OCHDL PROUDLY SPONSORS 10TH ANNUAL CHARITABLE EVENT FOR CRS

For the second consecutive year, OCHDL proudly sponsored the Catholic Relief Services (CRS) reception at the Wisconsin Club. This was a very special year, as the humanitarian group celebrated its 10th year here in Milwaukee. As always, a very well received event and powerful message was presented.

The Milwaukee chapter of CRS, which includes OCHDL Shareholder Carl Holborn, brought about a great deal of awareness this year–reaching out to radio stations, publications, and even appeared on TMJ4's *The Morning Blend* to help spread the word about CRS and their charitable mission. The Milwaukee committee is grateful for all the support the Milwaukee community has shown to them over the years and are very proud to be celebrating this ten-year milestone.

CRS is one of the largest international aid organizations in the world. They are also one of the most efficient and effective: Ninety-seven percent of their expenditures go directly to programs that benefit individuals overseas. As part of the universal mission of the Catholic Church, they work with local, national and international Catholic institutions and structures, and other organizations, to assist people on the basis of need, without regard to race, religion or nationality. They alleviate suffering and provide assistance to more than 100 million people in need who live in some of the most impoverished places in over 100 countries.

O'Neil Cannon is honored to have been a part of such a meaningful event.
Read more about CRS >>

SEVENTH CIRCUIT COURT OF APPEALS REJECTS "WORTHLESS" SUBWAY CLASS ACTION SETTLEMENT

On August 25, 2017, the Seventh Circuit Court of Appeals rejected a settlement of a class action lawsuit that alleged Subway's "footlong" sandwiches failed to measure up. *In re Subway Footlong Sandwich Marketing and Sales Practices Litig.*, 869 F.3d 551 (7th Cir. 2017). The settlement offered "zero benefits for the class" and only served to enrich class counsel, according to the Court of Appeals. Thus, the class action settlement was rejected and the case was remanded to the district court.

The Subway footlong litigation was ill-advised from the start. It was filed after Subway customers posted pictures on social media allegedly showing that some “footlong” sandwiches measured closer to 11 inches. Several class action law firms jumped on board and quickly filed lawsuits alleging violations of state consumer-protection statutes. But the facts didn’t support the claims. Subway used the same size “raw dough sticks” at all its stores, and that raw dough always weighed exactly the same. Although baking variations caused some of the raw dough sticks to bake up a bit short of 12 inches, those customers who bought slightly smaller sandwiches received no less bread, by volume, than any other. And, the quantity of meat and cheese was the same on each sandwich. Customers also could add a wide range of other toppings to their sandwiches. So, in the end, there was no evidence that any customer was short-changed any food.

The settlement of the Subway lawsuit, which was approved by the district court, required Subway to take certain steps over a period of four years to reduce the likelihood that there would be “short” footlong sandwiches in the future. Although the district court and the parties found value in Subway taking these additional steps, the Seventh Circuit Court of Appeals disagreed. Specifically, the Court of Appeals focused on language in the parties’ settlement agreement stating that, even after these steps were taken, it was still possible that Subway’s footlong sandwiches would be slightly shorter than 12 inches because of baking variations. In the Court of Appeals’ view, the settlement accomplished nothing that would benefit the consumers who made up the class.

Upon concluding that the Subway class action settlement offered “zero benefits” to the class, the Court of Appeals vacated the district court’s order approving the settlement. The case was recently remanded to the district court, where it currently awaits further action.

For more information about the benefits and drawbacks of class action litigation generally, you may contact Doug Dehler at 414-276-5000 or doug.dehler@wilaw.com.

DO YOUR DUE DILIGENCE

Most attorneys during their career have the opportunity or obligation to effectuate service of process of a legal document pursuant to a rule or statute. It can be in any area of the law. My practice area of creditors’ rights litigation requires me to serve process of a lawsuit under a statute that, at first glance, is complex, but over time has become engrained in my mind.

For a Wisconsin court to have jurisdiction over an individual defendant in a civil action, a summons must be served personally upon the defendant or, if with reasonable diligence the defendant cannot be served personally, by leaving a summons with a competent family member at the defendant’s home. If with reasonable diligence the defendant cannot be served by the above methods, then service may be made by publication and mailing.

