STUDENT LOANS: RECENT FEDERAL WARNING SHOTS TO FINANCIAL INSTITUTIONS

You can hardly throw a textbook today without hitting a media story about student loans. From the debt burden that graduates face to the actual loans that students have access to and how they're structured, our country is taking a hard look at college costs and financing. Now the landscape is shifting.

Students, who used to hold little power in the loan process, are gaining a voice. Financial institutions should take note and adjust their loan-making processes or face more regulation and potential losses down the road.

This article shares information about recent federal announcements and their implications to the banking industry.

Recent Federal "Guidance"

There are, essentially, two types of student loans: 1) standard payment plans with established payment amounts and timelines from the moment a student graduates, and 2) graduated repayment plans under which the student's initial payments are lower and then increase approximately every two years. Most graduated repayment plans require monthly payments over ten years.

The problem with graduated payment plans (and, let's face it, many other student loans) is that some students don't end up making as much money as they expected upon graduation and they struggle to pay their debt. A deeper look into some of the loan structures themselves led federal regulators to make a recent announcement to financial institutions that originate private student loans.

On January 29, 2015, federal financial regulatory agencies issued guidance for financial institutions that originate private student loans with graduated repayment terms. Some of the guidance may seem common sense, but clearly the regulators saw practices in the private banking industry that made them take note.

Financial institutions should see these guidelines as a warning shot: you've got to study your private student loan-making process and even your student loan culture or face more federal attention down the road.

The federal agencies issued the following principles for financial institutions that make private student loans with graduated repayment terms to ensure that they "prudently underwrite the loans in a manner consistent with safe and sound lending practices":

- Ensure orderly repayment by calibrating repayment terms to reasonable standards based on debt;
- Avoid payment shock by including repayment terms that a borrower can meet over the life of the loan;
- Align payment terms with income and do not structure repayment terms to mask delinquencies or defer losses;
- Provide clear disclosures to the borrower as required by applicable laws and regulations, including the Truth in Lending Act;
- Comply with all consumer laws, regulations, and reporting standards; and
- Contact borrowers before reset dates to help establish student debt as a priority and aid borrowers in responding to any challenges.

More Power to the Students Coming

Further proof of a shifting landscape: The White House is studying whether it should be easier to wipe out student loans in the bankruptcy process. Currently, federal law prohibits student loans from being discharged in bankruptcy, except in rare cases. In a nutshell, banks need to work with students to arrive at fair repayment plans, or they may risk losing their assets in that student's bankruptcy process.

The takeaway from this recent "guidance"? Students are gaining power in the loan process and banks need to be much more careful about how they structure loans and how they communicate with students throughout the life of a loan.

What Should You Do?

Financial institutions need to take a hard look at their private student loan-making process, their relationships with students throughout the life of a loan, and their very culture around student loans. You have received a warning: "Do this right, and do it fairly, or face consequences."

If you have any questions, please contact Attorney Melissa S. Blair at O'Neil, Cannon, Hollman, DeJong and Laing S.C. at 414-276-5000.

ATTORNEYS GUMINA AND REIB PUBLISH LABOR AND EMPLOYMENT LAW ARTICLE SERIES IN INSIDECOUNSEL MAGAZINE

Attorneys Joseph Gumina and Erica Reib authored a Labor and Employment Law article series

entitled, “Anticipating and Managing Wage and Hour Pitfalls” on *InsideCounsel.com*. This monthly magazine serves general counsel and other top in-house legal professionals and provides strategic tools to help them better manage their legal departments.

To learn more about the wage and hour topics below, click on the article links. Attorneys Joseph Gumina and Erica Reib can be reached at 414-276-5000 if you would like further information.

- “A primer for inside counsel on donning and doffing under the FLSA,” published 3/20/2015
- “Paying employees correctly under the FLSA with preliminary and postliminary activities,” published 4/3/2015
- “Education on unpaid internships for the in-house counsel,” published 4/17/2015
- “Unpacking the surprisingly tricky ‘regular rate’ in overtime calculation,” published 5/1/2015
- A primer for inside counsel on meeting FLSA overtime exemption tests,” published 5/15/2015
- “Independent contractors—Avoiding misclassification under the FLSA,” published 5/29/2015

SEVENTH CIRCUIT RULES THAT LENDER’S TITLE INSURANCE POLICY DOES NOT COVER RISK OF INADEQUATE CONSTRUCTION FUNDING

Does a Lender’s title insurance policy cover construction liens filed by unpaid contractors where the lender has discontinued disbursing its construction loan mid-stream due to insufficient funds to complete the project? In *BB-Syndication Services, Inc. v. First American Title Insurance Co.*, 780 F.3d 825 (7th Cir. 2015), the United States Court of Appeals for the Seventh Circuit has emphatically answered “No.”

