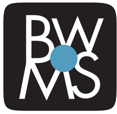

Burke, Warren, MacKay & Serritella, P.C.

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BANKING / FINANCIAL SERVICES

Feds Greenlight Fintech Bank Charter

The federal agency responsible for chartering national banks has approved issuing new bank charters for financial technology companies.

The Office of the Comptroller of the Currency ("OCC") announced that this new category of "fintech charters" will enable new fintech banks to focus on providing automated and digital financial products and services, without the need to provide the full suite of bank services required from banks operating under traditional charters.

Craig McCrohon

The Fintech Charter

The new fintech charter will allow banks to receive many of the powers of the national charter, but without the burden of taking deposits. Thus, fintech chartered banks can offer loans and participate in the credit card payment ecosystem without the burden of complying with the myriad of rules aimed at traditional deposit-taking banks.

Continued on page 3

REAL ESTATE

World's Largest Starbucks to Open in Chicago in 2019

Starbucks plans to open a four-level flagship "Roastery" in the former Crate & Barrel building at Michigan Avenue at Erie Street. This will be the largest space for any Starbucks to date including their high-end "Roastery" concept that the company is rolling out around the world. The Firm's Rob Gamrath is honored to support Starbuck's real estate efforts at multiple locations throughout the greater Chicago area.

WEALTH & SUCCESSION PLANNING

2018 Year-End Tax and Estate Planning Summary

Greg Winters

For several years, we have stated in this year-end article that there were not significant changes to the individual income tax provisions during the preceding year. 2018, however, is different. In December 2017, Congress passed, and the President signed the Tax Cut and Jobs Act (the "Act") making significant changes to the tax laws, including

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ENTREPRENEUR'S CORNER

Inventor Finds Relief For Planter Fasciitis

Entrepreneur Dakota Smith had an idea for a better mouse trap, or in this case, a better solution to relieve the symptoms of Plantar Fasciitis (PF) — a disorder of the connective tissue which supports the arch of the foot resulting in severe pain in the heel and bottom of the foot.

Adam Jung

While running and engaging in other physical activities, Smith became one of the over three million people estimated to develop PF each year. During his search for relief, he met with numerous podiatry physicians and physical therapists, and noticed a pattern in their recovery recommendations. Cryotherapy (icing) and massage were recurring elements of treatment.

Smith developed a tool that combined both treatment methods into one easy-to-use system, incorporating a marble ball (two in total, kept in the freezer between uses) and a patented track. After just five days, the pain was gone! He spent two years perfecting the Spara Podiatry Massage Tool, and to this day continues marathon training free of foot pain.

Dakota Smith with Spara Tool.

Smith has been working tirelessly to share his invention with others suffering from the effects of PF. The Firm's Adam Jung has counseled Smith and his company, Spara Inc., as they raised capital from investors and brought this innovative product to market. More information about the Spara Podiatry Massage Tool can be found at www.sparainc.com. Adam can be reached at 312/840-7097 or ajung@burkelaw.com.

BWM&S

Firm Welcomes New Associates

Burke, Warren, MacKay & Serritella welcomes associates Erica Burgos and Julia Schenk

Erica Burgos is an associate in the Firm's Corporate and Real Estate practices. She was a summer associate at the Firm during 2017.

Erica Burgos

Erica earned her B.A., *cum laude*, from DePaul University in 2010 and her J.D., *cum laude*, from Chicago-Kent College of Law in 2018. During law school, Erica served as an editor of the *Seventh Circuit Review*, participated in the Self-Help Web Center program in collaboration with the Circuit Court of Cook County to provide pro se litigants with free legal resources, and was a member of the Moot Court Honor Society. Erica can be reached at 312/840-7049 or eburgos@burkelaw.com.

Julia Schenk is an associate in the Firm's Corporate and Real Estate practices. She was a summer associate at the Firm during 2017.

Julia earned a B.A. from Washington University in St. Louis in 2014. She earned her J.D., *summa cum laude*, from The John Marshall Law School in 2018. During law school, she served as Executive Justice of John Marshall's Moot Court Honors Program, wrote for the Law Review, and completed a judicial externship at the Illinois Appellate Court, First District. Julia can be reached at 312/840-7076 or jschenk@burkelaw.com.

Julia Schenk

FINTECH
Continued from page 1

Furthermore, without deposits these new banks will avoid the need for federal deposit insurance and escape the numerous rules and watchful eye of the Federal Deposit Insurance Corporation.

New Chance to Shop for the Most Lenient Regulator

Another bonanza for these banks is the chance to avoid many state consumer and other restrictions otherwise imposed on organizations that do not have federal bank charters. Under general principles of federal banking law, the federal rules governing national banks "preempt" state rules. This is music to the ears of potential fintech charter applicants, such as non-bank financial service companies. Without the special fintech charter, these non-bank firms would be subject to the rules of each of the 50 states. This means different interest rates, penalties, collection practices and other significant restrictions on consumer lending practices.

With a fintech charter, these streamlined technology-enabled banks can set up shop in one state, and then operate in every other state subject primarily to the laws of the original "home state." Unlike other non-bank, multi-state lenders, the new fintech bank need only comply with the home state rules and those of the OCC and the National Bank Act.

Another potential regulatory break for these new fintech banks is looser community reinvestment and lending requirements. Traditional banks are subject to strict requirements to lend money in their market areas. With a new type of technology-enabled bank, regulators have suggested that they may loosen these community lending requirements.

The Other Bank Business – Payments

Financial technology companies, if licensed under the fintech charter, would be able to participate in credit and debit card payment networks. These payment networks drive most of the online and offline non-cash consumer and small business payments. With a bank charter, a technology-enabled lender or payments company needed to contract with a traditional bank so that the non-bank lender could offer a full-service credit or debit card payment system. This meant sharing substantial revenue and profit with each of the banking providers. Without the fintech charter, the more traditional full-service national and state banks had a monopoly on connecting with some of the largest payment providers or card processing companies.

