

By Kevin M. Busch



Kevin M. Busch is the chair of our commercial department and a member of our board of directors. As part of his commercial practice, Kevin counsels banks and their customers regarding all aspects of banking law, including check fraud problems. He may be reached at BuschK@moss-barnett.com or 612.877.5292.

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CHARLES PONZI IS NOT YOUR FRIEND

The past year has brought news of Ponzi schemes of stunning proportions. Schemes measured in billions of dollars have pushed schemes measured in mere millions of dollars off the front page. Thousands of investors, including individuals who invested their life savings and charities, have been hurt upon the inevitable collapse of these schemes.

Victims invariably react to news of the collapse by saying, "I can't believe I did not see this coming." In truth, though, Ponzi schemes can be extraordinarily difficult to detect. This article will explore some ways an investor can avoid being the next Ponzi victim.

Charles Ponzi did not invent the pyramid fraud scheme that now bears his name. His story, however, does demonstrate well the nature of a pyramid scheme and provides avoidance lessons that can still be applied today.

Mr. Ponzi was a charming and ambitious person who in the early 1900's induced investors to invest with him by offering very high returns on a dubious scheme involving, of all things, international postage charges. Many of the investors were Mr. Ponzi's friends (or friends of friends) and relatives. Mr. Ponzi kept the scheme afloat by using money from later investors to pay the earlier investors. After a few months, the supply of new investors ran out and the scheme collapsed leaving many investors with nothing.

Here are a few lessons from Mr. Ponzi's story:

- A high rate of return is suspect. First ask why this promoter *can* pay more than what is paid on comparable investments. Then ask why this promoter *would* pay more than a market rate. A legitimate promoter with a strong and stable history should be able to borrow from

institutional lenders at very favorable rates. The very fact that the promoter is offering higher rates should be an indication either that the investment is untried and too risky for the ordinary investor or that the investment is fraudulent.

- The fact that a promoter is a friend (or at least acts friendly) or a relative or is active in a particular club, charity, or religious organization, does not endow the promoter with special business skills and may not make the promoter any more trustworthy. For example, dramatic charitable contributions by a promoter may have been funded with investor money.
- Vanity can cloud good judgment. The clever promoter lets investors think that they are especially smart and discerning. Each investor believes that he or she is among the select few allowed to invest, when in reality anyone with a checkbook can invest.
- Beware of secrecy and urgency. A promoter who cannot (or will not) explain his or her business plan in a few short paragraphs, support the plan with audited financial statements, and then provide a reasonable time to digest that information does not deserve to receive any investor money.
- Early performance may not be repeated. Any Ponzi scheme can pay investors consistently for months, or even years, without the benefit of any legitimate business. New investor cash can support the appearance of success. Investors must look at operating results, not just at cashflow.

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**SKYROCKETING PROPERTY VALUES RETURN TO EARTH —
PROPERTY TAXES MAY NOT:
WHAT YOU CAN DO TO MAKE SURE YOU ARE NOT OVERTAXED**

For most of this decade, property values increased at a breathtaking pace. That rapid appreciation helped encourage aggressive borrowing and lending, which accelerated residential and commercial development and fueled even greater appreciation. As we are all painfully aware, the upward spiral could not be sustained. Mortgage defaults and residential foreclosures exploded in number, sales declined, and the swift rise in home values came to an abrupt halt. Values for residential properties have fallen in many localities. Commercial property values are suffering the same fate. Now is the right time to examine the valuation of your property used to determine how much real estate taxes you will have to pay.

Local government assessors have finite resources dedicated to estimating fairly the value of each real estate tax parcel. The recent dramatic increase in values followed so emphatically by a sharp decline makes the job of timely adjusting the value of each parcel nearly overwhelming for an assessor with responsibility for hundreds or even thousands of properties. Assessments may not have kept up with changes in the market. Consequently, your property could be grossly overvalued for tax purposes, and you might be paying too much tax.

