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

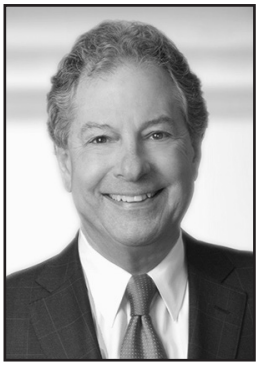
FALL 2015 | BWM&S BULLETIN | VOLUME 13 • ISSUE 2

BWM&S

BURKE, WARREN, MACKAY & SERRITELLA GOES INTERNATIONAL!

Firm selected as Chicago representative in International Legal Network

Globalization means different things to different organizations. For middle market companies, it can mean more markets to sell to and more markets to source from. For big law firms, it can mean the expensive undertaking of opening offices in the different business hubs around the world where their multinational clients do business. For middle market companies entering new markets, the expense connected with using a single global law firm can be staggering.



Jeff Warren

With this in mind, Burke, Warren, MacKay & Serritella is very pleased to announce its selection as the Chicago member of Lawyers Associated

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CORPORATE

TELEMARKETING: FCC ORDER COMPOUNDS RISK FOR CUSTOMER CALLS

U.S. businesses continue to face an onslaught of class action litigation arising out of phone calls to their customers. Over a three year period, companies have agreed to pay in excess of $200,000,000 to settle lawsuits brought under the federal Telephone Consumer Protection Act (TCPA). These TCPA lawsuits have not typically included companies involved in deceptive or fraudulent practices. Rather, the TCPA lawsuits have targeted pharmacies notifying patients that prescriptions are ready, banks alerting customers to account

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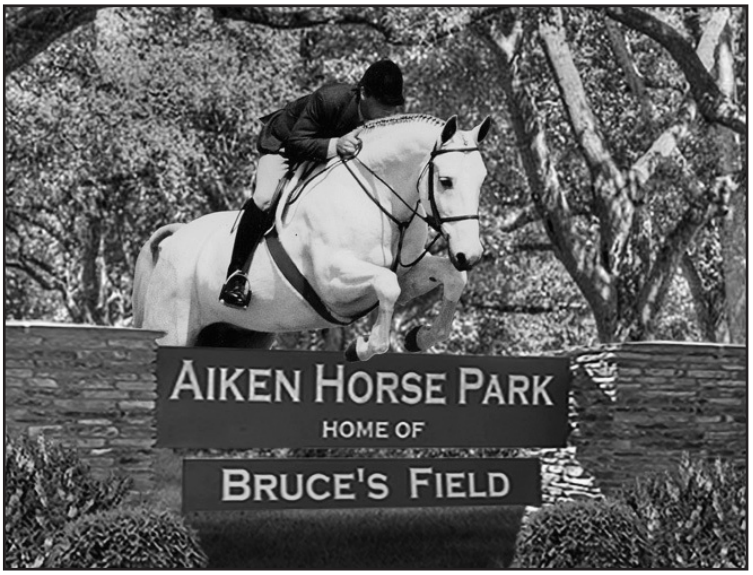
BWM&S

BRINGING BRUCE'S DREAM TO LIFE



AIKEN, SOUTH CAROLINA, IS HORSE COUNTRY. From fox hunting to horse drawn carriages, Aiken is home to unique and beloved equine traditions complete with infrastructure, professional training, veterinary medicine and other support services. For over a century, the town has produced dozens of champion thoroughbreds. Aiken also participates in every popular equestrian discipline. It is home to a number of exciting Hunter/Jumper and U.S. Equestrian Team events as well as a thriving polo community. Its equine culture dates back generations and has attracted horsemen from across the country, which included Chicago area native Bruce Duchossois, who moved to Aiken 20 years ago. Duchossois first gained

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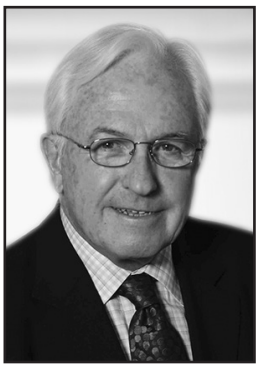
INSIDE THIS ISSUE:

NEXT ISSUE: Client Developments, Year-End Planning And More.

