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

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REAL ESTATE

LG CONSTRUCTION + DEVELOPMENT'S BREATHTAKING RIVER NORTH RESIDENCES

Firm client LG Construction + Development, a Chicago-based real estate development and construction firm, recently announced its plan to bring luxury condominiums to the River North neighborhood in the summer of 2016. The development, located at 676 N. Kingsbury and being marketed as "The Ronsley," will offer spacious, modern layouts with sensible green touches, as well as other high-end building amenities.

Rendering of The Ronsley.

The Ronsley's "green touches" include locally sourced materials, energy efficient appliances, individual HVAC units, and special insulated window panels. By reducing energy footprints and operating expenses, The Ronsley stands out among Chicago's other adaptive re-use residential condo developments. The building will have 41 total units, including

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PROTECTING YOUR CUSTOMERS FROM FORMER EMPLOYEES

In industries where customer lists are essential, employers often seek to prevent an employee from stealing clients through the use of legal covenants, namely non-competition and non-solicitation agreements. To protect your customers from former employees — and their new employers — using your content and information, you should review your employment agreements and your security policies to

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CHICAGO RIVER CLEAN-UP

25 Firm attorneys participated in Chicago River Day earlier this spring, joining more than 2,000 volunteers working along the banks of the river at more than 60 river locations. Participants collected garbage, removed invasive species, planted seedlings, and much more. Firm participants focused their efforts in Edgebrook Woods in the city's northwest side.

Removing invasive species near the river bank are Chris Manning, Ira Levin, Tom Boyle, and Steve Meinertzhagen.

Joe von Meier, Andrew LeMar, Alexandra Vozza, Richard Lieberman, Stephen Schuster, and Ben Wieck plant trees. Chicago River Day is sponsored by Friends of the Chicago River, an organization solely dedicated to the 156 mile Chicago River system.

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PROTECTING YOUR CUSTOMERS
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make sure that your valuable customer information is fully protected.

Post-Employment Restrictive Covenants

The restrictiveness of non-compete and non-solicitation agreements determines whether the contract will be enforceable in court. A non-compete agreement bars a former employee from competing against a former employer for a specified amount of time. For example, if the employee, had worked in a pharmaceutical company, a non-compete agreement would prevent him or her from working in the pharmaceutical industry. Oftentimes, these agreements are restricted to a specific geographic area.

Aaron Stanton

John Kobus

The non-solicitation agreement is a less restrictive contract and is narrowly aimed at preventing an employee from soliciting his or her former employer's clients. Unlike the non-compete agreement, the employee is allowed to immediately start work in the same industry and in the same geographic area.

Burke, Warren recently represented a company that was seeking to enforce a non-solicitation agreement against a former employee. The former employee left the company, started his own business and actively solicited clients from his former company. In court, Burke, Warren partners, Aaron Stanton and John Kobus, showed that the former employee breached his non-solicitation agreement and obtained a preliminary injunction that effectively shut down the former employee's new business.

Courts generally view non-solicitation agreements more favorably, as they do not impose limitations on an employee's right to work. When balanced against the company's legitimate interests — to preserve and to protect its client base — non-compete agreements have been found to greatly restrict an employee's ability to seek other employment. Non-solicitation agreements, on the other hand, are generally viewed by the courts as imposing reasonable conditions as the employee is free to continue working in his or her area of expertise.

Regardless of whether you think you need (or currently use) a non-compete or non-solicitation agreement, several factors must be met under Illinois law for them to be enforceable.

The first factor is whether you have given your employees adequate consideration for the post-employment restrictions. In the case of *Fifield v. Premier Dealership Services*, the Illinois Appellate Court ruled that in order to enforce post-employment restrictions in employment agreements, an employer must employ that employee for at least two years or offer other adequate consideration to the employee, such as a signing bonus in exchange for the employee's agreement not to compete with the employer, post-employment. *Fifield v. Premier Dealership Services*, 2013 IL App (1st) 120327.