The *BB-Syndication Services, Inc. v. First American Title Insurance Co.* litigation arose from the financial collapse of a major Kansas City mixed-use construction project. At the inception of construction, a dispute arose between the general contractor and the owner-borrower regarding the cost of construction. The contractor claimed that design changes made by the owner and its architect entitled the contractor to a price increase of over $22M. If the contractor’s allegations were true, then the construction project would be underfunded by over $22M. The borrower disputed the price increase, and construction continued while the dispute between the contractor and the borrower progressed through arbitration.

With knowledge of the potential funding shortfall, the construction lender chose to proceed with financing the costs of construction as it progressed. The lender continued to fund the monthly construction draws for over one and one-half years, before it finally elected to cease all further construction loan disbursements, citing the huge loan imbalance and other defaults by the borrower. By then, the lender had disbursed about $61M of its $86M construction loan. Construction stopped, unpaid contractors filed construction liens totaling millions of dollars against the property, and the borrower filed bankruptcy.

In response to the liens, which had priority under Missouri law, the lender made a claim against the title insurance policy that insured the priority of its mortgage. The lender demanded that First American pay off all of the liens under the loan policy's construction lien coverage. First American ultimately denied coverage on grounds that the lender's own conduct—ceasing all funding of construction and refusing to release undisbursed loan proceeds to pay the contractors—had caused the liens to be filed, triggering policy exclusion 3(a). Exclusion 3(a) bars coverage for liens and encumbrances that are "created, suffered, assumed, or agreed" to by the insured.

BB-Syndication ultimately filed suit against First American. The District Court granted summary judgment in favor of First American, holding that exclusion 3(a) barred all coverage for all of the construction liens. BB-Syndication appealed. In a pivotal opinion, the Seventh Circuit affirmed the District Court's decision, holding that the lender had "created" the liens.

Perhaps the most significant aspect of the Seventh Circuit's opinion is its reasoning. In the few court decisions in other prior cases facing this issue, the outcome has turned upon the following two factors: 1) the existence or nonexistence of a disbursement agreement between the construction lender and the title company; and 2) whether or not the lender had disbursed the entire loan amount. The Seventh Circuit expressly criticized the reasoning of those prior decisions, and charted its own course. The Court recognized that construction lenders typically possess the power to exercise significant control over the loan transaction and over the construction project, particularly with regard to the project's finances. The Seventh Circuit concluded that construction lenders have both the ability and the duty to investigate, monitor, and to ensure the construction project's economic viability, both at inception and throughout construction. The Court held that "[w]hen liens arise from insufficient funds, the insured lender has 'created' them by failing to discover and prevent cost overruns—either at the beginning of the project or later." Consequently, the Seventh Circuit adopted a simple rule that "exclusion 3(a) excludes coverage for liens that arise as a result of insufficient funds."

The lesson for construction lenders is clear. They can no longer rely upon title insurance as a safety net against construction liens that arise due to insufficient construction funding. Instead, they must rely upon their own due diligence and other financial instruments, such as third-party guarantees or performance bonds. On the other hand, title insurers can take

comfort that they will not be left holding the bag when a construction lender decides to quit disbursing a construction loan due to insufficient funding.

Mr. Slawinski represented the First American Title Insurance Co. in the BB-Syndication Services, Inc. litigation. He may be contacted by telephone at 414-276-5000 or via e-mail at steve.slawinski@wilaw.com.

ELECTRONIC SIGNATURES: THE LAW IS CATCHING UP

Electronic signatures are alluring to time-pressed clients who are closing deals all over the city, the state, the country and the world. But are electronic signatures enforceable? Can you enforce an agreement when the only "signature" you received was the other party's typed name at the bottom of an email or a text? How about when your only copy of the other party's signature is a pdf?

For decades now, people have attempted to enter into agreements through purely electronic means, but the law has been slow to guarantee that these purely electronic agreements would be enforceable in court. Recently, though, the law has started catching up by enforcing certain electronic signatures and agreements.

