WHAT HAPPENS IF MY BUSINESS CAN'T PERFORM ITS CONTRACT DUE TO THE CORONAVIRUS?

Many businesses are experiencing interruptions in their operations due to the coronavirus outbreak. These interruptions can be caused by business closures, quarantines, and restrictions on travel and large gatherings. In response to these interruptions, businesses may find themselves unable to perform their contractual obligations or have a vendor or customer that is no longer fulfilling its contractual obligations. Either way, it is important to determine whether nonperformance is excusable given the global pandemic.

Businesses concerned about meeting their contractual obligations due to the coronavirus should review their contracts to determine their options. For instance, many contracts contain a *force majeure* or "Act of God" clause, which may excuse a party's nonperformance when extraordinary events outside of the party's control prevent a party from fulfilling its contractual obligations. Each situation is unique and such a clause may apply for some businesses and not for others. It is important to note that the occurrence of an extraordinary event alone does not excuse performance. Rather, a party seeking to invoke a *force majeure* clause must also show its mitigation efforts and that the event made performance truly impossible. Because the coronavirus pandemic is an uncontrollable and extraordinary event that may prevent a party from performing under a contact, the coronavirus could be considered a *force majeure* event.

A party seeking to excuse its nonperformance based on the coronavirus should review the relevant contract's *force majeure* clause. After all, whether an event qualifies as a *force majeure* event depends on the specific language included in the *force majeure* clause itself. Many contracts will specifically define what constitutes a *force majeure* event. If the parties have defined a *force majeure* event as any event outside the parties' control, then courts may be more inclined to find that the clause encompasses the coronavirus pandemic. Further, courts may apply a *force majeure* clause that specifically lists "acts of government," "pandemics," or "quarantines."

It is important to note that a drop in a customer base alone may not result in the application of a *force majeure* clause. For example, in 2018, one federal district court concluded an egg buyer was not relieved of its obligation to purchase eggs because of a drop in demand under Iowa law, but acknowledged a drop in supply due to an outbreak of avian flu might have constituted a *force majeure* event. *Rexing Quality Eggs v. Rembrandt Enterprises, Inc*., 360 F. Supp. 3d 817 (S.D. Ind. 2018).

To reach this conclusion, the court applied the Restatement on Contracts, which is used by

Wisconsin courts. Specifically, the court looked to the following guiding principal:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Id. at 841 (quoting Restatement (Second) of Contracts § 261 (1979)). The court held that "a change in purchaser demand—even a substantial change—is a foreseeable part of doing business." *Id.*

Given the size and changing impact of the ongoing coronavirus outbreak, it is hard to predict how courts will apply this fact-specific analysis to the present situation. Ultimately, whether a viral outbreak like the coronavirus qualifies as a *force majeure* event will depend on how the contract is drafted and the particular facts of the situation. A party seeking to invoke a *force majeure* clause to excuse its nonperformance must be prepared to show its mitigation efforts. Therefore, documenting efforts to overcome the impacts of the coronavirus is key.

Contracts with *force majeure* clauses usually provide what remedies are available to the parties when the clause is invoked. Often, contracts allow for either party to terminate the agreement when one party seeks to invoke the *force majeure* clause. However, contracts may instead permit a party to delay performance until the *force majeure* event is resolved.

Common law remedies may also be available to parties whose contracts lack a *force majeure* clause. Specifically, parties seeking to excuse nonperformance may find relief under the doctrines of impossibility, impracticability, and frustration of purpose. However, whether and under what circumstances these doctrines apply depends on the applicable law in the relevant jurisdiction and the specific facts and circumstances causing the nonperformance.

Overall, businesses impacted by the coronavirus should review their contracts to assess what rights and remedies are available to them in the wake of the coronavirus outbreak. The attorneys at O'Neil Cannon have experience in contract disputes and would be happy to discuss your options with you.

STATE AND FEDERAL FUNDING OPPORTUNITIES

FOR SMALL BUSINESSES AFFECTED BY THE CORONAVIRUS PANDEMIC

SBA to Provide Disaster Assistance Loans for Small Businesses Impacted by the Coronavirus

As part of the Trump administration's efforts to combat the coronavirus outbreak and minimize economic disruption to the nation's 30,000,000 small businesses, the U.S. Small Business Administration (SBA) is offering designated states and territories low-interest federal disaster loans for working capital to small businesses suffering substantial economic injury as a result of the coronavirus. Upon a request received from a state's or territory's governor, the SBA may issue, as provided by the Coronavirus Preparedness and Response Supplemental Appropriations Act that was recently signed by the President, an Economic Injury Disaster Loan declaration.

