

Corporate and Construction Update

May 2011

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COMING SOON:

SUMMER SEMINAR

The Economy: Where Are We??
Is it time to do a deal?

- Bankers' Round Table
- Insurance, construction, and intellectual property issues

Willis Tower
Willis Board Room, 20th Floor
233 S. Wacker Drive
Chicago, Illinois
8:00 a.m. – 12:00 p.m.

Date: TBD

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Spring Update

Spring is here, and we hope the rain will stop soon so construction season can start. The stock market continues to rise, so that part of the balance sheet continues to improve. Interest rates remain at historically low levels, but gasoline prices and raw material prices are increasing. Many Fortune 500 companies are reporting substantial increases in revenues and profits. Big and small companies are starting to hire, and the unemployment rate is slightly improving. So, where are we with respect to the economy? *Is it time to do a deal?*

Our Illinois and Indiana banker friends are telling us that they have money to lend at very favorable rates. However, economists are forecasting that rates may start to rise as we move into the later part of the year.

In the past two months, our firm has added 4 new attorneys, and we are actively looking for office expansion opportunities at favorable terms. We are starting to see an increase in client activity in many areas, including those involving purchase and lease of real estate, development, and registration of trademarks. Entrepreneurs are willing to invest their capital. Local towns are contributing funds and streamlining various application and permit processes to make deals more attractive. Bankers are becoming more creative, putting some of their capital to work. The consumer seems to have a little more confidence and appears to be spending a little more.

As a result, we think that now *is a time to do a deal*; however, business executives must carefully analyze each detail of the transaction prior to signing on the dotted line. We hope that you will be able to join us for our Summer Forum that addresses various banking, insurance, construction, and intellectual property issues that will help you decide whether *it is time to do a deal*.

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Bryce Downey & Lenkov News

Bob Bramlette was re-elected as Flossmoor Library Trustee in Flossmoor, Illinois. He also serves as a Commissioner of the Flossmoor Police & Fire Commission.

John Wagener was re-elected as a village trustee in his home town, The Village of Green Oaks, Illinois, where he is in charge of Public Works.

Bob Bramlette served as a judge for the 2010-11 National Appellate Advocacy Competition (NAAC) held on April 7, 2011 by the American Bar Association Law Student Division. Many law schools participated including Duke University, Cornell University, University of Texas, Ohio State University, Washington University and University of California Berkley.

Real Estate Taxes

MY REAL ESTATE TAXES KEEP GOING UP! HELP!!

Illinois, Cook County, many towns and villages, and some school districts are in difficult financial positions. As a result, each of these taxing bodies is looking for ways to raise revenue. Some school districts are having referendums. Illinois has raised the state income tax rate from 3% to 5% starting in 2011. In 2010, Cook County residents had to pay 55% of the estimated tax bill for the 1st installment, rather than “just” 50%. After the November 2010 election, the tax bills were issued, and the real estate tax multiplier skyrocketed from 2.97 to 3.37, which was a 13.5% increase.

Three components make up Cook County real estate taxes. 16 local taxing districts (e.g., the grade school, the high school, park district, village or town, Cook County, Cook County Public Safety, etc.) each prepares a budget, which is used to determine the tax rate for the particular taxing body.

The second component is the state multiplier, which is approved by our elected officials in Springfield.

The third component is the assessed valuation of your property. The assessed valuation is determined by the assessor’s office. Every third year, property owners receive a statement indicating the past and new assessed valuation. There are many components that determine the assessed valuation, but square footage of the building is the key factor. Another important factor is the square footage of the land.