I recently represented a client who, two years earlier, had obtained a large money judgment against a defendant/guarantor. Prior to obtaining a judgment in the case, the process server attempted to personally serve the guarantor 4 times – once at his parents’ house and, upon learning that the guarantor no longer resided there, 3 more times at his place of business. While attempting to serve at the guarantor’s place of business, the process server left his business card asking that he be contacted. The server testified to the court that the guarantor eventually called him, told the server that he would not make himself available for service, and instructed the server to publish. Based on the guarantor’s statements, service by publication was initiated. A default judgment was eventually entered against the guarantor after he failed to timely respond to the publication summons. Thereafter, the client initiated and continued to attempt to enforce and collect upon the judgment using supplementary collection procedures.

Twenty months after the judgment was entered, the guarantor filed a motion to reopen the case, asking the court to void its own judgment on the basis that the court lacked personal jurisdiction over him. The guarantor claimed that the creditor did not exercise due diligence in trying to find and serve him personally, thus rendering service by publication ineffective to establish jurisdiction.

Under Wisconsin law, there is no time limitation in bringing such a motion since ineffective service of process renders a court without jurisdiction over a defendant. It matters not whether the judgment is aged nor whether a client has spent thousands of dollars trying to enforce and collect upon the judgment. To make matters more difficult, a defendant’s actual knowledge of a lawsuit is not a factor in a court’s determination of whether a plaintiff has undertaken due diligence in attempting to serve a defendant.

Needless to say, my client was alarmed when it received the guarantor’s motion. So what does a plaintiff like mine need to do to avoid such a situation? How may a plaintiff find comfort that it exercised due diligence in attempting to personally serve a defendant prior to publishing a summons as a means of service of the lawsuit? Does a plaintiff need to hire an expensive investigator to perform a search of the individual? Should a costly asset/information database search be ordered?

Due diligence is not defined by statute, but Wisconsin is not without judicial authority. A Wisconsin court of appeals has described reasonable diligence as the diligence to be pursued that is reasonable under the circumstances, but not all diligence which may be conceived. Nor is it that diligence which stops just short of the place where, if it were continued, might reasonably be expected to uncover an address of the person on whom service is being attempted. See *Loppnow v. Bielik*, 2010 WI App 66, ¶ 10, 324 Wis.2d 803.

While this judicial statement is somewhat amorphous, in my practice, I have gleaned that judges generally seem to require at least 3 attempts at personal service before service may be made by publication. Such attempts at service, however, may be viewed as futile if a server stops short in making a proper inquiry into the defendant's whereabouts before attempting service. See *Heaston v. Austin*, 47 Wis. 2d 67 (1970); *West v. West*, 82 Wis. 2d 158 (1972) (Due diligence was not established when a husband could have ascertained his wife's address by contacting any one of several relatives or in-laws). Courts may also take into consideration a defendant's statements as to his whereabouts or evasive actions on the part of a defendant in determining whether the due diligence standard was met. See *Welty v. Heggy*, 124 Wis. 2d 318 (Ct. App. 1985); *Emery v. Emery*, 124 Wis. 2d 613 (1985).

In my case, the court's determination ultimately boiled down to the existence of evasive actions on the part of the guarantor. An evidentiary hearing was held and, although the guarantor denied ever speaking to the process server, the court found the process server more credible than the guarantor in regard to the guarantor's evasive maneuvers and statements to the process server. Vital to the court's ruling was the existence of the process server's notes on the face of his affidavit stating that the defendant indicated he would not make himself available and advised the process server to publish.

From this experience, it is clear that meticulous notes, records and other documentary evidence must be kept in regard to a process server's communication with a defendant along with the server's attempts to serve a defendant if publication is the method in which a plaintiff chooses to rely upon to effectuate service of process. Moreover, before choosing a process server it is a good idea to check the server's licensure history, including any reprimands or suspensions that may have been handed down by governing regulatory bodies. This will ensure no negative history exists that could render due diligence testimony from the server incredible.