Firm Client McDavid Merges With Shock Doctor Sports

New leading sports protection and performance company, United Sports Brands

Earlier this year, the owners of firm client McDavid, Inc. sold the company to fellow sports protection company, Shock Doctor Sports. The combined company, called United Sports Brands, brings together two leading sports protection and performance companies with complementary product lines and a shared history of innovation and commitment to athletes. This sale represents the culmination of years of carefully planned strategic growth and a well executed plan to bring the company to market.



Dick Burke

Adam Jung

McDavid manufactures, designs, and markets sports medicine, sports protection, and performance apparel for active people and athletes. McDavid products have remained at the top of the recommended lists of professional athletes, sports medicine specialists, and athletic trainers. From research-backed ankle braces to protective apparel with patented HEX technology, McDavid products address the broad range and specific needs of athletes across a variety of sports and levels of competition.

The company's athlete roster is stacked with some notable names, including Los Angeles Clippers center DeAndre Jordan, as well as some up and comers such as Dre Kirkpatrick and Nick Springer. But, that's not all. McDavid apparel can also be seen on professional choreographers and dancers touring with some of the biggest names in music including Britney Spears, Madonna, Rihanna, Jason Derulo, and Lady Gaga. McDavid has been headquartered in the Chicago suburbs for nearly 30 years, with subsidiaries in Japan and Europe. The brand is proudly sold in major sporting good retailers across the United States and over 65 nations worldwide.

The McDavid legacy began in 1969 when Dr. Robert F. McDavid Jr., the company's namesake and founder emeritus, created the first widely used protective knee brace for football. After a period of grass-roots growth, Robert F. McDavid III (Bob) and colleague Terry Fee founded McDavid Knee Guard, Inc., where they licensed the right to manufacture and sell the knee brace in 1980. Now, many successful product lines and

years later, countless professional basketball and football players, as well as over 75 of the nation's largest colleges and universities, are wearing McDavid.

The Firm's Dick Burke has been working with Bob McDavid and Terry Fee since the 1980s. The Firm's work with McDavid over the years has ranged from simple to complex. Assignments have included general corporate planning and maintenance matters, employment issues, tax planning, real estate matters, estate planning, as well as disputes. "Bob and Terry have, like other successful entrepreneurs, instinctively moved their company forward through the years," says Burke. "As McDavid grew, so did the suite of services we delivered to them."

"When Bob and Terry decided that they wanted to begin the process of selling the company, we were honored to be asked to represent McDavid in the transaction," said Burke.

Assisted by the Firm's Adam Jung, the representation in this transaction began with early planning to develop a strategy to sell the company, which included finding the right potential buyer. Once Shock Doctor was selected, the Firm was active in all aspects of the transaction, including the negotiation of key agreements and the closing of the sale.

The Firm is honored to have been a part of the growth and success of McDavid as well as the continued success of United Sports Brands. For more information on the McDavid, Inc. transaction, please contact Dick Burke at rburke@burkelaw.com, 312/840-7001, or Adam Jung at ajung@burkelaw.com, 312/840-7097.

BRUCE'S DREAM

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national fame as a horseman in 1973 and over the next 40 years, became one of the country's leading exhibitors in the competitive Adult Amateur Hunter Division and one of the sport's most important supporters, both nationally and internationally.

Duchossois lost his battle with cancer in 2014. But in the last few years of his life, he was able to set the wheels in motion for the transformation of a 66 acre field and steeplechase track in Aiken into something remarkable — Bruce's Field.

Fifteen years ago, after learning that developers were interested in turning the field and steeplechase track into a housing development, Bruce and his partner Jack Wetzel bought the property, located in the heart of Aiken's equine district. In the years that followed, steeplechase events and an occasional horse show continued to take place on the property. During this time, Bruce dreamed of transforming his property into a world class equestrian facility that would bring back the traditional elements of a horse park, something he saw as missing in too many of the newer equestrian facilities.

"This is Bruce's dream," says Scot Evans, a director of the Aiken Horse Park Foundation that owns and operates Bruce's Field. "Bruce knew exactly what he wanted: a world class equestrian facility combined with the park-like atmosphere that he loved so much throughout his life. He also wanted the park to be connected with the community with a focus on children, education and charity. And he wanted to build a team and an organization that would help create and operate the facility far into the future," said Evans.

