# DIZARD SUCCESSFULLY CONCLUDES ANOTHER RECEIVERSHIP: WISCONSIN AVENUE OFFICE BUILDING SOLD TO LENDER AFTER COURT AUCTION

Through a court-ordered auction, a downtown Milwaukee office building that houses the Internal Revenue Service was sold to a lender this month. The previous owners were the target of a lawsuit filed in 2013 that resulted in an auction where the building was purchased for $14 million. The IRS leases approximately 80 percent of the building, and it is located near The Shops of Grand Avenue. An article about the transaction recently ran in the *Milwaukee Business Journal*.

Attorney Seth Dizard was the receiver of this building leading up to the auction that attracted interest from national investors.

Read full article here.

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# TAX AND WEALTH ADVISOR ALERT: TIME FOR THE INCOME TAX TAIL TO START WAGGING THE ESTATE PLANNING DOG

Estate planners should now focus less on transfer taxes and more on income taxes when building a plan that provides for a client's loved ones.

This is a change. For a long time, estate planners were focused primarily on the transfer taxes (i.e., estate, gift, and generation skipping), while minimizing income tax planning for their clients. For example, many an estate planner has pontificated *ad nauseum* about the power of lifetime gifting. If the client utilizes the annual gift exemption, gifting removes the value of the gift from the donor's estate, and if the client utilizes the lifetime gift exemption, gifting removes appreciation from transferred property. But, an income tax tradeoff has always existed. If the client makes a gift during life, the donee receives the property with the donor's income tax basis; if the client makes that same transfer at death, the donee will receive the property with a basis equal to date of death value. This is called "stepped-up" basis and presumes property will appreciate in value. For those beneficiaries unlucky enough to receive bequests in 2008 and 2009, they might use the term "stepped-down" basis to

reflect their reality.

So, why did these planning strategists place transfer tax avoidance as a higher priority than income tax planning? A few simple reasons are obvious:

1. Until recently, the transfer tax rate was much higher than the capital gains rate (as high as 55% in 2000).
2. The amount excluded from the transfer tax system, known as the estate (or gift) tax lifetime exemption, was relatively low compared to the net worth of a successful client ($1,000,000 in 2001 growing to $3,500,000 in 2009).
3. The first spouse to die left assets valued at an amount equal to the lifetime exemption to a credit shelter trust. Those assets would grow estate tax-free but would not receive a basis step-up on the death of the surviving spouse.

So what has changed?

1. The rate differential between the transfer tax and capital gains tax was dramatically reduced. The transfer tax is 40% now, and the capital gains tax can be as high as 25–30% when you figure in the impact of the net investment income tax and state tax. But, a differential still exists, so all else equal, the income tax is still lower.
2. The 2012 Tax Act (AFTA) made the concept of portability permanent. Without going too far into the mechanics of portability, the first spouse to die leaves assets to the surviving spouse tax-free, and portability allows the surviving spouse to utilize both spouses' lifetime exemptions at death. Further, property of the two spouses will receive a full basis step-up on the death of the surviving spouse. Nevertheless, while that gives us an income tax planning tool, it does not make income tax more important than transfer tax.
3. The real paradigm shift comes from the dramatic increase in the estate tax exemption. In 2015, each spouse can leave $5.43 million (10.86 million working in concert) without the imposition of estate taxes. This will remove millions of people from a world of being concerned about transfer taxes; however, those same people and their heirs are subject to capital gains taxes at very low income thresholds. For example, assume Mom and Dad are worth $3,000,000 and are in their late 50s. In the past, they would give assets they believed to have high appreciation potential to their two children, both of whom are in their 30s and each of whom makes $100,000 per year. Based on the Rule of 72, the appreciation would be subject to an onerous estate tax in the parents' hands; in the hands of their children, the appreciation would be subject to a much lower capital gains tax when the children elected to sell the asset. Under a better method, Mom and Dad would sell appreciating assets to an irrevocable grantor trust, retain the income tax exposure on future sales, and "leverage" the gift to the children. Now, however, Mom and Dad should hold onto low basis, highly appreciating assets to receive the income tax step-up upon the survivor's death. A closer look at the strategy should be taken only when Mom and Dad's net worth begins to approach the indexed estate tax exemption. In other words, the planning world is now turned on its head and waiting is the better strategy than giving for clients whose net worth is under the exemption

amount.

At the end of the day, clients will want to seek out advisers who can navigate the world of both income and estate taxes, and can help them build a plan to take care of the people they care about while minimizing the impact of all taxes. No more cookie cutter plans; no more cookie cutter planners.