State and Federal Electronic Signature Laws

There are two primary laws that govern electronic signatures. The first is the federal Electronic Signatures in Global and National Commerce Act ("E-SIGN"). The second is the Uniform Electronic Transactions Act ("UETA"), which has been adopted in some form by 47 states, including Wisconsin ("WI UETA"). Illinois, New York and Washington have not adopted UETA, but they have adopted their own electronic transaction laws.

How Do the Laws Work in Practice?

E-SIGN and UETA were each enacted to ensure that electronic records and signatures are not denied legal effect solely because of their electronic form. But what does that mean in practice and in court?

First, an "electronic signature" means any "electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." This means that pdf copies of signatures, typed names at the bottom of emails or texts, and personal access codes are some of the many items that can qualify as

electronic signatures.

Now, let's say that you have taken another party to court to enforce an agreement signed electronically. The opposing attorney's first argument may be that her client's electronic signature is not enforceable. In that case, the court will have to determine whether the two parties *agreed* to conduct the transaction electronically. This agreement may have come in the form of an expressly written document or it may have been implied contextually over the course of negotiations.

This is really at the heart of the Wisconsin law: can the court find that the parties expressly or implicitly agreed to accept electronic signatures?

Obviously, it is better to express this agreement in writing. Otherwise, a good litigator will fight the validity of the contract, which will increase court costs and fees. Therefore, parties should include in their agreements a clause that expressly states that the parties agreed to accept electronic signatures.

What Does Wisconsin's Electronic Signature Law Say?

Wisconsin law states that the following three requirements must be met before WI UETA will apply to an electronic record:

1. The subject matter of the electronic record must not fall within WI UETA's list of prohibited subject matters (see below);

2. The parties must agree to use electronic records; and

3. The electronic record must be capable of retention at the time it is received.

What is a "Prohibited Subject Matter" Under WI UETA?

WI UETA generally applies to all electronic records unless WI UETA or another statute expressly prohibits the use of an electronic format. Examples of specific areas where WI UETA does not help to enforce an electronic record include the following:

1. The creation of wills or testamentary trusts;

2. Certain agreements governed by the Wisconsin Uniform Commercial Code;

3. Records governed by any law relating to adoption, divorce, or family law matters;

4. Notices provided by a court;

5. Court orders;

6. Official court documents (*e.g*. briefs and pleadings);

7. Certain notices (*e.g*. termination of utility services, termination of health or life insurance benefits, product recalls, foreclosure, or eviction);

8. Consumer disclosures governed by E-SIGN; and

9. Records subject to a law that expressly prohibits the use of an electronic format.

What Constitutes an "Agreement" Under WI UETA?

As discussed earlier in this article, WI UETA does not apply unless the parties both agree to conduct the transaction via electronic means. Again, this is at the heart of the law: both parties must express an agreement to conduct the transaction electronically, either in writing or in the context of their negotiations. Of these two options, the most secure way is to express agreement in writing within the actual contract.

When in Doubt, Contact Your Attorney

Of course, this is a simplified description of the laws governing electronic signatures. There are also requirements related to consumer documents, technology, storage of the electronic documents and even security measures. However, the bottom line is that the law is finally catching up to the real-world demands of today's business transactions.

If you have any questions, please contact O'Neil Cannon at 414-276-5000.

A FAMILY MATTER: PROTECTING AN ELDERLY PARENT WITH DEMENTIA FROM FINANCIAL ABUSE

As Baby Boomers continue to age, an increasing number of elderly Americans and their families are forced to deal with the devastating effects of dementia. According to the National Center on Elder Abuse, approximately 5.1 million Americans over the age of 65 suffer from some form of dementia. In addition, nearly half of all individuals over the age of 85, the fastest growing segment of our population, currently suffer from Alzheimer's disease or some other type of dementia. Many of these individuals do not have a will or a trust, nor have they executed power of attorney documentation. Conversely, many others have planned ahead, going to great lengths to ensure that "everything is taken care of" in advance for their

families.

Today, advance planning commonly includes nominating an individual to be a Durable Power of Attorney. This approach allows one (assuming mental competency is intact) to choose the person who will manage his or her affairs and assets if that person is unable to do so adequately in the future. Appointing a Durable Power of Attorney in advance alleviates the need for the initiation of public proceedings to address the elder individual's mental capacity.