OCC Meets TBD: Unresolved Regulatory Details

The OCC's new fintech charter rules have many blanks that require filling. For example, under traditional bank charters, banks primarily lend money and take deposits. The regulations therefore reflect the risks and compliance requirements associated with these traditional services. For example, the OCC now monitors the bank loan portfolios, looking for over-concentrations in real estate, commercial, general consumer, or consumer mortgage loans. Today, if a bank generates significant service revenue by providing lending or processing services associated with credit cards, the regulators may penalize the institution for over-concentration in a particular niche industry.

The OCC's new policy on fintech charters only states that the agency will address issues concerning concentration of business risks, capital requirements, and special rules addressing the specific technology used by the fintech bank. For example, the federal regulators must still determine rules to assign bank capital requirements based on the perceived risk of the fintech activities. With so many gaps in regulatory clarity, no entity has yet applied for this special charter.

Family Feud – Regulatory Style

For many banks, the fintech charter is benign, if not banal.

However, in the world of turf-conscious federal and state bank regulators, the new charter is tantamount to a declaration of war.

State banking regulators share a concurrent power to issue bank charters with the federal government. Banks may operate under a state charter or national charter. Though most larger banks chose the more powerful national charter, thousands of smaller banks still operate under their state-issued charters. Some of these charters date to well before 1900. This "dual-banking system" arose from the earliest days of the United States and the definition of the rights and relationships of state and federal government. The state charters are also products of many of the industries that could benefit from a locally-controlled bank regulatory system. In the 1800s, this meant farmers. In the early 1900s, this resulted from lobbying by Massachusetts and New York trust companies.

Today, the turf war has shifted to technology-enabled financial service companies.

State regulators, through their trade association, have argued that the new fintech charter is unconstitutional, unnecessary, inefficient, incomplete, inconsistent and just an overall bad idea. The New York State Banking Commission, as a kind of first among equals of state bank commissioners, has taken a leading role in the filing of a federal law suit to stop the implementation of the new fintech charter.

The Long Fight

These are merely the first shots in what could be a long turf war. The outcome will determine the scope and legal contours of the charter. Some commentators see this as kind of a cold war among industry groups. The largest traditional banks, along with the largest technology-enabled non-bank lenders, support the national fintech charter. Smaller independent banks see the possible loss of business to financial competitors playing under a much looser set of rules. Consumer groups are furious over the possibility that these fintech banks could use the charter as a

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When a Key Employee Resigns, Joins Your Competitor and You Have Nothing in Place to Stop Them

When a key employee tendered his resignation to join forces with a company's only competitor in a highly specialized field, the company called Burke, Warren. A brief conversation revealed that standard preventive steps (confidentiality and non-compete agreements) had not been put in place. The company rightly believed it had no way to stop the defection and it found itself in dire straits.

Fred Mendelsohn

Fred Mendelsohn and a litigation team that included Nick Gowen and Jay Dobrutsky scoured all available information and identified potential alternative grounds for preventing the former employee from shutting down the departing employee — a Disclosure of Trade Secrets claim and/or a Breach of Fiduciary Duty action, both of which can apply to claims against former officers of a company.

Nick Gowen

They immediately sought and obtained a temporary restraining order, after which the judge called for a standstill. Burke, Warren's litigation team used this time to file affidavits, schedule depositions, issue subpoenas, and engage investigators to develop a strategy to eliminate the client's risk. The efforts delivered: a forensic analysis raised a red flag indicating that several non-company devices had been connected to the employee's company laptop.

Jay Dobrutsky

With the pressure on, the parties met to discuss a possible resolution — under the condition that defendants produce the forensically identified devices. Further analysis revealed that the employee had downloaded source code and customer data from the company. This discovery allowed the company to stop the employee's defection — all without the typical contractual provisions that would likely have been relied upon in court.

Employers big and small can benefit from lessons learned on both sides of this matter: prevention and litigation.

Prevention

Key steps should be implemented, and policies followed:

1. "Plan A" – Protect your company and be prepared. Employees should sign agreements that address key issues including confidentiality, handling of proprietary information and assignment of inventions as well as post-employment restrictive covenants.
2. Keep a "Plan B" individual within reach. This could be a trusted current employee or outsourced individual who can step in and cover the position of a departing employee who cannot readily be replaced or who has key information that can damage or sabotage the company.
3. All employees should be required to acknowledge receipt of an employee handbook with information that addresses these and other critical issues, including those beyond the scope of this article — employment-at-will, sexual and other harassment, professional conduct, confidentiality, etc.
4. Employees (especially those in key positions) should be required to execute agreements addressing issues specific to their position. While one-size-fits-all may often suffice, aspects of key positions often require specific consideration.
5. Measures for maintaining confidentiality of valuable information need to be taken. Although these take significant time to develop, they become critical when key employees come and go. Many companies have proprietary information that meets the definition of "trade secrets" under federal or state law.
6. Business operations should be tailored to prevent access to or disclosure of proprietary or trade secret information to any personnel beyond those who truly need the information to perform their work. Access and disclosure practices should be reviewed regularly on an employee by employee and/or department-by-department basis. For example, work and personal electronic devices (cell phones, computers, tablets and work/personal communication portals) should be separated so that non-essential employees do not have access to sensitive business information.