In 2013, Bruce pushed his planning into high gear. He and Jack brought Evans together with the Firm's John Stephens and tasked the two trusted advisors to facilitate the process of building the organization that would bring the dream to life. Evans fondly recalls the day when Bruce said that his lawyer, John Stephens, could really help get this project off the ground. "Since that day, John's expertise and leadership have been critical to the Foundation's success," said Evans.

An aerial rendering of Bruce's Field in Aiken, South Carolina.

The next step was to assemble a uniquely qualified board of directors, with each member sharing Bruce's passion and commitment to Aiken's equestrian traditions. With the help of board member James "Burr" Collier and the Firm's Mary Kruit McWilliams, the Aiken Horse Park Foundation was quickly granted status as a 501(c)(3) charity by the IRS.

Once the Aiken Horse Park Foundation was launched and the plans for Bruce's Field were approved, it was time to break ground in November of 2014, just a few months after Bruce lost his battle with cancer. Bruce died in July of 2014 at the age of 64, but not before finalizing plans for the new facility.

Over the next year, the Foundation faced and overcame a variety of obstacles, including zoning opposition and regulatory hurdles, as well as the competitive challenges that make it difficult for any charity competing with the for-profit venues that dominate the equestrian world today.

Integrated within and around the steeplechase racetrack, Bruce's Field provides exhibitors with the feel of a horse show from a bygone era, while featuring state-of-the-art footings, stabling and support services. The Aiken Horse Park's facilities are designed to accommodate the town's many equestrian activities as well as charity events, educational clinics, training for amateur athletes, exhibitions, and competitions.

"Bruce loved horses and he also loved Aiken," said Richard Duchossois, Bruce's father and chairman of The Duchossois Group. "Building this park was something he always wanted to do. It was his hope and ours as well that the park would become a major attraction in Aiken that would provide an economic boost to the region." Duchossois added: "Our family is delighted with John Stephens and his colleagues at Burke Warren. John knew what Bruce wanted and he was able to build a team to complete the park in the most professional way possible."

While Bruce's Field hosted the Aiken Fall Festival this September, the official grand opening will take place

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TELEMARKETING

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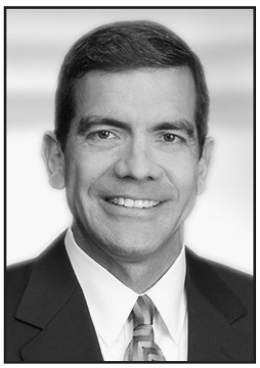
information, and similar legitimate business conduct.

The TCPA sets forth a complex labyrinth of requirements applicable to telephone calls and text messages. These requirements are more demanding for telemarketing calls, meaning calls that concern the commercial availability of goods or services or calls that encourage the purchase of goods or services. Subject to limited exceptions, auto-dialed and prerecorded telemarketing calls to cell phones are prohibited unless the caller has received the prior written approval of the called party to make the call. Prerecorded telemarketing calls to residential lines are similarly prohibited unless prior written approval is obtained, with limited exceptions.



John Darrow

Companies hit with the onslaught of TCPA litigation have typically conducted business in good faith compliance with TCPA requirements. Nonetheless, lawsuits have attacked unknowing and accidental violations. For example, ABC Pharmacy may have on file Jane Doe's consent to make calls to Jane's phone number. Jane subsequently moves and her phone number is reassigned to Johnny Rotten. ABC Pharmacy attempts to contact Jane at the phone number on file to provide a prerecorded refill reminder. ABC Pharmacy instead reaches Johnny. Johnny files suit under the TCPA against ABC Pharmacy for unauthorized, prerecorded calls.

Because of the proliferation of TCPA lawsuits, business groups sought relief from the FCC and filed numerous petitions requesting reasonable guidelines to govern telemarketing calls. Unfortunately, on July 10, 2015, the FCC released a Declaratory Ruling and Order (FCC 15-72) that set forth unrealistic standards and created heightened business exposure to litigation.

