UNITED STATES SUPREME COURT CLARIFIES STANDARD ON SANCTIONS FOR VIOLATING BANKRUPTCY DISCHARGE

On June 3, 2019, the United States Supreme Court in *Taggart v. Lorenzen* unanimously held that a bankruptcy court may impose contempt sanctions against a creditor for violating a discharge order where "there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful." The Court rejected the Ninth Circuit Court of Appeals' holding that a creditor's good faith belief that its collection actions did not violate the discharge order—even if unreasonable—shields the creditor from civil contempt sanctions.

A discharge order is a fundamental part of the bankruptcy system. It releases the debtor from personal responsibility for pre-bankruptcy debts, and enjoins creditors from attempting to collect a debt covered by the discharge order.

But not all debts are discharged. The Bankruptcy Code lists 19 categories of debt that are excepted from discharge. Discharge orders, however, do not specify which of the debtor's debts are discharged. As a result, it may be unclear whether a particular debt is covered by an order, leaving creditors to guess whether the debts owed to them were discharged.

In *Taggart*, the Court resolved when it is appropriate to sanction a creditor who guesses wrong and attempts to collect a debt in violation of a discharge order.

The facts of the case are unusual. Taggart transferred his interest in an Oregon limited liability company to his attorney. The company and the other owners sued Taggart in state court for transferring his interest in violation of the company's operating agreement. On the eve of trial, Taggart filed for Chapter 7 bankruptcy, which stayed the state-court litigation pending completion of the bankruptcy.

After Taggart received a bankruptcy discharge, the state-court action resumed. The state court unwound the transfer and ordered Taggart to pay the company's post-bankruptcy attorney's fees. While Taggart's discharge order would normally cover these fees, the state court concluded that Taggart "returned to the fray" of litigation after bankruptcy, thereby making him liable.

Meanwhile, Taggart returned to the bankruptcy court and asked that it hold the company and owners in contempt for violating the discharge order by seeking attorney's fees against him. The bankruptcy court denied Taggart's request, agreeing with the state court that Taggart had returned to the fray. The district court on appeal disagreed that Taggart had returned to the fray and, as a result, held that the company and owners had violated the discharge order.

On remand, the bankruptcy court imposed contempt sanctions against the company and owners for violating the discharge order. The company and owners appealed the sanctions award, and the Bankruptcy Appellate Panel reversed. Taggart appealed, and the Ninth Circuit affirmed the panel's decision. It held that a creditor's "good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable."

Justice Stephen Breyer's 11-page opinion unequivocally rejected the Ninth Circuit's "good faith belief" standard, holding that civil contempt sanctions are appropriate when there is no "fair ground of doubt" as to whether a creditor's actions violated a discharge order. The Court reasoned that the Ninth Circuit's subjective standard is contrary to traditional civil contempt principles and depends too much on "difficult-to-prove states of mind." The Court similarly rejected a near strict liability standard under which a creditor who violated a discharge order would be sanctioned, even if the creditor had an objectively reasonable basis for concluding that its conduct was lawful. Because the Ninth Circuit had applied an improper standard, the Court vacated the judgment and remanded for further proceedings consistent with the opinion.

As a practical matter, although the Court did not adopt the Ninth Circuit's subjective standard, *Taggart* is still a win for creditors because it provides some needed clarity on when creditors can be sanctioned for violating a discharge order. However, while this decision may provide peace of mind to many creditors collecting a debt after bankruptcy, it is important that creditors ensure they have an objectively reasonable argument that debts they are collecting were not discharged in bankruptcy. A failure to do so may result in civil contempt sanctions, including the debtor's attorney's fees and costs, damages for emotional distress, and punitive damages.

Creditors should also be aware that *Taggart's* standard on sanctions for violating a bankruptcy discharge order does not apply to violations of the automatic stay. Accordingly, creditors' objectively reasonable belief that their actions did not violate the automatic stay may not insulate them from sanctions.

For further information, please contact Jessica Haskell at 414-276-5000 or jessica.haskell@wilaw.com.

