OCHDL IS PLEASED TO ANNOUNCE THAT ATTORNEY BRITANY E. MORRISON HAS JOINED THE FIRM

Attorney Britany E. Morrison, a graduate of Marquette University Law School, recently joined the Milwaukee law firm O'Neil Cannon Prior to joining the firm, Britany worked at a "Big Four" public accounting firm utilizing her certified public accounting license to help clients manage regulatory compliance risks and enhance returns. Britany is a member of the firm's Business Law and Tax/Succession Practice Groups, and her practice will focus on tax planning.

O'Neil Cannon, founded in Milwaukee in 1973, is a full-service legal practice that primarily focuses on providing business law and civil litigation services to closely-held businesses and their owners. The firm represents corporations, institutions, and partnerships at all stages of the business life cycle, helping them start, grow and transition from one generation to the next. We also assist business owners with their personal legal needs including tax and estate planning, family law and litigation—including personal injury litigation.

TAX AND WEALTH ADVISOR ALERT: THE FIVE OBJECTIVES OF GOOD SUCCESSION PLANNING

In our last article we discussed why a well-constructed succession plan is necessary. In this article, we review the five essential objectives the plan needs to address. The five objectives are:

1. Maximize the value of the business;
2. Minimize taxes;
3. Provide for the continuity and survival of the business;
4. Treat your children fairly; and
5. Preserve family harmony.

As you can imagine, meeting all five of these goals is a balancing act. For instance, you may entertain several strategies for maximizing value and ensuring the business's survival, but not all of these will preserve family harmony. You'll have to weigh some decisions against others (possibly over and over again), before arriving at a strategy that meets all five objectives.

Objective 1: Maximize the Value of the Business.
Since this probably has been the goal of your business all along, succession planning simply shifts this strategy to the context of continued growth and value once you're no longer at the helm.

Objective 2: Minimize Taxes.
Without proper planning, income and estate taxes can take a huge bite out of your business. Your advisor can present options, structures, and strategies to reduce this burden significantly.

Objective 3: Provide for the Continuity and Survival of the Business.
You'll need to balance a number of dynamic factors here, including the current direction of the economy and key staff and family members involved with the business. Additionally, if you want to transfer the business to one or more of your children before you pass on, you need to consider your own financial security and standard of living, based on your company's profitability. You may also want to include a component that provides for your own continued compensation.

Objective 4: Treat Your Children Fairly.
Typically, business owners want all of their children to receive a fair share from their business or estate, regardless of the children's ownership stake or level of involvement in the company. It is important to distinguish fairness from equality. For some families, fair is not always equal and equal is not always fair.

Objective 5: Preserve Family Harmony.
Questions of succession and inheritance always carry the potential to evoke conflict between family members. Some may feel entitled to particular parts of your estate, while others may feel slighted by your decision to give control to someone else. This objective can sometimes be the most difficult to meet, but careful planning and open discussion make it possible.

Consider the Needs and Goals of All Affected Parties.
Bear in mind that everyone with "skin in the game" brings needs and goals to the table, and you'll need to take these into account in your plan. These affected parties include:

1. You (the owner) and your spouse;
2. Children who are active in the business;
3. Children who are not active in the business; and
4. Key management staff who are not family.

With this reality in mind, we encourage honest discussion with all affected parties throughout the process, from planning to the actual transfer. These conversations may be challenging at times, but open conversation is almost always preferable to keeping people in the dark and then surprising them.

Your People Come First.
Tax considerations and other financial factors are a necessary part of all business planning, but remember the best interests of your family and key people always outweigh tax considerations. Tax savings alone should never be the deciding factor for a specific plan.

Finally, as you strive to meet and balance these five objectives, remember that you may have more alternatives than you see at first, which is where your attorney's advice comes in handy. Don't get discouraged as you work through the issues. As long as you keep these objectives in mind, your options are limited only by the imagination, current laws, and your commitment to the plan being carried out.

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- Can I Really Be Sued There?
- Give a Guarantor Some Credit!
- IRS Issues a Second Set of April 2019 Changes to Retirement Plan Correction Program

Firm News:

- Jim DeJong Awarded Carroll University Distinguished Alumnus Award
- WI Supreme Court Rules in Favor of Firm's Client
- WI Supreme Court Rules Unanimously in Property Tax Case

Click the image below to read more.