- **Good Faith Not Good Enough for Reassigned Numbers:** There is no pragmatic way for companies to learn of reassigned numbers. Businesses sought relief from the FCC for unintentional violations involving reassigned numbers. The FCC's response was a one-call exception for reassigned numbers. Any subsequent call constitutes a violation. The FCC's exception only works if the called party answers the call and chooses to make the caller aware that he or she is not the intended party. In other words, liability will persist if the call goes unanswered (which is often the case when a call is unexpected) or if the call reaches a generic voicemail greeting.

- **Unless it's a Rotary Phone, it's an Auto-dialer:** The use of auto-dialers can create liability under the TCPA. An auto-dialer is reasonably understood to be equipment that is used to dial random or sequential numbers. Unfortunately, the FCC Order states that any dialing equipment *that has the capability*, if so programmed, to dial random or sequential numbers is considered an auto-dialer, *even if* it is not in fact programmed or used for random or sequential number dialing. The FCC gave just one example of a dialing system that would not qualify as an auto-dialer: a rotary telephone.

- **"Cheeseburger, Fries, and One Revocation of Consent:"** Businesses are required to offer reasonable methods for customers to revoke consent to receive telemarketing calls. What is now deemed reasonable is not reasonable. Under the FCC Order, businesses may not limit the manner in which revocation may occur. Rather, it is up to the customer to decide how to revoke consent. This potentially allows a customer to revoke consent by advising a store clerk of revocation at the check-out line, with the company liable if it fails to timely honor such revocation. The following comments made in a dissent to the FCC Order are insightful:

> *"[H]ow could any retail business possibly comply? Would they have to record and review every single conversation between customers and employees? Would a harried cashier at McDonald's have to be trained in the nuances of customer consent for TCPA purposes? What exactly would constitute revocation in such circumstances? Could a customer simply walk up to a McDonald's counter, provide his contact information and a summary "I'm not lovin' it," and put the onus on the company?"*

- **The Doctor Can Call…If He Knows Your Calling Plan Details:** The FCC stated that healthcare calls, such as appointment reminders and prescription notifications, serve an important public purpose. Unfortunately, a new FCC exception would protect these calls only if numerous standards are met, including a prohibition on any call that is charged to the patient or counted against the patient's plan limit on minutes. It is unclear how a patient's calling plan details would be known to the healthcare provider.

- **Risk to Banks that Provide Fraud Alerts:** The FCC stated a desire to provide protection for financial-related calls concerning fraud and identity theft, data security breaches, and money transfers. However, similar to healthcare calls, the new FCC exception would not protect any call that is charged to the customer or counted against the customer's plan limit on minutes.

The FCC Order is currently subject to multiple court challenges. For more information, please contact John Darrow at 312/840-7003 or jdarrow@burkelaw.com.

Firm's Warren and Thompson Present on IMD Development

From Left, the Firm's Patrick Thompson and Jeff Warren, Colt Landreth from Plaza Property Advisors, Inc. and Jack Higgins of Higgins Development Partners. Patrick Thompson and Jeff Warren joined Firm client Jack Higgins in a panel discussion in connection with the Gateway Center development — a multi-use project on ten acres in the Illinois Medical District in Chicago. Higgins is the lead developer in the $300 million property. Thompson and Warren are lead counsel. The event took place before a crowd of real estate professionals at the Midwest Chapter of the Royal Institution of Chartered Surveyors (RICS) on Wednesday, September 16th, at the Northwestern Law School Thorne Auditorium in Chicago. Colt Landreth chairs the RICS Midwest chapter.

BWM&S

Firm Welcomes New Associate Alexandra Vozza

The firm welcomes Alexandra (Alex) Vozza, a new associate in the Firm's Litigation practice. Ms. Vozza's commercial litigation experience includes contract, fraud, professional liability, whistleblower and class action disputes through all stages of litigation. She also has experience in emergency litigation, trusts and estate litigation, and providing counsel to clients with general corporate and organizational matters. Since joining the firm, Ms. Vozza has expanded her practice to include employment disputes, the representation of real estate brokers and the representation of automobile dealerships in franchise disputes.

Alexandra Vozza

Ms. Vozza has represented a variety of individuals, businesses, and business owners in both Illinois state and federal courts. Prior to joining the firm, she was an associate for two years at a boutique litigation firm in Chicago.