On March 17, 2020, the SBA issued revised criteria for states and territories seeking an Economic Injury Disaster Loan declaration related to the coronavirus. The relaxed criteria will have two immediate impacts:

- **Faster, Easier Qualification Process for States and Territories Seeking SBA Disaster Assistance.** Historically, the SBA has required that any state or territory affected by disaster provide documentation certifying that at least five small businesses have suffered substantial economic injury as a result of a disaster, with at least one business located in each declared county or parish. Under the just-released, revised criteria, states or territories are only required to certify that at least five small businesses within the state or territory have suffered substantial economic injury, regardless of where those businesses are located.
- **Expanded, Statewide Access to SBA Disaster Assistance Loans for Small Businesses.** SBA disaster assistance loans are typically available only to small businesses within counties identified as disaster areas by a governor. Under the revised criteria issued today, disaster assistance loans will be available statewide after an economic injury declaration. This will apply to current and future disaster assistance declarations related to the coronavirus.

Any Economic Injury Disaster Loan declaration issued by the SBA makes loans available **statewide** to small businesses and private, non-profit organizations to help alleviate economic injury caused by the coronavirus. Once a declaration is made, the information on the application process for Economic Injury Disaster Loans will be made available to affected small businesses within the state. These loans must be used to pay fixed debts, payroll, accounts payable and other bills that can't otherwise be paid because of the disaster's impact. The interest rate is 3.75% for small businesses without credit available elsewhere; businesses with credit available elsewhere are not eligible. The interest rate for non-profit

organizations is 2.75%. The SBA offers loans with long-term repayment periods in order to keep payments affordable, up to a maximum term of 30 years. Terms are determined on a case-by-case basis, based upon each borrower's ability to repay.

Governor Evers Seeks an Economic Injury Disaster Loan Declaration from the SBA for Small Businesses Affected by the Coronavirus

On March 18, 2020, Governor Evers submitted a request to the SBA to declare the coronavirus a disaster for the State of Wisconsin. If the SBA declares Wisconsin a disaster area, the SBA will allow Wisconsin small businesses across the state to apply for SBA Economic Injury Disaster Loans, which would offer up to $2,000,000 in assistance for each affected small business. Governor Evers's request to the SBA can be found here.

As of the date of this article, the SBA has declared the following disaster areas: Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Maine, Maryland, Massachusetts, Montana, Nevada, New Hampshire, New Mexico, New York, North Dakota, Oregon, Rhode Island, Texas, Utah, Virginia, Washington, and Wyoming. The list continues to grow and the areas eligible for SBA Economic Injury Disaster Loans are continuously updated here.

If Wisconsin is declared a coronavirus disaster area or if your small business is located in one of the declared disaster areas, you can apply for an Economic Injury Disaster Loan through the SBA here.

Wisconsin's Small Business 20/20 Program

On March 17, 2020, the Wisconsin Economic Development Corporation arranged for the deployment of $5,000,000 in emergency funds to create the Small Business 20/20 Program in order to help mitigate the impact of the coronavirus pandemic on small businesses in Wisconsin. The purpose of the program is to ease the' short-term cash flow challenges of these small businesses, and to protect jobs and public health in Wisconsin. The Small Business 20/20 Program provides funds to eligible Wisconsin-based Community Development Financial Institutions (CDFIs) that can make grants available to existing loan clients in order to mitigate the effects of the coronavirus pandemic. Eligible applicants for the Small Business 20/20 Program funds are Wisconsin CDFIs that have a minimum organizational loan portfolio of at least $4,000,000, or a collaborative of CDFIs with a combined organizational loan portfolio of at least $4,000,000. A list of Wisconsin's 24 CDFIs can be found here.

Approved CDFIs and collaboratives will make program grants available to for-profit businesses that are loan recipients in good standing as of March 1, 2020 with the approved CDFI or its collaborating CDFIs. These businesses must have 20 or fewer full-time or part-time employees and greater than $0 but less than $2,000,000 in annual revenues. Preference for

these program grants will be given to service and retail businesses.

Businesses may be granted two months of payroll and rent expenses, up to a maximum of $20,000. These funds must be used for rent and payroll expenses, including covering paid leave (e.g., sick, family, and other leave related to the coronavirus) during the duration of the funding period.

If you have questions relating to the SBA's Economic Injury Disaster Loans or the Wisconsin Small Business 20/20 Program, please contact O'Neil Cannon

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KEY WISCONSIN TITLE LITIGATION DECISIONS: RESTRICTIVE COVENANTS, ANTICIPATED PRIVATE NUISANCE, STATUTE OF LIMITATIONS APPLICABLE TO FORECLOSURES, AND STIPULATED DISMISSAL OF PRIOR FORECLOSURE

Recently, Wisconsin Courts have handed down several key decisions concerning title litigation that deal with the issues of restrictive covenants, anticipated private nuisance, the statute of limitations applicable to foreclosure actions, and stipulated dismissal of prior foreclosures.

Below is a brief summary of the most important of these court decisions.

Restrictive Covenants

The Wisconsin Supreme Court faced the question of whether the short-term rental of a residential property constitutes "commercial activity" under a restrictive covenant. In *Forshee v. Nueschwander*, a 4-3 majority of the court held that because the term "commercial activity" was ambiguous, the restrictive covenant in place did not prohibit the Nueschwanders from using their property for short-term rentals.

