LETTERS OF INTENT NOT IMPORTANT? BE CAREFUL.

When buying or selling a business, it is critical to take the negotiation and preparation of the letter of intent seriously. All too often, I hear the phrase, "letters of intent are not binding, so we don't need to spend time negotiating them." Other times, a new client will have already signed a letter of intent before engaging our firm or other advisors. Letters of intent contain many key terms, and while it is true that signing a letter of intent will not typically bind a party to close the transaction, it is important for all parties in a transaction to understand that if the transaction does close, it will likely close on the terms contained in the letter of intent. Accordingly, when negotiating a letter of intent in the sale of business context, the parties should invest the time and energy necessary to fully understand the impact the letter of intent's terms will have on the transaction.

A letter of intent (also sometimes referred to as a term sheet or an LOI) is usually prepared by the buyer and presented to the seller, and it describes the key terms of the buyer's proposal to purchase the seller's business. Among other things, the LOI will describe what the buyer is buying (typically, either the assets of the business or the shares in the business), the purchase price, and how the purchase price will be paid (all cash, seller note, earn-out, etc.). It may also contain additional concepts relating to non-competition, post-closing employment for the seller's owner, assumption of liabilities, indemnification, and terms relating to the buyer's lease or purchase of the real estate used by the seller's business. An LOI also typically contains certain provisions that are actually binding on the parties, including provisions that require the seller to deal exclusively with the buyer for a period of time, dictate which state's law will apply when interpreting the LOI, obligate the parties to maintain confidentiality, and state that each party will be responsible for its own transaction expenses. Finally, because buyers and sellers have varying degrees of leverage as a transaction progresses, buyers and sellers may take different approaches when selecting the terms to include and the terms to omit in an LOI.

Given the importance that an LOI will have on the transaction, the parties must understand the terms in the LOI and recognize that the agreed-upon terms in the LOI will form the basis for the terms that will be contained in the definitive purchase agreement and related documents. A party that attempts to change the agreed-upon terms in an LOI, because it did not fully understand the LOI's terms, will face challenges. That party will likely be accused of "re-trading" or "moving the goalposts," and, as a result, the party taking this approach will often lose a tremendous amount of negotiating capital; capital that could be well spent on other commonly negotiated terms in the definitive purchase documents. This practice often results in a longer transaction process, increased transaction expenses for both parties, and a lower likelihood of the transaction actually closing.

In conclusion, while an LOI is not technically binding on the parties in most cases, the LOI will have a significant impact on the overall transaction. It is critical for the parties to recognize this.

For more information on LOIs and this topic you can contact Jason Scoby at 414-291-4714 and jason.scoby@wilaw.com

Jason Scoby is a member of the firm's Business Practice Group and Banking and Creditors' Rights Practice Group. He advises and represents individuals, businesses, and banks on a variety of corporate, banking, and business-related issues, including mergers and acquisitions, commercial loan transactions, corporate issues, contract negotiation and preparation, and business entity selection and formation.

NINETEEN ATTORNEYS NAMED SUPER LAWYERS

Each year, *Super Lawyers* surveys the State's attorneys and judges, seeking the State's top attorneys. The lists for 2016 were just published and, once again, a large number of our attorneys are included thereon.

Dean Laing was named one of the Top 10 attorneys in Wisconsin for the second time. He was also named one of the Top 50 attorneys in Wisconsin for the eleventh straight year. In doing so, he is one of only seven attorneys out of over 15,000 attorneys in Wisconsin — and the only commercial litigator in Wisconsin — to make the list all eleven years. Dean was also named one of the Top 25 attorneys in Milwaukee.

Seth Dizard and Patrick McBride were also named one of the Top 50 attorneys in Wisconsin. This is the fourth time that Seth has made the list. Seth and Patrick were also named one of the Top 25 attorneys in Milwaukee.

Doug Dehler, Jim DeJong, Pete Faust, Bob Gagan, John Gehringer, Joe Gumina, Greg Lyons, Greg Mager, Joe Newbold, Chad Richter, John Schreiber, Jason Scoby and Steve Slawinski were also named Super Lawyers, a recognition given to the top 5% of attorneys in Wisconsin. Jim DeJong, Pete Faust, John Gehringer and Greg Lyons have made the list for the past 10 or more years.

Megan Harried and Erica Reib were also named Rising Stars, which is limited to 2.5% of the young attorneys in Wisconsin.

In total, we had 19 of our attorneys named to the lists by *Super Lawyers*, representing more

than 50% of our practicing attorneys, which is more than 10 times in excess of the 5% statewide standard.

We are extremely proud of these recognitions, but even more proud of the quality of service we provide to our clients.