The assessor's estimated market value and classification of the property as to type, together with the applicable tax rate, determine the amount of tax for each tax parcel. Policy decisions by multiple taxing districts and the legislature, the distribution of the various types of property in the community, and events within and beyond the local community come

together to establish the tax rate and ultimately the taxes due. The one factor that you as an owner can most easily and directly challenge is the assessor's estimate of the market value of your property.

Minnesota law requires that the assessor's estimate of the market value of each parcel be not less than 90% of the true fair market value, but not more than the fair market value. That estimate is always subject to examination, discussion with the assessor, and possible modification, in both rising and falling markets. The likelihood that the assessor's estimate exceeds the fair market value has certainly increased in recent months.

The overall decrease in property values will lower the taxes payable to local government and other taxing units, such as school districts. Tax rates might increase as local governments struggle to meet their budget needs. If the assessor's estimate of market value of your property is too high when compared to the market or to similar properties, you are already paying more than your fair share. If tax rates go up, you will pay an even bigger excess over what you should pay. A successful appeal will save you money now and protect you into the future. When property values recover, the assessor will make upward adjustments from a lower starting point. An appeal can influence your taxes for years to come.

Every March property owners receive a notice stating the estimated market value of their property as of January 2 of the current year. The formulas relating to tax classification and tax rate use that estimated market value to calculate the amount of tax due and payable

*By Michael T. Etmund
and Paul B. Zisla*



Michael T. Etmund represents clients in the areas of property tax appeals, creditor's remedies, collections, and contractual disputes. He may be reached at EtmundM@moss-barnett.com or 612.877.5309.



Paul B. Zisla represents businesses and individuals in property tax, eminent domain, land use and zoning, and other real estate use and development matters. He may be reached at ZislaP@moss-barnett.com or 612.877.5328.

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“Red Flags” Identity Theft Program Mandate

Effective May 1, 2009, regulations of the Federal Trade Commission, commonly known as the Red Flags Rules, require “creditors” to implement a program to detect and prevent identity theft involving credit accounts. While the Red Flags Rules are focused on financial institutions and businesses that deal with consumers, the definition of “creditor” in the Red Flags Rules is written broadly and may extend to businesses that extend credit to other businesses.

Employment Law Alerts

- The Department of Labor has issued new regulations under the Family and Medical Leave Act. Employers with 50 or more employees should revise their policies to comply with new requirements and take advantage of some new employer-friendly regulations.
- The Americans with Disabilities Act has been amended to make it much easier for employees to establish that they have a “disability.” Employers with 15 or more employees need to be more careful than ever when dealing with employees with medical conditions.
- The Lilly Ledbetter Fair Pay Act amended the Civil Rights Act (Title VII), the Americans with Disabilities Act, the Rehabilitation Act, and the Age Discrimination in Employment Act to make it easier for employees to sue for pay discrimination.
- The federal minimum wage was raised to \$6.55 in July 2008. This new minimum wage is applicable for most employers.
- In 2008, the EEOC issued guidance to its field staff and the public regarding performance and conduct issues under the Americans with Disabilities Act, the application of the Americans with Disabilities Act to veterans with service-connected disabilities, and religious discrimination.

Estate Planning Alerts

- The federal estate tax exemption is \$3.5 million for persons dying in 2009. Under current law, federal estate taxes will be repealed in 2010. National experts are predicting that, due to more urgent, pressing matters such as the economy, Congress will change the law to freeze the estate tax exemption at \$3.5 million. It is anticipated that when the economy stabilizes, Congress will then take another look at the estate tax laws and consider possible changes to the exemption. Be aware that many states have exemptions that differ from the federal exemption; for example, the Minnesota estate tax exemption is \$1 million.
- The annual gifting exclusion increased from \$12,000 in 2008 to **\$13,000 in 2009**. This is the amount that you can gift annually to each recipient without incurring any gift tax. The lifetime gifting exemption of \$1 million remains unchanged. This is the total amount (*not including the annual gifting exclusion*) that you can gift free of any gift taxes during your lifetime.

If you would like assistance in assuring best practices in any of these areas, please contact your attorney at Moss & Barnett.

