



BWM&S



A CONVERSATION WITH CHICAGO'S 11TH WARD ALD. PATRICK DALEY THOMPSON:

A unique perspective

Patrick Daley Thompson balances between life as an attorney here at Burke, Warren, MacKay & Serritella and as Alderman Continued on page 6



Chicago Coalition for the Homeless

Burke, Warren was a sponsor of the Justice Circle event in support of Chicago Coalition for the Homeless, the oldest not-for-profit advocacy group focused on homelessness in the United States. The organization works to protect the rights of homeless people and advocates for long-term solutions to the problem of homelessness. Burke, Warren also provides pro bono support to the organization. Firm attorneys (from left) Josh Cauhorn, Jamie Robinson and Steve Schuster attended the recent event at Revolution Brewing.

LITIGATION

WILL THE SKYROCKETING GROWTH OF TCPA LITIGATION SLOW?

Court Decision Provides Business Groups with Partial Victory

If your business makes sales telephone calls or sends text messages, you need to carefully consider the federal Telephone Consumer Protection Act ("TCPA"). The TCPA creates significant litigation risk; during a three-year period, businesses paid over \$200,000,000 to settle TCPA lawsuits. The impact is widespread, with at least 40 industries hit by TCPA litigation. Subject to limited exceptions, the

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## TCPA

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TCPA prohibits the use of an automated telephone dialing system (“ATDS”) to place calls and text messages to cell phones unless the called party has provided prior express written consent. The TCPA places similar prohibitions on prerecorded telemarketing calls and text messages regardless of whether or not an ATDS is used.

TCPA litigation surged after the Federal Communications Commission (“FCC”) issued a sweeping order in 2015 that set forth unrealistic compliance standards and created heightened business exposure to litigation. In response, several trade groups sued the FCC to challenge elements of the order. On March 16, 2018, the D.C. Circuit Court of Appeals granted partial relief.

The FCC order had created an exceptionally broad definition of ATDS to include any telephone equipment with the *potential* capacity to generate and dial random or sequential telephone numbers, *even if* it is not in fact programmed or used for such purposes. Under this FCC definition, it seemed even an iPhone could be an ATDS, and one dissenting FCC commissioner lamented that callers were only safe from TCPA liability if they used rotary dial phones. The Court rejected the FCC’s expansive definition. With this decision, courts will revert back to the previous definition of an ATDS: (1) whether the telephone equipment at issue has the *present* capability to automatically dial random or sequential numbers; and (2) whether human intervention is needed to dial a number.

The Court also struck down the FCC’s “one-call standard” that sought to address unintentional violations of the TCPA that arise where, unbeknownst to the caller, their phone number has been reassigned to a third party. The FCC order allowed a one-call exception, with any subsequent call

constituting a TCPA violation based on the theory that the caller would know the number was reassigned after the first call. This theory assumes that the called party answers the call (which is typically not the case when a call is unexpected) and makes the caller aware that he or she is not the intended party. The Court did take notice of a possible solution in the FCC’s recent efforts to generate a “comprehensive repository” of reassigned numbers, which callers could use to avoid calling nonconsenting individuals with reassigned numbers.

However, the Court upheld the FCC directive that allows subscribers the freedom to revoke consent to telemarketing calls and texts in any way “clearly expressing a desire to receive no further messages.” In other words, businesses may not limit the manner in which revocation may occur, such as communication to a central phone number or e-mail to ensure tracking of such revocations. The Court did state that its decision had no effect on customers agreeing beforehand on how they may revoke consent. Businesses would be wise to include such terms in their consent documents.

Finally, the Court upheld the FCC’s limited interpretation of the exception for healthcare calls to permit calls “for which there is an exigency” and “a healthcare treatment purpose,” such as appointment and exam confirmations and reminders, wellness checkups, and prescription notifications. A broader interpretation had been sought to cover any HIPAA covered call.

Burke, Warren attorneys are available to answer any questions regarding this recent court decision and to help structure programs to reduce their TCPA liability. Please contact Danielle Gould (dgould@burkelaw.com or 312/840-7070); John Darrow (jdarrow@burkelaw.com or 312/840-7003); Shana Shifrin (sshifrin@burkelaw.com or 312/840-7124); or Josh Cauhorn (jcauhorn@burkelaw.com or 312/840-7055) with any questions regarding these issues. 