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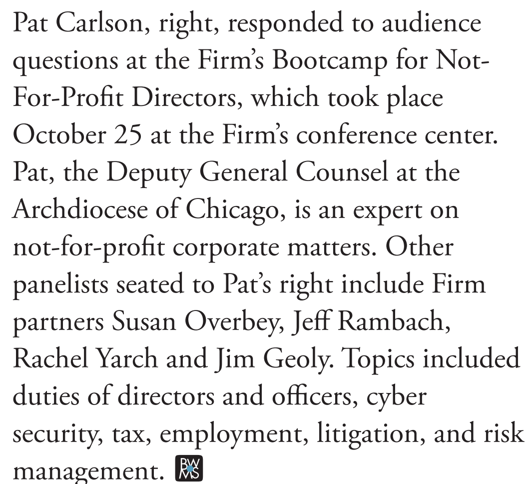
Firm Hosts Not-For-Profit Bootcamp



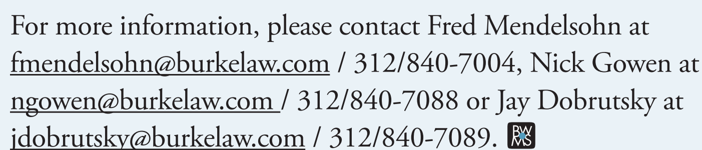
Pat Carlson, right, responded to audience questions at the Firm's Bootcamp for Not-For-Profit Directors, which took place October 25 at the Firm's conference center. Pat, the Deputy General Counsel at the Archdiocese of Chicago, is an expert on not-for-profit corporate matters. Other panelists seated to Pat's right include Firm partners Susan Overbey, Jeff Rambach, Rachel Yarch and Jim Geoly. Topics included duties of directors and officers, cyber security, tax, employment, litigation, and risk management.

7. Establish clear, systematic steps to "lock out" key employees from access to work or materials vital to the departing employee, and to prevent sabotage or theft of company property. Processes should be implemented to recover all company property from the departing employee.

Litigation

What can be done if a key employee does depart your employ and, worse yet, heads to work for a significant competitor? Answers vary depending on the applicable law, employment agreements, employee handbooks and specific circumstances:

1. Consult with counsel and take stock of what damage might be done by the departing employee, assess how many components of the "Prevention" list are in place, and review the law applicable to the situation.
2. If the employee has an employment agreement, a demand letter should be sent to the employee and his new employer, advising of the agreement's existence and requiring that these parties cease and desist. While filing suit against a competitor may or may not be strategically wise, advising the competitor that their new employee has obligations to your company may be quite valuable down the road — establishing possible causes of action.
3. If your employee was a high-level manager, officer or director of your business, he or she may well have heightened fiduciary obligations to your company, such that it may be illegal — even if he or she timely resigns all positions with your company — to use proprietary or trade secret information. Caveats here include the preemption provisions of various trade secret statutes and laws, and the nature of any agreements between the departing employee and the departed employer, but such leverage should not be overlooked.
4. Don't forget forensics. If the company can demonstrate that the departing employee converted company property while still employed (or otherwise), the company may likely win the case — by obtaining an injunction or other relief that prevents the key employee from joining the competitor.



For more information, please contact Fred Mendelsohn at fmendelsohn@burkelaw.com / 312/840-7004, Nick Gowen at ngowen@burkelaw.com / 312/840-7088 or Jay Dobrutsky at jdobrutsky@burkelaw.com / 312/840-7089.

Animals in the Workplace:
How Employers Should Handle Employee Requests to Bring Service Animals and Emotional Support Animals to Work

With an increase of stories in the media about emotional support animals (including a recent story about an airline's refusal to allow a passenger to bring an emotional support peacock on a flight), some employers are wondering what to do if and when an employee makes a request to bring a service animal or emotional support animal to the workplace.

The Americans with Disabilities Act ("ADA") prohibits discrimination by employers, government agencies, and public accommodations (such as hotels, restaurants, and movie theaters) against individuals with disabilities. Although the sections of the ADA relating to government agencies and public accommodations specifically address service animals, the section of the Act related to employers is silent on the issue.

Per the EEOC, a service animal that may be a required accommodation in the employment context is one that "helps an individual with a disability overcome a workplace barrier.

Under Titles II and III of the ADA (relating to government agencies and public accommodations) a "service animal" is defined as a dog (or, in some cases, a miniature horse) that is individually trained to do work or perform tasks for a person with a disability. Examples of service animals include a dog that guides an individual who is blind, pulls an individual in a wheelchair, or alerts and protects a person who is having a seizure. Dogs whose sole function is to provide comfort or emotional support do not qualify as service animals under Titles II and III of ADA.

Elizabeth Pall

The Equal Employment Opportunity Commission (EEOC), the entity tasked with enforcing Title I of the ADA (related to employers), has not adopted the same definition of service animals. Per the EEOC, a service animal that may be a required accommodation in the employment context is one that "helps an individual with a disability overcome a workplace barrier." Last year, the EEOC made its position clear that, in some circumstances, allowing an employee to bring an emotional support animal to work is a reasonable accommodation. The EEOC brought a lawsuit on behalf of an employee diagnosed with post-traumatic stress disorder who was denied the use of a dog that helped the employee control his anxiety. The case is still pending in the Northern District of Iowa.

Accordingly, when confronted with a request by an employee to bring a service animal or emotional support animal to work, employers should engage in the same interactive process as required of any accommodation request. The employer should request enough information from the employee to learn: (1) why the animal is necessary (including medical documentation verifying the claimed disability and detailing why having an animal would help them); (2) what the animal does for the employee; (3) that the animal is trained; (4) that the animal will not disrupt the workplace; and (5) that the animal will be able to safely navigate the workplace.

Like any other accommodation request, a request to bring an animal to work should be granted unless it would cause an undue hardship. Animals that fundamentally alter the nature of business operations, cannot be controlled by their handler, bite someone, or are not housebroken would constitute an undue burden, and a request to bring them to work can be denied on that basis.

In short, requests to bring service animals or emotional support animals to work should be analyzed on a case-by-case basis and employers should remain open to engaging in an interactive process with employees to discuss whether the accommodation is reasonable and feasible.

For more information on service and emotional support animals in the workplace, please contact Elizabeth Pall at 312/840-7099 or epall@burkelaw.com.

REAL ESTATE

Understanding ADA Title III

How Public Accommodation Providers Can Avoid Hairy Situations with Service Animals

As a commercial landlord or building owner, you may be constantly juggling concerns over building maintenance and repairs, operating expenses, and occupancy. What may not immediately jump out at you — but should certainly be on your radar — is how to properly handle the ever-increasing requests for use of a trained service animal on your premises.