GIVE A GUARANTOR SOME CREDIT!

Before extending commercial loans, lenders will regularly require an owner or principal of a borrowing entity to personally guaranty payment of the entity's loan obligations. It is well-

settled under Wisconsin law that a personal guaranty contract is separate and distinct from the borrower's loan contract with its lender. For this reason, lenders are entitled to enforce a personal guaranty as either a stand-alone obligation or in conjunction with an enforcement action against its borrower on the loan debt.

Often, lenders will elect to enforce the obligations of a borrower and guarantor in a single court action. Such an action may also seek to foreclose collateral pledged to secure the borrower's indebtedness such as mortgaged real property. This was exactly how Horizon Bank proceeded to collect a personally guaranteed loan obligation.

Horizon Bank loaned $5 million to its customer, Marshalls Point, secured by a mortgage upon real property in Sister Bay, Wisconsin. Musikantow, a member of Marshalls Point, executed a personal guaranty of payment of the $5 million loan. Upon Marshalls Point's loan default, Horizon Bank commenced a foreclosure action of the real property and, in the same action, brought a claim for a money judgment against Musikantow per the terms of his guaranty.

The parties to the lawsuit stipulated to the entry of both a judgment of foreclosure of the Sister Bay property as well as a $4 million judgment against Musikantow as the guarantor of the loan. The stipulation provided that the Sister Bay property be sold at a sheriff's sale and that proceeds realized by Horizon from the sale be credited to reduce the money judgment against Musikantow.

Horizon Bank purchased the Sister Bay property with a sheriff's sale credit bid of $2.25 million. Horizon then moved the circuit court for confirmation of its credit bid as being fair value for the property per the requirements of section 846.165 of the Wisconsin Statutes. In its confirmation motion to the court, Horizon also indicated that it would not seek a deficiency judgment against its borrower, Marshalls Point, but requested an order applying the amount of its credit bid to offset the $4 million judgment against Musikantow on his guaranty.

Musikantow and Marshalls Point did not oppose confirmation of Horizon Bank's $2.25 million credit bid as being "fair value" for the Sister Bay property, but objected to Horizon Bank's request to apply only this credit bid amount toward Musikantow's guarantor judgment. Musikantow argued that "fair value" is not the same as "fair market value." Accordingly, he argued he should be entitled to a credit against his guaranty obligation in an amount greater than the $2.25 million credit bid since, in Musikantow's opinion, the Sister Bay property was worth far more.

The circuit court entered an order confirming the sheriff's sale, but left the calculation of Musikantow's credit for another day. Horizon Bank appealed the circuit court's order and argued that Musikantow's guaranty obligation should be credited to the extent of the amount of proceeds received by the bank from the sheriff's sale. The court of appeals agreed with Horizon Bank and reversed the circuit court, remanding the case to Door County with a

direction to amend the money judgment against Musikantow by applying a credit of $2.25 million.

The court of appeals was ultimately reversed. The Supreme Court of Wisconsin determined that the stipulation executed among Horizon Bank and Musikantow was ambiguous as to the credit to be provided against Musikantow's judgment obligations. Moreover, the court held that, under Wisconsin law, the credit to be provided toward a guarantor's obligation is not a function of the "fair value" required to confirm a foreclosure sale under section 846.165 of the Wisconsin Statutes. Accordingly, the Supreme Court remanded the case to the circuit court to determine the fair market value of the Sister Bay property so that such amount may be credited toward Musikantow's guarantor judgment.