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

EMPLOYMENT LAWSCENE ALERT: MULTI-MONTH NEED FOR LEAVE DISQUALIFIES EMPLOYEE FROM ADA PROTECTIONS

Last week, the Seventh Circuit Court of Appeals issued a decision in which it stated that the Americans with Disabilities Act (ADA) does not require employers to give employees more leave after their Family Medical Leave Act (FMLA) allotment runs out. In *Severson v. Heartland Woodcraft Inc.*, the employee had a back condition for which he took twelve weeks of FMLA leave. At the end of his FMLA leave, he requested an additional two or three months of leave to recover from back surgery. The employer denied his request and terminated his employment, telling him that he could reapply once healthy. Instead, the employee filed suit, claiming that the company had violated the ADA by refusing to grant him a leave of absence and by failing to transfer him to a vacant job or a light duty position.

The ADA prohibits employers from discriminating against employees who are "qualified individuals," meaning that they can perform the essential functions of their jobs with or without accommodation. The Seventh Circuit upheld the district court's grant of summary judgment to the employer, finding that the employee was not a "qualified individual" with a disability under the ADA because he could not work, as shown by his need for long-term medical leave. Although there is no bright-line rule for what is considered a disqualifying long-term leave, the Court noted that, while a few days or even a few weeks of non-FMLA time would be acceptable, a period of multiple months is too long as leave does not permit the employee to perform the essential functions of his job. Although the EEOC argued in an amicus brief that a long-term leave of absence is a reasonable accommodation if it is definite, requested in advance, and would allow the worker to return at the end of the leave, the Court rejected this argument stating that such a policy would make the ADA into a medical leave entitlement instead of an anti-discrimination law that requires reasonable accommodations. The Court also rejected the plaintiff's other reasonable accommodation arguments, as he presented no evidence that there were any vacant positions at the time of his termination or that the company provided light duty to employees in any situation.

Although employers should carefully consider their obligations to employees under both the ADA and the Wisconsin Fair Employment Act, determine whether a requested accommodation is reasonable on a case-by-case basis, and engage in the interactive process with employees, this decision will be helpful in guiding employers that are evaluating employees' requests for extended leave.

EMPLOYMENT LAWSCENE ALERT: IT'S TIME TO AMEND 403(B) RETIREMENT PLAN DOCUMENTS!

If your organization is a public school or university, a tax-exempt charter school or hospital, a church, church-affiliated entity, or other tax-exempt organization, it is eligible to sponsor a

403(b) retirement plan.

For any eligible sponsor of a 403(b) plan, it is critical, to ensure the ongoing tax-compliance of the plan, to conform your document to the form of an IRS pre-approved 403(b) document (available for use since March 2017) no later than March 31, 2020. This date is the IRS-announced end of the “special remedial amendment period” that permits correction of plan language defects retroactive to January 1, 2010, provided that plans are operated in the meantime according to the regulatory requirements.

This means that if your last 403(b) plan amendment and restatement pre-dates March 2017, or is not otherwise in the form of a 2017 IRS-approved document, an amendment and restatement must occur by the deadline to ensure proper compliance. The IRS will not honor, or issue, any letters as to the qualified status of an individual 403(b) plan. This is why all 403(b) plan sponsors must adopt a 2017 pre-approved document. Pre-approved documents are available through a number of plan service providers, third-party administrators, and employee benefits attorneys.

Any employer who, for whatever reason, *never* complied with the final 403(b) regulations (and ERISA, if applicable), and operated 403(b) program subsequent to December 31, 2009 *without* adopting a written 403(b) plan document, may make use of an IRS correction program. Under the IRS’s Employee Plan Compliance Resolution System, a properly documented correction and application, together with a fee, can be submitted to obtain administrative relief for the failure to previously document the plan. It is likely that the ability to correct a failure to have a plan document will become significantly more restricted (and expensive) if not addressed prior to March 31, 2020.

In our experience, the IRS has been active, in recent years, in auditing the operations of 403(b) plans of Wisconsin entities and organizations. It should be anticipated that 403(b) plan audits on and after April 1, 2020 will review not only operational, but also documentational, compliance with the 403(b) plan rules.

While the March 31, 2020 deadline is still two and a half years away, it can take some time for 403(b) plan changes to be fully considered and approved by the required bodies (retirement plan committees, and or boards of education or boards of directors) that are common within the organizations of eligible employers.

The existence of the deadline also presents an opportunity for 403(b) plan sponsors to revisit the extent to which current plan design features are functioning to support human resources objectives (on both a recruitment, retention, and costs basis), and whether any design amendments should be considered in conjunction with the required amendment and restatement.