Title III of the Americans with Disabilities Act ("ADA") prohibits discrimination on the basis of disability in the activities of places of public accommodations. Such places are generally open to the public and may include offices, shelters and other privately-owned, non-residential commercial facilities.

In a further attempt to limit discrimination against those with disabilities, the Department of Justice ("DOJ") addressed a recurrent issue regarding the term "service animal." Under Title III of the ADA, a "service animal" is defined as any *dog* that is individually trained to do work or perform tasks for the benefit of an individual with a disability. A disability may include a wide range of matters, including physical and mental impairment, as well as PTSD, heart disease, and addiction. While dogs are generally the only species of animal considered "service animals" under Title III, the DOJ has since revised its regulations to incorporate a new, separate provision regarding miniature horses. Under this new provision, a miniature horse service animal is one that generally ranges from 24 to 34 inches in height, weighs between 70 and 100 pounds, and has been individually trained to do work or perform tasks for people with disabilities.

It is imperative that public accommodation providers understand that an assistance animal is not a pet, nor is it an emotional support animal. Service animals perform disability-related functions, including but not limited to: guiding individuals who are blind, alerting individuals who are deaf to sounds, providing rescue assistance, and alerting persons to an impending seizure. Emotional support and therapy animals are untrained animals whose presence merely provides comfort, thereby disqualifying these animals from being considered service animals under the ADA.

As an owner or operator of an ADA-covered facility, it is important to note that a dog need only meet the definition of a service animal to be allowed onto the property. As such, when presented with an individual requesting the use of a service dog, public accommodation providers may only inquire as to 1) whether the dog is a service animal that is required because of a disability, and 2) what work or tasks the dog has been trained to perform. A covered entity may not make such inquiries where these facts are readily apparent and may not further require that the dog be professionally trained nor demand any certification or documentation from individuals regarding their disabilities.

The DOJ clarified that a service dog should generally be allowed unless admitting service animals would fundamentally alter the nature of a service or program.

The DOJ clarified that a service dog should generally be allowed unless admitting service animals would fundamentally alter the nature of a service or program. In most instances, the presence of a service animal will not result in a fundamental change; however, a person with a disability may be asked to remove his service animal where the dog is out of control or where the dog is not housebroken. Even where there is a legitimate reason to request that a service animal be removed, providers must still offer the person with the disability the opportunity to obtain goods or services without the animal's presence. Additionally, allergies or phobias of dogs are not valid justifications for denying access or use of a service animal.

Covered entities should note that the assessment factors for determining whether a miniature horse can be accommodated in their facility is distinct from the test for service dogs in that providers may consider 1) whether the miniature horse is housebroken, 2) whether it is under the owner's control, 3) whether the facility can accommodate the miniature horse's type, size, and weight, and 4) whether the miniature horse's presence will not compromise legitimate safety requirements necessary for safe operation of the facility.

Understanding the nuances of Title III and ensuring that public accommodation providers remain compliant is often a difficult undertaking. Given the limited inquiries permitted regarding the use of service animals by individuals with disabilities, a public accommodation provider's analysis of such matters should take into consideration all the facts of each unique situation.

This article was prepared by Erica Burgos, an associate in the Firm's Corporate and Real Estate groups. She can be reached at 312/840-7049 or eburgos@burkelaw.com.

AIA Updates Construction Contract Form Agreements

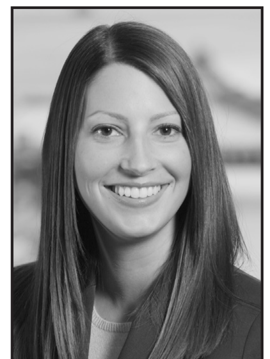
In 2017, the American Institute of Architects (AIA) published updates to several of its construction contract forms. The AIA's forms are the most commonly used form agreements in the construction industry and are updated once every ten years. The 2017 updates include changes to two of the most widely used forms used with the design-bid-build delivery model, the A102 (Standard Form of Agreement Between Owner and Contractor — Cost of the Work Plus a Fee with a Guaranteed Maximum Price), and the A201 (General Conditions of the Contract for Construction), which is often incorporated by reference into the A102. A number of changes were made with the intent to (i) remove barriers to the continuation of the work as events arise during the project, and (ii) formally acknowledge technological advances.

A few of the most noteworthy changes to the A201 are as follows:

1. **Section 2.5 – Owner's Right to Carry Out the Work:** In the event an Owner has the right to carry out work under Section 2.5 where the contractor has failed to perform the work, the Architect no longer is required to issue a change order and has the authority to nullify or withhold a Certificate of Payment from the contractor in order to reimburse the owner. This change is consistent with the objective to advance the conduct of the work.
2. **Section 3.7.4 – Differing Site Conditions:** The time period for the contractor to provide notice of the discovery of differing site conditions has been reduced from 21 to 14 days. This change addresses comments that the prior time period was too long and is again consistent with the objective to try and advance the conduct of the work.
3. **Section 4.2.4 – Communications:** The 2017 update now allows the owner to directly communicate with the contractor so long as the architect is included in any communications that affect the architect's services or responsibilities. Given this additional line of communication, and to avoid confusion, parties are advised to specify the matters where an owner may directly communicate with the contractor and the party responsible for giving the contractor direction on those matters.
4. **Section 7.4 – Minor Changes in the Work:** The 2017 revision made a fairly significant change to this section. While the A201 has always granted the architect the authority to order minor changes to the work that do not modify the contract sum or the schedule, the 2017 update places an affirmative obligation on the contractor to review the changes to confirm that they will not affect the cost or schedule. If the contractor does not notify the architect that the changes will require an adjustment to the contract sum or schedule prior to performing the minor changes, the contractor is deemed to have waived the right to any such adjustment.
5. **Article 9 – Progress Payments, Lien Waivers and Indemnification:** The 2017 update includes two noteworthy modifications. First, Article 9.3.1 has been updated to reflect common industry practice, by giving the owner or architect authority to require the contractor, as a condition to receiving each progress payment (not just final payment) to submit lien waivers and releases from its subcontractors and suppliers covering the applicable portion of the work. Second, Section 9.6.8 is a new section which provides that if the owner has fulfilled its payment obligations to the contractor, the contractor is obligated to defend and indemnify the owner from all losses, damages and expenses (including attorneys' fees) arising out of any lien or claim by any subcontractor or supplier. The new provision also requires the owner to provide notice to the contractor of receipt of a lien claim or other claim for payment.
6. **Section 14.4.3 – Termination by Owner for Convenience:** The 2017 update eliminates the contractor's ability, upon a termination by the owner for convenience, to collect "reasonable overhead and profit" on the portion of the work not performed prior to the termination and instead allows the parties to negotiate an established "termination fee" that the owner will pay to the contractor. The contractor is still permitted to recover payment for work already performed and other costs actually incurred by the contractor by reason of the termination. While owners will no longer be required to pay the contractor for its unearned profit, it may be difficult in practice for the parties to agree upon the termination fee amount at the onset of the project.