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

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## NEW CHANGES TO OBTAINING DISCOVERY IN WISCONSIN FOR USE IN OTHER STATES

Obtaining discovery in Wisconsin for cases pending outside the State will soon become a lot easier. Until the end of 2015, a party in out-of-state litigation will still need to obtain the appropriate commissions from the court handling the underlying litigation and then file those commissions along with the necessary petition materials in a Wisconsin court to have a subpoena issued for testimony or documentary evidence to be given or produced here. However, effective January 1, 2016, this process will become much more streamlined as Wisconsin finally adopted the provisions of the Uniform Interstate Depositions and Discovery Act (UIDDA).

The UIDDA is a uniform act that is patterned after Rule 45 of the Federal Rules of Civil Procedure. It sets forth an efficient and inexpensive procedure through which litigants can seek and obtain discovery from witnesses located outside the jurisdiction of the trial court. The UIDDA was promulgated in 2007 and has since, at the time of this writing, been enacted in 35 states plus the District of Columbia and the U.S. Virgin Islands.

Specific provisions of the proposed rule change and their interplay with current Wisconsin law were discussed at an open administrative rules conference on December 5, 2014, at which the court voted to return the petition to the Judicial Council for editing and refinements consistent with the court's discussions. On March 24, 2015, the Judicial Council filed an amended petition containing such changes. The matter was discussed further at an open rules conference on June 10, 2015, at which the court voted unanimously to adopt the amended petition, with certain changes to the language and comment regarding the issuance of a subpoena.

By an order dated July 7, 2015, the court ordered that, effective January 1, 2016, Wis. Stat. §

887.24 be repealed and recreated to incorporate the provisions of the UIDDA as modified to comport with Wisconsin law. A copy of the court's July 7th order can be found here.

As recreated, the new Wis. Stat. § 887.24 will allow for subpoenas to be issued for discovery in Wisconsin by two methods:

- First, a party may have a subpoena issued by a clerk of circuit court by submitting a foreign subpoena to the clerk in the county in which the discovery is sought. When submitted, the foreign subpoena must be accompanied by an appropriate Wisconsin subpoena form that includes certain information that is specified in the statute. No filing fee will be required, and the clerk will not open a case file; however, the clerk may keep a record of the subpoenas issued.
- Second, a party may elect to retain an attorney authorized to practice law in Wisconsin to sign and issue a subpoena in his or her capacity as an officer of the court. Any subpoenas issued by Wisconsin attorneys must contain the same statutorily required information as that required for subpoena forms submitted to a clerk of circuit court.

To avoid any conflicts with the rules relating to the unauthorized practice of law, Wis. Stat. § 887.24(3)(d), as recreated, specifically provides that requesting the issuance of a subpoena through either of the prescribed methods in § 887.24(3) will not constitute an appearance in Wisconsin courts. However, should the need for a protective order arise related to the subpoena or should there be a need to enforce, quash, or modify the subpoena, then a special proceeding will need to be started in the circuit court in the county in which the discovery is sought.

The full text of Wis. Stat. § 887.24, as repealed and recreated, can be found here.

In closing, while Wisconsin lawyers will no longer be needed to serve as local counsel to petition a Wisconsin court to secure discovery for out-of-state parties, they should still understand the rule change to not only effectively counsel out-of-state lawyers and parties on how to obtain discovery in Wisconsin, but also because they may be called on directly to issue subpoenas for discovery from witnesses located in Wisconsin for use in litigation pending elsewhere.

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## LIMITATION OF LIABILITY

From time to time in drafting an agreement, one of the parties may wish to limit contractually any remedies or liability that the other party might seek at a later point in time. For example, a software developer might seek to limit any possible liability associated with the development of the software or with respect to the contract in any way. Another example

would be in a purchase or sale of a business, where a seller may wish to limit liability that the buyer might assert at some future point in time.

In the case, *Aurora Health Care, Inc. v. Codonix Inc*., *2006 WI 1589629 (E. D. Wis. 2006)*, our firm was defending a party who was sued under a long and sophisticated contract. One part of the contract sought to limit liability to a particular sum or to three times the amounts paid under the contract. Furthermore, there was a limitation which provided that in no event will either party be liable for any consequential, indirect, special, or incidental damages. While there may be a dispute as to the meaning of those terms, clearly this is an attempt to limit liability under the contract.

Contractual remedies such as the ones mentioned above have often been upheld by the courts. In a Seventh Circuit case, the parties' contract contained remedy limitations that excluded lost profits, special, contingent, incidental, or consequential damages. Even in the face of those contractual limitations, the claimant sought significant sums of money in lost profits damages. The court noted that both parties were sophisticated commercial parties and that the limitation of remedies provisions still provided the plaintiff with a minimum adequate remedy, and therefore, the remedy limitation "did not fail of its essential purpose." In essence, the Seventh Circuit said, "a deal is a deal."