EMPLOYMENT LAWSCENE ALERT: IRS ISSUES A SECOND SET OF APRIL 2019 CHANGES TO RETIREMENT PLAN CORRECTION PROGRAM

The IRS Employee Plans division on Friday, April 19, released an updated version of its comprehensive retirement plan correction protocol. Although touted as a "limited update" to the Employee Plan Compliance Resolution System, or EPCRS, the changes contained in this

new Revenue Procedure 2019-19 nonetheless offer substantial savings opportunities for certain employer sponsors of 401(k), 403(b), and profit-sharing plans, and employee stock ownership plans (ESOPs).

The update is effective immediately, and is notable for being the second change in the EPCRS rules to take effect in April 2019. Under a previously-issued update to the program, a new online-only submission requirement took effect on April 1, 2019. As of that date, plan sponsors are no longer permitted to submit EPCRS correction applications or payments by mail.

Bottom Line

The effect of the April 19 update is to expand the circumstances under which a plan sponsor is permitted to correct a self-identified error under the self-correction program (SCP), rather than having to submit a formal application, and accompanying fee, to the IRS.

This expansion of the opportunities for self-correction is a welcome opportunity for plan sponsors who become aware of certain plan compliance failures involving the language of the plan document as well as particular types of errors in the operation of participant loan programs. Correction of the specified errors may now be made on a less formal basis. Provided that the proper correction protocol is followed and documented, a correction can now be completed without having to pay the usual IRS submission fee, which ranges from $1,500 to $3,500.

EPCRS Background

The purpose of the IRS EPCRS program, generally, is to provide a system of correction programs and procedures for sponsors of tax-qualified retirement plans that have fallen outside of the qualification requirements either because of errors in the language of the plan document or because of mistakes in how the plan is operated. The EPCRS correction program permits plan sponsors to correct these errors and thereby to continue to offer retirement benefits to their employees on a tax-favored basis.

Depending on the nature and severity of a retirement plan compliance error, three different EPCRS programs exist, each with slightly different rules:

- SCP. For the least significant errors, the Self Correction Program (SCP) permits a plan sponsor to self-correct the error without paying any fee or sanction and without submitting any documentation to the IRS. Even though no documents are submitted to the IRS under the SCP program, it is important that the proper self-correction protocols described by the IRS are followed. An improper or undocumented self-correction provides no future IRS audit protection. A proper retirement plan self-correction, however, will protect a plan sponsor from future fees or penalties related to the

properly-corrected error.

- VCP. For more significant compliance failures, or for failures not corrected within a specified time period, the only way to receive approval of a correction is to participate in the Voluntary Compliance Program (VCP). This program requires that a description of the error, and of its correction, be submitted to the IRS for formal approval. To use this program, a plan sponsor must pay a fee to the IRS. Under the recently-amended fee structure, the amount of the fee depends solely on the amount of plan assets and ranges from $1,500 (for plans with less than $500,000 in assets) to $3,500 (for plans with more than $10,000,000 in assets).

- Audit CAP. If it is the IRS, rather than the plan sponsor, who identifies a compliance error, then the only permitted correction program is the more expensive Audit CAP program. Errors can be corrected under Audit CAP if the IRS identifies an error during an audit. Under Audit CAP, the penalties imposed in order to retain the retirement plan's tax-qualification will be larger than under the VCP program, and will vary, based upon the nature and extent of the compliance error, the severity of the error.

Potential Opportunity to Make Key Corrections at a Lower Cost

The Treasury Department and IRS expect to continue to update the EPCRS program, in whole or in part, from time to time. Given the ever-changing and highly fact-specific nature of the IRS correction program, the severely adverse threat of plan tax-disqualification, and the need to determine the most effective correction strategy, plan sponsors who suspect or know that a retirement plan has a compliance error are advised to work confidentially with legal counsel specifically experienced in this area of practice. Because an error cannot be corrected under either the SCP or VCP programs after an IRS audit has begun, it is always best to respond to a compliance error quickly and proactively.