Ms. Vozza was born and raised in the suburbs of Detroit, Michigan. She earned her B.A. from the University of Michigan, where she majored in Economics and earned her J.D./M.B.A. from Loyola University Chicago. During law school, Ms. Vozza served as the Articles Editor of the Loyola Consumer Law Review and earned a Certificate in Taxation. She further served as a Research Assistant at the Loyola University School of Law for a professor who taught courses in Federal Income Tax and Corporate and Partnership Tax. As an undergraduate, Ms. Vozza spent a semester abroad studying corporate law and governance at the London School of Economics.

Ms. Vozza can be contacted at 312/840-7012 or avozza@burkelaw.com.

Pat Bruks Presents to Entrepreneurs at 1871

The Firm's Pat Bruks presents again to a group of entrepreneurs at 1871. 1871 is Chicago's Entrepreneurial Hub for Digital Startups where over 350 up and coming entrepreneurs go to find help and support as they convert their ideas into new fast-growing tech businesses. Housed in Chicago's Merchandise Mart, the group takes its name from the year of the great Chicago Fire — not from the destruction caused by the fire, but instead for the explosive growth in the city that followed. Pat conducts a series of workshops designed to help entrepreneurs improve their skills and efficiency in analyzing business contracts and determining the relative value of deals.

NLRB Makes Sweeping Changes in Joint Employer Law

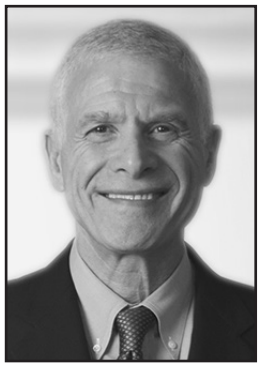
Businesses that have outsourced non-core functions (such as janitorial services) or entered into contracts to assume non-core functions of other businesses (such as supply chain management) could find themselves as "joint employers" with their "business partners" under the National Labor Relations Act (the Act), by virtue of a long-awaited, hotly-contested and sharply divided opinion hot off the presses of the National Labor Relations Board (NLRB) — *Browning-Ferris Industries*. As a result, two businesses could find themselves to be "joint employers" of a single workforce under the Act. Both businesses may then be subject to the obligations of bargaining with a union over terms and conditions of employment, as well as liable for unfair labor practices committed by either business, which could subject both businesses to potential NLRB sanctions, union picketing, boycotts, and/or strikes.

The New Joint Employer Test

In *Browning-Ferris Industries*, the NLRB changed the test for determining joint-employer status. The previous test dated back to 1984 and required that one business exercise direct, actual control over another employer's workers to be deemed a "joint employer" of that workforce. Determinations will now be governed by an expanded and fact specific standard that focuses on whether the "putative" or joint employer has the potential or "mere right" to control the workforce of another employer, even if that right is not exercised. Under the new test, the NLRB will look at indirect control over both traditional employment factors — such as the right to set wages and hours, hire and fire workers, and supervise the work force — as well as indirect control over such factors as the number of workers to be used, scheduling, seniority, overtime, inspection of work, and contract termination rights.

With the number of temporary employees climbing to an all-time high of 2.87 million in 2014, and employers using temporary employees in a much wider range of occupations, the NLRB found its prior joint employer standard to be too narrow. According to the NLRB, the definition of *employer* should encompass as many employment relationships as possible to foster workers' rights to collective bargaining. The NLRB opinion acknowledged that its new standard would require a factual inquiry in every case.

Fred Mendelsohn



Ken Richman

This is exactly the kind of grist that unions can and will use to gain ground in their ongoing efforts to establish collective bargaining relationships. While the NLRB stated in *Browning-Ferris Industries* that a joint employer will be required to bargain only with respect to such terms and conditions of employment which it possesses sufficient authority to control, this pronouncement suggests that employers could become embroiled in significant legal disputes, first as to whether or not they are a joint employer, and then if so, what terms and conditions of employment they have authority to control.

