Smith can be contacted at 312/840-7121 or tsorgesmith@burkelaw.com. Ms. Shifrin can be contacted at 312/840-7124 or sshifrin@burkelaw.com.

LABOR & EMPLOYMENT

New Law Bans Most Applicant Credit Checks

As of January 1, 2011, most employers will be unable to perform credit checks on an applicant or employee due to changes in employment laws.

Employers covered under the Employee Privacy Act will be barred from the following practices:

- Obtaining an applicant's or employee's credit history
- Using a consumer report agency to look into an applicant's or employee's credit report
- Initiating adverse employment action against an employee based on his or her credit report or credit history

However, certain exceptions do exist. If credit worthiness is a genuine job qualification, employers will still be able to obtain credit checks. These positions include jobs that give employees unsupervised access to over $2500 of merchandise or cash, signatory power of assets greater than $100 and positions giving access to confidential information.

Another exception is that employers can still obtain credit checks for individuals in management positions setting the control of the company or where the law requires the credit history be held as part of obtaining that job.

The following employers are also exempt from the Employee Privacy Act:

- Banks and other financial institutions
- Businesses engaged in the insurance business
- State law enforcement agencies
- State and local government agencies that require credit reports
- Qualified debt collection agencies

The Employee Privacy Act does not however stop employers from obtaining background checks as allowed in the Fair Credit Reporting Act so long as there is no credit information contained in the report.

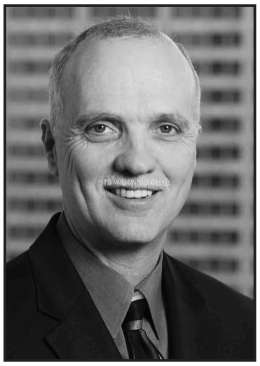
Employees who sue an employer under the Employee Privacy Act may be able to collect civil damages, injunctive relief and attorney's fees and costs.

For more information on this subject please contact Marty LaPointe at 312/840-7012 or mlapointe@burkelaw.com.

Discharging Employees

Truth and openness reduces risk

The U.S. is in the midst of its worst business downturn in 70 years. Many businesses have faced necessary reductions in workforce. However, even in times of prosperity, all business managers face situations where they need to let people go. Whether terminating an employee for performance problems or misconduct, the ability to effectively terminate people is a skill all managers should have.



Marty LaPointe

Absent an employment agreement, employees work "at will" and therefore can be discharged at any time, for any reason. While the law does not require an employer to provide a reason for letting someone go, common sense surely does. So does Risk Management 101. Missteps managers make in the termination process can lead to serious consequences and financial risk for the company. Employers have a lot at stake in handling terminations appropriately.

Many employees fall into one or more protected classes as defined by Title VII. These classes include age, disability, national origin, race/color, religion and sex. If not given an honest and legitimate reason for termination, many employees will assume the reason is their protected class status and will file a claim against the company. Not in a protected class? Employees may claim "reverse discrimination." There is no winning when it comes to not providing a reason for termination.

Before the point of termination, a good manager should have laid the proper groundwork. Well documented performance problems show that an employee was made aware of issues and given ample time to improve. Documentation is crucial and will help ensure the termination does not turn into one person's word against another's and a date in court.

Communication is "king"

Employees need to know what is expected of them when they are hired. They also need to be advised if they are not meeting expectations. Terminating an employee rarely happens on the spot, but rather builds over time. Direct and clear performance communications not only help employees understand what is expected of them, they can also help shield employers from potential litigation.

When the decision to terminate is made, schedule a face to face meeting with the employee. Managers should be firm.

In many cases, misconduct issues have festered far too long or bad performance was not properly documented. This does not mean litigation is inevitable, but it does mean that your margin for error is effectively zero.

This is not a debate and there should be no back and forth discussion. It is important, however, to treat the employee with respect throughout the entire process. An employee who feels respected is less likely to want to turn a termination into a legal dispute.

Fight the urge to "duck the issue" when terminating an employee

While some people thrive on confrontation (especially in my profession), most of us do not. We hope that all of our meetings are pleasant experiences. Why bring up something negative? Besides, doesn't providing reasons for termination put my company at risk? Exactly the opposite is true: not providing a reason for termination leaves an employer at risk.

Again, when not given a reason for termination, many employees will assume the actual reason is some form of discrimination and may seek counsel.

Managers are people too

While we know the right way to handle our people and issues that arise, from time to time we may drop the ball. In many cases, misconduct issues have festered far too long or bad performance was not properly documented.

This does not mean litigation is inevitable, but it does mean that your margin for error is effectively zero. It is critical to get on top of all the issues as quickly as possible and of course you need to make a plan. Since financial risk for your company is now elevated, you may be well served by consulting outside counsel.

Marty LaPointe is happy to answer your employment questions. He can be reached at 312/840-7012 or mlapointe@burkelaw.com.

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WEALTH & SUCCESSION PLANNING

It's A Great Time For GRATs!

On six separate occasions in 2010, Congress introduced legislation designed to curtail a very favorable estate planning technique called a "Grantor Retained Annuity Trust" or "GRAT." Fortunately for taxpayers who wish to transfer assets to their children and grandchildren during their lifetimes, Congress was unable to eliminate this technique and GRATs continue to be very attractive wealth transfer tools, particularly in this current low interest rate environment.

A GRAT is an irrevocable trust that is designed to hold marketable securities, closely-held business interests, real estate or other property for the benefit of the individual who transfers the property into the trust (the "grantor") for a set term of years. During the stated term the grantor is entitled to receive fixed annuity payments, which are typically expressed as a fixed percentage of the initial value of the property contributed to the GRAT. At the end of the stated term, the assets remaining in the GRAT, which typically reflect the growth and income on the initial contribution of property to the GRAT, will be distributed to the grantor's children and grandchildren completely free of gift taxes.

Jonathan W. Michael

By way of example, let's assume that the grantor contributes $1 million of publicly traded stock to the GRAT, the grantor is 60 years old, the GRAT has a term of two years and the required minimum rate published by the Internal Revenue Service, which is now at historically favorable levels for taxpayers, is 2%. Let's also assume that the stock appreciates in value at a rate of 6% each year. Upon the first and second anniversary of the GRAT, the grantor would receive an annuity payment of approximately $515,000. The balance of the assets remaining in the GRAT at the end of the second year (i.e., the income and appreciation in excess of the 2% published rate), or approximately $62,600, would be distributed to the grantor's children and/or grandchildren completely free of gift taxes. Assuming the same facts as above and extending the term from two years to ten years, the annuity payments to the grantor would be $111,000 per year and the remainder available for distribution to the grantor's children and/ or grandchildren would be $323,000.

We have found GRATs to be a very effective wealth transfer tool for clients owning assets that they believe are undervalued due to the current market conditions, clients with large concentrations of publicly traded securities or stock or other interests in closely-held businesses and for clients who have already utilized all or a significant portion of their $1 million "gift tax free" amount.

If you have questions about GRATs, please feel free to contact Jonathan W. Michael at 312/840-7049 or jmichael@burkelaw.com, or the other members of BWM&S' Wealth & Succession Planning group.