Provisions that relate to lost cost savings are typically treated as consequential damages or lost profits. A court may determine that a contract does not fail of its essential purpose because someone was denied a certain remedy since the remedy provided for in the contract was a product of that party's own negotiation and making. In other words, if you helped design the contract and you signed it, you made your own bed and you must sleep in it.

Limiting liability or, for that matter, limiting warranties that might be available and the remedies that might flow from those warranties are part of a negotiation that allocates risk in accordance with the parties' sound business practices. The courts may say that a commercial purchaser can better assess its economic expectations and anticipate problems with meeting those expectations by demanding particular warranties to address the problems, or to ensure against that particular risk. In fact, some courts have indicated that if a commercial purchaser wants a product of higher quality, or better durability, or a better warranty, the purchaser is free to negotiate in the marketplace.

If a party wants stronger warranties and remedies, they are likely to have to make other concessions such as an increase in the price.

Care should be taken in the negotiation of provisions which may limit the liability of the parties to the contract or may limit any warranties under the contract. If a party is concerned about any such limitations, then the best approach may be to seek to negotiate more favorable terms rather than pursuing a claim at a later point in time where the other side will

argue that the opponent is seeking to re-write the contract.

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

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## DIZARD MENTIONED IN JOURNAL SENTINEL: OWNERS OF MILWAUKEE BUILDING DECLARED NUISANCE FACE COURT ORDER

In a recent article published by *The Journal Sentinel*, Dizard was mentioned for his court-appointed receivership of a local Milwaukee apartment building that has been declared a public nuisance.

Attorney Seth E. Dizard is the head of the firm's Banking and Creditors' Rights Practice Group. He has extensive experience serving as a court-appointed receiver throughout the State of Wisconsin for businesses, construction projects, real estate developments, marital and family estates, rental income properties, and high net worth individuals.

Read full article here.

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## GRANT KILLORAN AND PATRICK MCBRIDE SELECTED TO THE 2015 IRISH LEGAL 100

Grant Killoran and Patrick McBride, shareholders in the Litigation Practice Group at O'Neil, Cannon, Hollman, DeJong and Laing S.C., recently were selected by the *Irish Voice Newspaper* to the 2015 Irish Legal 100.

First introduced in 2009, the Irish Legal 100 is a listing of leading legal figures across the United States and honors accomplished and distinguished lawyers of Irish descent from law schools, law firms, the judiciary and industry around the country. Past honorees have included United States Supreme Court Chief Justice John Roberts and United States Supreme Court Associate Justice Anthony Kennedy, and honorees have been invited to meet with Ireland's Ambassador to the United States.

For information about the Irish Legal 100, visit www.irishlegal100.com.

For more information about O'Neil, Cannon, Hollman, DeJong and Laing S.C., including Attorneys Killoran and McBride, visit www.wilaw.com.

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# O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C. HOSTS CONTINUING LEGAL EDUCATION SEMINAR FOR SMALL FIRMS AND SOLO PRACTITIONERS

On October 7, 2015, O'Neil, Cannon, Hollman, DeJong and Laing S.C. hosted a Continuing Legal Education seminar entitled "Hot Legal Topics for Small Firms and Solo Practitioners" focusing on legal issues of interest to Wisconsin small firm and solo practice attorneys. Over 50 attorneys attended the event.

The firm's Managing Shareholder, Dean Laing, presided over the event.

Chad Baruch of Dallas, Texas was the keynote speaker for the seminar. Attorney Baruch spoke on effective legal writing. He also spoke on constitutional law issues.

A number of O'Neil, Cannon, Hollman, DeJong and Laing S.C. attorneys also spoke at the event:

- Patrick McBride, Joe Newbold, Melissa Blair, and Christa Wittenberg participated in a panel discussion on the role of judicial clerks and court staff in state and federal court proceedings.
- Tim Van de Kamp presented on commercial lease issues.
- Greg Mager presented on asset protection in divorce and family transfers.
- Seth Dizard presented on recent developments in receivership law.
- Grant Killoran and Greg Lyons presented on legal and practical issues related to commercial arbitration in the United States and abroad.

O'Neil, Cannon, Hollman, DeJong and Laing S.C. will hold this seminar again in the Fall of 2016.

If you would like any additional information regarding the seminar, including copies of the seminar materials, or if you would like to attend the 2016 seminar, please contact Grant Killoran at grant.killoran@wilaw.com or at 414.276.5000.