As a result of the Supreme Court's decision in Musikantow, lenders have some interesting decisions to make when determining how best to enforce a loan obligation, particularly when the payment of such a loan obligation is guaranteed by a liquid and collectible guarantor. Why should a lender commence an action to liquidate collateral pledged by its borrower when there exists a guarantor having the ability to satisfy the loan obligation? Proceeding against a wealthy guarantor would seem less risky than a lender credit bidding and taking title to property through a sheriff's sale, while having to afford a credit to its guarantor for the full market value of the property (an amount which is subject to litigation and uncertain until ordered by a court). Especially troubling is the fact that it is not uncommon for lenders to fall short in obtaining net proceeds equivalent to the amount credit bid when property obtained at sheriff's sale is ultimately sold by the lender to a third-party. This dilemma faced by lenders does not seem to be in the best interest of some guarantors who may now be the prime collection target of a loan obligation, as opposed to pledged collateral. Moreover, it would seem that personal guarantees of payment may no longer be afforded the value traditionally provided by lenders in underwriting a commercial loan following Musikantow. This has the potential of driving up the costs of lending which may ultimately be passed on to borrowers.

As a practical effect of Musikantow, it is imperative that lenders have a level of certainty and evidence of the fair market value of pledged collateral before choosing to proceed down the dual path of foreclosing collateral and enforcing a personal guaranty. A failure to undertake such an analysis may effectively result in an unexpected credit to a guarantor whom a lender expected to look to for recovery.

For more information on this topic or assistance in the enforcement of a commercial loan obligation, contact John Schreiber at 414-276-5000 or John.Schreiber@wilaw.com.

CONSIDERATIONS FOR CONTRACTUAL ARBITRATION PROVISIONS

Arbitration is a common form of alternative dispute resolution (ADR) used frequently and effectively in business settings. In arbitration, the parties have flexibility to choose decision-makers, jurisdiction, and many procedural rules, but they limit themselves in terms of discovery and some courtroom protections.

While most courts will enforce arbitration clauses in contracts, such clauses should be sufficiently clear and precise. When considering arbitration and contractual arbitration provisions:

1. Treat arbitration clauses as key business terms.

The arbitration clause contains the details of how you will settle any dispute that arises. Review it as carefully as you would any other business term, like delivery or payment details.

2. Use the contractual negotiation process to design a mutually-agreeable arbitration clause.

During contract negotiation, most business parties are cooperating well together and are pursuing a shared interest in creating a contract that benefits them both. This atmosphere lends itself well to creating an arbitration clause that will meet the parties' respective needs if a dispute arises later.

3. Attend to the details.

Although negotiation is a good time to address arbitration decisions, remember that cooperation between the parties in negotiating their contract is not necessary a sign that this corporation will continue. Any details regarding arbitration not agreed upon at the outset of the deal may be more difficult to negotiate after the arbitration provision is part of a signed agreement and the parties face a dispute and feel less inclined to cooperate.

4. Focus on the type of arbitration that is appropriate for the transaction.

The type of arbitration that is most familiar to you may not be the best choice for every transaction or situation. Consider your business goals each time the question of arbitration is discussed. For instance, will the circumstances of a future dispute lend itself well to binding arbitration, or does non-binding arbitration provide more or better "bargaining power" to discuss a settlement of the dispute?

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

414-276-5000.

EVEN THE BRIGHTEST MINDS CAN SUFFER FROM DEMENTIA

Recently, Justice Sandra Day O'Connor, the first woman appointed to the United States Supreme Court, wrote a letter addressed to "Friends and fellow Americans" discussing her diagnosis with the beginning stages of dementia. In her letter, Justice O'Connor explained that her condition is "probably Alzheimer's disease."

Justice O'Connor, age 88, was appointed to the Supreme Court by President Ronald Reagan in 1981. Since retiring from the Supreme Court in 2006, Justice O'Conner has continued to demonstrate her commitment to public service. In 2010, Justice O'Conner began the iCivics program, which she describes as an educational program designed "to teach the core principles of civics to middle and high school students with free online interactive games and curriculum that make learning relevant and remarkably effective." As explained in her recent letter, Justice O'Connor believes her diagnosis means she can no longer help to lead this cause, but she believes the program will continue to flourish under new leadership. More information on the iCivics program can be found at www.icivics.org.