OCHDL PUBLIC SERVICE

One of the benefits of working at O'Neil Cannon is the firm's strong commitment to public service. The Firm encourages its attorneys to give back to our community. I am honored to serve on the Board of The Wisconsin Law Foundation. The Wisconsin Law Foundation is the charitable arm of the State Bar of Wisconsin. The mission statement for the organization notes that "the Wisconsin Law Foundation is a charitable and educational organization that serves to promote public understanding of the law, improvement of the administration of justice and other law-related public service through funding of innovative and creative programs that improve the vision of the American justice system." The Wisconsin Law Foundation accomplishes this mission through its numerous programs.

Two of the programs supported by the Wisconsin Law Foundation are the Wisconsin State High School Mock Trial Tournament and the Belle Case LaFollette Awards. The mock trial program teaches high school students about the court system and develops students' public speaking and research skills. The Belle Case LaFollette Award recognizes three recent law school graduates who represent under-served populations such as those of modest means and those who live in rural areas. These awards support the Wisconsin Law Foundation's mission of law-related public service. You can visit the State Bar of Wisconsin website to learn more about the many programs supported by the Wisconsin Law Foundation.

OCHDL IS PLEASED TO ANNOUNCE THAT ATTORNEY NICHOLAS G. CHMURSKI HAS JOINED THE FIRM

Attorney Nicholas G. Chmurski, a graduate of Marquette University, has recently joined the Milwaukee law firm O'Neil Cannon Nick is a member of the Business Law and Real Estate and Construction Groups. His business background and clerkship experience make Nick a valuable resource, as he is able to contribute across practice groups to help solve a wide range of legal issues.

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.

AVOIDING PITFALLS WHEN ADDING SWEAT EQUITY MEMBERS IN AN LLC

Many owners and businesses desire to reward employees with ownership interests for services rendered. This can be a valuable incentive that recognizes past accomplishments and improves employee engagement and retention by allowing them to share in the success of the business without requiring a capital investment. While bonuses, raises, or phantom equity can often accomplish similar goals with fewer structural considerations, the allure of being a true owner is sometimes hard to match. More likely than not, the flexibility and reduced formality of an LLC were factors in making it the entity of choice. However, because LLC ownership is unique, there are several key issues to consider when adding this sweat equity member to make sure all parties understand the consequences.

First, how is the LLC managed? If it is a member-managed LLC (default in Wisconsin), the new employee-member could have full agency power and could enter into contracts or agreements on behalf of the LLC. While the employee might already have significant authority according to his or her job title or responsibilities, this member agency authority extends to issues outside of the ordinary course of business, such as taking out a loan or purchasing real estate. On the other hand, a member of a manager-managed LLC is viewed more akin to a passive, limited partner, with no actual agency power. Therefore, before adding the employee as a member, the current members should review the ownership structure and possibly amend the LLC's articles of organization to align their goals.

Second, does the LLC have an operating agreement? Outside of being an essential tool to structure and manage the business, an operating agreement can modify default provisions of the Wisconsin statutes that govern LLCs (Wisconsin Statutes Chapter 183). For example, unless modified in an operating agreement, Wisconsin law provides that voting in member-managed LLCs is based on members' capital contributions, and not on members' ownership interests. An employee receiving a member's interest for services will have voting rights based on the value of his or her services as recognized on the LLC's capital account, regardless of the actual member's interest received. To remedy this situation, the LLC should document all members' capital contributions (including the value for services) and draft (or amend) an operating agreement that clearly defines voting rights for all members. There are many ways to accomplish this goal (unitizing the members' interest, etc.), but it is important to make sure all parties understand their respective rights and roles in the LLC.

Lastly, what are the tax consequences? If the LLC is taxed as a partnership (default), the employee receives a regular capital interest in the LLC, that member's interest would be considered compensation in exchange for services that will likely be taxed as ordinary income. Depending on the value of those services, the employee could have a significant tax burden in the year he or she receives the capital interest without any guarantee of receiving cash distributions from the LLC to help cover that tax. Think winning a car on *The Price is Right*, only to discover a several thousand dollar tax bill waiting off-stage. The LLC can address this by offering the employee an interest consisting of the future profits/losses of the business. A profits interest still allows the employee to have similar rights as a member in the LLC, but because there is no initial value assigned to the profits interest (and thus no liquidation value), the employee has no immediate tax obligation. The employee-member would then owe tax only on his or her allocation of future company profits. While taxes are inevitable, proper planning can avoid surprises and headaches for the employee and company, alike.