RESIDENTIAL

When you receive the notice from the Assessor’s Office, you have an opportunity to appeal the new assessed valuation under various theories, including lack of uniformity. Lack of uniformity happens when your neighbor’s home is larger and may be on a larger lot, but it has a lower assessed valuation. You can find information about your home and other homes in your neighborhood on the Assessor’s web-site at www.cookcountyassessor.com. The appeal form, which is also on the site, requires you to provide your name, address, and the property tax number (“PIN”) for your home. List on the appeal the PINs for three of your neighbors’ homes that are larger than yours, but that have smaller assessed values. You should receive a determination within six weeks or so. If you don’t like the results, then you can file an appeal with the Cook County Board of Review. Both the Assessor’s Office and the Board of Review hear appeals for various Chicagoland neighborhoods during certain times of the year. Again, if you look on the website, you can determine when the Assessor and the Board of Review are accepting appeals for your neighborhood.

COMMERCIAL AND INDUSTRIAL

Commercial and Industrial properties are assessed in similar manners as residential. However, appeals for these properties generally involve an appraisal by a licensed MAI Appraiser. The appraiser inspects the property and other properties in the area. The property is analyzed under three methods: sales comparison

approach (estimate of value that compares the property with similar properties that have recently sold and have similar characteristics or indicators of value); cost approach (cost to construct the building less estimated depreciation); and the income approach (how much cash flow is generated). After making the calculations, the Appraiser provides an overall value.

The assessed valuation is determined by multiplying the appraiser's value of the property by 25% for industrial and commercial properties.

The appraisal is attached as one of the documents that are submitted to the Assessor or the Board of Review in order to determine whether the assessed valuation will be adjusted.

After submitting your appeal to either the Assessor or the Board of Review, you will normally receive a determination within 6 to 8 weeks. If an appeal is made with the Board of Review, the appellant has the opportunity to make an oral argument.

Last fall, we represented a client before the Board of Review. The building was used solely by the owner for its business. Due to the economy, the net income for the past few years was down, and there were several buildings in the neighborhood that had recently become vacant. After we presented our case that the property was overvalued, the Board of Review decreased the assessed valuation by 28%. Even with the increase in the state multiplier, the client's real estate taxes were substantially lower than in the prior year.

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Social Networking for Business and Your Company's Social Media Policy

Charlie Sheen is using Twitter to help save his job! During the recent election, political candidates were sending tweets to get people to vote for them. Last January, Bears quarterback Jay Cutler was the subject of a lot of criticism on social media sites after he was hurt in the game against the Packers. Many small businesses send tweets to announce new products and services.

People are using social networking sites to communicate about everything from celebrity issues and politics to balancing the budget in Wisconsin and problems in Africa and the Middle East. Social networking sites present a lightening fast way of communicating that is being used daily by people in their business or workplace. By participating in a blog, chat room or online social network; a company can announce a new product or service, respond to criticisms or problems, attract top talent, and facilitate an open exchange of ideas between employees and customers...all of which enhance the brand and help to drive sales.

With the good comes the bad and unfettered employee access to social networking sites and blogs can present a host of problems for your business. Companies must seek to protect: (a) their confidential and proprietary information from unwanted disclosure, and (b) their trade secrets, trademarks and service marks from infringement. Businesses also need to protect their own and their executives' reputations from embarrassing or offensive blog posts, or the posting of content that is disparaging or that projects an undesirable or unwanted image.

Your company should establish an employee social media policy for discussing or posting company information, whether during or outside of work. First and foremost, your policy should remind employees that everyone must obey the law. Policies should require that employees comply with the law in regard to copyright and plagiarism. Other relevant laws include those related to libel and defamation of character. Defamatory statements can lead to lawsuits

against the author of the statement — which can be deemed to be your company if the statement is made by an employee on what appears to be a company sponsored or sanctioned site. Relationships with clients, customers and vendors are valuable assets that can be damaged through a thoughtless comment, so your social networking policy should make clear that employees are not to reference any clients, customers or vendors without first obtaining their express permission to do so.

A simple and general guideline to follow for crafting your company’s policy should be to require that all communications are to be made in a responsible manner that is not disruptive, offensive to others, or harmful to the company. The use of social networking sites can be very rewarding for your business, but be mindful of the potential problems. You can minimize the risks by having a written social media policy for communications, both in and outside of the workplace.

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Federal Pre-emption of State Tort Claims, or Not?