The employee in the *Fifield* case, who worked in the automobile insurance and finance industry, executed an employment agreement that precluded him from competing with the employer for two years after termination. This restriction, however, did not apply if the employee was terminated "without cause during the first year of employment." The employee resigned three months after executing the employment agreement and went to work for a competitor. The Illinois Appellate Court held that the non-compete restriction was invalid because it lacked "adequate consideration," stating that where the only consideration given to the employee is the promise of future at-will employment, "there must be at least two years or more of continued employment to constitute adequate consideration."

The *Fifield* decision presents two questions that all employers must address:

- How can an employer best ensure that non-competition provisions in employment agreements with new employees can and will be enforced?
- For current employees with non-compete agreements who have been employed for less than two years, what can the employer do to protect itself?

The answer to both of these questions is that the employer must offer the employee "adequate consideration" in exchange for the non-compete restriction. Although there is scant Illinois law on what constitutes "adequate consideration" for enforcement of a non-compete provision, it is clear that the consideration for the non-compete must be more than the salary and benefits that the employee will receive or currently receives for his or her employment. Therefore, after *Fifield*, an employer now must offer something in addition to regular salary and benefits — that is, something that the employee is not entitled to or would not normally receive simply for his or her employment. Courts outside of Illinois have held that additional adequate consideration includes: a signing bonus, stock options, a year-end bonus, managerial or other specialized training that could lead to career advancement, unconditional severance benefits at the end of

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employment, or a raise or promotion (for current employees).

Having determined what additional consideration will be offered, an employer must then determine what amount is adequate. Although there is no precise formula to ascertain what amount is adequate under the law, courts look at the amount of consideration on a case-by-case basis, based on the employee's salary, education, experience, and industry custom and practice. For example, courts have found that signing bonuses of $500.00 and $2,000.00 in consideration for a non-compete in an employment agreement were sufficient additional consideration to make non-compete restrictions enforceable.

In addition to consideration, in order to create an enforceable post-employment restriction, an employer must show that: (1) it has "a legitimate business interest" in need of protection by the non-compete, which includes a multi-faceted array of factors, including whether: (a) the employer has "near permanent customer relationships" and/or (b) the employee has access to the employer's confidential information; and (2) the restrictions are reasonable in geographic and temporal scope — for example, the employee cannot compete for one year and within five miles of employer. Likewise, the non-solicitation should only apply to customers that the employee actually worked with and/or had contact with during the last year of employment. These requirements are very factually intensive and any non-solicitation or non-compete agreements should be narrowly and specifically tailored to the employer's specific business and industry.

Confidential Customer Information

One important factor in the above analysis as to whether an employer can enforce a post-employment non-compete or non-solicitation agreement is whether the employee had access to the employer's confidential information.

Many employers believe that the names, addresses, e-mails, and phone numbers of their customers are *per se* confidential. This is not correct. To be considered "confidential" under the law, the customer lists (1) must contain actual information that is not publicly available (*i.e.*, the list contains customers' buying patterns, preferences, or other market data) and (2) must be kept confidential (*i.e.*, access is limited and password protected). Your projectable client list:

- Should contain comprehensive customer information, including buying history and customer characteristics, timing of the purchase and potential obsolescence of products or services, customer business needs and preferences, and cost sensitivity.
- Have employees sign a non-disclosure and non-solicitation agreement, with the above requirements met, prohibiting the use of information designated "Confidential" and solicitation of customers.
- Protect customer information by requiring passwords, limiting access to customers on a need to know basis, and restricting downloading of customer information onto personal devices.

The above are general steps. To discuss the right steps to best protect your company's customer information and determine what best fits your company's needs, feel free to contact Aaron Stanton at 312/840-7078 or astanton@burkelaw.com or John Kobus at 312/840-7093 or jkobus@burkelaw.com.