Lee and Mary Jo Nueschwander bought the property in question on Hayward Lake in Hayward, Wisconsin in 2014, renovated it, and began renting it out for short-term rentals to vacationers through the popular VRBO (Vacation Rental By Owner) website. The Nueschwanders' neighbors sued in Sawyer County Circuit Court to enforce the covenant,

contending that the short-term rentals were “commercial activity” under a restrictive covenant that provided, “There shall be no commercial activity allowed on any of the lots.”

The circuit court agreed with the neighbors and granted an injunction to stop the Nueschwanders’ rental activity; the Court of Appeals reversed the circuit court’s decision and lifted the injunction.

On appeal, writing for the majority, Chief Justice Patience Drake Roggensack reasoned that public policy favors the free and unrestricted use of property. Moreover, wrote Justice Roggensack, deed restrictions “must be expressed in clear, unambiguous, and preemptory terms” and strictly construed to favor free use.

Turning to the covenant at hand, the court found that “commercial activity” was undefined and ambiguous as written. Accordingly, the court ruled that the term should be construed in favor of free use and affirmed the appellate court’s decision to lift the injunction.

Justice Shirley Abrahamson concurred, writing that the term “commercial activity” was unambiguous and that it meant activity undertaken for profit. Justice Abrahamson focused on the occupants’ activities on the property and concluded that no “commercial activity” was conducted on the property.

Justice Daniel Kelly’s concurrence, which was joined by Justice Rebecca Bradley, also focused on the occupants’ activities on the property but found that the renters were not engaging in “commercial activity” on the property. Justice Kelly also wrote that the covenant does not preclude renting out the property.

In dissent, Justice Ann Walsh Bradley found that the term “commercial activity” was not ambiguous and that it means “of or relating to commerce.” Justice Bradley noted that the Nueschwanders made $56,000 renting out the property in 2015, which made it a lucrative enterprise and, therefore, a “commercial activity.” She openly questioned whether the numerous covenants that use the same term or a similar term will be enforceable in the burgeoning short-term rental industry.

Also in restrictive covenant news, the Wisconsin Court of Appeals held that a treehouse was a “structure” covered by a restrictive covenant that provided, “All structures to be place or constructed upon lots . . . shall, prior to construction, be approved in writing, by C&B Investments.”

In *C and B Investments v. Murphy*, James Murphy and Rebecca Richards-Bria were homeowners in a subdivision developed by C and B Investments. In June 2015, without the approval of C and B, Murphy began building a treehouse that would be 10 feet long by 8 feet wide by 7 feet high at its completion. C and B filed suit to enforce the covenant requiring its consent to construct “structures” on its property.

The Circuit Court of Juneau County ruled that the treehouse was not a "structure," and C and B appealed the decision. The Court of Appeals, in a per curiam opinion, reversed the circuit court, finding that the term "structure" was unambiguous and means something that is built or constructed. As the covenant applied to "all structures," it covered a treehouse, according to the appellate court.

Anticipated Private Nuisance

In *Krueger v. AllEnergy Hilton, LLC*, the Court of Appeals addressed whether Wisconsin recognizes a cause of action for anticipated private nuisance. The appellate court held that the state does recognize such a claim but that the complaint in the case before it was deficient.

AllEnergy sought to construct a frac sand mine in the town of Hixton, but town landowners, including Greg Krueger the lead plaintiff, sought a permanent injunction to stop that from happening.

The group of landowners alleged that the proposed mine would operate 24 hours a day, 7 days a week, and would cause air, water, noise, and light pollution as well as vibration. Moreover, they alleged, the mine would deplete ground water, interfere with quiet, peaceful enjoyment, and also cause a drop in property values and an increase in traffic congestion and road damage.

The Circuit Court of Jackson County granted AllEnergy's motion to dismiss the case, and the Court of Appeals affirmed. The court held that Wisconsin does, indeed, recognize a cause of action for anticipated nuisance, and laid out the elements:

(1) Defendant's proposed conduct will "necessarily" or "certainly" create a nuisance; and

(2) The resulting nuisance will cause the claimant harm that is "inevitable and undoubted."

Turning to the case at hand, the Court of Appeals affirmed the circuit court and ruled that the complaint failed to state a claim because the allegations contained within it were "too sparse" and did not support the conclusion that the mine would necessarily create a nuisance and inevitably result in harm.

Statute of Limitations Applicable to Foreclosure Actions

In 2018 in *Bank of New York Mellon v. Klomsten*, the Court of Appeals faced the question of whether Wisconsin's six-year statute of limitations for contract actions bars a mortgage foreclosure action.

Gloria J. and Steven S. Klomsten executed a note and mortgage in 2003 and defaulted in

2005. A foreclosure action against them was not filed until 2016. The Klomstens moved to dismiss while the bank requested summary judgment. The Jefferson County Circuit Court sided with the bank, granted summary judgment, and denied the Klomstens' motion to dismiss. The Klomstens appealed.