Now that the opportunities for self-correction have been expanded, there is no time like the present for plan sponsors to review their tax-qualified plan documentation and operations. Because more types of compliance errors can now be self-corrected, the cost of bringing an employer-sponsored retirement plan back into good standing may now be reduced.

WISCONSIN SUPREME COURT RULES

UNANIMOUSLY FOR FIRM'S CLIENT IN PROPERTY TAX CASE

On March 14, 2019, the Wisconsin Supreme Court ruled that taxpayers need not operate their farms for a business purpose in order to have their farms classified as agricultural land for property tax purposes. The case is *State ex rel. Peter Ogden Family Tr. of 2008 v. Bd. of Review*, 2019 WI 23.

The firm's clients, Peter Ogden and Terri Mahoney-Ogden, operate a small farm on approximately 12 acres of land near their home in the Town of Delafield, where they grow and harvest apples, hay, and Christmas trees. Despite previously assessing the property as "agricultural land" from 2012 through 2015, in 2016 the Town's tax assessor changed the property's classification to "residential"—even though the Ogdens had never stopped farming the land. The change in classification drastically increased the Ogdens' property tax burden.

The Ogdens objected to the change in classification in a hearing before the Board of Review for the Town of Delafield. The tax assessor asserted that the Ogdens did not operate their farm sufficiently as a business. Even under this business standard, two members of the Board of Review still ruled for the Ogdens, though two did not. The tie went to the tax assessor and against the Ogdens. The Ogdens appealed.

The case ultimately made its way to the Wisconsin Supreme Court. There, the Court ruled, 7-0, that the tax assessor was incorrect. "No statute, administrative rule, or case law supports a business purpose requirement for the 'agricultural land' property tax classification," the Court wrote.

Our Attorney, who represented the Ogdens in the case, explained to the Associated Press that the Court's decision will help ensure uniformity in how agricultural land is taxed.

"Hopefully after today assessors won't come to these off-hand conclusions about what's not really in the law," Our attorney said. "The whole purpose of the law is to help preserve Wisconsin's farmland. This decision will help stop assessors from coming up with some other reason to change the classification. It's good for small farmers around the state."

JIM DEJONG AWARDED THE 2019 CARROLL

UNIVERSITY DISTINGUISHED ALUMNUS AWARD

Shareholder and past firm president Jim DeJong is the 2019 recipient of the P.E. MacAllister Distinguished Alumnus Award for his service to Carroll University. Named after P.E. MacAllister, alumnus from the class of 1940 and member of the Carroll Board of Trustees for over fifty years, the P.E. MacAllister Distinguished Alumnus Award for service to Carroll recognizes individuals for their extraordinary commitment and service to their alma mater.

“Jim has demonstrated his passion for and commitment to Carroll in numerous ways. He has been an active alumnus, assisting with alumni programs and other aspects of the campus community as the parent of two Carroll graduates. His leadership stood out as a board member – chair of the institutional advancement committee, co-chair of Carroll’s largest comprehensive campaign and chair of the presidential search committee. Jim also served with distinction as chair of the board and is a most deserving recipient of this award, named for P.E. MacAllister. Jim follows in his footsteps, as he has generously given of his time, talent and treasure.” – Dr. Cindy Gnadinger, President of Carroll University.

Carroll University’s Distinguished Alumni Award is the highest honor bestowed by the University. The award is provided to Carroll graduates based on their professional achievements, contributions to society and support of the university.The recipients of this award are chosen based on their demonstrated quality of leadership, volunteerism, and professional excellence in their fields.

As an alumnus, Jim has served his alma mater in a variety of leadership capacities. He began his nine year tenure on Carroll’s Board of Trustees in 2008 and served as Board Chair for three years of his tenure. He was also a member of the President’s Advisory Council, Chair of the Board’s Institutional Advancement Committee, and Co-Chair of Campaign Carroll: The Common Thread.

Over the years, both Jim and his wife, Patty, have volunteered and appeared at multiple alumni and campus events, including regional gatherings throughout the U.S. Jim has served on several of his reunion committees throughout the years and delivered the commencement keynote address to Carroll’s Class of 2017.