Doug Wambach

Robert Gamrath III


Rachel Wanroy

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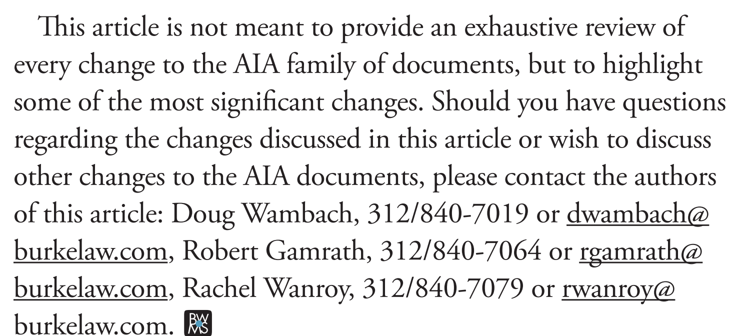
7. **Article 11 – Insurance:** Perhaps the most substantial change to the A201 is the relocation of all of the contractor's insurance and bond requirements from Article 11 to an exhibit (labeled A102, Exhibit A.) As the insurance provisions are probably among the most commonly negotiated within the document (parties often attached a separate exhibit to the 2007 form with their specific insurance requirements), moving these terms to a separate exhibit should streamline the editing process. Article 11 of the 2017 form still includes the requirements for the owner's insurance. Article 11 now also includes an affirmative obligation on the owner, rather than the insurer, to notify the contractor of a threatened or actual cancellation of required insurance coverage within three business day of the owner becoming aware of such an occurrence.
8. **Article 15 – Claims:** A number of changes were made to claims provisions of the A201. An important distinction was made between claims discovered before the expiration of the warranty period and claims discovered after completion of the project and expiration of the warranty period. Section 15,1.3.1 maintains the 21-day notice to the architect or initial decision maker of a claim discovered prior to the expiration of the warranty period. A new Section 15.1.3.2 merely requires notice to the other party and does not set a time frame for the notice, subject to applicable statutes of limitation as specified in Section 15.1.2, for claims discovered after the expiration of the warranty period. This is a commonsense change recognizing that (i) many of the personnel involved with the project, such as the architect or other initial decision maker, will no longer be actively engaged with the project after the expiration of the warranty period, and (ii) most claims discovered after expiration of the warranty period are latent defects where little benefit is gained from an expedited notice.
9. **Section 1.6 – Notices:** The 2017 version of the A201 now allows parties to opt-in and provide for notice by e-mail if a method for notice by e-mail is set forth in the Agreement. However, it is important to note that notice of claims must still be delivered by more traditional means of certified or registered mail or courier.

The A102 (cost plus contract) has also been modified to include various noteworthy changes, many of which flow through from changes to the A201:

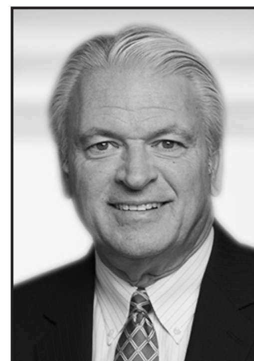
1. **Section 15.5 - Insurance:** The 2007 form incorporated the insurance provisions from the A201 by reference. The 2017 update includes a separate Exhibit A identifying all of the required insurance to be carried by both the owner and the contractor, with pre-filled options to be selected by the parties. Given the importance of insurance, these changes make the contract easier to customize for both parties.
2. **Section 14.1.3 - Termination for Convenience:** As with the A201, the 2017 update includes a pre-negotiated termination fee to be payable to the contractor in the event of a termination for convenience by the owner. The payment of the termination fee does not preclude the contractor from collecting the other amounts payable to contractor (e.g., payment for work performed prior to the termination and costs that result from the termination.)
3. **Article 4 – Contract Time:** The 2017 update now provides check boxes to be selected by the parties for the definition of the date of commencement of the work and the required timeframe for substantial completion (if no selection is made, the default selection is the date of the agreement), whereas the 2007 form assumed a date of commencement of the work on the date of the agreement. The changes provide more specificity to contract time and recognize the variability of contract time requirements from project to project.
4. **Section 12.1.8.1 – Retainage:** One of the most notable form changes in the 2017 update is the establishment of a separate section providing for how retainage will be handled. Previously retainage was referenced in a few separate sections within Article 12. Most notably, retainage billing is now provided for upon substantial completion, not final completion, of the work.
5. **Article 7 and Article 8 – Cost of the Work:** Several costs which were previously included in Article 7 (Costs to be Reimbursed), including bonuses, profit sharing, incentive compensation and other discretionary payments, are now included in Article 8 (Costs not to be Reimbursed.) Additionally, the owner has broader approval rights with respect to any costs included in the Cost of the Work (which approval must be in writing), and the agreed rates for labor costs cannot be changed during the duration of the contract unless agreed to by the parties through a modification of the agreement.
6. **Section 5.1.6 - Liquidated Damages:** While the 2007 forms referenced liquidated damages here and there, the 2017 revision places greater emphasis on consideration of liquidated damages by including a separate section within Article 5 (Contract Sum) where the parties can insert the terms and conditions for liquidated damages. The new liquidated damages section is also referenced under the substantial completion provision.