The Court of Appeals affirmed the circuit court. The appellate court ruled that while action on the note was barred by the six-year statute of limitations in Wis. Stat. § 893.43, the 30-year limitations period under Wis. Stat. § 893.33 applies, allowing foreclosure of the mortgage.

Stipulated Dismissal of Prior Foreclosure

In *Deutsche Bank Nat'l Trust Co. v. Buboltz*, the Court of Appeals reversed the Milwaukee County Circuit Court and held that the stipulated dismissal of a prior foreclosure action did not bar a lender from filing a subsequent foreclosure action.

In 2006, Alexander Groysman purchased a residential property for which he secured a mortgage with Bank United, FSB. He then deeded the property to EAG Investments, LLC. Bank United assigned the note and mortgage to OneWest Bank, the predecessor of Deutsche Bank.

Payments on the mortgage stopped in 2008 and OneWest Bank filed a foreclosure action in June 2009. In April 2013, a foreclosure judgment was entered. Two years later, in April 2015, the foreclosure was reopened and dismissed without prejudice by stipulation, which stated that the stipulation and order was "due to payoff of the loan."

The loan had not been paid off, however, and OneWest assigned the mortgage to Deutsche in June 2016. In April 2016, Groysman/EAG sold the property, and the title company discovered the unsatisfied mortgage and requested from Groysman the loan number and contact information for the bank. In response, Groysman provided an old letter from the bank that said the load was paid off "contingent" on final audit of Groysman's check, but no payment had actually been made.

Deutsche filed a foreclosure action on May 12, 2017. The purchasers filed a summary judgment motion seeking dismissal of the action, arguing that the prior foreclosure was "dismissed due to payoff of loan," and therefore Deutsche's only option would have been to reopen the old dismissed case, but it was too late under Wis. Stat. § 806.07(2).

The bank countered that the prior case was dismissed without prejudice, allowing the bank to file a new case of its own.

Judge Rothstein in the circuit court dismissed the foreclosure action, and the bank appealed. The Court of Appeals reversed and remanded the case, concluding that a dismissal without prejudice is not final on the merits and "by definition" allows a plaintiff to sue again. The

court therefore ruled that the bank was not barred by Wis. Stat. § 806.07 from filing a new foreclosure action.

If you have questions about these cases or title litigation in Wisconsin contact Steve Slawinski at 414-276-5000 or steve.slawinski@wilaw.com.

WISCONSIN ADOPTS LAW ALLOWING REMOTE ONLINE NOTARIZATION

Wisconsin has now joined a growing group of more than 20 states that allow electronic Remote Online Notarization (RON) of documents. On March 3, 2020, Wisconsin enacted 2019 Wisconsin Act 125, Wisconsin's New RON law. The Act takes effect on May 1, 2020 and requires the Wisconsin Department of Financial Institutions to promulgate new rules regarding the performance of a RON notarial act.

Under prior law, all documents that required notarized signatures had to be executed while in the physical presence of a notary public, who would witness or attest the signature. The new RON law updates document notarization requirements to meet the demands of modern 21st century business practices and technology.

With RON, a signatory no longer needs to be in the physical presence of the notary when the document is executed. In fact, a signatory can be in another city, state, or even another country. The notary may use approved online tools to perform the notarial act while the signatory executes the document at a remote location. The RON law requires the notary and the signatory to have an online audio and visual connection allowing them to communicate with each other in real time, and the notary must make an audio and visual recording of the notarial act.

The use of RON has its limits, however. It cannot be used to notarize certain types of documents, including wills and testamentary trusts, living trusts, powers of attorney, marital property agreements, authorizations for disclosure of health care information, and health care powers of attorney and living trusts. But the new RON law will help to simplify and facilitate the closing of real estate transactions and other business deals.

BEWARE OF MAINTENANCE AND REPAIR RESPONSIBILITIES IN COMMERCIAL LEASES

One of the most important aspects of a commercial lease is apportioning the maintenance and repair responsibilities for the leased premises. Maintenance and repair responsibilities vary greatly based on the type of lease, design of the leased premises, and negotiating power of the landlord and tenant.

At the outset, it is important to appreciate the structure of each lease. Generally speaking, there are two categories of leases based on how rent is calculated. On one end of the spectrum is the gross lease (sometimes called a "full-service lease"), which provides that a tenant's rental payment includes all expenses associated with the leased premises. On the other end of the spectrum is the net lease, which provides that a tenant's rental payment is net of certain expenses in association with the leased premises. In a net lease, the tenant reimburses the landlord for these expenses in the form of additional rent or pays the expenses directly.