CHARLES PONZI CONTINUED FROM PAGE 1

- Do not assume that other investors have already investigated the investment. Each investor must be prepared to ask the necessary questions as if he or she were the first to invest with this particular promoter.
- Beware of unusual documents. Legitimate investments have a common look and feel that sophisticated investors expect to see. Quirky documents from unusual sources are a red flag for extra caution.

A clever promoter can manipulate his or her investment scheme so that many of the factors described above are not present, but a careful consideration of all these factors should help an investor see through most Ponzi schemes that might be presented. An investor with questions regarding an investment should seek out advice from a trusted lawyer, accountant, or investment advisor.





POTENTIAL BENEFITS ISSUES OF EMPLOYEE TERMINATIONS: WHO JUST BECAME FULLY VESTED?

By Arthur J. Glassman

Current difficult economic times have resulted in layoffs and other employee terminations. Employers need to be aware that terminating a significant number of employees may result in a “partial termination” of a 401(k) plan or other retirement plan.

If a partial termination occurs, the plan is treated as terminated with respect to the terminated participants and their employer funded benefit must become 100% vested. A partial termination also requires an allocation of any unallocated forfeitures that the plan may be holding.

The IRS has created a rigid rule for determining whether there is partial termination. Some courts, however, have been more reluctant to find that a partial termination has occurred. IRS guidance presumes a partial termination if there is a 20% or more turnover rate in the plan due to employer action. The 20% computation includes both vested and non-vested participants. The presumption can be rebutted by showing that the turnover rate is routine.

If employer termination of participants occurs over multiple plan years, the turnover rate must be determined for the entire related period. For example, if an employer begins laying off employees during the 2009 plan year and continues to do so in 2010, the IRS says that both plan years must be looked at together. This may result in a partial termination for the entire 2009-2010 period, even if the turnover rate in 2009 is less than 20%.

As partial terminations can be effective retroactively, an employer may not realize that a partial termination has occurred until after some participants have received the distribution of their benefits. Once participants receive distributions, it can be difficult to locate them because they do not keep the plan administrator up-to-date on their current addresses. Questions can arise about possible misallocation of amounts that should not have been forfeited. On the other hand, an improper partial termination may give rise to a claim by remaining participants that they should have received forfeitures wrongly eliminated, subjecting the plan to penalties and disqualification. These issues illustrate the importance of making a timely and proper determination of whether a partial termination has occurred.

Please contact your attorney at Moss & Barnett with any questions about partial terminations or any other issues relating to executive compensation and employee benefits.



Arthur J. Glassman works with businesses, business owners, and individuals in the areas of employee benefit plans, wills and trusts, and business and corporate operations. He may be reached at GlassmanA@moss-barnett.com or 612.877.5272.



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in the following calendar year. The notices will also report the value established the prior January 2 to be used to calculate the taxes due this year. You have until April 30 of each year to appeal to the Minnesota Tax Court and challenge the estimated market value used to establish the tax due that year. The deadline for appealing the estimated market value established in 2008 and used to determine the tax due in 2009 is April 30 of this year. The deadline for appealing the estimated market value established as of January 2009 for taxes you will have to pay in 2010 is April 30, 2010.

To contest the amount of taxes payable you need to challenge the assessor's estimate of the market value of your property. There are several items to consider when deciding whether to make that challenge.

1. The estimated market value of each tax parcel is available online for nearly every Minnesota county. When compared to similar properties in your area, is the estimated market value of your property out of line? Is there something about the physical character of your property or its recent history that makes it different than other properties with the same estimated market value?
2. A review of recent sales information for similar nearby properties may show that the assessor's estimated market value is too high for the area or for properties like yours. This approach is particularly useful for residential property where the data is often plentiful and readily available through several real estate brokerage websites.

3. Research the classification the assessor used - residential, commercial/industrial, or other - to make certain the assessor has it right. An error or mischaracterization can result in your paying vastly excessive real estate taxes.
4. Talk with the assessor. The assessor can provide information as to how the property was valued and the classification determined. You may find out that the assessor based the valuation on incomplete or inaccurate information. You can even request a new assessment of the property.
5. Prior to filing an appeal with the Tax Court, you can appear before the local board of appeal and equalization and present information showing that the assessed value is too high. Nearly every city has such a board. If you are not satisfied with the result, you can appeal to the county board of appeal and equalization. You do not have to appeal to the board of appeal and equalization to preserve your right to appeal directly to the Tax Court.