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### Darrow Named to IESA Advisory Committee

*John Darrow, pictured center with members of the Notre Dame School cross country team, has been named to the Illinois Elementary School Association (IESA) Cross-Country Advisory Committee. The IESA Cross-Country Advisory Committee is responsible for making recommendations to the IESA Board of Directors for changes and improvements to the IESA cross-country rules and procedures for both the regular season and for the state championship series. Mr. Darrow serves as the head track and cross-country coach at Notre Dame School in Clarendon Hills. During his tenure, his teams have won eleven conference championships, three sectional titles, and two state championships.* 

## FIRM WELCOMES JEFFREY C. RAMBACH AND DAVID M. SCHOENHERR

**B**urke, Warren, MacKay & Serritella, P.C. welcomes Jeffrey C. Rambach and David M. Schoenherr.

**Jeff Rambach** helps clients navigate the complex world of tax law to optimally structure transactions and



*Jeff Rambach*

uncover value-maximizing tax credits. He is a member of the Firm's Real Estate, Tax Advisory Services and Wealth & Succession Planning practice groups.

Jeff's tax practice includes four main areas: tax credits, transactional tax, private client/wealth management, and

non-profit organizations. He earned his B.S. from Boston University and his J.D. from the Tulane University Law School. He earned his LL.M. in Taxation from the Georgetown University Law Center. Prior to joining the Firm, Jeff was a tax partner in the Chicago office of Nixon Peabody. He can be reached at 312/840-7011 or jrambach@burkelaw.com.

As a member of the Firm's Corporate and Financial Services practice groups, **David Schoenherr** has a broad understanding and appreciation for the complexities that a transaction may entail and enjoys working with clients who will allow for global analysis, detailed investigation and problem-solving when the situation calls for it. David prepares and negotiates operating agreements, contribution agreements and other miscellaneous



*David Schoenherr*

transaction documents for businesses in a wide variety of industries, including beverage distribution, real estate development, and professional and consulting

services. David earned his B.S. from the University of Michigan and his J.D./M.B.A. from Michigan State. He earned his LL.M. in Taxation from DePaul University. David joins the Firm from the Chicago office of SmithAmundsen. He can be reached at 312/840-7041 or dschoenherr@burkelaw.com. 



### LeMar Recognized as Volunteer of the Year

Earlier this year, Andrew LeMar was recognized as the William J. Hibbler Memorial Pro Se Assistance Program Volunteer of the Year. Andrew is pictured above with Legal Assistance Foundation of Metropolitan Chicago (LAF) staff attorney Karen Doran. Volunteers greatly increase LAF's capacity to serve low-income and otherwise vulnerable populations in Cook County and Andrew has been a reliable volunteer at Hibbler for many years, helping people without lawyers navigate and understand their federal lawsuits. Many pro se litigants specifically ask to meet with him. Congrats, Andrew! 

## BURKE, WARREN ADVISED ROSA & UNIS, LLC IN THE PURCHASE OF FINTUBE, LLC

Burke, Warren, MacKay & Serritella, P.C., advised Rosa & Unis, LLC, in its acquisition of Fintube, LLC and subsidiaries in Tulsa, Oklahoma and Monterey, Mexico, respectively.

Fintube is a recognized leader in heat transfer technologies, providing highly engineered products to a wide range of industries around the world where high performance heat transfer components and equipment are required.

Burke, Warren's deal team was led by tax partner, Jeffrey Rambach and corporate partner Elizabeth Davis and included finance partner Adam Jung, real estate partner, Stephen Schuster, and associates, David Schoenherr and Brian Welch. 

## APPELLATE RULING HIGHLIGHTS RISK FOR OUT-OF-STATE EMPLOYERS UNDER ILLINOIS WAGE PAYMENT AND COLLECTION ACT

If your company has employees living or working in Illinois, you'd best take note of the recent ruling by the Illinois First District Appellate Court in *Watts v. ADDO Management, LLC et. al.* The ruling clears the way for unpaid employees who perform even small amounts of work in Illinois to sue both in-state and out-of-state employers under the Illinois Wage Payment and Collection Act ("Wage Payment Act"). *Watts* is also the first Illinois appellate ruling to address the territorial reach of the Wage Payment Act in light of new regulations issued by the Illinois Department of Labor in 2014.