The United States Supreme Court issued two opinions on the issue of federal preemption this past February. In Bruesewitz v. Wyeth LLC, No. 09-152 (Feb. 22, 2011), the Court held that the federal vaccine injury compensation statute (National Childhood Vaccine Injury Act, “NCVIA”), expressly preempted common law state tort suits seeking damages for defectively designed vaccines. In Williamson v. Mazda Motors, No. 08-1314 (Feb. 23, 2011), the court held that compliance with certain Federal Motor Vehicle Safety Standards (“FMVSS”) which allowed manufacturers to employ a lap-only restraint system for the middle seating position in the back row did not insulate the manufacturers from state tort suits claiming that the lack of a shoulder restraint system constituted a defect.

The seemingly at odds decisions can be reconciled when the Court’s analysis is reviewed.

The Bruesewitz court noted that the NCVIA expressly “preempts all design defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects.” The NCVIA established a no-fault compensation program for individuals who suffer serious adverse side effects from FDA approved childhood vaccines. It was enacted as a substitute for court litigation in order to promote vaccine development and to encourage parents to have children vaccinated.

NCVIA’s preemption provision was analyzed by the Majority in the 6-2 decision, and the justices focused on the “unavoidable” side effects language. The preemption provision states “[n]o vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death . . . if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.” 42 USC §300(aa)-22(b)(1). Thus, the Court held that so long as the vaccine was properly labeled and manufactured, a design defect claim based upon the inclusion of a hazardous component would be preempted. On the other hand, a side-effect suit alleging a manufacturing defect or failure to comply with federally mandated warnings or labeling requirements, would not be precluded. “Unavoidable” means what it says. The design claims are gone as a matter of statutory interpretation.

Right after issuing the Bruesewitz split decision, the Court unanimously held in Williamson that a FMVSS pertaining to seat belts did not either expressly or impliedly preempt a California tort suit against Mazda for failing to install rear seat lap-and-shoulder safety belts. The court went to great lengths to distinguish its earlier and frequently cited holding in Geier v. American Honda, 529 U.S. 861 (2000), that an earlier version of the same FMVSS impliedly preempted common law damage claims based on the

failure to install air bags. After reviewing the safety standards' regulatory history and the government's differing position in the two cases, the Majority held that the lap belt vs. lap-and-shoulder belt choice in Williamson, was "not a significant objective of federal regulations," unlike the seat belt vs. airbag choice in Geier.

The key to Williamson is that whenever the government gives manufacturers a choice between two or more options, a tort suit that imposes liability on the basis of one of the options is not always an "obstacle" to a comprehensive and uniform federal regulatory scheme, and such claims will not always be preempted.

What this means to manufacturers in the pharmaceutical, chemical, pesticide and other federally regulated industries is that compliance with federal regulations may preempt tort suits under the correct circumstances. However, if the regulations provide choices or options to achieve compliance, adherence to minimum design standards will not necessarily provide preemptive protection. In other words, absent a stated objective by the government to the contrary, manufacturers may possibly expose themselves to common law damage actions by electing any design choice other than one based upon the maximum prescribed standards.

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New and Old Cases Mandate that General Contractors Revise Their Insurance Procurement Clauses

Based on a new decision by the First District Appellate Court, *Westfield Insurance Company v. FCL Builders, Inc.*, 2011 WL 855397 (1st Dist. March 2011), and the previous case of the *Estate of Robert P. Willis v. Kiferbaum Construction*, 357 Ill.App.3rd 1002, 830 N.E. 2d 636 (1st Dist. 2005), general contractors should review the insurance procurement clauses of their

subcontracts. The reason for the review is that while the insurance procurement clauses may be fairly straightforward when dealing with the first tier subcontractor, these cases point out problems when enforcing the insurance procurement clauses downstream to second, third and fourth tier subcontractors.