Variations of the gross lease and net lease exist. A modified gross lease is more tenant-friendly and allows the landlord and tenant to negotiate which expenses relating to the leased premises should be included and excluded from the tenant's rental payment. A triple net (NNN) lease is the most common type of net lease, and generally provides that a tenant pays the landlord for its proportionate share of real estate taxes, insurance, and operating expenses (usually specifically defined) in addition to the tenant's base rental payment. An absolute net lease is the most landlord-friendly type of lease and apportions all risk and expenses associated with the leased premises, including all maintenance and repair responsibilities, to the tenant.

Chapter 704 of the Wisconsin Statutes governs landlord-tenant rights. Section 704.07 provides default rules for maintenance and repair obligations in the absence of contrary language in a commercial lease.

A landlord's obligations include:

- Keeping common areas in good repair;
- Keeping equipment that furnishes services (e.g., heat, water, elevator, air conditioning) to the tenant in good repair;
- Making all necessary structural repairs; and
- Repairing and replacing plumbing, electrical wiring, machinery, and equipment furnished with the leased premises.

Wis. Stats. § 704.07(2).

A tenant's obligations include:

- Repair and remediation for damage and infestation caused by action or inaction of the tenant; and
- Ordinary and routine maintenance and repairs for plumbing, electrical wiring, machinery, and equipment furnished with the leased premises.

Wis. Stats. § 704.07(3).

Typically, a landlord is responsible for the repair of structural and major component parts of the leased premises, as well as any replacements that would be considered capital expenditures, such as the roof, parking lot, and foundation. The tenant remains responsible for maintenance and ordinary repairs to items inside of the leased premises over which the tenant has control. In many commercial leases, however, a landlord may attempt to shift repair and replacement responsibilities to a tenant for items that exclusively service the leased premises. One common example is heating, ventilation, and air conditioning (HVAC) systems, which can carry considerable costs.

A good rule of thumb is that the longer the lease term and the fewer number of tenants in a particular building, the more likely it is that a tenant will take on additional maintenance and repair responsibilities. Landlords and tenants should be careful to clearly apportion these responsibilities to avoid ambiguity. For example, "operating expenses" should be clearly defined to avoid any misunderstandings between the parties.

Whether you are a landlord or a tenant, our experienced legal team at O'Neil Cannon can answer your lease questions and protect your interests.

NO-CONTEST CLAUSES

When Denver Broncos owner Pat Bowlen died in June 2019, he left behind a professional football franchise valued at more than $2.5 billion. The validity of his trust, wherein he named one of his seven children as chief executive after he passed, is being fought over in court by his children.

After Bowlen's death, his two oldest daughters, Amie Bowlen Klemmer and Beth Bowlen Wallace, filed a lawsuit challenging the validity of the trust. They argue that Bowlen was subject to undue influence when he executed the trust in 2009 and that he lacked the requisite mental capacity to create the trust. Bowlen lived with Alzheimer's Disease for several years before his death, and the trustees of his trust have run the NFL team since 2014 when Bowlen stepped down for health reasons.

Amie's and Beth's challenge is not without risk because of what is known as a "no-contest clause" contained within the terms of the trust document. The "no-contest clause" could cause them to receive nothing from their father's trust.

Simply put, a "no-contest clause" – also known as an "*in terrorem* clause" – in a will or trust seeks to punish a beneficiary who challenges the decedent's estate plan. Generally, the "punishment" for the beneficiary who challenges the will or trust is disinheritance. The threat of losing out on all or part of an inheritance is often enough to keep a beneficiary from challenging a will or trust with a "no-contest clause" in it.

Laws concerning "no-contest clauses" vary by state. Wisconsin has a statute that addresses the use of "no-contest clauses," explicitly permitting them but limiting their enforcement "if the court determines that the interested person had probable cause of instituting the proceedings." That is, in Wisconsin, the court may decide not to enforce the provision if the court finds that the contestant had sufficient facts to justify why he or she made the contest, even if the contestant's challenge was ultimately unsuccessful. Of course, this means that a court could enforce a "no-contest clause" if the court finds that the challenger had no "probable cause" for bringing the challenge in the first place if the court upholds the will or trust as valid. Accordingly, under Wisconsin law, there is considerable risk involved in bringing a challenge to an estate planning document with a "no-contest clause" in it.

Bowlen's case is in Colorado, which explicitly allows "no-contest clauses" in wills but has no corresponding provision in statutes concerning trusts. Case law on the issue is also sparse, so in this situation, if Amie and Beth are found to be in violation of the "no-contest clause" and the trust is held to be valid, it is quite possible that they would forfeit their shares of the trust. On the other hand, if a court finds they had probable cause to challenge the trust, it's also possible that a court would decline to enforce the "no-contest clause."

ARETHA FRANKLIN'S ESTATE: ARE HANDWRITTEN DOCUMENTS VALID WILLS?