The sad news regarding Justice O'Connor's diagnosis reminds us that even the brightest minds are not immune to the devastating impacts of Alzheimer's disease and other forms of dementia. Justice O'Connor's letter might also serve as inspiration for those who suffer from dementia or who have family members or other loved ones who suffer from such conditions. You can find the full letter here.

It is important to acknowledge the significant impacts that this tragic disease can have on families and on our society as a whole. As our nation's baby boomers continue to age, the number of people impacted by dementia will likely increase significantly. According to the Alzheimer's Association, there are currently about 5.7 million people suffering from Alzheimer's disease in the United States, and that number is expected to double by 2050.

We would do well to heed one of the statements that Justice O'Connor made in her letter: "It's not enough to understand [the effects of dementia], you've got to do something." At O'Neil Cannon, we remain committed to helping to protect the legacies of those who suffer from this disease. Unfortunately, there are times when a family member or other acquaintance might attempt to take advantage of a person suffering from dementia by exerting undue influence to gain a financial benefit. These attempts to take advantage might

involve unauthorized transfers or withdrawals of money from an elderly person's accounts, or improperly seeking to elicit changes to a will, trust, or other legal document. While many people diagnosed with dementia remain capable of changing their estate plans for some period of time after they are diagnosed, if such changes are the result of undue influence, then those who are impacted may have the right to pursue relief in court.

If you would like to further discuss this article, please feel free to contact Attorney Trevor Lippman at 414-276-5000 or Trevor.Lippman@wilaw.com.

CREATING ARBITRATION CLAUSES IN CONTRACTS: WHERE AND HOW

Arbitration clauses in commercial and employment contracts are increasingly popular as a means to try to settle business disputes without going through a court trial. Arbitration clauses should be clear regarding how the arbitration is to be carried out.

In addition to detailing who will hear the dispute (the arbitrator), an arbitration clause should designate a place or venue for the arbitration. This is particularly important if there is a chance the dispute will be between a private party and a foreign government. If so, the private party may wish to have any arbitration take place in a neutral country.

An arbitration clause also should make clear how the arbitration will be carried out. For example, what issues will be decided in the arbitration – and what issues, if any, should be excluded from the arbitration? There may be certain issues that are not suited to arbitration, or that cannot be arbitrated in a particular jurisdiction. In addition, arbitration clauses can specify whether the arbitration is intended to be binding or non-binding, as well as the governing law to be applied.

A "good faith negotiation" or mediation clause can be useful to allow the parties to attempt to settle their dispute before the arbitration begins, either by direct negotiation or with a third party mediator.

Also, consider language to address certain procedural issues, such as: the scope and nature of discovery and the discovery process and the arbitration hearing procedures, including rules of evidence, exhibits, court reporters, and the record (if any) of the proceeding. Arbitration clauses also can include information on the scope of allowable remedies, including whether injunctive relief is allowed or the parties can agree to limitations or exclusions of remedies.

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

TERMS AND CONDITIONS: HOW SELLERS CAN AVOID GETTING INJURED IN A "BATTLE OF THE FORMS"

In an ideal world, parties involved in the sale and purchase of goods would have a signed contract to establish the terms and conditions of the sale. A well-drafted, signed contract confirms the parties' intentions to create a contract and clearly articulates its material terms in a single document. If a dispute arises, the parties can refer to that contract to determine each side's rights and obligations.

More often than not, though, companies conduct business via purchase orders and acknowledgments without ever signing a separate contract. In such cases, how do you determine the governing terms of the agreement or whether a contract has actually been formed?

This article answers these critical questions by providing an overview of contract formation and discussing the rules and laws that govern contracts when disputes occur. Particular attention is focused on the "Battle of the Forms," which arises when there is no signed contract between buyers and sellers and each party refers to their own standard terms and conditions. Although this battle puts sellers at a distinct disadvantage, there are steps that sellers can take to protect themselves if such a battle arises.

Contract Formation Overview

Common law and the Uniform Commercial Code (the "UCC") are the two bodies of law that govern the creation, performance, and enforcement of contracts. Common law applies to contracts relating to services, real estate, insurance, and intangible assets, while the UCC covers contracts for the purchase and sale of goods. If a contract contains both goods and services, then whichever transaction is dominant dictates the applicable body of law.