In many cases, it is common for one or more of an elderly parent's adult children to step in and help manage the parent's affairs, particularly when the elderly parent's spouse has passed. Oftentimes, due to the proximity of one child to the parent's residence, a strong relationship with the parent, or for a multitude of other possible reasons, one child ends up visiting with and assisting an elderly parent more than other children. That child might even live with the parent. In those cases, the elderly parent will frequently name this child as his or her Durable Power of Attorney.

Unfortunately, with vulnerability comes opportunity. Provided with suddenly unfettered access to significant funds from numerous accounts and sometimes very little oversight, there can be disputes between adult children about how an elderly parent's assets and financial affairs are being handled.

It goes without saying that every family with multiple siblings has unique dynamics that may change over time. It is not uncommon for siblings to grow apart over the years due to differences in lifestyles, ideologies, or personalities. On the other hand, sometimes, siblings become each other's best friends, talking to each other nearly every day. These unique family dynamics can sometimes play a role in disputes over estate planning matters, especially after one parent has passed and the other parent is suffering from some infirmity associated with an advanced age.

These family dynamics sometimes manifest themselves into unfortunate scenarios. At its extreme, the most troubling situation is when there are allegations that one child is stealing from an elderly parent. This may lead to a problem that inheritance trial attorneys are all too familiar with — most or all of an elderly parent's assets slowly dissipate, not necessarily on expenses associated with caring for the parent.

Imagine, for instance, that a doctor just recently diagnosed an elderly mother with Alzheimer's disease. The husband, and father, passed away years earlier. The mother has $500,000 in assets at the time of her diagnosis. She has four children and drafted a will after her husband passed away indicating that it is her wish to leave one-fourth her estate to each of her children. At the same time, the mother has named one child (Child A) as her Durable Power of Attorney. After the Alzheimer's diagnosis, two doctors sign a Statement of Incapacity, which results in Child A taking over all of the mother's financial affairs. The

mother passes away one year later, and in the estate proceedings, Children B, C, and D learn that each of them will receive $25,000 — far less than they had expected. Children B, C, and D concede that Child A legitimately spent $100,000 on their mother's medical care and other living expenses. But where did the other $300,000 go? Some family members do not want to broach the subject because they find it to be an uncomfortable discussion. Nobody wants to wrongly accuse a family member of such an egregious act. Moreover, family members may feel they are being "greedy" if they initiate a legal proceeding involving property that, to that point, had never belonged to them.

There is more to consider, however. Parents often spend a lifetime working, saving, and investing in hopes of being able to provide loved ones with financial support after they pass. Is it fair to a parent's legacy to walk away to avoid the confrontation? Ultimately, this is the very personal and difficult decision many adult children have to make.

There are several things one can do to try to protect against such situations:

- **Ask Questions**
  If you get the sense that somebody is taking advantage of an ailing parent, ask that person questions. Stay involved to the extent you can. If you believe there are unusual or suspicious circumstances surrounding an elderly parent, take note of them. One who might otherwise take advantage of an elderly parent might not do so if he or she knows that others are regularly checking on the status of the parent's care and financial matters.

- **Talk to Your Parent**
  The effects of dementia are unquestionably devastating, but, to a point, an ailing parent may still have the capacity to sense when something is wrong. On occasion, talk with your elderly parent outside the presence of the caretaker or power of attorney. If your parent never answers the phone or somebody refuses to let you inside your parent's home, continue your efforts to initiate contact.

- **Look for the Signs of Improper Purchases**
  Not every purchase that a caretaker makes should cause immediate suspicion. But, if one who is appointed Durable Power of Attorney suddenly buys a new luxury car, takes an expensive vacation, or engages in other activity that is clearly out of the ordinary, you should inquire. Try to engage in honest and open conversations with all of your family members about these matters. If concerns remain, it may be time to consider other arrangements.

- **Inquire as to Whether the Durable Power of Attorney Documentation Includes Gifting Powers**
  If your parent signed a Durable Power of Attorney document, ask whether the document specifically grants the person appointed the Durable Power of Attorney the power to make gifts on their behalf. While a Durable Power of Attorney document can provide an individual with expansive power over the finances of the

elderly parent, the more general language typically seen in these documents often will not provide the Durable Power of Attorney with the authority to make gifts to himself, herself, or to others. If an elderly parent wants to give the Durable Power of Attorney the authority to give gifts, this must be stated explicitly in the Power of Attorney document. Any person who is considering granting such expansive powers to a loved one needs to give such matters very careful consideration.

