DON’T SELL YOURSELF SHORT: EARLY TAX PLANNING TO MAXIMIZE THE SALE OF YOUR BUSINESS

What part of selling a business is most important to sellers? Most would respond that receiving the highest purchase price is most important. At first blush, this makes sense. However, sellers often focus on the number of zeros in the purchase price and ignore the fact that paying a large amount of income taxes will effectively reduce the purchase price. *Really*, sellers hope to walk away with the most cash in their pockets, i.e. the most after-tax proceeds. Sellers can maximize their after-tax proceeds by engaging in tax planning early. Too often, sellers lose out on tax savings by not considering the tax consequences of a sale sooner.

Prior to engaging with a buyer, sellers can identify tax opportunities and risks that affect the purchase price through sell-side due diligence. Generally, buyers prefer to purchase assets (as opposed to stock) and will pay a premium to do so. Sellers prefer stock sales to take advantage of favorable capital gains rates. However, a seller could identify early on that its net operating losses (NOLs) create an opportunity that allows the seller to negotiate a higher purchase price in an asset sale with peace of mind that it can offset its gains with NOLs. Alternatively, if a seller can pass on its NOLs to a buyer through a stock sale, the seller could demand a higher purchase price as the NOLs create value to the buyer by reducing the buyer’s future tax liabilities.

Sellers should also pinpoint tax risks that may drive down the purchase price. For example, a seller may discover any of the following in due diligence: failure to file all required income and sales and use tax returns in all required jurisdictions; use of improper accounting methods; poorly designed compensation plans; and failure to comply with local tax laws and transfer pricing methodologies. Ideally, a seller will identify these issues before a buyer does and correct them before the buyer can knock down the purchase price.

Sellers should negotiate certain “minor” aspects of a transaction earlier. Generally, sellers lose leverage and buyers gain leverage as a transaction proceeds. Sellers would often benefit from negotiating certain terms as early as the letter-of-intent stage of a deal, because these “minor” terms have meaningful tax consequences to the seller. For example, parties usually negotiate purchase price allocation at the very end of a transaction when the seller has much less bargaining power even though the purchase price allocation will directly impact the seller’s bottom line. Also, if not negotiated early on, the seller may have difficulty renegotiating the form(s) of consideration used even though the range of possible forms of consideration – cash, debt, rollover equity, escrows, earn outs, etc. – creates a range of tax consequences to the seller.

Overwhelmed yet? Most business owners know that differing overall structures create differing tax consequences when selling a business; however, most do not think about the less obvious aspects of a transaction that could have a meaningful impact on the seller's bottom line. By the time many of these tax planning opportunities and risks are identified, the seller has lost the leverage to make meaningful changes. Sellers should engage early in tax planning and sell-side due diligence if they plan to sell a business. Not doing so could leave the seller with a much smaller effective purchase price than expected.

For more information on this topic contact Samantha Amore at 414.276.5000 or samantha.amore@wilaw.com.

JIM DEJONG SPEAKS TO 2017 CARROLL GRADUATES

Jim DeJong, chairman of the Milwaukee law firm of O'Neil Cannon, provided the keynote address at Carroll University's Commencement Sunday, May 14.

Carroll alumnus DeJong '73 told 2017 graduates that a lot had changed since his days here but one thing is the same, "Carroll is truly a special place." And, of course, Gert is still here. That spurred some giggles among graduates, warming up the crowd before Jim shared his key message: Be present in the moment. "While we can connect with people in various ways electronically, we can only build true relationships with intentional focus and effort," he said.

DeJong has been involved with Carroll University since 1958 and both he and his father the Rev. Lloyd DeJong have served terms on the Carroll University Board of Trustees. Most recently DeJong, the immediate past chair of the board, served as co-chair with Campaign Carroll, working to raise $52.7 million.

More than 670 Pioneers celebrated their Commencement in a ceremony on Main Lawn, where thousands of friends and family gathered for the special occasion.