This article is not meant to provide an exhaustive review of every change to the AIA family of documents, but to highlight some of the most significant changes. Should you have questions regarding the changes discussed in this article or wish to discuss other changes to the AIA documents, please contact the authors of this article: Doug Wambach, 312/840-7019 or dwambach@burkelaw.com, Robert Gamrath, 312/840-7064 or rgamrath@burkelaw.com, Rachel Wanroy, 312/840-7079 or rwanroy@burkelaw.com.

RESTRUCTURING, INSOLVENCY AND BANKRUPTCY

Dave Welch Appointed to ABI Advisory Board

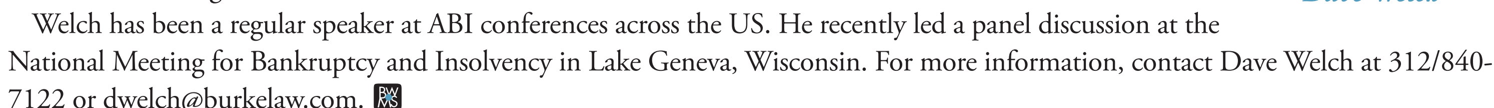


Dave Welch

Burke, Warren, MacKay & Serritella, P.C. partner Dave Welch has been appointed to the Advisory Board of the American Bankruptcy Institute (ABI). ABI is the nation's largest organization of professionals in the bankruptcy and insolvency area, made up of over 12,000 members in multi-disciplinary roles.

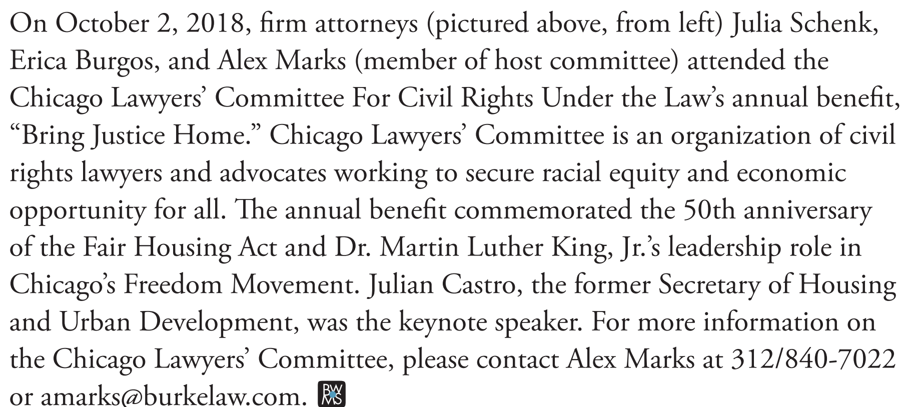
ABI plays a leading role in providing congressional leaders and the general public with non-partisan reporting and analysis of bankruptcy regulations, laws and trends. Members of the organization are often called on to testify before Congress, analyze proposed bills, and conduct periodic briefings for congressional committees and legislative staff.

Welch has been a regular speaker at ABI conferences across the US. He recently led a panel discussion at the National Meeting for Bankruptcy and Insolvency in Lake Geneva, Wisconsin. For more information, contact Dave Welch at 312/840-7122 or dwelch@burkelaw.com.



BWM&S

Firm Attorneys Attend Chicago Lawyers' Committee For Civil Rights Under the Law's Annual Benefit



On October 2, 2018, firm attorneys (pictured above, from left) Julia Schenk, Erica Burgos, and Alex Marks (member of host committee) attended the Chicago Lawyers' Committee For Civil Rights Under the Law's annual benefit, "Bring Justice Home." Chicago Lawyers' Committee is an organization of civil rights lawyers and advocates working to secure racial equity and economic opportunity for all. The annual benefit commemorated the 50th anniversary of the Fair Housing Act and Dr. Martin Luther King, Jr.'s leadership role in Chicago's Freedom Movement. Julian Castro, the former Secretary of Housing and Urban Development, was the keynote speaker. For more information on the Chicago Lawyers' Committee, please contact Alex Marks at 312/840-7022 or amarks@burkelaw.com.

FINTECH

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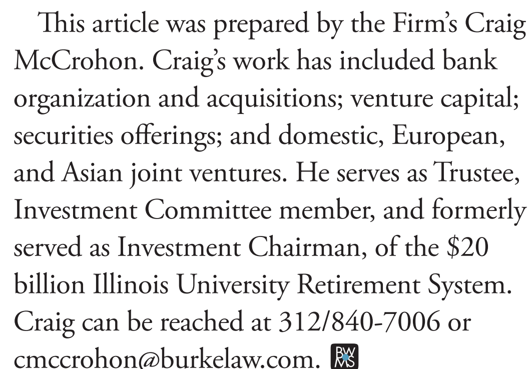

loophole to evade decades of hard-fought state restrictions.

The outcome will be determined by a long regulatory chess game. The first move will likely be the issuance of the first fintech charter. The next moves will be lawsuits brought by state regulators. After that, likely more regulatory clarification by the OCC. Then, more innovation and clever exploitation of unanticipated loopholes. After that, a few more years of litigation. Finally, a truce and consensus about the regulations and the ultimate nature of a fintech bank. Business and technological innovation might accelerate the process.

However, in the realm of the judges and legislative chambers, and absent a spectacular crisis, financial regulatory innovation for fintechs will likely be a slow march into the future.

This article was prepared by the Firm's Craig McCrohon. Craig's work has included bank organization and acquisitions; venture capital; securities offerings; and domestic, European, and Asian joint ventures. He serves as Trustee, Investment Committee member, and formerly served as Investment Chairman, of the $20 billion Illinois University Retirement System. Craig can be reached at 312/840-7006 or cmccrohon@burkelaw.com.