Under both bodies of law, a contract is created by an offer and its acceptance (plus consideration, but that's not of issue here). However, the laws diverge when it comes to defining the actions that constitute "acceptance."
Let's take a look at these differences.

Acceptance: Common Law

Under the common law, a contract is valid only if the offer and acceptance mirror each other. In other words, when a party accepts an offer it must be on the exact same terms as the original offer. If the terms differ, a rejection, not an acceptance, has occurred and no contract is formed. This is called the “mirror image rule.”

If a party accepts an offer but attaches different terms to the offer, common law views the acceptance as a counter-offer instead. The original offeror may then accept the counter-offer or make a counter-offer of its own. If this back-and-forth continues on the terms, but the goods are eventually sent, then the terms contained in the last document apply. This is known as the “last shot rule.” Obviously, this rule gives an enormous advantage to whomever sends the last document.

Acceptance: The UCC

The UCC modifies both the mirror image rule and the last shot rule. Under Section 2-207 of the UCC, a binding contract may arise even if an offeree’s acceptance makes changes to the terms of the original offer, excluding a few specific situations. In addition, to avoid the last shot rule, Section 2-207 has special rules that dictate how the law handles conflicting terms and conditions. To best understand how Section 2-207 works, let’s examine its application in the formation of different sales contracts.

Signed Contract

Section 2-207 does not apply to signed contracts. Accordingly, a written and signed contract setting forth the agreed upon terms and conditions is the best scenario for both sellers and buyers. While there may be a dispute regarding interpretation of the contractual language, Section 2-207 would not come into play in this scenario. Section 2-207 thus does not apply to signed contracts.

Contract by Exchange of Forms: Battle of the Forms

When a seller and buyer create a contract through an exchange of forms, a Battle of the Forms is inevitable. A contract by exchange of forms usually occurs as follows: A buyer and seller negotiate and agree on main points such as price, quantity, quality and time for delivery. The buyer then submits a purchase order with pro-buyer boilerplate terms and conditions. The seller responds with an acknowledgement containing equally strong pro-seller terms and conditions. Following the exchange, performance occurs and the seller ships the goods and the buyer accepts them.

If a dispute arises, one party may argue that there was no agreement on certain terms

because such terms were additional terms prohibited by the UCC. Under Section 2-207, if an acceptance or confirmation includes additional terms, those extra terms will become part of the contract unless:

- the offer expressly limits acceptance to the terms of the offer;
- the additional terms materially alter the offer; or
- notification of objection has been given or is given within a reasonable time after the additional terms are received.

Conflicts often arise over whether an additional term is a material alteration such as:

- Changes to price, quantity, delivery;
- Warranty disclaimers;
- Limitations on liability;
- Limitation on time for bringing claims;
- Choice of law or forum provisions; or
- Attorneys' fees provisions.

Sellers are in a precarious position in a Battle of the Forms. Most of the protections a seller would include in its acknowledgement to a buyer would be considered material alternations. As a result, those protections would not become a part of the contract between seller and buyer.

Contract by Conduct

Now, let's imagine that there's been a Battle of the Forms with material alterations included in the acknowledgment, but the buyer and seller have performed despite the differences. A subsequent dispute arises over the terms. How does the UCC determine the applicable terms?

Section 2-207 dictates that terms in both forms that do not clash become part of the contract. The remaining terms, however, are supplied by the UCC. These are called "gap fillers" and are very buyer friendly. They include:

- Implied warranties of merchantability and fitness;
- No limitation on seller's liability;
- Consequential damages;
- Four-year statute of limitations;
- Payment due on delivery;
- Insurance risk remains with the seller until delivery of goods; and
- Additional buyer and seller remedies.