RETHINKING YOUR DOCUMENT RETENTION HABITS WHILE SPRING CLEANING?

Springtime can be a good excuse to “clean house.” If you are evaluating your document retention practices this season, consider these points as you determine what to keep and what to toss:

- If you are involved in litigation or reasonably anticipate litigation, you are required to keep all documents related to the case by implementing what is referred to as a “litigation hold.” This includes suspending automatic deletion features on servers or email systems. Courts can issue monetary sanctions or even enter an adverse judgment for failure to take reasonable steps to preserve documents related to litigation.
- Know and comply with all regulatory document-keeping requirements that may apply to you or your business. As just one example, lenders are currently subject to record retention requirements under federal lending laws that include keeping closing disclosures for five years. *See* 12 C.F.R. § 1026.25. If you are unsure of the governing requirements, consult an attorney.
- Weigh the costs and benefits of keeping documents. On one hand, it can be valuable to be able to dig out old documents when an unexpected problem or opportunity arises. Quickly finding key correspondence to defeat a threatened lawsuit can save money and headaches. On the other hand, storing documents—whether paper or electronic—has real costs. Paper documents take up space that may be used for more productive purposes. The storage of electronic documents and emails has costs, as well, including hardware, software, maintenance, and tech support. A good document retention policy aims to balance these competing interests.
- Documents are only useful if you know where and how to find them. Just like a storage room full of unlabeled paper files, electronic records that are haphazardly stored, poorly named, or unsearchable are of limited value.
- Consistency is key. A formal document retention policy that is reliably implemented is best. In the event of a future lawsuit or dispute, a document retention policy that was consistently followed could minimize discovery disputes over destroyed documents.

If you are unsure of the legal implications of keeping or disposing of certain documents, contact an attorney. For more information, contact Christa Wittenberg at 414-276-5000, Christa.Wittenberg@wilaw.com, or any of the other attorneys at OCHDL.

THE FOUR CORNERS RULE AND INSURERS’ DUTY TO DEFEND IN WISCONSIN

One of the central purposes of liability insurance is to protect the insured by providing a defense in the event of a lawsuit. But what defines the limits of an insurer’s duty to defend its

insured under Wisconsin law? How is the insurer to decide whether or not to defend an insured in a given case? Has an insurer breached its duty if it refuses to do so? These are critical questions. If an insurer breaches its duty to defend, the insurer may face severe consequences under Wisconsin law, including potential bad faith liability, loss of coverage defenses, and liability beyond policy limits.

With so much at stake, how should an insurer determine its duty to defend? That question is not always easy to answer. Unfortunately, Courts in Wisconsin have made answering that question more difficult with a confusing series of inconsistent decisions over the decades.

The Four Corners Rule

To determine the insurers' obligation to defend a policyholder, states including Wisconsin have typically applied what's known as the "four corners rule"–review is limited to what's within the "four corners" of the documents' pages. No more, no less. In this case, that means that an insurer must decide whether or not to defend by comparing the language of the insurance policy to allegations made in the complaint. All other sources of information are deemed irrelevant.

As originally conceived, the rule was intended to protect the insured. It was to preclude insurers from denying a defense based upon the litigation's actual merits, and to prevent insurers from using facts they have learned to deny a defense.

In recent years, courts throughout the country have wrestled with the application of the four corners rule. The majority of states have carved out exceptions to it, while Wisconsin courts have struggled with these exceptions.

Amorphous Rulings For Amorphous Exceptions

In *Grieb v. Citizens Cas. Co*., 33 Wis.2d 552, 558 (1967), the Wisconsin Supreme Court found that an insurer was not required to defend a policyholder. The Court saw no need to go beyond the four corners of the complaint and the insurance policy in that case. But in dicta the Court appeared to recognize at least four situations in which it could be appropriate to look beyond the four corners of the documents:

1. Where there was a conflict between allegations made in the complaint and the known facts;
2. Where the allegations are ambiguous or incomplete;
3. Where the relevant facts fall both within and outside the policy coverage; or
4. Where the complaint states conclusions rather than facts.