Firm's Mark Stern elected Vice Chairman of Concordia University's Board of Regents

The Firm's Mark O. Stern has been elected Vice Chairman of the Board of Regents of Concordia University Chicago, located in River Forest, Illinois. Concordia University Chicago is a comprehensive university of The Lutheran Church-Missouri Synod and Mark has served on the Board of Regents since 2010. The University celebrated its 150th anniversary in 2014 and currently enrolls more than 5,000 undergraduate and graduate students. The University has also been recognized by the Chronicle of Higher Education as one of the nation's fastest growing campuses for the expansion of its innovative graduate programs. To learn more about Concordia, please visit www.cuchicago.edu. Mark can be reached at 312/840-7058 or mstern@burkelaw.com.

Mark O. Stern

Corporate Identity Theft: A True Crime Story

Fred Mendelsohn

For this discussion, let's assume that your business operates nationwide with offices in several states. Assume further that servicing your customers is heavily dependent on key employees serving a region from your local branch. And finally, assume that you have invested millions of dollars and years of your life building not only your nationwide brand, but the regional business serviced by this critical local branch.

One day, you discover that key employees from one regional office have formed a company with a name deceptively similar to your trade or business name (even though it's subject to state or federal trademark protection), and have begun actively diverting your company's business to their new company. Adding insult to injury, while still on your payroll, they download your key customer files and other proprietary data, though they do attempt to cover their electronic tracks.

Finally, they distribute letters to key customers on their attorney's letterhead, declaring that your company is not authorized to do business in the state where their business is located.

When your "foreign registration" with one secretary of state's office expired due to the tardy filing of a $30 renewal form, these employees create a new entity in that state using your company name, effectively blocking your reinstatement there.

This is not fiction, but fact! The foregoing plot comes directly from allegations in a case just initiated by this author to halt the deliberate, premeditated theft of one company's key branch**.**

No business owner or investor can sit idly by as their own employees pull the very rug out from under them — and attempt to sell it to his own customers! The business must recover the loss of its property, customers, and the corresponding revenue.

From a business and legal viewpoint, the company must also ensure that the word within the organization is that the owners will not tolerate such misconduct — lest other employees in different locations get similar ideas. As such, suit must be filed and aggressive litigation action taken.

Legal maneuvers have included temporary restraining orders and preliminary injunctions based on violations of the Unfair Competition Rules existing under the federal Lanham Act, the federal Computer Fraud and Abuse Act, and state laws prohibiting deceptive trade practices, trade secret misappropriation, interference with established business relationships, fiduciary duty violations, and conspiracy.

From a legal standpoint, it is worth noting that, in the case described here, none of the key malefactors had signed a covenant not to compete or any other post-employment restrictive covenant limiting post-employment solicitation and/or interference with business relationships (customer, vendor, employee).

How do such crimes happen? And, what can be done to prevent them?

In our experience, even with post-employment restrictive covenant agreements in place, many employees in such cases convince themselves that their agreements can simply be ignored or are not enforceable. These conclusions are often aided by attorneys advising that the non-compete agreement is illegal or can be defeated in court.

Nevertheless, post-employment restrictive covenants are valuable tools for preventing this kind of misconduct, and employment files should be regularly reviewed by your counsel to ensure that proper agreements are in place — to protect legitimate interests of customers, vendors and employees, as well as proprietary information, whether stored electronically or in paper files.

In light of the ever shifting landscape of the law on post-employment restrictive covenants (currently leaning toward limiting employers' power to protect their businesses), employee agreement audits should be undertaken on a regular schedule, and upgrades made as necessary to protect legitimate business interests to the ultimate extent of the law. A state-by-state analysis can prove critical.

Similarly, a detailed calendar must include dates concerning regulatory requirements — early warnings of foreign entity registration and business license renewal deadlines should be on the company calendar, along with tax filings and insurance payments.

The same holds true for state and federal trademark registrations. Maintaining federal trademarks can involve the timely filing of Affidavits of Continued Use (a sworn statement filed by the owner of a registration that the mark is in use in commerce) and payment of fees; state level requirements vary. Assumed business names and similar filings must also be regularly audited for continued compliance with state requirements and fee payments.