Unfortunately, elder financial abuse is all too real. This abuse can have devastating consequences both on the ailing parent and on their families. Be mindful of the potential problem. Naivety is not a sufficient excuse when it comes to caring for those who need our help the most. There are legal avenues you can take to try to protect the rights of your parents and your parents' beneficiaries.

If you have any questions, please contact Attorney Trevor Lippman at O'Neil Cannon at 414-276-5000.

UNITED STATES SUPREME COURT CLARIFIES THAT NOTICE, AS OPPOSED TO FILING A LAWSUIT, IS A PROPER METHOD OF EXERCISING TILA RESCISSION RIGHTS

In an opinion dated January 13, 2015, the Supreme Court of the United States reversed a decision of the Eighth Circuit Court of Appeals, unanimously holding that borrowers may exercise their three-year right of rescission under the Truth in Lending Act (TILA) simply by providing written notice to their lender.

The Court in *Jesinoski v. Countrywide Home Loans, Inc.* held that the petitioners' written notice to Countrywide of their election to exercise the right to rescind their loan was sufficient, resolving conflicting authority among federal circuit and district courts that interpret TILA as requiring a borrower to file a lawsuit within three years of loan consummation in order to exercise such rescission rights.

According to the Court's opinion delivered by Justice Scalia, TILA explains in unequivocal terms that a borrower shall have the right to rescind a loan by notifying the creditor of his intention to do so. According to Justice Scalia, "[this] language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. … The statute does not also require him to sue within three years."

Interestingly, the Court's opinion goes on to provide that, unlike the elements of common-law rescission which require a party to tender back what it received in order to be entitled to such relief, a borrower does not necessarily need to tender to a creditor funds received under the loan in order to effectuate its election to exercise its rescission rights under TILA. In the words of the Court, "[t]o the extent [TILA] alters the traditional process for unwinding such a unilaterally rescinded transaction, this is simply a case in which statutory law modifies common-law practice."

The full opinion of the Supreme Court of the United States in *Jesinoski v. Countrywide Home Loans, Inc.* can be found at: http://www.supremecourt.gov/opinions/14pdf/13-684_ba7d.pdf.

WISCONSIN ADOPTS NEW "SINGLE-PRIME" DELIVERY METHOD FOR STATE CONSTRUCTION PROJECTS

Effective January 1, 2014, a fundamental change was made to the method by which public construction projects are led by the State of Wisconsin's Department of Administration. Wisconsin adopted a new single-prime delivery method to replace its former multiple-prime method. Under the former multiple-prime method, the State would contract with a principal contractor, but would also enter separate contracts directly with mechanical, electrical, plumbing, and fire protection (MEP) subcontractors. Under the new single-prime method, the State will only enter into a single contract with a general prime contractor.

Wisconsin's new single-prime delivery method is actually a unique hybrid, because the State will continue to solicit competitive public bids from the MEP subcontractors, as was done under prior law. However, the successful MEP bidders will enter subcontracts with the general prime contractor, rather than with the State.

Under the new law, all contractors must first be certified by the Division of Facilities Development before submitting any bid. The bidding process begins with the submission of competitive public bids by the MEP subcontractors. The successful low MEP bidders are then selected and identified by the Department of Administration, and the Division of Facilities Development must post the bidders' names and the amounts of the successful MEP bids on its website. Within five (5) days thereafter competitive public bids for the general prime contract must be submitted. The bidders must include the bids of the successful MEP contractors in their own bids for the general prime contract. The general prime contract is then awarded to the lowest qualified responsible bidder.

The general prime contractor is required by law to enter into subcontracts with each of the successful MEP subcontract bidders selected by the Department. The law mandates that each subcontract must contain certain terms prescribed by statute, including provisions pertaining to prompt payment, insurance and bonding, indemnification, and retainage. The law generally precludes alteration of the scope or price of the subcontract work. It is up to the general prime contractor and each of the MEP subcontractors to negotiate all other subcontract terms. Reaching agreement on the many remaining critical subcontract terms could prove problematic, however, given the arranged marriage between the general prime contractor and each MEP subcontractor that results from Wisconsin's hybrid single-prime delivery method. The general prime contractor will probably find it difficult or impossible to dictate terms unfavorable to the MEP subcontractors, because it has no voice in the selection of the MEP subcontractors and the law does not require the MEP subcontractors to accept any terms besides those imposed by statute.