The Wisconsin Supreme Court neither applied nor expressly adopted any of these exceptions in *Grieb*. Nevertheless, since then, both State and Federal courts in Wisconsin have used

these exceptions.

For example, in *American Motorists Ins. Co. v. Trane Co.*, 544 F.Supp. 669 (W.D. Wis. 1982), a Federal District Court read *Grieb* to mean that an insurer could look at "known or readily ascertainable facts," but only if there was a conflict between the allegations and the facts or an ambiguity in the allegations.

In 1987, the Wisconsin Court of Appeals (District III) also looked to facts not included in the complaint, in *Berg v. Fall*, 138 Wis.2d 115 (Ct. App. 1987).

In *Berg v. Fall*, plaintiff Robin Berg alleged that he'd been punched by defendant James Fall. The Plaintiff's complaint alleged only intentional conduct, not negligence. Fall's insurer refused to defend Fall in the lawsuit, because its policy expressly excluded coverage for any intentional injury to another party. But Fall claimed that he had acted in self-defense, and therefore the policy's exclusion should not apply. The trial court decided that Fall had committed an intentional act (i.e., to strike Berg), and his reason for doing so was irrelevant. It granted summary judgment in favor of his insurer.

The Court of Appeals considered the same extrinsic facts but reversed, holding that the insurer had a duty to defend Fall. The policy was intended to exclude intentional torts. Citing *Grieb*, enough of the facts were there, accessible in the record, to support Fall's position, and, if proven, these facts would be a complete defense to the assault and battery claim. The appellate court also said that it wasn't surprising that Berg had omitted from his complaint facts that supported Fall's defense, and that Berg's omission should not determine Fall's insurance coverage.

However, a year later, the Court of Appeals (District IV) took the opposite view. In *Professional Office Bldgs. v. Royal Indem. Co.*, 145 Wis.2d 573, (Ct. App. 1988), the trial court considered extrinsic facts known to the insurer but not included in the complaint, and concluded the insurer had no duty to defend. But the Court of Appeals reversed, stating that the Federal Court's decision in *American Motorist* was persuasive, but ultimately, it did not control in Wisconsin state courts. Grieb required the duty to defend to be determined solely by the allegations of the complaint, it held, without regard to extrinsic facts (contained in deposition testimony and so forth).

Later cases only further muddied the issue. In *Doyle v. Engleke*, 217 Wis. 2d 277 (1998), and in *Smith v. Katz*, 226 Wis. 2d 298 (1999), the Wisconsin Supreme Court signaled that under Wisconsin law an insurer's duty to defend is to be determined under the four corners rule, looking solely to the insurance policy and the allegations of the complaint. In both cases, the high court criticized the Court of Appeals' decision in *Berg* as being contrary to a long line of Wisconsin cases, yet did not overrule *Berg*.

Then, some twenty years after *Berg*, *Estate of Sustache v. Amer. Fam. Mut. Ins. Co.*, 2007 WI App 144, 303 Wis.2d 714 (2007), came before the Wisconsin Court of Appeals.

Like *Berg, Sustache* involved a fistfight, and, once again, the complaint alleged only intentional battery, but the insured claimed he had acted in self-defense. The trial court based its decision solely upon the complaint and found no duty to defend. The Court of Appeals affirmed, citing *Doyle and Smith*, concluding that Wisconsin law "knows no exceptions" to the four corners rule. Yet, in dicta the Court noted that where the "true facts" call for coverage but the complaint fails to reveal those facts, the insured should be entitled to a defense. The Wisconsin Supreme Court had declined to hear the case on certification by the Court of Appeals. Hence, the Court of Appeals noted that "We think the issue warrants Supreme Court comment at some point in the future."