In a nutshell, the Wage Payment Act imposes requirements on when and how compensation should be paid to employees in Illinois. It also gives Illinois employees a right to sue employers to collect unpaid compensation. Although the Wage Payment Act does not apply to "true" independent contractors (as defined by the statute and regulations), it applies to virtually any other type of "agreement" to pay compensation. The Wage Payment Act applies not only to wages paid to hourly employees, but also to salaries, commissions, and compensation paid to administrative, executive, and professional employees (including bonuses, unpaid vacation, severance and golden parachutes, etc.).

### The Wage Payment Act:

- imposes *significant* penalties on employers who deliberately withhold compensation
- makes managers, officers, and executives personally liable under certain circumstances
- can make a willful violation a crime
- allows the Illinois Department of Labor to pursue employers directly and, where appropriate, impose additional fines and penalties
- can be the basis for class actions
- gives employees the right to collect their attorneys' fees and interest in prosecuting a claim

In its opinion, the appellate court interpreted language in the statute that makes it applicable "to all employers and employees *in this State*." Finding the phrase "in this State" to be ambiguous, the appellate court looked to the Illinois Department of Labor's 2014 regulations, which suggested that the Wage Payment Act did not exclude employers physically situated outside of Illinois. The regulations also provide that the Wage Payment Act could apply to work performed entirely outside of Illinois, if the employer is located here.

Relying on the regulations, the appellate court found that two truck drivers who had been dispatched from Illinois to deliver

cargo to Oregon could assert a claim under the Wage Payment Act against an employer located in Michigan, even if only 8% of their work had been performed in Illinois. However, the court noted that out-of-state employers must still have "sufficient contacts" in Illinois to be held liable under the Wage Payment Act, and left open whether the employers had potential defenses to the statute.

To any lawyer who hasn't blocked first-year civil procedure out of their memory, "sufficient contacts" immediately calls to mind the related concept of "minimum contacts," and the constitutional protection against being sued in states in which you have little-to-no operations. These fact-intensive concepts may give out-of-state employers potential defenses to the Wage Payment Act, as well as defenses against being sued in Illinois in the first place.

*Watts* serves as a reminder that employers should continuously consult with counsel to stay in compliance with state-specific wage-and-hour laws, including the Wage Payment Act. *Watts* also highlights the importance of retaining a skilled and knowledgeable litigator to pursue potential defenses.

For more information, please contact Eric VanderPloeg at 312/840-7129 or [evanderploeg@burkelaw.com](mailto:evanderploeg@burkelaw.com). 



*Eric VanderPloeg*



### Creative thinking is behind the resurgence of American manufacturing

Firm client Semblex, a manufacturer of fasteners used in vehicle production including the all-aluminum body Ford F-150, created Semblex University to showcase required skills and train employees. Pictured above, from left, are trainees James Baruffi and David Martinez and instructor Ray Noguera.

## IS YOUR WEBSITE ADA COMPLIANT?

Thousands of businesses, large and small, have recently been hit with demand letters and lawsuits from blind and visually-impaired persons, alleging that their websites are not fully accessible, in violation of the Americans with Disabilities Act (“ADA”). The claimants allege that the defendants’ websites lack coding that coordinates with screen-reading software which reads text and other online content aloud to blind and visually-impaired persons.

To date, defendants’ motions to dismiss such claims have been denied by several federal courts. In January, 2018, one California District Court rejected Pizza Hut’s defense that its website was accessible because it contained a 1-800-Number accessible by screen-reading software which visually impaired users were instructed to call for assistance in navigating the website

(*Robles v. Yum! Brands, Inc.*).

However, another California District Court dismissed such a claim brought against Domino’s Pizza. That case, *Robles v. Domino’s Pizza, LLC*, is now on appeal before the Court of Appeals for the Ninth Circuit, and a ruling later this year could provide further guidance on this issue. Notably, the U.S. Chamber of Commerce filed a brief in this appeal asking the Ninth Circuit to hold that ADA Title III does not extend to websites.