And last but not least: ALL businesses have proprietary information, some of which may qualify as protectable trade secrets. An annual check-up on the nature and secure storage of such information, policies and agreements related to the use, access and maintenance of these assets, is likewise critical to the ongoing security of any business.

Fred Mendelsohn would be happy to answer any questions regarding this subject matter. He can be reached at fmendelsohn@burkelaw.com or 312/840-7004.

Vacation Homes: Rules of Engagement

Spell out in writing how your vacation property should be used.

You are fortunate enough to have a family vacation home and you want your family to enjoy it after you die. Your good intentions, without proper planning, may lead to disputes that could frustrate, if not extinguish, your hope for continued family fun.

Your estate plan already directs where your assets should go upon your death. Why not spell out how your vacation property should be used as well?

We have worked with clients to tailor property sharing arrangements based on their specific family dynamics to reduce or eliminate family friction. While each family situation is unique, we have developed several universal guidelines for sharing a vacation home. Here are a few:

Put it in Writing. Without written directions, controversies are more likely to arise. Using a written agreement as a guide, family members will be in a much better position to handle the challenges that will inevitably arise from the responsibilities connected to shared vacation homes.

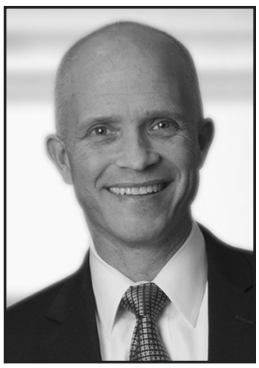
Use of Home. Your plan addressing your family members' use of the home should be fair and should balance the interests of all generations. For example, we help families create schedules that permit family members to pick dates on a rotating basis, with the older generation having preference over younger generations. Family members may also agree on times when anyone can visit the property, such as weeks when the entire family gathers for holidays or birthdays. The actual design of any selection process should be determined by the family's primary decision makers and then spelled out in the agreement.

"Mom, you promised me the house for Memorial Day Weekend!"

Taxes and Maintenance. With respect to any vacation home, someone will have to collect funds and pay the taxes and maintenance expenses. The task of collecting money and paying taxes and expenses is often not addressed, leading to unequal payments, haphazard maintenance, and, inevitably, hard feelings. We recommend that the agreement provide for the election of one family member to act as a property manager. This can allow for a more efficient and fair collection of funds and better organized maintenance. In turn, the manager may be rewarded with preferential selection of home use.

Escape Clause. Most likely, there will be a child or grandchild who does not share the desire to use, keep and maintain the vacation home. The agreement should provide descendants with a means to cash out their portion of the home and an agreed upon way to determine price. They can base the cash-out payment on a percentage of current market value. If those who want to keep the vacation home cannot fund the buyout, then the agreement may call for a deferral of payment with interest and a lien on the property, or for a sale of the home.

Options to Purchase. Many family members become concerned that an interest in their vacation home might pass outside the family, thereby giving a non-family member a right to use it. This can be addressed by providing family members an option to purchase an owner's interest should a child or grandchild attempt to sell their interest or transfer their interest upon death to somebody outside the immediate family.



Marty Ryan

Gerry Ring

Arbitration. In the event a dispute among family members arises, the agreement can contain a provision for arbitration of the dispute in lieu of a court proceeding. Arbitration can be faster, less expensive, and will permit a resolution in keeping with the family's wishes. It can also help maintain civility during a sensitive time.

While heading to your retreat to get together with family this summer, consider spelling out in writing the terms that can secure the continued use and enjoyment of your home for generations to come.

This article was prepared by Marty Ryan and Gerry Ring. Marty is an estate planner with 24 years experience. Gerry is an estate litigator who has handled numerous disputes involving property sharing. If you have any questions about the preparation of a vacation home agreement, you can reach Marty at 312/840-7060 or mryan@burkelaw.com or Gerry at 312/840-7014 or gring@burkelaw.com.