In the *Westfield* case, FCL Builders, Inc. ("FCL") was the general contractor, and it subcontracted the structural steel work to Suburban Ironworks, Inc. ("Suburban") who in-turn further subcontracted the steel erection work to JAK Ironworks, Inc. ("JAK"). Westfield Insurance Company ("Westfield") was the insurance carrier for the second tier subcontractor JAK. JAK's employee Anwar Oshana was injured on the job and brought suit against FCL Builders, Inc. FCL tendered the defense to Westfield and Westfield denied coverage. The basis for the denial was that FCL Builders, Inc. was not an additional insured under the insurance policy issued by Westfield.

The additional insured endorsement in the Westfield policy read as follows:

"Section II – Who Is an Insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." (emphasis added)

The Appellate court identified two key issues with regard to this case: (1) was FCL the "entity" for whom JAK was performing operations? (2) was FCL "such a person or organization" with whom JAK had agreed in writing to add as an additional insured? The Appellate court reluctantly acknowledged that JAK was probably performing operations for FCL. However, the Appellate court ruled that FCL was not such a person or organization with whom JAK had "agreed in writing" to add as an additional insured. The Appellate court did so even though the terms and conditions of the higher tier contract were

incorporated into the subcontract between JAK and Suburban.

The Appellate court ruled that the policy “explicitly and unambiguously requires a direct written agreement to that effect in order to cover anyone other than JAK under the policy.” Because no written agreement ever existed between FCL and JAK, FCL cannot be an additional insured under the policy and Westfield is not obligated to furnish FCL with a defense. In short, because there was not a direct contract between the second tier subcontractor and the general contractor, there was no additional insured coverage for the general contractor.

The key to this decision is the specific language in the additional insured endorsement. This language should be contrasted against the specific language of other vicarious liability additional insured endorsements. In short, not all additional insured vicarious liability endorsements are the same.

For example, in *Pekin Insurance Company v. Pulte Home Corp. et. al.*, 404 Ill. App. 3d 336, 935 N.E. 2d 1058 (1st Dist. 2010) the additional insured endorsement read as follows:

“Who is an Insured Section II” is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or an agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability incurred solely as a result of omission of the named insured and not for its own independent negligence or statutory violation....”

The slight change in language of the additional insured endorsement would be sufficient to

distinguish the *Westfield* AI endorsement with the AI endorsement in the recent *Pekin* case.

The *Westfield* case follows the admonition by the 1st District Appellate court in the *Kiferbaum* Case. That case went into a great deal of detail as to how and under what circumstances a second and third and even fourth tier subcontractors are obligated to provide AI insurance to the general contractor. That admonition was:

“While we realize it may be of little solace to Kiferbaum in this instance, we feel it incumbent upon us to advise general contractors to insert language into future standard contracts requiring that their subcontractors designate the general contractor as an explicit third-party beneficiary of all subcontracts entered into in furtherance of the general contract. We believe such alterations would protect general contractors by providing them explicit rights of recovery in their appurtenant subcontracts and will prevent future recurrence of the result that we have reached today.”

The result reached by the *Kiferbaum* court was not favorable to general contractors.

With the recent *Westfield* case, we recommend to general contractors to have their insurance procurement clauses and their flow down provisions reviewed so as to avoid the surprises in both the *Westfield* case and in the *Kiferbaum* case.

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Bryce Downey & Lenkov is a firm of experienced business counselors and accomplished trial lawyers who deliver service, success and satisfaction. We exceed clients' expectations while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Merrillville, IN, Memphis and Atlanta and attorneys licensed in multiple states, Bryce Downey & Lenkov is able to serve its clients' needs with a regional concentration while maintaining a national practice. Our practice areas include:

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Workers' Compensation

The attorneys at Bryce Downey & Lenkov are committed to keeping you updated regarding the latest developments in corporate and construction law in Illinois and Indiana. If you would like more information on any of the topics discussed above, or have any questions regarding these issues, please contact Geoff Bryce 312.377.1501 or gbryce@brycedowney.com. © Copyright 2011 by Bryce Downey & Lenkov LLC

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