A major problem for businesses, as Pizza Hut pointed out, is that neither the ADA nor any other law articulates standards to which a company’s website must conform. The World Wide Web Consortium has created the Web Content Accessibility Guidelines (WCAG), updated to WCAG 2.0 in 2008, but only recipients of

federal funding in the United States must adhere to WCAG 2.0, whereas Canada, the United Kingdom and European Union have set WCAG 2.0 as the standard. In *Pizza Hut*, the Court held that in order to proceed, the Plaintiff need only demonstrate that Pizza Hut had not met its obligations under the ADA “generally and without reference to a particular standard” — raising the question of whether meeting WCAG 2.0 standards might have been deemed sufficient for Pizza Hut’s website.

While this kind of litigation originated on the West Coast,

cases are now being filed in the Midwest. Without clear standards, it is difficult to determine what precautions can be taken to avoid potential litigation related to your website and mobile applications. First, contact your web developer and ask whether your website and mobile application meet WCAG 2.0 Level AA criteria; if not, then we recommend that you take steps to do so promptly. Second, speak with your local chamber of commerce, and state and federal elected officials to encourage them to implement clear website accessibility standards. Three, contact counsel to assist you with compliance on these and other ADA issues.

For more information, please contact Rachel Yarch at 312/840-7029 or ryarch@burkelaw.com or Blake Roter at 312/840-7116 or broter@burkelaw.com. 



Rachel Yarch



Blake Roter

## SUCCESSION PLANNING

### U.S. NEWS RECOGNIZES FIRM’S TRUSTS AND ESTATES PRACTICE AS ONE OF CHICAGO’S BEST!

The attorneys at Burke, Warren MacKay & Serritella were thrilled to learn that their trust & estates colleagues were included among “Chicago’s best” according to recent to *U.S. News* findings.

Members of the practice represent clients ranging from professionals and entrepreneurs in the early stages of wealth creation to those with a net worth in excess of a billion dollars, some of whom are ranked by *Forbes* magazine among the 400 richest Americans.

Members of the Group play active roles in the wealth and succession planning community, as Fellows of the American College of Trust and Estate Counsel, and adjunct professors at The John Marshall Law School and DePaul University, who teach tomorrow’s wealth planning professionals, while others serve on charitable boards throughout the Chicagoland area. One member of the Group received the prestigious Chicago Estate Planning Council’s Austin Fleming Distinguished Service Award, which recognizes Chicagoland’s leading estate planning practitioner.

The full resources of the Firm, including the corporate, real estate, litigation, and tax advisory services practice groups, complement our wealth and succession planning group. 

## THOMPSON

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representing the 11th Ward in Chicago. The 11th Ward includes Bridgeport, along with Armour Square, Canaryville, Pilsen, University Village and Tri-Taylor neighborhoods. In addition to addressing the ongoing needs of his ward, Thompson maintains a busy commercial real estate practice at Burke, Warren.

Thompson was elected Alderman in 2015. Prior to his election, he served since 2012 as one of nine elected Commissioners of the Metropolitan Water Reclamation District (MWRD). Prior to joining the Firm in 2011, Thompson was a partner at DLA Piper. Thompson started his career as a commercial real estate broker at Chicago-based Jupiter Realty.

In the Q&A with Thompson below, we explore the past, present and future of his two-track professional life.

**Q:** *How would you compare your previous role as MWRD Commissioner with Alderman of Chicago's 11th Ward?*

**A:** I was one of nine MWRD Commissioners, whose constituents included the elected officials of the 125 communities within the District along with the 5 million people who call those communities home. Our work focused on sanitation, stormwater and water treatment. We dealt with the realities of flooding and its impact on communities. We worked to find creative solutions with many elected officials. We passed the Watershed Management Ordinance, setting standards for new development projects relating to sewer construction, erosion control, detention, floodplain management and other related development matters. In contrast, as Alderman I deal with a smaller population and a much broader scope of services. With approximately 57,000 residents, the 11th Ward has a population which is larger than all but a handful of cities in Illinois. On the Ward

level, little things make a big difference in people's lives. Trash needs to be picked up on time and potholes need to be filled. When there's a problem in my Ward, my constituents expect me to be on top of it. I also serve as unofficial zoning administrator for my Ward. My legal experience and real estate background have been a big help.