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Blum Animal Hospital on *Today Show*

Firm client Blum Animal Hospital, repeatedly voted the top Animal Hospital in Chicago, was recently featured on NBC's The Today Show, *along with the CBS Nightly News, to discuss the recent outbreak of Canine Influenza in the Chicagoland area. Pictured to the left with* Today Show *correspondent Gabe Gutierrez is "Walter" the dachshund and Blum co-owners Dr. Julia Georgesen and Dr. Natalie Marks. Asked to comment about their relationship with BWMS, Dr. Marks stated, "we not only feel very fortunate to be able to work with the knowledgeable attorneys at Burke, but we also get to care for several of their dogs!" Congrats to Blum!*

RELIGIOUS ORGANIZATIONS

Firm Hosts Dean of the University of Notre Dame's New Keough School of Global Affairs

The firm was honored to host Scott Appleby, Marilyn Keough Dean of the University of Notre Dame's Keough School of Global Affairs, for a discussion on *Integral Human Development on a Global Stage.* Dean Appleby discussed the role the new school will play in preparing students to engage in the worldwide effort to address the greatest challenges of our century: threats to security and human dignity that come in the form of crushing poverty and underdevelopment; failed governance and corruption; resource wars; civil wars; and other forms of political violence and human rights violations. The school will "devote itself to the advancement of integral human development — a holistic model for human flourishing articulated in Catholic social thought by popes from Paul VI to Francis."

Scott Appleby

With the launch of the Keough School of Global Affairs, its first new school in nearly a century, the University of Notre Dame is making a uniquely Catholic mark upon the areas of global affairs while continuing in the tradition of other distinguished universities in international education and global outreach. Dean Appleby, a professor of history and a scholar of global religion, graduated from Notre Dame in 1978 and received master's and Ph.D. degrees in history from the University of Chicago. From 2000-2014, he served as the Regan Director of the Kroc Institute for International Peace Studies. Appleby co-chaired the Chicago Council on Global Affairs Task Force on Religion and the Making of U.S. Foreign Policy, which released the influential report, "Engaging Religious Communities Abroad: A New Imperative for U.S. Foreign Policy," in 2010. He is the author or editor of 15 books, including the widely cited volume *The Fundamentalism Project* (co-edited with Martin E. Marty, University of Chicago Press). Most recently, Appleby co-edited (with Atalia Omer) *The Oxford Handbook on Religion, Conflict and Peacebuilding*. He also serves as lead editor of the Oxford University Press series "Studies in Strategic Peacebuilding."

The school will "devote itself to the advancement of integral human development — a holistic model for human flourishing articulated in Catholic social thought by popes from Paul VI to Francis."

The discussion was held on May 28 at River Roast in Chicago. Dean Appleby was introduced by the firm's James A. Serritella. Many thanks to the Dean as well as all of the attendees who participated.

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Firm's Participation in Investing in Justice Campaign-Campaign Results Released

BWM&S is honored to have again participated this year in the 9th annual Chicago Bar Foundation Investing in Justice Campaign, an annual campaign engaging thousands of lawyers and legal professionals to come together around a common cause as a legal profession — helping to ensure that everyone has access to necessary legal help, not just those who can afford it.

The 2015 Campaign set new records across the board while raising awareness and much-needed funding for pro bono and legal aid services in the Chicago area. Our firm was one of 147 law firms, corporate legal departments and other law-related organizations that participated in this year's Campaign, through which more than 4,700 individual attorneys and legal professionals contributed more than $1.45 million, both record amounts.

100 percent of individual contributions to the Campaign go directly to CBF grants while leveraging hundreds of thousands in additional funding for this work as well. This year's Campaign will yield more than $2 million in grants to 34 pro bono and legal aid organizations thanks to a number of generous matching contributions from participating firms and companies, including BWM&S, and with the additional foundation and government funding the CBF is able to leverage through the Campaign grants process.