Jim’s contributions to Carroll College are greatly valued, as expressed in an article published by the University on its website:

“Jim’s ongoing encouragement of alumni and friends to start and/or continue their engagement with Carroll is very beneficial and helps keep Carroll a very special place.”

Read the full honor here.

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.

EMPLOYMENT LAWSCENE ALERT: H-1B SEASON IS IN FULL SWING

As Wisconsin slowly awakes from the deep freeze of the polar vortex, employers are busy preparing applications for the H-1B filing season. Wisconsin employers seeking non-immigrant foreign workers in specialty occupations that require theoretical or technical expertise should consider contacting legal counsel to begin preparation of their visa petitions. All paperwork must be submitted during the application period, which begins on **April 1, 2019** and typically runs only until **April 5, 2019**.

What is an H-1B Visa

An H-1B visa allows U.S. employers to temporarily employ foreign workers in specialty occupations that require specialized knowledge or an advanced degree. H-1B visas are typically approved for positions in finance, engineering, mathematics, science, computer programming, or medicine. However, many positions requiring a bachelor's degree or higher will qualify.

H-1B visa holders allow the foreign worker to remain in the United States for a maximum of six years. While the application period starts on **April 1,** the visa is valid for the 2020 fiscal year, meaning that recipients of the visa may not begin working before October 1, 2019.

There is a cap on how many H-1B visas may be issued for each financial year: the government will issue 65,000 regular H-1B visas, which require specialized knowledge or a bachelor's degree, as well as another 20,000 visas for applicants with a U.S. master's degree or higher. Typically, however, the government receives two to three applications for every available quota position. Although application numbers have decreased in recent years, the 2019 H-1B fiscal year saw 190,098 H-1B applications during the first five days of the application period. Consequently, it is essential that employers are prepared to submit their petitions within the application period to avoid missing an opportunity to have the petition adjudicated.

This quota does not apply to certain institutions of higher education, related or affiliated nonprofit entities, nonprofit research organizations, or government research organizations.

Who is Eligible for an H-1B Visa?

Any foreign worker who meets the required educational requirements may have an employer petition on her behalf for an H-1B visa. Non-immigrants who are already in the United States on other valid visas may also qualify for the H-1B visa. These applications generally come from F-1 Student Visa holders who have completed their studies at an American university and are seeking to enter the workplace. Other visa-holders, such as L-1 Intracompany Transferee Visa holders and, in some cases, B-1/B-2 Visitor Visa holders, may also qualify.

Once a foreign worker has obtained an H-1B visa, she may be eligible to adjust her status to a Legal Permanent Resident through an employment based green card adjustment.[1] Additionally, H-1B visa holders are eligible to bring their spouse and children under 21 years old with them to the United States under the H-4 dependent visa.

H-1B Visa Application Process

It is important to note that the U.S. employer is charged with submitting the H-1B petition on behalf of the foreign worker. There is a two-step process to this petition:

First, the employer must apply for a Labor Certification Application (LCA) with the U.S. Department of Labor. The LCA is an attestation by the employer that it adheres to certain labor requirements regarding wages, working conditions, and, if applicable, labor unions. The LCA is filed using the Department of Labor's online iCERT system and can take between one to two weeks to receive approval.

Second, the employer will submit the approved LCA along with the USCIS form I-129 and other accompanying documents for H-1B consideration. Because the number of H-1B applications greatly outnumbers the statutory quota, USCIS uses a lottery system to randomly select applications for adjudication. Applications that have not been selected will be returned to the employer with the appropriate filing fees.

Practical Tips

Whether you are an employer looking to sponsor an employee or an employee seeking to adjust to an H-1B, there are several practical steps you can take to facilitate the burdensome H-1B application process.