Advice for Sellers

As previously stated, it's best to always operate with a signed agreement. Unless you have a

signed contract, you will likely be dealing with the Battle of the Forms. Given the pro-buyer nature of the UCC, sellers are at a distinct disadvantage in this battle, even with well-drafted terms and conditions. If UCC gap fillers are used, the seller is subject to much additional risk.

So what's a seller to do?

- Never assume that your terms and conditions will automatically be applied.
- Never sign a buyer's form unless key issues have been addressed and resolved.
- Reference and attach your terms and conditions early, often and every single time there's an exchange.
- Attempt to have the buyer accept and sign the seller's terms and conditions.
- Carefully review the terms and conditions in the buyer's forms and respond with express objections prior to commencing performance.
- Get the buyer to modify its standard terms and conditions to include the seller's key protections.
- Always include certain non-negotiable terms in your terms and conditions.
- Attempt to negotiate a master contract with the buyer that lays out all of the applicable and acceptable terms and conditions for contractual dealings with one another moving forward.

Also note that certain protections in a seller's terms and conditions should be considered to be non-negotiable, including:

- Payment provisions;
- Disclaimer of implied warranties;
- Limitations of buyer's remedies to repair or replace at seller's option;
- Limitation on seller's liability;
- Limitation on period to bring claims;
- Protections of seller's intellectual property;
- Disclaimer of consequential damages; and
- Specifying what law applies and what courts have jurisdiction.

FAMILY SECURES LARGE SETTLEMENT IN CONTENTIOUS INHERITANCE DISPUTE

The extended family of a reclusive millionaire secured a large settlement on the eve of trial. As reported by the Milwaukee Journal Sentinel, when LeRoy Ern died at the age of 92, he purportedly left his entire $1.6 million estate to his financial advisor. At the time of the changes, Mr. Ern suffered from dementia and lived the life of a hermit. According to the allegations, soon after meeting the financial advisor, Mr. Ern nominated the financial advisor as his financial and health care power of attorney. Eventually, the financial advisor obtained

an interest in 100 percent of Mr. Ern's estate upon Mr. Ern's death.

As is often the case in disputes such as this, the purported transfers to the financial advisor to take place upon Mr. Ern's death occurred through a series of different mechanisms. Here, it involved a revised will identifying the financial advisor as the personal representative and sole beneficiary as well as changes to the beneficiary designation on multiple annuity policies. Other common mechanisms may include the retitling of accounts from the name of the decedent or his or her trust into a joint account, payable-on-death account, or transfer-on-death account to the alleged wrongdoer or a change in beneficiary designation on a life insurance policy.

After Mr. Ern died, the financial advisor filed the will and sought to serve as the estate's special administrator. Mr. Ern's family members objected to the will on the basis the financial advisor obtained a 100 percent interest in the estate in bad faith. As the newspaper points out, the family and the financial advisor settled on the eve of the scheduled trial that was set to begin this week. As part of the settlement, the family will receive the bulk of Mr. Ern's estate. It is evident that had Mr. Ern's family not taken court action to assert their rights, they would have received nothing. Instead, they secured a settlement worth almost $1.5 million.

If you would like more information on this topic, you are welcome to call Trevor Lippman at 414-276-5000 or trevor.lippman@wilaw.com.

SIX QUESTIONS EVERY FAMILY BUSINESS OWNER SHOULD BE ASKING

If you own a family business, you should be thinking about your succession plan, whether you plan to sell the business to fund your own retirement or pass it on to your descendants or other key employees. To get you started, below are six questions to ask yourself. We answer each in our book, *The Art, Science and Law of Business Succession Planning*.

1. Am I prepared to consider transferring ownership of my business during my lifetime? If you ever plan to retire—if you don't intend to die at your desk —you should already be thinking about this. Will you retain ownership in the business, draw retirement or hand it over completely?

2. Am I prepared to consider transferring control of my business during my lifetime? Ownership and control are different things. Do you have mechanisms in place so the business can run effectively in your absence?

3. Have I made sure that the transition of my business will be orderly? If the answer is currently “no,” expect chaos during the transition, unless you make a plan.