Wisconsin's new hybrid single-prime system affords protection to MEP subcontractors against bid shopping, and continues the relative autonomy they enjoyed under the old multiple prime system. Those benefits come at a price, however. The new law requires each MEP subcontractor to obtain a 100% performance bond and a separate 100% payment bond naming the general prime contractor as the obligee.

Of perhaps greatest concern to MEP subcontractors are the new law's indemnification provisions. The new law mandates the inclusion into all MEP subcontracts of certain extensive and complex indemnification terms, which generally obligate the MEP subcontractor to "defend, indemnify, and hold harmless" the general prime contractor and its principals for damages and fines for "bodily injury, sickness, disease, or death, or injury to or destruction of property, including… loss of use" arising from the performance of the subcontract work. This includes an obligation to indemnify the general prime contractor for claims arising from its own negligence or fault in providing supervision or oversight of the MEP subcontractor's work. MEP subcontractors may find that these indemnification obligations expose them to potential liability for which they may have no insurance coverage under their general liability policies.

By creating its own unique hybrid delivery method, Wisconsin has ventured into uncharted territory. Time will tell whether this experiment meets with success or failure. The new law raises many unanswered questions. Prospective bidders need to know that the rules have changed, how they have changed, and the significant implications of those changes.

VICTORY FOR WHISTLEBLOWERS AND TAXPAYERS: USE OF PUBLICLY AVAILABLE INFORMATION DOES NOT BAR CASES INVOLVING GOVERNMENT FRAUD

Under a federal statute known as the False Claims Act, whistleblowers with knowledge of overcharges or other fraudulent activity directed at the federal government may be entitled to substantial monetary rewards through lawsuits known as *qui tam* cases. The monetary rewards authorized by the False Claims Act provide those who have valuable information about government fraud a strong incentive to come forward and report it. Companies alleged to have engaged in such fraud often fight back by arguing that a whistleblower's *qui tam* case should be dismissed because it is improperly based on "publicly available" information, citing the False Claims Act's "public disclosure bar."

In a victory for whistleblowers and taxpayers, a federal appellate court based in Chicago recently rejected a broad reading of the public disclosure bar. In *U.S. ex rel. Heath v. Wisconsin Bell, Inc.*, the Seventh Circuit Court of Appeals ruled that the public disclosure bar did not apply where a whistleblower's *qui tam* claim cited a contract that was available for public review on a government website. The Court of Appeals decided that the whistleblower's claim against Wisconsin Bell could proceed because it was not "based upon" the publicly available contract, but instead was based on "genuinely new and material information" that the whistleblower obtained through "his own investigation and initiative."

The whistleblower who filed the case, Todd Heath, is a telecommunications consultant based in Waupun, Wisconsin. Heath is retained by school districts and private businesses to identify overcharges contained in their telephone bills. Those bills and supporting materials are often complex and can be confusing even to sophisticated consumers. Heath, who has been auditing phone bills for more than 20 years, has the training and experience necessary to interpret such materials. Relying on information obtained through his own investigation and professional experience, Health filed a *qui tam* case alleging that Wisconsin school districts were overcharged for telecommunications services.

The Wisconsin school districts were not the only victims of the alleged overcharging, according to Heath, because the federal government subsidizes and pays a substantial portion of the schools' telecommunications bills under a federal program known as the E-Rate program. Before he filed his *qui tam* case, Heath notified the federal government of his findings, as required by the False Claims Act.

The public disclosure bar relied upon by Wisconsin Bell as a defense is intended to prevent

whistleblowers from filing “parasitic” or “opportunistic” *qui tam* lawsuits based on information obtained through government reports or other public documents of the type specifically listed in the federal law. The Court of Appeals concluded that the public disclosure bar did not apply to Heath’s lawsuit, however, explaining that his case was not “based upon” the contract that Wisconsin Bell cited to support its defense. After ruling in Heath’s favor on this issue, the Court of Appeals decided not to consider other arguments made by Heath concerning the public disclosure bar.