- Initiate the dialog early. Because the H-1B application is driven by the employer and not the employee, it is important that both sides communicate early and often regarding the capacity and willingness of the employer to petition.
- Check the prevailing wage requirement. The LCA application requires information on the prevailing wage for the open position. This process can be extremely time consuming and complex. However, if the prevailing wage is found to be Level 1 (e.g., an

entry level wage), more information, such as an expert opinion letter may be necessary. Because any additional steps to show eligibility may delay the application, it is best to understand what needs to be done early.
- Understand what documents will be needed for the petition. These likely include degree certificates, transcripts, a job description, and other corporate documents. Remember, if any documents are in a foreign language, you must provide a copy of the original as well as a certified translation.
- Update the employer's *Validation Instrument for Business Enterprises* (VIBE) entry with USCIS. VIBE is a program that allows USCIS to retrieve commercially available information about the employer. Although not required, employers are permitted to update the VIBE entry to facilitate the H-1B adjudication process.

With the H-1B visa, early planning is essential to identify any potential issues. For example, additional time may be needed to translate documents, independently assess foreign credentials, or to determine whether the applicant may be eligible for a more efficient path to employment, such as through an O-1 visa, an L-1 visa, or other investment-based applications.

If you are interested in utilizing the H-1B process to strengthen your workforce, please contact O'Neil Cannon to discuss how we are able to assist you in your immigration needs.

[1] Employment based green card adjustments require extensive documentation and may take months or years to finalize. Please contact the attorneys at O'Neil Cannon to determine whether such a step is viable.

EMPLOYMENT LAWSCENE ALERT: REMEMBER MARCH 1 DEADLINE FOR REPORTING A "SMALL" HIPAA BREACH

Employers who are classified as covered entities under HIPAA are required to report any 2018 breach of protected health information that affected fewer than 500 individuals (also known as a small breach) by March 1, 2019. This current breach notification requirement arises from amendments made to HIPAA under the Health Information Technology for Economic and Clinical Health (HITECH) Act, as finalized in 2013. HIPAA defines a covered entity as either (1) a group health plan, (2) a health care clearinghouse, or (3) a health care provider who electronically transmits any protected health information. A covered entity may be an individual, an institution, or an organization.

Background

Under applicable rules, a breach is defined as an impermissible use or disclosure under the HIPAA Privacy Rule that compromises the security or privacy of the protected health information. Some exceptions apply, so that not all incidents will rise to the level of a breach. Still, an impermissible use or disclosure of protected health information is generally presumed to be a breach unless the covered entity demonstrates that there is a low probability that the protected health information has been compromised based on a risk assessment of several specified factors.

Notification Requirement

Upon the occurrence of a confirmed (or in some cases, suspected) breach, the affected individuals must be provided with detailed notification letters without unreasonable delay and no later than 60 days after the discovery of the breach. While the covered entity, most often, provides the required notifications, the final rules permit the delegation of reporting duties to a business associate.

A HIPAA breach also triggers an obligation to notify the Office of Civil Rights (OCR) of the U.S. Department of Health and Human Services (HHS).

- When a breach affects 500 or more individuals, the reporting entity must notify OCR contemporaneously with the notification to individuals (and must also notify local media outlets).
- Where a breach affects fewer than 500 individuals (also known as a small breach), however, a reporting entity must maintain a log or other documentation of all breaches occurring during the year, and annually report all such breaches no later than 60 days after the end of that calendar year.

For a small breach occurring any time in 2018, the deadline to report that breach to OCR is March 1, 2019.

Small Breach Reporting Details

A reporting entity is not required to wait until the March 1 deadline to report a small breach. Small breaches may be reported as early as contemporaneously with the occurrence of the breach. Regardless of timing, all small breaches must be reported to OCR in the same manner. Specifically a reporting entity must report the breaches online through the OCR's "Breach Portal."

Note that even when a covered entity delegates the reporting function to a business associate, the covered entity retains ultimate legal responsibility for proper reporting. Accordingly, covered entities who delegate reporting may want to require proof of timely

reporting.

Be aware that, while the reporting entity may report all small breaches on a single date, each separate breach incident will require a separate submission. Instead of simply uploading a log of breach incidents occurring in the prior year, the reporting entity must complete a six-section questionnaire to provide: (1) general information; (2) identification of the covered entity, business associate, and relevant contact information; (3) the nature of the breach; (4) a summary of related notices provided and actions taken; (5) an attestation, and; (6) a summary. Multiple fields must be completed within each of these six sections. The HIPAA status of a reporting party (as either a HIPAA covered entity or a business associate) must be indicated on the "Contact" tab of the online filing form.