**Q:** *You moved your practice from one of the largest firms in the world to mid-sized, Chicago-based Burke, Warren. Why the move — and how has that impacted your practice?*

**A:** DLA Piper is one of the top firms in the world and it was an honor for me to be a partner with that very talented

*“For as long as I can remember, I have been a witness to my family's public service, which is why I'm drawn to it. That includes my uncle, John Daley, a Cook County Commissioner; my uncle, Bill Daley, who served as Secretary of Commerce to President Clinton and Chief of Staff to President Obama; my grandfather, Richard J. Daley, and my uncle, Richard M. Daley, who both served as mayors of Chicago.”*

— ALDERMAN PATRICK THOMPSON

group of people. DLA had the capacity to get things done almost anywhere in the world, but my interests were focused on Chicago and the region. At Burke, Warren, we provide a full-service platform, while maintaining a level of personal connection with clients which is rare today. From my perspective, the talent I have available is as good as it gets for any commercial development project in the greater Chicago area. We have a well conceived business model

utilizing a team of experienced partners and talented associates. This firm is very well positioned to succeed in a highly competitive legal market.

**Q:** *Is being a member of a famous political family a blessing or a curse?*

**A:** I have been very blessed to be part of a wonderful family. For as long as I can remember, I have been a witness to my family's public service, which is why I'm drawn to it. That includes my uncle, John Daley, a Cook County Commissioner; my uncle, Bill Daley, who served as Secretary of Commerce to President Clinton and Chief of Staff to President Obama; my grandfather, Richard J. Daley, and my uncle, Richard M. Daley, who both served as mayors of Chicago. I've always been interested in the impact that government can have on communities — I like to focus on building up the communities, bringing people together, and finding creative solutions to problems. I believe public service is an admirable profession. Our family's public service also extends beyond government; there are many ways to serve the public. My mother and two aunts were public school teachers. My grandfather and three uncles were also lawyers, which had a big influence on me.

**Q:** *Has your public service given you a different perspective in your law practice?*

**A:** It really has. Each real estate development project is unique, but they are all affected by both public and private interests. My experience as both a public servant and a real estate lawyer helps me see both sides of the issues. It's helped me understand that there is almost always a solution to any difficult development problem — one that serves the community's needs and provides a reasonable result for the owner or developer.

**Q:** *Bridgeport is becoming an increasingly popular place to live.*

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*Why do you think that's the case?*

**A:** Crain's did a nice piece on Bridgeport a few months ago, calling it the fastest growing neighborhood in the City. We had over 300 new residential units — both single and multi-family — under construction in 2017. We are a bedroom community with a well-balanced mix of residential options including modest properties and high-end options too. You can find single-family homes and rowhouses. The residential prices in Bridgeport are lower than other areas and our main draw is people who envision living in more of a “community” than some trendier areas. We have excellent schools, both public and Catholic. Bridgeport also has excellent public transportation, with access to the Red and Orange lines and the new 31st Street Bus that connects the two trains. My goal is to attract positive development to the 11th Ward.

The challenge for me is attracting new folks while also providing opportunities for our existing residents and their families. We have a diverse community and we try to accommodate everyone. I grew up in Bridgeport, so it's important to me to develop the community while also accommodating the people who have always loved living there.

*Q: Can you say more about the appeal of Chicago's 11th Ward and Chicago in general?*

**A:** Chicago's South Side has a rich culture, which helps explain the increase in development. The Obama Library is a once-in-a-lifetime opportunity for Chicago. Closer to home for me is the beautiful Eleanor Boathouse — a new rowing training center and boat storage facility. The art community and restaurant scene are also thriving. The Bridgeport Art Center and Zhou B Art Center both have world class exhibitions. We also have excellent restaurant options between our local establishments and some great chains that Chicagoans know and love. The neighborhood is constantly evolving, and I think more and more people are catching on.