Aretha Franklin's heirs are embroiled in a court battle due to several handwritten documents that the Queen of Soul wrote before her death. The issue at hand is: Are these handwritten documents valid wills under Michigan law?
Shortly after Aretha's death in August 2018, no will could be found, which meant that Aretha's assets would be distributed to her next of kin via Michigan's intestate law. Later, three separate handwritten wills were found in Aretha's home, leading to a dispute between Aretha's children in the Michigan probate court. One will was found in a notebook stashed

under some couch cushions in Aretha's living room. The attorney for Aretha's estate submitted these handwritten wills to the probate court, even though he questioned whether these handwritten wills were valid under Michigan law. The documents lack the usual formalities of a Last Will and Testament–some of the handwriting is difficult to read, some verbiage is crossed out, and some notes are penned in the margins of these documents.

The validity of handwritten wills is often questioned because it is difficult to know whether the decedent really did write the document, whether that document truly conveys the decedent's last wishes, and sometimes, what the decedent's last wishes were.

Michigan Law May Honor Aretha's Handwritten Will

In Michigan, the general rule is that a will is valid if it meets three requirements: (1) it is in writing; (2) it is signed by the testator or, while the testator is present, by another at the testator's direction; and (3) it is signed by at least two witnesses within a reasonable time after seeing the testator sign or after the testator acknowledges the signature. At first glance at this statute, it would appear the handwritten wills of Aretha drafted in private do not comply with the Michigan statutory requirements.

However, Michigan recognizes an exception to the will requirements under what is known as a "holographic will." A holographic will is an informal will that is handwritten and signed by the testator, but there is no witness requirement or the need for lawyer involvement, thereby forsaking some of the execution formalities required under Michigan law. Michigan simply requires a holographic will to be dated, signed, and that the material terms of the will are in the testator's handwriting.

For any of Aretha's holographic wills to be upheld the proponents of her will need to establish she intended these documents to be her last will and testament. Michigan courts will declare a holographic will valid only if it can be demonstrated by "clear and convincing evidence" that the testator intended the document to be the decedent's will. Aretha's intent can be proven by using outside evidence such as the nature of the relationships with her sons or even portions of the documents not in her handwriting. Aretha's intent may be difficult to prove, because of the informal and secretive nature of the handwritten wills. Even if Aretha's intent can be shown and a handwritten will is upheld by the court, a long and expensive court battle among her children will likely follow.

Wisconsin Law Does Not Allow Holographic Wills

Unlike Michigan, Wisconsin has taken a firm stance against holographic wills and will not uphold them as valid. In Wisconsin there are nearly identical will requirements to those in Michigan: (1) it must in writing; (2) the will must be signed by the testator or in the presence of the testator at the testator's direction; and (3) the will must be signed by at least two

witnesses within a reasonable time after witnessing the signing of the will, after the testator's acknowledgment of their signature on the will, *or* after the testator's acknowledgement of the will. What is not identical is Wisconsin's acceptance of holographic wills. If the controversy was taking place in Wisconsin, Aretha's handwritten documents would not be held to be valid wills and Aretha's estate would be distributed to Aretha's next of kin via Wisconsin's default intestate rules.

Estate planning can be a challenging and stressful process that all too often ends in disputes such as this. Wisconsin residents should meet with an experienced estate planning attorney to ensure his or her will is valid under Wisconsin law.

For estate planning assistance contact Kelly M. Spott at 414-276-5000
or kelly.spott@wilaw.com.

IRS UNVEILS SIGNIFICANT VIRTUAL CURRENCY TAXATION ENFORCEMENT INITIATIVE

The Internal Revenue Service (IRS) recently announced that, by the end of August 2019, more than 10,000 taxpayers would receive mailed letters relating to virtual currency. The IRS is sending the letters to taxpayers who may have failed to report income, pay taxes, or properly report virtual currency transactions. For this purpose, virtual currency includes cryptocurrency and non-crypto virtual currency, including Bitcoin, Ether and JPM Coin.
There are three different types of letters being sent to taxpayers. Each of the three versions are intended to provide information to help taxpayers understand their tax and filing obligations and how to correct previous errors. However, the letters differ from one another in tone and in the response required by the recipient taxpayer.
Two of the letters invite taxpayers to voluntarily report and pay previously unreported virtual currency income, penalties, and interest. The other letter alleges likely noncompliance in stronger terms and requires specific action by a stated deadline. The text of this final letter indicates that the recipient should expect significant IRS scrutiny, as well as potential examination or enforcement action.