TAX PLANNING
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provisions related to individual taxation. Most of these changes became effective in 2018.

Rate Reduction
The centerpiece of the legislation was a reduction in tax rates. The top rate was reduced from 39.6% to 37%. In addition, the 15%, 25%, 28%, and 33% brackets were replaced by new 12%, 22%, 24%, and 32% brackets.

As has been true for some time, short-term capital gains continue to be taxed at ordinary rates. Long-term capital gains and qualified dividends continue to be taxed at rates of 0%, 15% and 20%. However, these rates now have their own brackets and are no longer tied to the ordinary income brackets. For 2018, the ordinary and long-term capital gain rates are:

<table>
<tr><th colspan="2">ORDINARY RATES</th><th colspan="2">LONG-TERM CAPITAL GAIN RATES</th></tr>
<tr><th>Taxable Income Joint/(Single)</th><th>Tax Rate</th><th>Taxable Income Joint/(Single)</th><th>Tax Rate</th></tr>
<tr><td>$0 - $19,050
($0 - $9,525)</td><td>10%</td><td rowspan="2">$0 - $77,200
($0 - $38,600)</td><td rowspan="2">0%</td></tr>
<tr><td>$19,051 - $77,400
($9,526 - $38,700)</td><td>12%</td></tr>
<tr><td>$77,401 - $165,000
($38,701 - $82,500)</td><td>22%</td><td rowspan="3">$77,201 - $479,000
($38,601 - $425,800)</td><td rowspan="3">15%**</td></tr>
<tr><td>$165,001 - $315,000
($82,501 - $157,500)</td><td>24%*</td></tr>
<tr><td>$315,001 - $400,000
($157,501 - $200,000)</td><td>32%*</td></tr>
<tr><td>$400,001 - $600,000
($200,001 - $500,000)</td><td>35%*</td><td rowspan="2">Over $479,000
(over $425,800)</td><td rowspan="2">20%**</td></tr>
<tr><td>Over $600,000
(over $500,000)</td><td>37%*</td></tr>
</table>

Increased Standard Deduction
In addition to reducing rates, the Act significantly increased the standard deduction amounts. For 2018, the standard deduction is $24,000 (increased from $12,700) for married couples, $12,000 (increased from $6,350) for single filers; and $18,000 (increased from $9,350) for individuals filing as head of household.

Individuals can either itemize their deductions or claim a standard deduction, whichever is greater. By increasing the standard deduction amount, many taxpayers that previously itemized their deductions will now be able to claim the standard deduction, thus, significantly simplifying those taxpayers' reporting obligations. It has been estimated that 18 million households will itemize deductions in 2018 versus 46 million last year.

Revenue Raisers in the Act

Reduced rates and the increased standard deduction benefit all taxpayers. However, to help pay for some of the costs associated with these benefits, the Act eliminated the personal exemption and reduced or eliminated several popular deductions.

Elimination of Personal Exemption
Previously, taxpayers could claim an exemption for themselves and each of their dependents. In 2017, the exemption amount was $4,050/person. For a family of 4, that equated to a reduction in taxable income of $16,200. Beginning in 2018, the personal exemption has been eliminated.

Cap on State & Local Tax Deduction
The most talked about change to the itemized deduction rules is the cap on the deduction for state and local taxes, including real estate taxes on primary and vacation residences. Previously, individuals could deduct all state and local income and real estate taxes paid.

Beginning in 2018, the deduction for state and local taxes is capped at $10,000. Many individuals pay significantly more than $10,000 in state and local taxes. In fact, for most higher income taxpayers, state and local taxes represent their single largest deduction. This is especially true for individuals in high tax states, such as Illinois.

Some states have already enacted legislation to counter the effectiveness of the cap on deductions for state and local taxes. Beginning in 2019, New York and New Jersey will introduce programs wherein individuals can contribute to newly created state charitable funds (for which they could claim a federal charitable deduction) and, in turn, will receive a credit that they would utilize to offset their state tax obligation. The Internal Revenue Service has already stated that they will be issuing regulations to curtail efforts to get around the cap on the deduction for state and local taxes.

Charitable Deductions
The laws related to charitable deductions were largely untouched by the Act. However, the legislation created a new 60% charitable deduction limit for cash contributions to public charities. In other words, individuals can now deduct cash contributions to public charities up to 60% of their adjusted gross income. In the past, cash contributions to public charities were capped at 50% of adjusted gross income.

Notwithstanding the increased cap on charitable deductions, many people will no longer receive a tax benefit from their charitable contributions. As noted above, millions of people that previously itemized their deductions will now begin claiming the standard deduction. Individuals whose total itemized deductions are close to the new

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standard deduction amount may consider combining their charitable contributions.

For example, a married couple filing a joint return may have itemized deductions totaling $23,000, including $5,000 of charitable gifts. Because their itemized deductions total less than the $24,000 standard deduction, the couple will simply claim the standard deduction and will receive no tax benefit for their charitable giving. A couple in this situation may consider combining 2-years of gifts into a single year and not make any gifts in the subsequent year. As such, in one year they would have itemized deductions of $28,000 ($23,000 + additional gifts of $5,000) and, in the subsequent year, their itemized deductions would total $18,000 and they would simply claim the $24,000 standard deduction.

IRA CHARITABLE ROLLOVER

In 2016, the provision allowing individuals age 70½ and older the ability to distribute up to $100,000 annually from an IRA to a charitable organization was made permanent. By distributing funds directly from your IRA to charity, the distribution is not included in the account owner's taxable income (and the account owner is not allowed to claim a tax deduction for the charitable contribution). The IRA Charitable Rollover remains available after passage of the Act.

Mortgage and Home Equity Indebtedness

The Act limits the deduction for interest incurred on home acquisition indebtedness to $750,000. Previously, homeowners were allowed to deduct mortgage interest on up to $1 million of home acquisition indebtedness, although the $1 million limitation continues to apply for loans that were in existence at time of the Act's passage. Beginning in 2018, the previous deduction for interest on up to $100,000 of home equity indebtedness is no longer allowed.