# GRANT KILLORAN APPOINTED TO THE BOARD OF DIRECTORS OF NORTH POINT LIGHTHOUSE FRIENDS, INC

Grant Killoran, Chair of the Litigation Practice Group at O'Neil, Cannon, Hollman, DeJong and Laing S.C., recently was appointed to the Board of Directors of North Point Lighthouse Friends, Inc.

North Point Lighthouse Friends is a non-profit organization committed to increasing public awareness of the history of North Point Lighthouse Station in Lake Park in Milwaukee, Wisconsin.

North Point Lighthouse Station is located at 2650 North Wahl Avenue in Milwaukee. The North Point Lighthouse began operating in 1885 and presently is comprised of 74-foot tower made of cast iron structural steel. North Point Lighthouse Station includes the North Point Lighthouse and a two-story Queen Anne-style wood frame dwelling known as the Keeper's Quarters, which was occupied from 1888 through 1994 by lighthouse keepers and their families and U.S. Coast Guard employees. North Point Lighthouse Station was decommissioned in 1994.

North Point Lighthouse Friends manages North Point Lighthouse Station for Milwaukee County following its transfer to the County from the U.S. Coast Guard. North Point Lighthouse Friends provides opportunities to adults and children to tour North Point Lighthouse Station and participate in special programming related to it and maritime issues.

North Point Lighthouse Station was placed on the National Register of Historic Lighthouses in 1980 and the National Register of Historic Places in 1984. It was designated as a Milwaukee County Landmark in 2005.

North Point Lighthouse Station is open to the public for tours from 1:00 p.m. to 4:00 p.m. on Saturday afternoons year round, as well as tours upon request with advance reservations.

For more information regarding North Point Lighthouse Station, please go to www.northpointlighthouse.org.

# ATTORNEY SLAWINSKI QUOTED IN COMMERCIAL OBSERVER: SEVENTH CIRCUIT SETS TITLE INSURANCE PRECEDENT

Steven J. Slawinski was interviewed by *Commercial Observer* recently regarding his role in the case *BB-Syndication Services, Inc. v. First American Title Insurance Co., 780 F.3d 825 (7th Cir. 2015).* This case has set the precedent that a lender's title insurance policy does not cover construction liens that arise due to insufficient construction funding.

Read full article here.

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# EMPLOYMENT LAWSCENE ALERT: CAN EMPLOYEES USE FMLA TO AVOID OVERTIME?

The FMLA requires that covered employers grant eligible employees twelve weeks of unpaid leave for a serious health condition that prevents them from performing the functions of their job. FMLA leave can be taken on an intermittent basis if medically necessary. A recent case out of the United States District Court for the District of Connecticut shows the importance of correctly identifying your obligations under the FMLA and how they may differ from your obligations under other employment law statutes such as the Americans with Disabilities Act.

In *Santiago v. Department of Transportation, et al.*, the employee was diagnosed with "cluster headaches," which he said were "worse than migraines," "completely disabling," and "can last for hours to days depending on the episode." The employee and his doctor determined that his "excessive work schedule," which was essentially anything over eight hours a day or forty hours per week, was a main trigger of his headaches and suggested that his work schedule be limited. Because the employee's job required mandatory overtime, the employer stated that it could not accommodate him and that, if he could not find another job with the employer, he would either need to apply for disability retirement or be terminated. The employer stated that those were his only options if he could not perform overtime, even if he applied for FMLA leave. The employee submitted FMLA paperwork from his physician that outlined his serious health condition and stated that he could not work over eight hours per day.  Because he could not perform overtime, he was placed on leave and eventually terminated.

Although the employer argued that the employee was only entitled to leave when he was

actually incapacitated, the court found that "[t]he examples in the regulation specifically provide that an employee can take leave to avoid the onset of illness, noting that 'an employee with asthma may be unable to report for work . . . because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level.'" (*citing* 29 C.F.R. § 825.115(f)).

Furthermore, the employer argued that what the employee was requesting was essentially a permanent accommodation that changed the essential functions of the job. The Court acknowledged that while the employee "might not be able to use the ADA to avoid overtime . . . employees can use their yearly allotment of 12 weeks of FMLA leave to significantly alter their schedules." The Court went on to point out that, unlike the ADA, the FMLA does not include an "undue hardship" defense and the employer is required to provide the mandated 12 weeks of leave.

Decisions like this can put employers between a rock and a hard place, where they need employees to be at work because overtime is an essential function of the job and where they have to comply with multiple laws. Employers also need to carefully evaluate their obligations to make sure that they are properly complying with all relevant employment laws.