Three Letter Versions

- **Letter 6174** (available here) notifies a taxpayer that the IRS has information regarding a potential failure to report income from a virtual currency transaction. The letter provides information regarding the taxation and reporting rules which apply regardless of whether the taxpayer received a payee statement (such as a Form W-2 or Form 1999) for a virtual currency transaction. Taxpayers need not respond to the letter, but

are advised to file amended tax returns or delinquent tax returns if a virtual currency transaction was not previously accurately reported on a federal income tax return.
- **Letter 6174-A** (available here) is worded nearly identically to Letter 6174. A key difference is that this letter informs the recipient taxpayer that the IRS is likely to send additional correspondence about potential virtual currency tax enforcement in the future.
- **Letter 6173** (available here) asserts that federal tax filing and reporting requirements appear to have been unmet by the recipient taxpayer for one or more of the tax years 2013 through 2017. The letter then directs the taxpayer to file amended tax returns. If the taxpayer believes that all tax reporting requirements have already been properly met, the taxpayer must formally respond to the IRS to attest to that position. Supporting detail and documentation must also be submitted. The taxpayer is required to sign the attestation under penalties of perjury that the submission, including all attachments, are true, correct, and complete. Any taxpayer-submitted information will be checked for accuracy against information received by the IRS from banks, financial advisors, and other sources. If a taxpayer does not respond to this letter within 30 days of the date on which the letter was mailed, the IRS will refer the account for audit.

Second Round of Additional Letters

In addition to the more than 10,000-letter initiative that the IRS publicly announced, as described above, some taxpayers are also reporting receipt of an apparent second group of letters in the form of a CP2000 Notice. The CP2000 Notice states that the IRS has received information from a third party that doesn't match information on the taxpayer's submitted tax return. The notices acknowledge that a virtual currency trading exchange, rather than the taxpayer, may have made the error. In any event, receipt of a CP2000 Notice indicates that the IRS is aware of a reporting discrepancy. A response to the letter is imperative and additional detail on responding is available here).

IRS Regards Virtual Currency as Property

The current IRS Virtual Currency enforcement initiatives conform to IRS guidance previously published in Notice 2014-21, which provides that virtual currency is treated as property for federal tax purposes. As is the case with any property, tax law requires reporting and taxation of amounts that are transferred for services or sold. Among other things, this means that:

- A payment made (or received) in virtual currency is subject to information reporting to the same extent as any other payment made (or received) in property.
- Payments using virtual currency made to independent contractors and other service providers are taxable, and self-employment tax rules generally apply. Typically, payers must issue Form 1099-MISC.
- Wages paid to employees using virtual currency are taxable to the employee, must be reported by an employer on a Form W-2 and are subject to federal income tax withholding and payroll taxes.
- Certain third parties who settle payments made in virtual currency on behalf of merchants that accept virtual currency from their customers are required to report

payments to those merchants on Form 1099-K, Payment Card and Third-Party Network Transactions.
- A taxpayer that successfully "mines" virtual currency (for example, uses computer resources to validate Bitcoin transactions and maintain the public Bitcoin transaction ledger) realizes gross income upon receipt of the virtual currency resulting from those activities.
- The character of gain or loss from the sale or exchange of virtual currency depends on whether the virtual currency is a capital asset in the hands of the taxpayer.

Expect Additional IRS Enforcement Efforts

The IRS has stated its awareness that because transactions conducted using the more than 1,500 known virtual currencies can be difficult to trace and have an inherently pseudo-anonymous aspect, some taxpayers may be tempted not to report virtual currency-related income to the IRS. The mailing of the more than 10,000 letters and the CP2000 Notices, to taxpayers believed to have engaged in unreported virtual currency transactions, is therefore likely to be only the first of many virtual currency enforcement actions. Additional IRS guidance is expected to be published on virtual currency reporting and taxation rules soon, updating the last official guidance issued in 2014

In the meantime, even taxpayers who do not receive a letter or notice should be aware that a failure to properly report the income tax consequences of virtual currency transactions could result in liability for tax, penalties, interest, and in some cases, exposure to criminal prosecution. Criminal charges could include tax evasion and filing a false tax return. Anyone convicted of tax evasion is subject to a prison term of up to five years and a fine of up to $250,000. Anyone convicted of filing a false return is subject to a prison term of up to three years and a fine of up to $250,000.

The attorneys of O'Neil Cannon can assist in reviewing, or responding to any of the three types of IRS Virtual Currency letters, the CP2000 Notices, and other tax-related notice or assessment letters received from the IRS.

IRS DECLARES SALES OF PROPERTY FROM ONE SPOUSE'S GRANTOR TRUST TO THE OTHER SPOUSE'S GRANTOR TRUST TO BE TAX FREE TRANSACTIONS

In a recent Private Letter Ruling the IRS declared that sales of property between spouses and the spouses' grantor trusts do not trigger income taxation. This ruling validates a planning technique using special trusts called Spousal Lifetime Access Trusts (SLATS) and transactions

between the spouses and these trusts. This type of planning is used to minimize or avoid estate tax and to protect assets from creditors and divorce. Please see PLR 201927003, Rev Rul 85-13, 1985-1 CB 184, and Code Sec. 1041(a).

OBJECTING TO AN OPPOSING PARTY'S REQUEST FOR ATTORNEY FEES CAN HAVE RAMIFICATIONS

You just lost a case in which the opposing party has a claim for attorney fees pursuant to a contract, statute or other fee-shifting mechanism. The opposing party has now filed a motion for attorney fees. Your initial reaction is to oppose the motion by arguing that the amount of time spent by the opposing party's attorneys was excessive and their hourly rates are unreasonable. Before pulling the trigger, however, you will want to consider a potential negative ramification of taking that position.