RECOGNIZED AS ONE OF THE TOP LAW FIRMS IN WISCONSIN BY SUPER LAWYERS

O'Neil, Cannon, Hollman, DeJong and Laing is pleased to be selected for inclusion in the 2015 *Super Lawyers Business Edition*. The Top firms were chosen based on the number of attorneys within the firm who were selected to the 2014 or 2015 Super Lawyers list in business practice areas, as well as a combination of metrics indicating the quality of those attorneys. Quality factors that were considered included the number of years selected to the list, inclusion on a top list, and their average blue ribbon panel scores.

The following attorneys recognized by Super Lawyers and featured in the *2015 Annual Directory* of the nation's top attorneys in business and transactions practice areas include:

- James G. DeJong – Mergers and Acquisitions
- Seth E. Dizard – Creditor Debtor Rights
- Peter J. Faust – Mergers and Acquisitions
- John G. Gehringer – Real Estate
- Joseph E. Gumina – Employment and Labor
- Gregory W. Lyons – Business Litigation
- Patrick G. McBride – Business Litigation
- Joseph D. Newbold – Business Litigation
- Chad J. Richter – Business/Corporate
- John R. Schreiber – Creditor Debtor Rights
- Jason R. Scoby – Mergers and Acquisitions

TWENTY ATTORNEYS ELECTED TO THE

WISCONSIN SUPER LAWYERS LISTS

O'Neil Cannon is proud to announce that the following sixteen attorneys were selected for inclusion on the Super Lawyers list, which is limited to 5% of all Wisconsin attorneys, as published in the December 2015 Edition of *Milwaukee Magazine and the* Wisconsin *Super Lawyers Magazine*:

- Douglas P. Dehler
- James G. DeJong
- Seth E. Dizard
- Peter J. Faust
- John G. Gehringer
- Joseph E. Gumina
- Dean P. Laing
- Gregory W. Lyons
- Gregory S. Mager
- Patrick G. McBride
- Joseph D. Newbold
- Chad J. Richter
- John R. Schreiber
- Jason R. Scoby

In addition, the following four attorneys were selected for inclusion on the Super Lawyers "Rising Stars" list, which "recognize[s] the top up-and-coming attorneys in the state—those who are 40 years old or younger, or who have been practicing for 10 years or less:"

- Melissa S. Blair
- Megan O. Harried
- Erica N. Reib
- Timothy M. Van de Kamp

The Firm is proud to further announce that Dean Laing, Seth Dizard, and Peter Faust were selected by Super Lawyers as "Top 50 Attorneys" in Wisconsin and "Top 25 Attorneys" in the Milwaukee Area. Dean is one of only 10 attorneys out of over 15,000 attorneys in Wisconsin—and the only commercial litigator—to be selected to The Top 50 list for all 10 years.

Super Lawyers is a national rating service that rates attorneys in all 50 states. The selection process is multi-phased and includes independent research, peer nominations, and peer evaluations. As part of its process, Super Lawyers surveyed more than 15,000 attorneys and judges in Wisconsin, looking for the best attorneys in the State.

The New Jersey Supreme Court recently upheld the findings of a Special Master who made the following determinations about Super Lawyers:

> "[T]he selection procedures employed by [Super Lawyers] are very sophisticated, comprehensive and complex.
>
> It is absolutely clear… that [Super Lawyers does] not permit a lawyer to buy one's way onto the list, nor is there any requirement for the purchase of any product for inclusion in the lists or any quid pro quo of any kind or nature associated with the evaluation and listing of an attorney or in the subsequent advertising of one's inclusion in the lists."

SUPER LAWYERS RECOGNIZES OCHD&L AMONG THE TOP WISCONSIN LAW FIRMS

O'Neil, Cannon, Hollman, DeJong and Laing is pleased to be selected for inclusion in the Super Lawyers Business Edition. Top firms were chosen based on the number of attorneys within the firm who were selected to a 2013 or 2014 Super Lawyers list in business practice areas, as well as a combination of metrics indicating the quality of those attorneys. Quality factors that were considered included the number of years selected to the list, inclusion on a top list, and their average blue ribbon panel scores.

The following attorneys recognized as outstanding in the business and transactions practice group and featured in the Super Lawyers Business Edition include:

- James G. DeJong – Mergers and Acquisitions
- Seth E. Dizard – Creditor Debtor Rights
- Peter J. Faust – Mergers and Acquisitions
- Chad J. Richter – Business/Corporate
- John R. Schreiber – Creditor Debtor Rights
- Jason R. Scoby – Mergers and Acquisitions

ATTORNEY JASON SCOBY REAPPOINTED TO FOURTH CONSECUTIVE TERM AS CHAIR OF MBA'S CORPORATE, BANKING AND BUSINESS SECTION

Attorney Jason Scoby of O'Neil Cannon was recently reappointed to serve as Chair of the

Corporate, Banking and Business Section of the Milwaukee Bar Association ("MBA") for the fourth consecutive year. In this role, Attorney Scoby focuses on providing continuing legal education presentations and resources, as well as networking opportunities for attorneys and other professionals in the corporate, banking, and business field.