In conclusion, while LLCs provide flexibility for adding sweat equity members, careful design and implementation is required to avoid any potential surprises.

EMPLOYMENT LAWSCENE ALERT: COURT INVALIDATES EXPANDED OVERTIME RULE

On Thursday, a federal court in Texas issued summary judgment invalidating the Obama administration's updated overtime regulations, which raised the minimum salary level for exempt employees from $455 to $913 per week. The Court determined that the "significant increase" was outside of the scope of Department of Labor's (DOL) authority, as was the provision that the minimum salary threshold would automatically update every three years.

The Court looked to Congress's intent under the Fair Labor Standards Act and found that the determining factor for whether an employee should be considered exempt is the duties the employee performs and whether those duties are executive, administrative, or professional in nature. By more than doubling the minimum salary level and excluding an estimated 4.2 million employees who were previously classified as exempt from exempt status, the Court found that the DOL had gone too far and essentially rendered the duties test meaningless. Because the emphasis should be on duties, not salary, the Court invalidated the updated overtime rules.

However, the Court did not go as far as to rule that the DOL has no authority to establish a minimum salary level. The Court found that the current minimum salary level is a permissible "floor" to screen out "obviously nonexempt" employees. Although the Fifth Circuit Court of Appeals is currently considering an appeal of the preliminary injunction the Texas federal court issued last November, the DOL under the Trump administration only continued the appeal for the purpose of establishing that it had the authority to establish a minimum salary level, which has now been done by the Texas court. The DOL is currently seeking public feedback on revisions to the overtime rule and may issue its own revised rule in the future. We will keep you updated on any further changes.

BEST LAWYERS® HONORS 18 ATTORNEYS IN 2018

O'Neil, Cannon, Hollman, DeJong and Laing S.C. is pleased to announce that 18 lawyers have been named to the 2018 Edition of *Best Lawyers*, the oldest and most respected peer-review publication in the legal profession.

Best Lawyers has published their list for over three decades, earning the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals. Its first international list was published in 2006 and since then has grown to provide lists in over 75 countries.

"For more than a third of the century," says CEO Steven Naifeh, "Best Lawyers has been the gold standard of excellence in the legal profession." President Phil Greer adds, "We are extremely proud of that record and equally proud to acknowledge the accomplishments of these exceptional legal professionals."

Lawyers on *The Best Lawyers in America* list are divided by geographic region and practice areas. They are reviewed by their peers on the basis of professional expertise, and undergo an authentication process to make sure they are in current practice and in good standing.

O'Neil, Cannon, Hollman, DeJong and Laing S.C. would like to congratulate the following attorneys named to the 2018 *Best Lawyers in America* list:

- Douglas P. Dehler – Litigation-Insurance
- James G. DeJong – Corporate Law, Mergers and Acquisitions Law, Securities/Capital Markets Law
- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, Litigation-Bankruptcy
- Peter J. Faust – Corporate Law, Mergers and Acquisitions Law
- Robert R. Gagan – Municipal Law

- John G. Gehringer – Commercial Litigation, Construction Law, Corporate Law, Real Estate Law
- Joseph E. Gumina – Litigation-Labor and Employment
- Dennis W. Hollman – Corporate Law, Trusts and Estates
- Grant C. Killoran – Litigation-Health Care
- Dean P. Laing – Commercial Litigation, Personal Injury Litigation-Plaintiffs, Product Liability Litigation-Defendants
- Gregory W. Lyons – Commercial Litigation, Litigation-Insurance
- Gregory S. Mager – Family Law
- Patrick G. McBride – Commercial Litigation
- Thomas A. Merkle – Family Law
- Steven J. Slawinski – Construction Law

Since it was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. *Best Lawyers* is based on an exhaustive peer-review survey. Over 54,000 leading attorneys cast more than 7.3 million votes on the legal abilities of other lawyers in their practice areas. Lawyers are not required or allowed to pay a fee to be listed; therefore inclusion in *Best Lawyers* is considered a singular honor. *Corporate Counsel* magazine has called *Best Lawyers* “the most respected referral list of attorneys in practice.”