Given the mixed precedent, consideration of extrinsic facts by trial courts had become commonplace and inconsistent. Insurers had little clear guidance to help them resolve questions involving the duty to defend. And neither party could rely on trial courts to produce predictable results. In practice, cases often boiled down to insurers relying on extrinsic facts when denying a defense, while insured defendants asserted extrinsic facts as grounds for demanding a defense.

A New Clarity in the Duty to Defend?

To resolve the ongoing tension, in 2016, the Wisconsin Supreme Court decided a pair of companion cases: *Water Well Solutions Service Group Inc. v. Consolidated Ins. Co*. and *Marks v. Houston Cas. Co.* These two cases reestablished the supremacy of the strict application of the "four-corners" rule in Wisconsin.

In *Water Well Solutions Serv., Inc. v. Consolidated Ins. Co.*, 2016 WI 54 (2016), Water Well Solutions Services, Inc. ("Water Well") had been hired by the Waukesha Water Utility in 2009 to replace a pump in an existing well. Two years later, Water Well's pump failed, and Waukesha sued for negligence. Water Well turned to its insurer, Consolidated Insurance Company ("Consolidated"), for defense against the suit, under its Commercial General Liability Policy. Consolidated refused either to defend or to indemnify Water Well. Consolidated argued that it was not required to do so, because the complaint only alleged physical injury to Water Well's product, and the policy specifically excluded such claims.

Water Well hired its own counsel, and, eventually, it reached an out of court settlement with the Utility. Then, Water Well filed suit against Consolidated, alleging bad faith and breach of the duty to defend. The circuit court granted summary judgment in Consolidated's favor, finding no duty to defend, and the Wisconsin Court of Appeals affirmed.

Water Well appealed to the Wisconsin Supreme Court, arguing that the complaint did not

include all of the physical damage at issue, claiming that other property besides the well had been damaged. If that was the case, Water Well continued, Consolidated would have been required to represent the firm. Therefore, Water Well argued that it should be allowed to present evidence establishing that additional damage. The insured urged the Court to adopt an exception to the four corners rule where an insurer refused to defend based upon a policy exclusion without seeking a coverage ruling and the complaint is factually incomplete or ambiguous.

The Court declined the invitation, instead clarifying adherence to the strict application of the four corners rule.

"We now unequivocally hold that there is no exception to the four-corners rule in duty to defend cases in Wisconsin," the Court wrote in *Water Well*. "We overrule any language in *Berg* suggesting that evidence may be considered beyond the four corners of the complaint in determining an insurer's duty to defend."

The Court did, though, address concerns about insurers who make a unilateral decision not to defend. While the Court did not require insurers to always seek a coverage determination, it "strongly encourage[d]" them to do so. Without one, insurers were acting "at [their] own peril" and opening themselves "up to a myriad of adverse consequences."

On that same day, the Court also issued its decision in a companion case, *Marks v. Houston Cas. Co.*, 2016 WI 53 (2016).

Marks, the insured, was the trustee of two trusts that owned a corporation, Titan Global Holdings, Inc. ("Titan"). Marks was an officer of Titan. Between 2007 and 2009, Marks and Titan became defendants in several lawsuits. Marks tendered his defense to Houston Cas. Co., with whom he had a policy for his work as trustee.

The lawsuits Marks faced, however, alleged only that Marks had committed misconduct as an officer of Titan, not as trustee. As a result, Houston refused to defend, because the policy contained an exclusion for Marks's activities as an officer for any entities other than the trusts. Houston did not seek a coverage ruling when making this decision. At trial, the court found Houston had no duty to defend, and the appeals court affirmed.

The Supreme Court affirmed that, not just an initial grant of coverage, but the *entire* policy, including exclusions, must be considered when determining whether a duty to defend exists. The insurer may only be barred from asserting exclusions if it has *breached* the duty to defend. Because Houston's decision not to defend was correct, the Court explained, no breach occurred, and the exclusions were properly applied.