The online reporting form also requires the reporting entity to indicate the level of pre-breach HIPAA compliance status, including whether or not HIPAA Privacy Rule safeguards and HIPAA Security Rule safeguards were in place.

Because filing the breach notice can be time-consuming, parties tasked with reporting 2018 small HIPAA breaches of unsecured protected health information are advised to gather and prepare the content to be reported before actually logging on to the OCR Breach Portal. Because any changes or updates to the submitted information must be entered as a separate entry, it is preferable to ensure that each submission is fully accurate. Moreover, because the content of Breach Notifications to OCR can form the basis for a future OCR investigation and enforcement action, it is advisable to have legal counsel review content prior to submission.

In addition to ensuring that 2018 breaches affecting fewer than 500 individuals are reported by March 1, covered entities and business associates should continue to ensure that HIPAA Policies and Procedures, as well as the applicable administrative, physical and technical safeguards are up to date and periodically reviewed.

WISCONSIN SUPREME COURT RULES IN FAVOR OF FIRM'S CLIENT

On January 29, 2019, the Wisconsin Supreme Court ruled in favor of our client, Park Bank, in a case of first impression in Wisconsin. In *Koss Corp. v. Park Bank*, 2019 WI 7, Koss Corp. sued Park Bank alleging that Park Bank acted in bad faith under the Uniform Fiduciaries Act ("UFA") in failing to detect an embezzlement being conducted by one of Koss's employees, Sue Sachdeva. Ms. Sachdeva embezzled $34 million from Koss Corp. over a 12-year period. The embezzlement was the largest embezzlement in Wisconsin history, and the ninth largest

embezzlement in U.S. history.

Koss Corp. had some of its bank accounts at Park Bank, which Ms. Sachdeva used to embezzle $17 million from Koss Corp. by use of cashier's checks she obtained from those accounts, which she used to pay her creditors for personal items such as jewelry, clothing and travel. Ms. Sachdeva was ultimately caught by an American Express employee, was criminally charged for her actions, and was sentenced to 11 years in prison.

After six years of litigation, the trial court granted Park Bank's motion for summary judgment in 2016, ruling that the evidence did not support Koss Corp.'s claim that Park Bank acted in bad faith.

On December 12, 2017, the Wisconsin Court of Appeals affirmed that ruling.

On January 29, 2019, the Wisconsin Supreme Court affirmed the Wisconsin Court of Appeals' decision in a 2-3-2 decision, with five Justices voting to affirm. The Court held that, to establish bad faith under the UFA, a bank must have acted dishonestly. The Court held that "[b]ad faith requires some evidence of bank dishonesty such as a bank willfully failing to further investigate compelling and obvious known facts that suggest fiduciary misconduct because of a deliberate desire to evade knowledge of fiduciary misconduct." *Decision* at ¶ 55. In so ruling, the Court recognized several foundational principles that form the framework for analyzing a bank's conduct when bad faith under the UFA is alleged:

> First, bad faith is reviewed on a transaction by transaction basis, such that the facts known to each individual bank employee are not aggregated to form collective knowledge of the bank. Second, whether a bank acted in bad faith is determined at the time of the breach of fiduciary duty, not by looking back at transactions that occurred many months earlier.
>
> Third, bad faith is an intentional tort; negligence by a bank is insufficient to show bad faith. Fourth, considerations of bad faith require analyses of a bank's actions to determine its subjective intent.

Id. at ¶¶ 52, 53.

In applying these foundational principles to the facts of the case, the Court held that "[w]hile discovery was extensive and conducted for years, no proof has been proffered from which a factfinder could find that any Park Bank transaction was not honestly done." *Id*. at ¶ 71.

Our firm is proud to have represented Park Bank in this case, and pleased that all of the courts to have considered the matter — the trial court, the Wisconsin Court of Appeals, and the Wisconsin Supreme Court — all held that Park Bank has no liability to Koss Corp. in this matter.

Park Bank was represented by Dean Laing, Greg Lyons and Joe Newbold of our firm. Koss Corp. was represented by Michael Avenatti of California.