Medical Expenses

Medical expenses continue to be deductible under the Act. For 2018, you will be able to deduct medical expenses to the extent they exceed 7.5% of your adjusted gross income. Beginning in 2019, medical expenses will only be deductible to the extent such expenses exceed 10% of your adjusted gross income. Prior to passage of the Act, medical expenses were deductible to the extent expenses exceeded 10% of adjusted gross income. The Act increased the deductibility of these expenses in 2017 and 2018.

Miscellaneous Itemized Deductions Eliminated

Under prior law, miscellaneous itemized deductions were deductible to the extent such expenses exceeded 2% of adjusted gross income. Miscellaneous itemized deductions include unreimbursed employee expenses, investment management fees, and tax preparation fees. Beginning in 2018, the deduction for miscellaneous itemized deductions has been eliminated.

Other Provisions of Note

529 Plans Expanded

529 plans are popular tools to save for college expenses. Under the Act, distributions from 529 plans can now cover up to $10,000 of education expenses for designated beneficiaries enrolled at a public, private or religious elementary or secondary school. *Note — Check your state law before distributing funds from a 529 plan for elementary or secondary school expenses. While the Act provides that distributions would not be taxable for federal purposes, many states, including Illinois, do not consider elementary or secondary school expense "qualified education expenses" and will subject such distributions to state income tax.*

Alternative Minimum Tax

The Alternative Minimum Tax was not eliminated, but the AMT exemption amount was increased to $109,400 for married couples ($70,300 for single filers). Also, these exemption amounts are only subject to phase-out for married couples with adjusted gross income of more than $1 million ($500,000 for single filers). This, combined with changes to the itemized deductions rules, should result in fewer middle-income households being subjected to AMT. The AMT will continue to be an issue for high-income taxpayers.

Alimony

The Act eliminates deductions for alimony payments required under divorce or separation agreements executed after December 31, 2018. Alimony recipients will no longer have to include alimony in taxable income. The Act's treatment of alimony payments also applies to divorce or separation decrees that are modified after December 31, 2018, if the modification specifically states that the new treatment of alimony payments now applies. For individuals who must pay alimony, this change may be expensive. Child support payments remain non-deductible by the payor.

Estate & Gift Taxes

The Act also made a significant impact on the estate and gift tax regime. While the estate and gift taxes were not eliminated, the Act doubled the unified exemption amount. Under prior law, the exemption was scheduled to be $5.59 million in 2018. Pursuant to the Act, the exemption amount increased in 2018 to $11.18 million ($22.36 million for married couples). The top tax rate for estate and gift tax purposes remains at 40%.

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 2018, the rate is a flat

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40 percent. The tax is in addition to any gift or estate tax otherwise payable. As with the gift and estate tax, each taxpayer is allowed an $11.18 million GST tax exemption for 2018.

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

Many clients utilize a portion or all of their gift tax exemption 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.

The increase in the exemption amount to $11.18 million ($22.36 million for married couples) provides an opportunity for those clients that had already fully utilized the old exemption amount to consider additional gifting.

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 gift or GST tax exemption.

Annual Exclusion Gifts

In 2018, you may make a gift of $15,000 to any individual and certain trusts without any gift tax consequences. Married individuals may make gifts of up to $30,000. 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 gift tax exclusion because any post-gift appreciation is no longer subject to gift or estate tax. To take advantage of the gift tax annual exclusion for 2018, gifts must be made by December 31. Gifts over $15,000 or gifts that will be "split" between spouses must be reported on a gift tax return, which must be filed in April 2019. The annual exclusion amount is expected to remain at $15,000 in 2019, $30,000 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 gift 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.

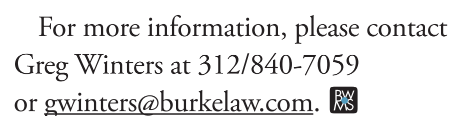
Take Advantage of Today's Low Interest Rates

Interest rates are rising, but they are still 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 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.

Example –Individual funds a GRAT with $1 million. The GRAT's term is 5 years and its assets appreciate at a rate of 6%. Assuming the applicable IRS interest rate is 3.6% (the rate in effect for November 2018) and the GRAT is "zeroed-out", the remainder value of the GRAT assets at its termination would be approximately $86,000. In other words, the GRAT structure would have allowed the individual to transfer assets valued at approximately $86,000 to his children or designated beneficiaries without incurring any gift tax obligation or utilizing any of his or her lifetime exemption amount. If the assets inside the GRAT were to appreciate at a rate of 8%, the remainder available to the trust's beneficiaries would be approximately $166,000.

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 in effect at the time of the sale. 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.

For more information, please contact Greg Winters at 312/840-7059 or gwinters@burkelaw.com.



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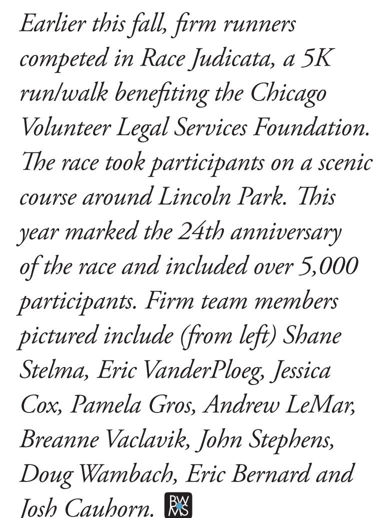
Firm's Race Judicata Team



Earlier this fall, firm runners competed in Race Judicata, a 5K run/walk benefiting the Chicago Volunteer Legal Services Foundation. The race took participants on a scenic course around Lincoln Park. This year marked the 24th anniversary of the race and included over 5,000 participants. Firm team members pictured include (from left) Shane Stelma, Eric VanderPloeg, Jessica Cox, Pamela Gros, Andrew LeMar, Breanne Vaclavik, John Stephens, Doug Wambach, Eric Bernard and Josh Cauhorn.