In *Marks*, the Court stated that the application of the exclusion could be determined from the allegations alone. The Court did note though, that it may not always be clear if an exclusion

applies from the complaint, and often, extrinsic facts may be necessary for that determination. In such cases, the insurer would have a duty to defend.

What Now? Determining Duty to Defend in a Post-*Water Well and Marks World*

The *Water Well* Court couldn't have been more emphatic: the four corners rule applies, with no exceptions.

Accordingly, insurers should defend whenever the complaint alleges an arguably covered claim, even if the insurer knows certain facts that might negate coverage. Insurers cannot rely on policy exceptions or exclusions for protection, unless the complaint's allegations specifically trigger one of these clauses.

What if allegations in the complaint are arguably covered by the policy, but the insurer knows relevant extrinsic facts that negate coverage? *Newhouse v. Citizens Sec. Mut. Ins. Co.*, 176 Wis.2d 824 (1993) outlines the required procedure:

- Provide a defense under reservation of rights;
- Intervene and seek bifurcation and a stay of the underlying action;
- Seek a coverage determination while the underlying action is stayed or pending;
- Continue to provide defense as needed, pending a final ruling on coverage; and
- Withdraw defense only after a final ruling determines no coverage exists.

Although *Water Well* and *Marks* allow insurers to refuse to defend without first seeking a coverage ruling, the Court warned that doing so is risky. Skipping the process is best reserved for small-dollar cases or cases where the facts are clear and simple.

Must an insurer defend where known facts support coverage, but the complaint does not allege a covered claim? According to both *Water Well and Marks*, the answer is no. Extrinsic facts *cannot* be considered to create the duty to defend. And whether those facts would work to invoke coverage or to deny it is irrelevant.

But it is worth noting that neither *Water Well* nor *Marks* involved extrinsic facts known to the insurer that supported coverage (as did *Berg*).

There may be other business or strategic reasons to defend an insured, in such cases, even though no defense may be required under the four corners rule. As an example, if it is likely that an insurer may end up having to provide a defense down the road, it may wish to control the defense from the start, shaping litigation strategy. And if coverage will be litigated at some point, defending the insured may foster goodwill with a court that considers the coverage question.

Putting the Four-Corners Rule and Duty to Defend to Work

As stated at the beginning, if an insurer makes an incorrect decision regarding the duty to defend, there can be severe consequences. Thus, even with this newly clarified four corners rule, there are still issues insurers must consider, moving forward.

For instance, even if extrinsic evidence is no longer relevant to determine the duty to defend, it *is* admissible regarding the insurer's duty to *indemnify*. Therefore, insurers must still investigate facts relating to indemnification, and *Water Well* does nothing to change that.

We need to see how the Court handles other fact-patterns. And depending on those subsequent cases, there's always a possibility of legislative enactments in response to those rulings.

And insurers must be aware that Wisconsin's "no exceptions" rule puts it in the minority. In neighboring Illinois, extrinsic facts are relevant, and an insurer is responsible for investigating those facts. A strategy prevailing in Madison may be disaster in Chicago.

It will take time to figure out just how bright this bright-line rule truly is. Until then, insurers should proceed carefully.

For more information on this topic contact Steve Slawinski at 414-276-5000 or Steve.Slawinski@wilaw.com.

LETTERS OF INTENT NOT IMPORTANT? BE CAREFUL.

When buying or selling a business, it is critical to take the negotiation and preparation of the letter of intent seriously. All too often, I hear the phrase, "letters of intent are not binding, so we don't need to spend time negotiating them." Other times, a new client will have already signed a letter of intent before engaging our firm or other advisors. Letters of intent contain many key terms, and while it is true that signing a letter of intent will not typically bind a party to close the transaction, it is important for all parties in a transaction to understand that if the transaction does close, it will likely close on the terms contained in the letter of intent. Accordingly, when negotiating a letter of intent in the sale of business context, the parties should invest the time and energy necessary to fully understand the impact the letter of intent's terms will have on the transaction.