The Facts Underpinning Browning-Ferris Industries (BFI)

BFI contracted with staffing company Leadpoint Business Services to supply roughly 240 sorters, screen cleaners and housekeepers at a BFI facility. The contract provided a number of limitations (not all exercised) on the Leadpoint workers, including BFI's right to require that Leadpoint employees meet or exceed BFI's selection procedures and tests. BFI employees at the facility were represented by the Teamsters Union. The case arose out of efforts by the Teamsters to include the Leadpoint employees in its existing BFI bargaining unit and to force BFI and Leadpoint to the bargaining table as joint employers.

Even though BFI and Leadpoint maintained separate supervisors, lead workers and HR departments, the NLRB found that BFI did not have to exercise actual control over Leadpoint employees to be deemed a joint employer with Leadpoint, so long as BFI retained the right (via the contract) to control the terms and conditions of Leadpoint's contract employees. The NLRB's conclusion relied upon some of the following contractual provisions:

- BFI *could* bar Leadpoint's employment of former BFI employees and require Leadpoint employees to meet BFI's hiring criteria, despite the fact that BFI did not participate in Leadpoint's day-to-day hiring;

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Firm Attorneys Attend @properties Laugh Off Fundraiser for Noah's Arc Foundation

Photo: (From left around Chicago Bulls center Joakim Noah) The Firm's Nora Flaherty, Danielle Gould, Aaron Stanton, and Dana White support firm client @properties at their @gives back Laugh Off fundraiser. The event took place at the Uptown Underground nightclub in Chicago on Monday, September 14th. @gives back, formerly @properties Friends and Neighbors Community Fund, was established in 2009 by @properties co-founders Thaddeus Wong and Michael Golden to inspire charitable outreach and support local organizations with an emphasis on education, homelessness, and youth development. Along with Noah, the event also featured the cast of Second City Chicago and the firm was one of many sponsors. The event raised over $40,000 for the Noah's Arc Foundation, a local organization founded by Noah and his mother Cécilia Rodhe that provides opportunities for at-risk youth to become more aware of their ability to make a positive impact on themselves and their communities.

NLRB

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- BFI had the "unqualified right" to discontinue its use of any Leadpoint workers, even though this happened only twice in their 6-plus year relationship;
- Leadpoint employees were obligated to comply with BFI safety policies, even though BFI never actually enforced any such policies; and
- Even though Leadpoint determined and administered its employees' pay rates, maintained all payroll records, and was solely responsible for providing and administering benefits for its employees, BFI had to approve pay increases and prohibited Leadpoint from paying its workers more than BFI paid its own workers for the same work.

The NLRB also determined that BFI exercised indirect control over Leadpoint employees by controlling the conveyor belt and setting productivity standards, even though quality and productivity standards were communicated to Leadpoint employees by Leadpoint supervisors. Nonetheless, the NLRB found that BFI had "near-constant oversight" and therefore controlled "the processes that shaped the day-to-day work" for Leadpoint employees.

The NLRB found the two employers to be "joint employers," and ordered previously impounded union election results to be tallied. The Teamsters won the election and will now sit at the bargaining table to negotiate with both BFI and Leadpoint.

The Browning-Ferris Industries Opinion, the Dissent and its Potential Impact

The NLRB's decision in *Browning-Ferris Industries* — decided by its three democratic appointees — was fiercely disputed by the Republican minority in a 30-page dissent, who argued that the majority imposed a "never-before-seen" test that extends far beyond the congressional intent of the Act. Unless and until appealed and overruled, or until Congress steps in, the opinion expands the range of employers who could find themselves in a putative "joint" employment relationship — particularly those engaged with staffing agencies and in franchise relationships.

The dissent contends that the NLRB has replaced a long-standing, predictable joint employer test with an ambiguous test that imposes far-reaching and adverse consequences which will foster bargaining *instability*, while imposing joint bargaining obligations on many businesses.

It is, of course, premature to determine the accuracy of these predictions. At a minimum, however, employers engaged with other businesses in synergistic commercial relationships (such as user-supplier/temporary staffing, parent-subsidiary, contractor-subcontractor, franchisor-franchisee relationships) should consider revisiting and likely revising their contractual relationships, while possibly reevaluating business relationships that may become complicated in the new climate created by the BFI opinion.

