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# Client Bulletin



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## Jeffrey A. Burkam, Attorney

We are pleased to announce that Jeffrey A. Burkam has relocated his law practice to the offices of Manos, Martin & Pergram Co., LPA. Jeff, a former Judge of the Delaware Municipal Court, was admitted to the practice of law in the State of Ohio in 1979 and opened a law practice in Delaware in 1980.

Jeff has years of experience in several practice areas that Manos, Martin & Pergram Co., LPA's attorneys do not handle, such as family law, criminal law, traffic law, and automobile accidents and personal injury law.

## Encouraging Employees to Think Like Owners

A key person or a few key employees, outside the ownership group but within a privately held company, may make all the difference to the growth and continued success of the enterprise. Compensation, beyond a paycheck every two weeks, can be structured in different ways to both retain those key people and/or incentivize them for the short run and long term. For example, if the main concern is **retaining** an employee (for the ongoing health of the enterprise, but especially after a merger or asset sale of the business), then the owners should consider the LLC version of a phantom stock plan, or a grant of unit appreciation rights (UARs). The UARs entitle a grantee to receive a cash payment on the vesting date equal to the excess, if any, of the fair market value of the company's units/membership interests (determined as of a **future vesting** date) over the **grant date** fair value. This will get into questions of valuing the entire enterprise on an annual basis, which will require working with accountants and appraisers, and care should be taken to avoid conflicts between these payments and the company's other needs for cash flow. Finally, UARs can be designed to follow IRC 409A or be IRC 409A-exempt (re: deferred compensation), but tax compliance is a concern. If the main concern is **incentivizing**, then it can become a simpler task of creating a bonus schedule based on a target collectibles figure or target billings [minus a predetermined disallowance (based on historical percentages for cash not collected)].

For example, in certain health care practices, trade literature suggests a base salary of 60-80%, with 20-40% of the overall compensation plan based on incentives.

Once target revenue and collectibles are set, it's easy enough to back into a percentage to arrive at the target incentive range of 20-40% of total compensation. Ideally, as opposed to a fixed base salary, this incentive portion should help an employee to better grasp basic operating parameters, such as numbers of patient visits to reach per year, day and hour, as well as making appropriate/accurate coding entries for insurer reimbursements and encouraging patients to keep follow-up visits.

*Continued . . .*

## Stormwater Management Litigation in Washington, DC Metropolitan Area may have Implications for the Rest of the Country

In general, a National Pollutant Discharge Elimination System (NPDES) program can be implemented in a way that is more flexible and reliant on local governments to best manage stormwater in their jurisdictions. A flow-based system based on total maximum daily load (TMDL) uses stormwater as a surrogate for sediment and pollutants washing into a stream. However, under a TMDL approach, some have suggested that the US EPA is effectively trying to regulate water itself under the Clean Water Act, as opposed to the pollutants prohibited under the Act, and a recent ruling (which the US EPA has decided not to appeal) would seem to support the notion that the US EPA is overstepping its bounds with TMDL. *Virginia Dept. of Transportation v. US EPA*, 1:12-CV-775 (E.D. Va., 01/03/2013). This case has also been referred to as the Accotink ruling since it involved stormwater flow into the Accotink Creek in Virginia. However, as of yet, the US EPA continues with its current regulatory process to roll out additional TMDL-based post-construction stormwater rules, scheduled for public comment beginning June 2013 and arising out of a settlement in a separate U.S. District Court case back in 2010 [*Fowler v. US EPA*, Civ. Action No. 1:09-CV-00005-CKK (D.D.C. 2009)]. This case has also been referred to as the Chesapeake Bay TMDL settlement. If they have not been already, any private or public sector clients will want to consult with their engineers and professional associations. For example, TMDL could mean post-construction retention requirements that mimic pre-development hydrology for as much as the first 0.5 inch or 1.0 inch of any given rainfall.

## Ohio Supreme Court's Foreclosure Procedures Decision and "No Second Bite at the Apple"

Ohio is a "judicial foreclosure" state and mortgage lenders cannot foreclose on a mortgage by a private sale as is permitted in some states.

An Ohio judicial foreclosure is a multi-step proceeding. A mortgage lender must first get a judgment that the borrower is in default on the note and for the amount, including interest and costs, due on the note. In most residential foreclosure cases, the mortgage lender obtains such judgment by "default" as the borrower does not file an answer to the complaint for foreclosure. Such judgments generally contain language that permits the defendant borrower to immediately appeal the granting of the judgment against him/her/them, and are titled something similar to a "decree in foreclosure and order of sale." When the 30 day appeal period passes without the defendant borrower filing a notice of appeal, the mortgage lender can request that a writ be issued to the Sheriff ordering a sale of the property. The Sheriff sets a date for the Sheriff's sale and advertises the sale. After the Sheriff's sale is conducted and there is a successful bidder at the sale, the mortgage lender files a motion asking the court to confirm the sale and order delivery of the Sheriff's deed to the successful bidder upon the successful bidder's payment to the Sheriff of the purchase price.

In *Countrywide Home Loans Servicing, L.P. v. Nichpor*, Slip Opinion No. 2013-Ohio-2083, decided May 28, 2013, the Ohio Supreme Court was faced with resolving a conflict between two circuit courts of appeal on whether a mortgage lender can do a voluntary dismissal of a foreclosure action after the court has issued a decree in foreclosure but before the court has issued its order confirming the Sheriff's sale and then refile a complaint in foreclosure. The Supreme Court said that when there is a decree in foreclosure that is a final appealable order, a mortgage lender cannot use the voluntary dismissal rule and thereafter refile the complaint in foreclosure. At paragraph 7, the Court stated "...to grant a lender the right to dismiss an action after a trial court has issued what it has indicated was a final judgment would lead to the untenable result that an unhappy lender could simply wait until after the sheriff's sale has occurred, decide that the sale price was too low, and then dismiss the case in order to get a second bite at the apple."

## Notice

This bulletin provides general information and is not legal advice. Please contact us if you need legal advice.

If you have friends or associates who you think would enjoy receiving a copy of this Client Bulletin, please feel free to forward it on. Thank you.

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