A letter of intent (also sometimes referred to as a term sheet or an LOI) is usually prepared

by the buyer and presented to the seller, and it describes the key terms of the buyer's proposal to purchase the seller's business. Among other things, the LOI will describe what the buyer is buying (typically, either the assets of the business or the shares in the business), the purchase price, and how the purchase price will be paid (all cash, seller note, earn-out, etc.). It may also contain additional concepts relating to non-competition, post-closing employment for the seller's owner, assumption of liabilities, indemnification, and terms relating to the buyer's lease or purchase of the real estate used by the seller's business. An LOI also typically contains certain provisions that are actually binding on the parties, including provisions that require the seller to deal exclusively with the buyer for a period of time, dictate which state's law will apply when interpreting the LOI, obligate the parties to maintain confidentiality, and state that each party will be responsible for its own transaction expenses. Finally, because buyers and sellers have varying degrees of leverage as a transaction progresses, buyers and sellers may take different approaches when selecting the terms to include and the terms to omit in an LOI.

Given the importance that an LOI will have on the transaction, the parties must understand the terms in the LOI and recognize that the agreed-upon terms in the LOI will form the basis for the terms that will be contained in the definitive purchase agreement and related documents. A party that attempts to change the agreed-upon terms in an LOI, because it did not fully understand the LOI's terms, will face challenges. That party will likely be accused of "re-trading" or "moving the goalposts," and, as a result, the party taking this approach will often lose a tremendous amount of negotiating capital; capital that could be well spent on other commonly negotiated terms in the definitive purchase documents. This practice often results in a longer transaction process, increased transaction expenses for both parties, and a lower likelihood of the transaction actually closing.

In conclusion, while an LOI is not technically binding on the parties in most cases, the LOI will have a significant impact on the overall transaction. It is critical for the parties to recognize this.

For more information on LOIs and this topic you can contact Jason Scoby at 414-291-4714 and jason.scoby@wilaw.com

Jason Scoby is a member of the firm's Business Practice Group and Banking and Creditors' Rights Practice Group. He advises and represents individuals, businesses, and banks on a variety of corporate, banking, and business-related issues, including mergers and acquisitions, commercial loan transactions, corporate issues, contract negotiation and preparation, and business entity selection and formation.

WOMAN WITH DEMENTIA LOSES HOME AFTER ALLEGEDLY UNKNOWINGLY SIGNING OVER DEED: RESOURCES TO PROTECT YOUR LOVED ONES FROM ELDER FINANCIAL ABUSE

In March 2017, Milwaukee WISN 12 reported a heart-wrenching story about a criminal investigation alleging two neighbors defrauded a 92-year-old woman suffering from dementia.

According to the allegations, they acquired her home as a gift through a deed and gained control of her nearly $2 million in assets through the execution of a durable power of attorney document. The neighbors then boxed the woman's belongings up, moved her out of the home she grew up in, and used her funds to remodel the house. You can read the full story here.

Unfortunately, this is an all-too-common story in the world of inheritance litigation. I regularly receive calls from previously unsuspecting individuals who have just realized that a loved one was financially abused during the victim's most helpless moments. Sometimes we are fortunate enough to suspect this while the victim is still alive so we can try to do something about it. More often than not, nobody recognizes this until after the victim has died. The shock usually comes when this person receives the victim's purported estate planning documents—whether a will or a trust, or their amendments—that dramatically change the expected inheritance of some or all of the victim's family members.

This type of situation happens more than many expect. As we become more aware of this problem through stories such as this and learn more about the effects of dementia and other diseases, it is important that we as a society are mindful of this issue. Of course every person, including our oldest population, has the right to do with their property as they wish. It needs to be as a result of his or her free will, however, and not at the hands of an individual with ulterior motives.