Chicago had record numbers of visitors last year, surpassing 50 million, including record numbers from overseas at a time when international tourism to the US overall was down. Chicago also led the way among US cities for corporate relocations. People want to be here. And that definitely includes Chicago's 11th Ward.

*Q. Describe how your public sector experience helps make the Burke, Warren real estate team so effective.*

**A:** As I mentioned, my work with the complex issues faced by governmental officials, coupled with my legal and real estate experience, allow me to assist our clients in formulating creative solutions in complex real estate situations. My experience, combined with our outstanding transactional and entitlement team, is part of what makes our Burke, Warren real estate practice uniquely well qualified. 

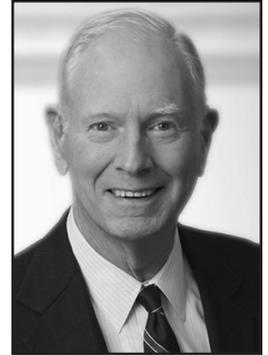
EMPLOYMENT LAW

## A VICTORY FOR AUTO DEALERS: U.S. SUPREME COURT RULES SERVICE ADVISORS ARE EXEMPT FROM OVERTIME PAY

**O**n April 2, the United States Supreme Court ruled that service advisors working at automobile dealerships are exempt from overtime pay under the Fair Labor Standards Act (the “FLSA”). The case involved a Mercedes Benz dealership in Encino, California that was sued by a service advisor for overtime backpay allegedly due pursuant to the FLSA. The dealership argued that its service advisors are exempt from the FLSA under an exception, or carve-out in the Act, applying to “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements.” 29 U.S.C. 213(b)(10)(A).

Reversing the Court of Appeals for the Ninth Circuit, which found service advisors did not fall within the exemption, the Supreme Court held that “[b]ecause service advisors are ‘salesmen primarily engaged in servicing automobiles,’ they are exempt from the FLSA’s overtime pay requirement.” The dissent disagreed, writing that because service advisors “neither sell nor repair automobiles,” the exemption was inapplicable. The case is viewed as a major victory for dealers, affecting more than 18,000 nationwide dealerships which collectively employ an estimated 100,000+ service advisors. [*Encino Motorcars, LLC v. Navarro, et al.*, No. 16-1362].

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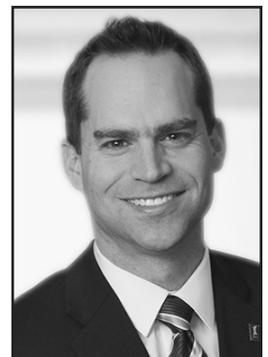
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*The Bulletin is written by the firm of Burke, Warren, MacKay & Serritella, P.C. to keep clients and friends current on developments in the law and the firm that might affect their business or personal lives. This publication should not be construed as legal advice or legal opinion on any specific facts or circumstances. It is meant as general information only. Consult an attorney with any specific questions. This is a promotional publication. ©2018 Editor: Cy H. Griffith, Director of Marketing.*

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## ESTEEMED CLIENT TURNS 100

*Barbara Clarke (seated) is pictured together with the Firm's Diane Keating, Kitty Flanagan of Flanagan Enterprises, and chair of the Firm's Wealth & Succession Planning Group Mary Kruit McWilliams as they celebrate Barbara's 100th birthday at the Chicago Botanic Gardens. The only surviving member of her family, Barbara worked as an accountant for a well-known Chicago family and retired in the 1960s. For many years, Barbara could be found volunteering in the greenhouses at the Gardens. In honor of her centennial birthday celebration and her many contributions to the Gardens, Jill A. Corr, Development Officer at the Chicago Botanic Gardens, announced the dedication of a Redbud Tree in Barbara's honor and presented her with a color picture of the tree in bloom as well as with a Chicago Botanic Gardens coffee table book. Barbara also received a framed congratulatory letter from Chicago Mayor Rahm Emmanuel, and an alumnus medallion and letter as the oldest living alum of Lakewood High School, of Lakewood, Ohio. Patty Shanahan, Associate Vice President of the Chicago Botanic Gardens, commented: "You and your law firm just went from advising, to loving." *