Heath is represented in this case by Doug Dehler of O’Neil, Cannon, Hollman, DeJong and Laing, S.C. in Milwaukee, Wisconsin. It is expected that, within several weeks, the Seventh Circuit Court of Appeals will send the case back to a federal court in Wisconsin for additional proceedings.

If you have questions regarding this case or any other potential whistleblower case under the False Claims Act, please contact Attorney Doug Dehler at 414-291-4719 or doug.dehler@wilaw.com.

U.S. SUPREME COURT RULES INHERITED IRAS ARE NOT “RETIREMENT FUNDS” EXEMPT IN BANKRUPTCY PROCEEDINGS

On June 12, 2014, the United States Supreme Court held that funds in an inherited individual retirement account (IRA) are not “retirement funds” within the meaning of the Bankruptcy Code, and therefore such funds are not exempt from creditor claims in bankruptcy proceedings.

Ordinarily, when a debtor files for bankruptcy relief, his or her legal and equitable interests in property become part of the bankruptcy estate available to satisfy valid creditor claims. However, the Bankruptcy Code exempts debtors’ interests in certain property in order to help debtors obtain a fresh start. Pursuant to 11 U.S.C. § 522(b)(3)(C), debtors are allowed to protect “retirement funds” to the extent they are held in a fund or account exempt from taxation under specified provisions of the Tax Code, such as an IRA.

According to the Court, “retirement funds” are sums of money set aside for the day an individual stops working. Consequently, the Court looked to the legal characteristics of inherited IRAs—as opposed to debtors’ personal IRAs—to determine whether such accounts contain funds set aside for the day when the account owner stops working.

The Court held that three legal characteristics of inherited IRAs prevent the funds from coming within the meaning of "retirement funds." First, the owner of an inherited IRA cannot contribute additional money to the account. Second, an owner of an inherited IRA is required to withdraw funds from the account no matter how far he or she is from retiring from the workforce. Third, the owner of an inherited IRA may withdraw all of the funds in the account without incurring a penalty under the Tax Code. If inherited IRAs were exempt under the Bankruptcy Code, a debtor could obtain bankruptcy relief and immediately thereafter withdraw all funds from his or her inherited IRA to purchase a new home, take an extravagant vacation, or go on a shopping spree, even while valid creditor claims went unsatisfied in the bankruptcy proceedings. Since inherited IRAs are not "retirement funds" exempt from a debtor's estate in bankruptcy proceedings, such funds may be used to satisfy valid claims of creditors.

The Court noted that its holding is consistent with the purpose of the Bankruptcy Code's exemptions, and balances the interests of debtors and creditors.

LANDLORDS TAKE ACTION! SIGNIFICANT CHANGES IN WISCONSIN LANDLORD/TENANT LAWS CAME INTO EFFECT MARCH 1, 2014

Wisconsin Act 76 went into effect on March 1, 2014. This Act makes numerous changes to Wisconsin's landlord/tenant law, Chapter 704 of the Wisconsin statutes. There are a number of changes that have an immediate impact on the ordinary course of a landlord's business that landlords and their counsel should consider.

First, Wis. Stat. § 704.05 potentially expands a landlord's ability to treat a tenant's personal property as abandoned in an eviction action in the absence of a written agreement to the contrary. The statute's technical revisions have arguably broadened the circumstances which trigger a landlord's rights with respect to abandoned property.

Second, the law now addresses costs associated with "infestation of insects or other pests, due to the acts or inaction of the tenant…" The landlord may elect to allow the tenant to repair such damage at his or her own cost, or alternatively, may take such action as is necessary to repair such damage and seek reimbursement for the reasonable costs associated with such action.

Third, while landlords are still required to provide a check-in sheet to new tenants, landlords no longer need to provide a "standardized information" check-in sheet.

Finally, the Act created Wis. Stat. § 704.14 which requires a “Notice of Domestic Abuse Protection” be included in all residential rental agreements. The required notice sets forth protections for tenants facing eviction in certain instances of domestic abuse as well as tenant termination rights pursuant to Wis. Stat. § 704.16.

Copies of the new legislation can be read here. There are a number of other changes landlords and their attorneys will find particularly of interest. Further information about this bill and its impact on Wisconsin landlords can be obtained by contacting any member of our firm’s Real Estate Practice Group, or if a dispute has arisen, by reaching out to our firm’s Litigation Practice Group.