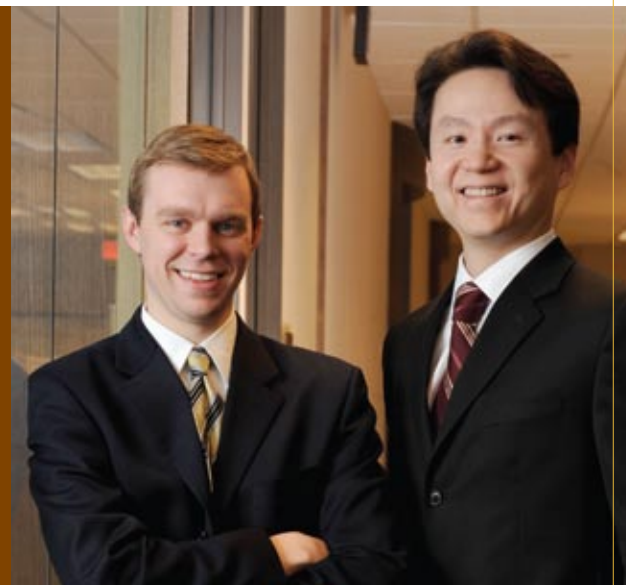
April 30, 2009 is rapidly approaching. Time is of the essence to appeal 2008 estimated market values. At Moss & Barnett, we can help you evaluate whether an appeal is appropriate, prepare the necessary filings, coordinate with valuation experts, negotiate with the assessor, and, if necessary, pursue the matter in court.

For further information regarding property tax appeals, visit the website of the city or county assessor where the subject property is located, the website of the Tax Court, or contact Moss & Barnett.

Two New Attorneys Have Joined the Firm

Jeffrey S. Waldron has joined our business and wealth preservation and estate planning practice areas. Jeff received his law degree, with high distinction, from Drake University Law School and was elected to the Order of the Coif. Jeff is also pursuing a Master of Laws in taxation through New York University School of Law. Prior to joining Moss & Barnett, Jeff was an associate with a large law firm in Des Moines, Iowa.

Jeff Y. Lin has joined our energy regulation and communications practice areas. During law school, Jeff worked with us as a law clerk through our joint internship program with Xcel Energy Inc. Prior to attending law school, Jeff worked in the accounting and finance fields. Jeff received his law degree from the University of Minnesota Law School.



Jeff Waldron and Jeff Lin

Moss & Barnett Announces New Infrastructure Practice Area

The pending infrastructure initiative of the United States is expected to result in substantial public investment in telecommunications, energy, and transportation infrastructure. These investments — coupled with the nation's need for substantially more infrastructure development — will create both opportunities and challenges for infrastructure-related businesses, including energy utilities, telecommunications carriers, local governments, contractors, and developers.

To help these businesses and local governments take full advantage of these infrastructure-related opportunities and meet the resulting challenges, Moss & Barnett has created an infrastructure practice area. This team includes some of Minnesota's leading attorneys in areas such as wireline and wireless telecommunications, energy, environmental law, real estate, intellectual property, commercial transactions, finance, and construction dispute resolution.

Whether you face the task of responding to an RFP, seek ways to better scale your business for major projects, or have problems on an existing project, you will likely need more help than a single lawyer can provide, and you deserve assistance that is practical, coordinated, and efficient. Moss & Barnett's new practice area brings disciplines together to create a cohesive, multi-disciplinary team that can provide businesses and local governments with state-of-the-art representation required to efficiently handle a broad spectrum of multi-faceted infrastructure projects. Working directly with our clients, as well as our clients' outside consultants and contractors, Moss & Barnett has refined a system that uses a secure, web-based extranet to document the status of each step in a project. In this way, our clients can receive online status reporting and have secure access to documents (including drawings and other project information), fully utilizing technology to enable completion of those projects on time and on budget. If you are interested in learning more, please visit our website at www.moss-barnett.com or give your attorney at Moss & Barnett a call.