When a party requests an award of attorney fees, the party must establish that its request is reasonable, meaning that the time spent on the case by its attorneys was reasonable in the context of the factual and legal issues in dispute, and that its attorneys' hourly rates are reasonable in the community in which the case is venued. The party on the other end of the motion, of course, has the right to challenge the fee request. When such a challenge is made, the moving party may counter by seeking discovery of the objecting party's attorney fees in the case. This is usually done for two reasons: (1) to try to back off the objecting party by creating the risk that its own attorney fees will be discoverable, and (2) to argue to the court that the best evidence of what is reasonable is what the objecting party paid in litigating the same legal and factual issues in the case.

Wisconsin has not yet decided whether such discovery is permissible, but courts in other jurisdictions have frequently considered the issue and are split on their holdings. The majority of courts hold that discovery of an objecting party's attorney fees is permissible under these circumstances. As one court held, "the defendant's fees may provide the best available comparable standard to measure the reasonableness of plaintiffs' expenditures in litigating the issues of the case." *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 1996 WL 66111, at *3 (N.D. Ill. Feb. 13, 1996). As another court held, "the time spent by the defense counsel . . . may well be the best measure of what amount of time is reasonable," calling it a "logical yardstick." *Pollard v. E.I. DuPont De Nemours and Co.*, 2004 WL 784489, at *3 (W.D. Tenn. Feb. 24, 2004).

Numerous other cases hold the same way. *See*, *e.g.*, *Henson v. Columbus Bank and Tr. Co.*, 770 F.2d 1566, 1574-75 (11th Cir. 1985); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 587 (3d Cir. 1984); *Frommert v. Conkright*, 2016 WL 6093998, at **2-3 (W.D.N.Y. Oct. 19, 2016); *Mendez v. Radec Corp.*, 818 F. Supp. 2d 667, 668-69 (W.D.N.Y. 2011); *Cohen v. Brown Univ.*, 1999 WL 695235, at **2-4 (D.R.I. May 19, 1999); *Murray v. Stuckey's Inc.*, 153 F.R.D. 151, 153 (N.D. Iowa 1993); *Coal. to Save our Children v. State Bd. of Educ.*, 143 F.R.D. 61, 64-66 (D. Del. 1992); *Real v. Cont'l Grp., Inc.*, 116 F.R.D. 211, 213-14 (N.D. Cal. 1986); *Blowers v. Lawyers Coop. Publ'g Co.*, 526 F. Supp. 1324, 1325-28 (W.D.N.Y. 1981); *Naismith v. Prof'l Golfers Ass'n*, 85 F.R.D. 552, 562-64 (N.D. Ga. 1979); *Stastny v. S. Bell Tel. and Tel. Co.*, 77 F.R.D. 662, 663-64 (W.D.N.C. 1978); *Vulcan Materials Co. v. Chandler*, 992 So. 2d 1252, 1268 (Ala. 2008); *Paton v. Geico Gen. Ins. Co.*, 190 So. 3d 1047, 1050-53 (Fla. 2016); *Miller v. Kenny*, 325 P.3d 278, 303 (Wash. Ct. App. 2014).

A minority of courts go the other way, holding that what an objecting party paid in attorney fees to defend a case is not relevant on the issue of whether what the plaintiff paid to prosecute the case is reasonable. The most recent case to so hold is *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794 (Tex. 2017). In that case, the Texas Supreme Court held as follows:

To the extent factual information about hourly rates and aggregate attorney fees is not privileged, that information is generally irrelevant and nondiscoverable because it does not establish or tend to establish the reasonableness or necessity of the attorney fees an opposing party has incurred. A party's litigation expenditures reflect only the value that party has assigned to litigating the matter, which may be influenced by myriad party-specific interests. Absent a fee-shifting claim, a party's attorney-fee expenditures need not be reasonable or necessary for the particular case. Barring unusual circumstances, allowing discovery of such information would spawn unnecessary case-within-a-case litigation devoted to determining the reasonableness and necessity of attorney-fee expenditures that are not at issue in the litigation.

Id. at 799. Other cases similarly holding include *Hernandez v. George*, 793 F.2d 264, 268 (10th Cir. 1986); *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646, 659-60 (7th Cir. 1985); *Costa v. Sears Home Improvement Prods., Inc.*, 178 F. Supp. 3d 108, 113 (W.D.N.Y. 2016).

Because Wisconsin has not decided this issue as of yet, and other jurisdictions are split on the issue, it may be risky to oppose an opponent's request for attorney fees on the grounds that the time spent by its attorneys was excessive or its attorneys' hourly rates are unreasonable, particularly if it is anticipated that the attorney fees you spent likely exceed the attorney fees spent by your opponent.

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