In the right circumstances, civil litigation may be the best way to position yourself to thoroughly investigate these matters. This is particularly so if you did not have reason to suspect the abuse until after the victim has died. Unlike the example above, criminal prosecutors are often limited in their ability to conduct a thorough investigation into matters involving a person's rightful estate. The obligation is often on the aggrieved person to protect his or her own rights.

I encourage you to look at the various resources referenced in the article and in your community if you fear a loved one or you are potential victims of financial abuse.

If you would like more information on this topic you can contact Trevor Lippman at 414-276-5000 or trevor.lippman@wilaw.com

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SECURED CREDITORS MUST FILE BANKRUPTCY PROOFS OF CLAIM IN THE SEVENTH CIRCUIT

In a reversal of a decision of the U.S. Bankruptcy Court for the Northern District of Illinois, the United States Seventh Circuit Court of Appeals in *In re Pajian* rejected a common bankruptcy court practice of not requiring secured creditors to file proofs of claim in order to receive distributions toward pre-petition secured arrearages as part of a debtor's chapter 13 plan of reorganization.

Pajian involved a chapter 13 bankruptcy debtor indebted to Lisle Savings Bank, a secured creditor. Lisle filed a late proof of its secured claim and the debtor objected to the claim based upon its untimeliness. Formerly, courts would allow a secured creditor such as Lisle Savings Bank to abstain from filing a proof of claim and, instead, wait to object to a proposed plan of reorganization that failed to include payments toward the creditor's secured pre-petition arrearage claim.

In opining that Rule 3002(c) of the bankruptcy code requires all (not only unsecured) creditors to file proofs of claim within 90 days of a Section 341 meeting of creditors, the Court of Appeals effectively barred Lisle Savings Bank from receiving distributions on its pre-petition secured arrearage claim as part of the debtor's plan of reorganization. While the Court of Appeals acknowledged that a secured creditor's lien (and right to foreclose the same) remains unaffected by its failure to timely file a proof of claim, the court's decision means that a debtor need not make plan payments to its tardy secured lender during its plan of reorganization (presumably 5 years), but is only required to make loan payments to its lender coming due during the plan in order to avoid a foreclosure of the bank's lien.

As a result, the debtor in *Pajian* was not required to make plan payments of loan arrearages during the course of its entire plan of reorganization. Because Lisle's lien was not avoided, however, the bank remained entitled to realize upon its pre-petition secured arrearage to the extent of the value of its security, but only after completion of the debtor's plan of reorganization or default under the terms thereof.

Many deadlines are very short under the bankruptcy rules. If you are a creditor, whether secured or unsecured, it is of utmost importance to contact bankruptcy counsel immediately

upon receiving a notice of bankruptcy. Failure to comply with bankruptcy deadlines, including the filing of a timely proof of claim, may prejudice the rights of a secured creditor as displayed by *Pajian*.

For further information, please contact John Schreiber or any of the attorneys in OCHD&L's Banking and Creditors' Rights Practice Group.

SETH E. DIZARD APPOINTED TO THE NATIONAL BOARD OF DIRECTORS FOR THE RUFFED GROUSE SOCIETY

Attorney Seth E. Dizard has recently been appointed to the National Board of Directors for the Ruffed Grouse Society. Established in 1961, the Ruffed Grouse Society (RGS) is North America's foremost conservation organization dedicated to preserving our sporting traditions by creating healthy forest habitat for ruffed grouse, American woodcock, and other wildlife. RGS works with landowners and government agencies to develop critical habitat utilizing scientific management practices.

Seth is a longtime member of the David Uihlein (Milwaukee) Chapter of RGS. O'Neil Cannon has been a regular corporate sponsor of RGS since Seth joined the firm. As an avid hunter and conservationist, the honor means a great deal to Seth and he looks forward to serving on the National Board. The firm is proud of Seth, as well as its longstanding tradition of giving back, in addition to supporting those causes which are important to its lawyers and staff.