Various Accolades

Moss & Barnett is pleased to congratulate **Kevin Busch, Ben Henschel, Tom Keller, Jim O'Brien, Chuck Parsons, Susan Rhode, Jim Rubenstein, Dave Senger, Tom Shroyer, Curt Smith, Cass Weil, and Ed Winer**, who have all been listed in *2008 Super Lawyers*. Special congratulations to Chuck Parsons and Ed Winer who were listed in the Top 100 and to Susan Rhode who was listed in the Top 10! Designation as a *Super Lawyer* is awarded annually to 5% of the licensed active lawyers in Minnesota who have attained a high degree of peer recognition and professional achievement.

Moss & Barnett also congratulates its *2008 Super Lawyers* who received other awards.

Ed Winer, co-chair of our family law practice area, was named one of the "Top 100 Attorneys in the U.S." by *Worth* magazine for the third consecutive year. This listing appears in the December 2008 issue of *Worth* magazine. Ed is one of the most honored family law attorneys in the nation, with a performance record that is difficult to match.

Tom Shroyer, a member of our litigation practice area and the firm's CEO and President, was awarded the Minnesota Society of Certified Public Accountants' "2007-2008 Friend of the Profession Award." The "Friend of the Profession Award" recognizes friends of the CPA profession who go "above and beyond" in their contributions to further the goals of the Society.

Chuck Parsons, a member of our real estate practice area, was named to the *Chambers USA* directory for the third consecutive year. *Chambers* is a London-based publisher that rates U.S. law firms and attorneys nationwide and publishes an annual directory entitled *America's Leading Lawyers for Business: The Client's Guide*.

PROFESSIONAL
Excellence + Teamwork

MOSS & BARNETT CONGRATULATES ITS ATTORNEYS
LISTED IN 2008 *SUPER LAWYERS*®

Special Congratulations to Chuck Parsons, Susan Rhode and Ed Winer - Listed in the Top 100



*Kevin M. Busch
Ben M. Henschel
Thomas J. Shroyer*

*Susan C. Rhode
Charles A. Parsons, Jr.
Curtis D. Smith*

*James A. Rubenstein
Cass S. Weil
Thomas A. Keller III*

*James E. O'Brien
Edward L. Winer
Dave F. Senger*

Election News!



Brian Grogan



Glen Schumann



Betsy Kiernat



Terese West



Matt Kostolnik

Brian Grogan, chair of our municipal communications practice area and newly created infrastructure practice area, was recently elected to our board of directors. Brian will serve a three-year term and joins returning directors, Dave Senger, Tom Shroyer, Rick Johnson, Susan Rhode, and Kevin Busch.

Glen Schumann, chair of the patents section of our intellectual property practice area, and **Betsy Kiernat**, a member of our real estate practice area, have been appointed as adjunct directors for 2009. Adjunct directors are shareholders who serve as

non-voting members on our board of directors for one year. The adjunct director program is intended to train future leaders of the firm.

We recently elected **Terese West** and **Matt Kostolnik**, both of our litigation practice area, as shareholders in Moss & Barnett.

Congratulations to all of these individuals who contribute to the success of our firm.

IMPORTANT NOTICE

This publication is provided only as a general discussion of legal principles and ideas. Every situation is unique and must be reviewed by a licensed attorney to determine the appropriate application of the law to any particular fact scenario. If you have a legal question, consult with an attorney. The reader of this publication will not rely upon anything herein as legal advice and will not substitute anything contained herein for obtaining legal advice from an attorney. No attorney-client relationship is formed by the publication or reading of this document. Moss & Barnett, A Professional Association, assumes no liability for typographical or other errors contained herein or for changes in the law affecting anything discussed herein.

www.moss-barnett.com

Facsimile 612.877.5999

Telephone 612.877.5000

Toll Free 877.494.MOSS

Minneapolis, MN 55402-4129

90 South Seventh Street

4800 WELLS FARGO CENTER

Moss & Barnett