For readers interested in more on this topic, or in discussing it further, please contact Fred Mendelsohn at 312/840-7004 or fmendelsohn@burkelaw.com, or Ken Richman at 312/840-7002 or krichman@burkelaw.com.

When Details Matter: Caveats for Commercial Tenants

Like many of our successful clients, your business may be expanding locally, nationally or even internationally. To facilitate your expansion, you may choose leasing over purchasing your business premises. After you find the perfect location or ideal building for your business and have reached agreement on key financial terms of the deal, then the real work begins — negotiating a lease agreement with the property owner. Even a small space can come with big legal risks. Be prepared: the initial draft of the lease is typically drawn up by the landlord and will nearly always be biased in the landlord's favor. But as with any other important contract, details of commercial leases matter, and many provisions are negotiable. However, all too often, the following lease provisions are overlooked by commercial tenants.

Rent Commencement. Take a close look at the provisions regarding "commencement of rent." Does the lease require you to pay rent starting on a fixed date whether or not the space is ready for occupancy? Commercial spaces often need to be customized for new tenants, and either you or the landlord will make the necessary changes or improvements. If the local municipality requires inspections and approvals before you are legally permitted to occupy the space, you will want to protect your business with a provision requiring completion of all renovations *and* municipal approvals *prior to commencement of rent*. If the landlord is performing the work, you should require the landlord to comply with all applicable laws and include meaningful remedies for its failure to do so.

Operating Expenses. Is the landlord permitted to charge you for operating expenses and taxes associated with the property? Be sure to negotiate exclusions for costs related to capital improvements such as the roof, building systems, structure, and parking lot. Consider adding caps on year-over-year increases for expenses that the landlord can control. Also, think about adding a provision that allows you to audit the books and records used to calculate the expenses you must pay. I recently reviewed a lease that allowed the landlord to charge the tenant for any expense, with no caps on year-over-year increases and the tenant had no right to audit. Do not give your landlord a blank check! If the landlord insists that you must pay for certain capital improvements, make sure those expenses will be amortized over their useful lives.

Brad Ader

HVAC. Tenants are often responsible for maintenance and repair of the heating, ventilating and air-conditioning equipment ("HVAC") serving the premises. However, leases may also include language requiring the tenant to replace the HVAC system when it fails — which can be very costly and unfair, especially if your lease term is short. The lease should require the landlord to be responsible for any major repair or replacement of the HVAC, while providing that the tenant only reimburse the landlord for the amortized cost of the repair or replacement on a monthly basis over the remaining lease term.

Assignment and Subletting. Make sure the lease requires the landlord to be "reasonable" in connection with any consents for assignment of the lease or subletting. If your company has many locations, you will want the flexibility to transfer your lease without the landlord's consent when you restructure or sell your business. Leases often require the landlord's consent for any kind of assignment or change in the control of the tenant's business, even when it is only a stock sale. A Firm client recently purchased a company holding over 40 leases, most of which required the landlord's consent to a sale transaction. Obtaining landlord consents can result in costly delays and place too much power in the hands of unreasonable landlords.

Environmental. If your business uses hazardous materials, make sure that your lease allows it, otherwise you might find yourself in default and subject to eviction. Most leases contain standard clauses prohibiting ALL hazardous materials on the premises. It is worth noting that common office supplies such as ink and toner for printers and copiers, cleaning products, insect repellent, paint and the like are considered hazardous materials.

Never agree to an environmental indemnity that could include environmental contamination that you did not cause. Many form leases contain such clauses. If the landlord insists on such an environmental indemnity, request a copy of a Phase I Site Assessment.

Indemnities. Imagine one of the landlord's maintenance personnel negligently slams his truck into one of your employees while on the property you lease. When your employee rightfully sues the landlord for damages, watch out! Many form leases contain a clause requiring the tenant to broadly indemnify the landlord for "any personal injury occurring on the property." Make sure your lease appropriately limits any indemnity so that the landlord and its employees' and agents' negligence, misconduct and breach of the lease are carved out from any indemnity given by you. In addition, the lease should require the landlord to indemnify you for its agents' negligence, misconduct and

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BWM&S GOES INTERNATIONAL!