4. Is there a logical successor to me in the management of the business? Who among your family members or employees has the qualifications to lead the business when you leave it? If no one comes to mind, whom could you groom to take over?

5. Are my key employees comfortable with my plans for business continuation, and will they stay with my firm rather than seeking more secure employment? If you don’t want your best employees working for your competitors—or becoming your competitors—down the road, you need to take appropriate steps to answer this question in the affirmative.

6. Is my estate sufficiently diversified so that children who are not active in the business may be treated fairly alongside those receiving an interest in the business? Not all your children will want a role in your company, but you want all of them to benefit from your wealth. How will you structure your estate to accomplish this goal?

Click here to get a free copy of *The Art, Science and Law of Business Succession Planning* mailed to you. You can also buy a copy of our book on Amazon, both in print and through the Kindle e-book service.

A TRUSTEE’S DUTY OF LOYALTY IN WISCONSIN

In Wisconsin, anyone who agrees to become a trustee is agreeing to become a “fiduciary.” A fiduciary is a person or corporation that has legal obligations to a trust’s “beneficiaries,” those who will benefit from a trust. In our state, a trustee owes the utmost duty of loyalty to the trust beneficiaries.

A trustee’s duty of loyalty requires him or her to administer the trust solely in the interests of the beneficiaries. A trustee violates the duty of loyalty if he or she puts personal interests above the trust beneficiaries’ interests.

The trustee is not allowed to profit or make deals for his or her own benefit in the administration of a trust. The duty of loyalty requires that the trustee not be motivated in his or her actions by self-interest or the interests of third parties. A trustee assumes a duty to protect the interests of the trust estate when he or she accepts an appointment as trustee. This means that a trustee cannot allow his or her personal interests to conflict with that duty in any way. This rule is intended to prevent any possible selfish interest of the trustee that can interfere with the trustee’s duty to the trust’s beneficiaries. Wisconsin courts

have held that acting in good faith alone is not enough to satisfy the trustee's duty of loyalty to the beneficiaries.

A trustee must proceed with the utmost caution if he or she engages in a transaction between himself or herself and the trust. For example, if a trustee buys a property owned by the trust, the trustee must be able to show that he or she acted prudently and in a business-like manner with a view to obtain the same fair market value price as he or she might have anticipated with proper due diligence. In general, it is required that trust beneficiaries approve a sale between the trust and a trustee.

If you have any question, please contact Greg Lyons at Greg.Lyons@wilaw.com or 414-276-5000.

CONTRACTUAL ARBITRATION CLAUSES: ARBITRATOR SELECTION AND QUALIFICATIONS

An increasing number of contracts contain arbitration clauses. But not all arbitration clauses are equally clear, precise, and specific–or equally enforceable.

Like other contract clauses, an arbitration clause may be invalidated under general principles of contract law. The U.S. Supreme Court has ruled that an arbitration clause may be invalid if it is indefinite, fraudulent or unconscionable, or was agreed upon under duress. As a result, commercial arbitration clauses should be clear and specific.

Before agreeing to an arbitration clause, consider how you would want any future arbitration to proceed, and the circumstances under which arbitration would be required.

For instance, consider whether you would like to use the services of a specific alternative dispute resolution provider, such as the American Arbitration Association. If you are considering such a provider, you might wish to examine its sample arbitration clauses and compare them to your own.

Next, consider the process established to select the arbitrator or arbitrators. Do you want to present your dispute to a single arbitrator or to an arbitration panel? For example, some arbitration clauses specify a panel of three arbitrators: each party picks one arbitrator, and then those two arbitrators choose the third arbitrator.

In addition to considering *how* the arbitrator will be chosen, you also should consider *who* will be qualified to serve as an arbitrator. For example, do you want the arbitrator to have

relevant experience in a particular subject area (like architecture, engineering, software, publishing, or employment) or a particular qualification (like a CPA or a JD)? By considering these sort of issues prior to entering into an arbitration agreement, you can reduce the risk of future conflicts and add a degree of certainty to the arbitration process.

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