The grants made possible by the Campaign fund a continuum of much-needed services in our community, including web-based information and resources, legal aid hotlines, advice desks and clinics, extended representation and significant impact litigation. Those receiving services thanks to the Campaign include the elderly, disabled individuals, veterans, children, domestic violence victims, people at risk of wrongfully losing their homes, immigrants fleeing persecution and abuse, and many others in the Chicago area in need of legal assistance.

The Investing in Justice Campaign is the largest campaign of its type in the country. In the course of its nine years, the Campaign has raised more than $11.5 million to help people in need get critical legal assistance.

Thank you to Aaron Stanton for serving as a Campaign Vice-Chair, Jeff Warren and firm management for their continued support and matching donation, the Pro Bono Committee for its efforts, and most importantly to all of the attorneys who participated!

More information about the Investing in Justice Campaign and the work of the CBF is available on the CBF website, chicagobarfoundation.org/campaign/.

WEALTH & SUCCESSION PLANNING

Firm's Jonathan Michael presents at Estate Planning Short Course

Earlier this spring, the firm's Jonathan Michael presented at the 58th Annual Estate Planning Short Course, sponsored by the Illinois Institute for Continuing Legal Education. Course attendees included attorneys currently practicing in and others wishing to expand their skills in the areas of estate planning and trust administration. The Estate Planning Short Course is one of the industry's leading conferences. Together with Fredrick B. Weber from Northern Trust, Jonathan led a discussion identifying a number of key provisions as well as how each functions. He also discussed how each can occasionally backfire.

Jonathan Michael

Founded in 1961 in Springfield, IL, the Illinois Institute for Continuing Legal Education is the leader in Illinois legal practice guidance, offering a variety of products and services designed to improve the Illinois legal profession through the education of attorneys.

Jonathan is a frequent presenter at conferences and seminars sponsored by the Illinois Institute of Continuing Legal Education as well as the Chicago Bar Association. He has authored numerous articles on topics including business succession planning, asset protection planning, and the transfer and taxation of collections and collectibles. As an Adjunct Professor in the LL.M. Program at The John Marshall Law School, Jonathan has also developed and currently teaches his estate and succession planning courses.

Jonathan's practice focuses on estate and gift tax issues, with an emphasis on wealth and business succession planning for closely held business owners and entrepreneurs. He represents a wide variety of clients, including business owners and entrepreneurs, executives, individuals and families with inherited wealth, not-for-profit organizations and charities, and individuals in the entertainment industry. He was honored to share his expertise with the attendees of the Annual Estate Planning Short Course and he hopes to see them next year. Jonathan can be reached at 312/840-7049 or jmichael@burkelaw.com.

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LG CONSTRUCTION

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six 3,500 to 5,000 square-foot triplex penthouses with 13-to-15 foot ceilings. With families in mind, The Ronsley will offer multiple layouts as well as a dog run and outdoor terrace with the capacity to support private swimming pools.

Joe von Meier

Dana White

LG recognized the need for new residential units in River North, and they clearly were not the only ones. Presales are gaining momentum, which is no surprise given the long line of success for LG. The group's diverse project history is a direct reflection of their ability to remain innovative and prosperous in a competitive market. LG's roots are in high-end, custom, single-family homes, and they are bringing that experience to buyers in the condo market who are looking for the same level of quality and sophistication in a downtown setting.

Representing LG Construction + Development since 2005, Joe von Meier, assisted by Dana White, has contributed to the success of LG's various projects and is honored to continue to do so for one of the most compelling residences in 21st century Chicago. According to Joe, "LG Construction + Development have been working toward a project of this magnitude for ten years. It is the culmination of their experience, vision, and determination to bring innovative, high-quality residences to the hottest markets in Chicago. The Ronsley is a milestone for LG's Brian Goldberg, Barry Howard, Marc Lifshin, and Matt Wilke and I am proud that Burke, Warren has been there for the journey."

Joe can be reached at jvonmeier@burkelaw.com or 312/840-7063 and Dana can be reached at dwhite@burkelaw.com or 312/840-7087.