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Worldwide (LAW). LAW is a global association of nearly 100 top quality independent law firms located in more than 50 countries. With access to 4,000 lawyers worldwide, membership in LAW allows member firms to serve clients in new domestic and foreign markets. Additionally, Burke Warren is identified within LAW's network of firms throughout the United States and the world as LAW's only full-service "go-to" law firm in Chicago.

"The city of Chicago is a significant center for business, and the appointment of Burke, Warren to this particular jurisdiction not only adds strength to LAW's presence in the United States of America, but provides the clients of its global membership with excellent legal representation for client transactions and advice in the Chicago jurisdiction," says LAW Chairman Brian Everett from Auckland, New Zealand.

LAW was established in the 1980s and was subsequently incorporated in 2001 under the Swiss Civil Code. Membership in LAW is by invitation only and the Firm was one of several considered for the Chicago market. Member firms have substantial experience representing middle market companies and high net worth individuals with worldwide legal needs.

"Membership in LAW enables us to provide access to first-quality service to our clients on a global level," says Jeff Warren. "The firm is honored to have been chosen to collaborate with LAW's member firms to serve their clients' needs as well as the needs of our clients."

Jeff Warren and John Stephens represented the Firm at LAW's annual meeting October 7-10 at the Langham Hotel in Shanghai, China. For more information about LAW, please contact Jeff Warren at 312/840-7020 or jwarren@burkelaw.com or John Stephens at 312/840-7017 or jstephens@burkelaw.com.

Firm Runners Participate in Race Judicata

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 along Lake Michigan in dowtown Chicago. This year marked the 21st anniversary of the race and included over 5,000 participants. Firm team members pictured include (from left) Adam Rick, Juanita Sullivan, John Stephens, Krista Smith, Doug Wambach, Patricia Carlson, Mary McWilliams, Lila McCabe, Tom Boyle, Brad Ader, Shana Keith, Shane Stelma, Nora Flaherty, Julianne Holdsberg, and Payal Kothari. Firm participants not pictured are Tiffany Sorge Smith, Joshua Cauhorn, and Alex Vozza.

DETAILS

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breach of the lease.

Insurance/Waiver of Subrogation. Before executing any lease, provide your insurance risk manager with a copy to be sure that you can obtain the required coverage at a reasonable price. Next, make sure your lease contains a clause requiring each party's property insurer to waive subrogation for fire or other insured casualty (even in the event of a party's negligence). Think about it: as a tenant, your rent is paying the landlord's insurance premium. However, if the landlord makes a claim under the policy, the insurer may file suit against you as tenant, to recoup its payout of the claim, if you or your employees are responsible. With a waiver of subrogation, the insurer agrees not to file suit against you in order to recover its losses.

Interruption of Utilities. There is not much the landlord can do about a neighborhood power outage. However, if the landlord's contractor negligently cuts the utility line to your premises, leaving you without power, you should not be required to pay rent when you cannot use your space for an extended period of time. This sounds crazy — until it happens. A clause providing for an abatement of rent if the utilities are not restored within a few days can incentivize the landlord to repair such problems quickly.

If this short list of legal issues has raised concerns for you, remember: if they were not adequately addressed in your existing lease, you can always attempt to address them upon renewal. Your lease should thoughtfully anticipate potential problems and equitably allocate risks, so that you can focus on conducting your business. Even if you have a great relationship with your landlord, your landlord may eventually sell the property. If that happens, your only protection may be that lease document.

For more information on commercial leases, please contact Brad Ader at 312/840-7137 or bader@burkelaw.com.

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(From left) The Firm's John Stephens, Ed Lowenbaum from Lowenbaum REP Inc., Richard Duchossois and Dayle Duchossois-Fortino.

BRUCE'S DREAM
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in May 2016, when the Aiken Horse Park Foundation will host the Aiken Charity Horse Show I (May 4-8) and Aiken Charity Horse Show II (May 11-15.)

"Our mission today as a group with support from the community, is fulfilling Bruce's dream," said Evans. "A walk on the field today gives the feel of gratitude and respect. With an equestrian tradition so firmly in place, this is a fitting legacy for a man who loved bringing people together."

For more information on Bruce's Field and the Aiken Horse Park Foundation, please contact John Stephens at 312/840-7017 or jstephens@burkelaw.com.