RGS is mainly comprised of grouse and woodcock hunters who support national scientific conservation and management efforts to ensure the future of the species. The organization employs a team of wildlife biologists to work with private landowners, and government, including local, state and federal, land managers who are interested in improving their land for ruffed grouse, American woodcock and the other songbirds and wildlife that have similar requirements.

To read more about the Ruffed Grouse Society and their efforts click here.

WHAT IS ARBITRATION?

Arbitration is a common form of alternative dispute resolution (ADR) in which parties agree to resolve a dispute by submitting it to one or more neutral decision-makers, or arbitrators, for decision. Arbitration consists of a formal hearing, similar to a trial, where the parties are represented by legal counsel and present evidence and testimony. The parties usually have the option to choose the decision-makers.

In Wisconsin, arbitration is governed by the Wisconsin Arbitration Act, which is found in Chapter 788 of the Wisconsin Statutes. Among other things, the Wisconsin Arbitration Act states that an arbitration clause in a contract is valid, irrevocable and enforceable unless certain grounds exist to invalidate the contract. However, a few disputes, including certain disputes over employment contracts, petroleum storage tank remediation and state employment relation matters, are exempt from this rule.

In a dispute governed by a contract containing an arbitration agreement, the Wisconsin Arbitration Act requires Wisconsin courts to send the parties to arbitration, instead of trial, pursuant to the terms of their contract. If a party seeking arbitration has failed to live up to its obligations under the contract containing the arbitration agreement, however, the court may choose whether or not to stay litigation so that the arbitration may proceed.

The Federal Arbitration Act contains a similar rule that “a written provision in any … contract” that indicates an intent to settle contract-related disputes by arbitration “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

In addition, federal courts may refer civil actions and bankruptcy adversary proceedings to arbitration if the parties consent. Both federal districts in Wisconsin have rules governing arbitration and other forms of ADR. Federal constitutional claims, some civil rights claims and claims involving damages over $150,000 cannot be sent to arbitration from federal court, however.

If you have any question, please contact Grant Killoran at grant.killoran@wilaw.com or 414-276-5000.

WHAT YOU NEED TO KNOW ABOUT LETTERS OF

INTENT IN COMMERCIAL LEASES

Both landlords and tenants have legal and personal obligations to understand and abide by each of the terms in their commercial leases. Too often, aspects of these leases are misunderstood or neglected entirely. The following blog series outlines these aspects one-by-one, emphasizing key points and illustrating these concepts via real-life commercial lease tenancies. To start, let's take a look at what you need to know about letters of intent, or LOIs.

LOIs are non-binding.

Although most terms listed in a commercial lease document are considered part of a binding contract, LOIs lack the formality to be considered binding. An LOI is intended to act as a general guide to outline the terms of a proposed lease, offering statements of key terms to the more legal oriented provisions necessary in the final lease agreement.

The most basic terms in a LOI would include:

- the identity of the Landlord and Tenant
- the location of the building and size of the space
- the amount of rent
- term or length of the lease
- extension options beyond the initial term
- personal guarantor or guaranties
- what the space may be used for

LOIs are typically negotiated by brokers.

More often than not, LOIs are negotiated and drafted by brokers, rather than by attorneys. A lawyer typically drafts the final lease agreement. Brokers lack the legal expertise and credentials to independently create legally sufficient binding contracts, which is why LOIs are best-described as written business terms.

LOIs are usually written without input from attorneys.

Because LOIs are typically non-binding, attorneys are not consulted to offer input throughout their drafting. However, both parties involved in any negotiations should understand the relevant legal aspects before engaging in the preparation and execution of LOIs.

For help with questions that come up during your research or negotiation, whether you're a landlord who wants to protect your interests or a tenant hoping to preserve your rights, call John Gehringer at O'Neil Cannon at 414.276.5000 for a strategic consultation about your next steps.