Some of the topics previously addressed and to be addressed in upcoming presentations include:

- Mergers and Acquisitions and Important Considerations when Buying or Selling a Business
- Issues in Commercial Loan Transactions
- Patient Protection and Affordable Care Act (commonly referred to as "Obamacare")
- Choice of Business Entity and the Associated Business and Tax Implications
- Drafting Enforceable Non-Compete Agreements
- Antitrust Impact on Businesses
- Contract Drafting

If you would like further information regarding an upcoming MBA event, or if you are interested in making a presentation for the MBA's Corporate, Banking and Business Section, please contact Jason at jason.scoby@wilaw.com. He can also be reached directly at 414-291-4714.

Attorney Scoby assists clients on corporate and business-related issues. He focuses primarily on mergers and acquisitions, commercial loan transactions, and general corporate law (e.g. contract review, preparation and negotiation, and general business and legal advice to closely held businesses).

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.

MORE HONORS FOR OUR ATTORNEYS – JANUARY 2013

O'Neil, Cannon, Hollman, DeJong and Laing S.C. is proud to announce that the following nine attorneys were selected for inclusion on the *Super Lawyers* list, which is limited to 5% of all

Wisconsin attorneys, as published in the December 2012 edition of *Milwaukee Magazine*:

- James G. DeJong
- Seth E. Dizard
- Peter J. Faust
- John G. Gehringer
- Dean P. Laing
- Gregory W. Lyons
- Patrick G. McBride

The Firm is proud to additionally announce that the following six attorneys were selected for inclusion on the *Super Lawyers* "Rising Stars" list, which "recognize[s] the top up-and-coming attorneys in the state—those who are 40 years old or younger, or who have been practicing for 10 years or less:"

- Joseph D. Newbold
- Laura J. Now
- Chad J. Richter
- John R. Schreiber
- Jason R. Scoby
- Timothy M. Van de Kamp

The Firm is proud to further announce that Dean Laing was selected by *Super Lawyers* as one of the "Top 10 Attorneys" in Wisconsin, regardless of practice area. Of the over 15,000 attorneys in Wisconsin, Dean was the only commercial litigator selected to the list. He was also selected by *Super Lawyers* as one of the "Top 25 Attorneys in the Milwaukee Area."

Super Lawyers is a national rating service which rates attorneys in all 50 states. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. As part of its process, *Super Lawyers* surveyed more than 15,000 attorneys and judges in Wisconsin, looking for the best attorneys in the State.

The New Jersey Supreme Court recently upheld the findings of a Special Master who made the following determinations about *Super Lawyers*:

> "[T]he selection procedures employed by [Super Lawyers] are very sophisticated, comprehensive and complex.
>
> It is absolutely clear… that [Super Lawyers does] not permit a lawyer to buy one's way onto the list, nor is there any requirement for the purchase of any product for inclusion in the lists or any quid pro quo of any kind or nature associated with the evaluation and listing of an attorney or in the subsequent advertising of one's inclusion in the lists."

MORE HONORS FOR OUR ATTORNEYS

The new lists of *Super Lawyers*® and *Rising Stars* are out and O'Neil Cannon is proud to announce that 12 (approximately 40%) of our lawyers made the lists. The lists are published in the December 2011 edition of *Milwaukee Magazine*. Our lawyers making the list are:

Super Lawyers

- James G. DeJong
- Seth E. Dizard
- Peter J. Faust
- John G. Gehringer
- Dean P. Laing
- Gregory W. Lyons
- Patrick G. McBride

Rising Stars

- Chad J. Richter
- John R. Schreiber
- Jason R. Scoby

The lists of *Super Lawyers* and *Rising Stars* are limited to 5% and 2.5%, respectively, of the lawyers practicing in Wisconsin.

Milwaukee Magazine also published lists of the Top 50 Lawyers in Wisconsin and the Top 25 Lawyers in the Milwaukee area, and both Mr. Laing and Mr. Faust made those lists as well. This is the sixth consecutive year that Mr. Laing has made the list of the Top 50 Lawyers in Wisconsin, making him the only commercial litigator in Wisconsin to have done so.

As described in the *Milwaukee Magazine* article, the process used for assembling the *Super Lawyers* and *Rising Stars* lists is as follows:

First, we ask lawyers across the state to name the top attorneys they've personally observed in action. We also perform our own research to find outstanding attorneys who may have been overlooked by their peers. Once we have our candidate pool assembled, we access the background, credentials and experience of each lawyer. Specifically, we look at 12 indicators of peer recognition and professional achievement—things like experience, verdicts and settlements, transactions, clients, honors and awards.

The lawyers are then evaluated by a blue ribbon panel of peers within their primary area of practice. Before final selections are made, we divide the lawyers by firm size and chose the

top lawyers from each group until we have a list that represents 5 percent of the lawyers in the state (*Rising Stars lists are limited to 2.5 percent).*

The list of Top 50 Lawyers in Wisconsin is comprised of the 50 lawyers in Wisconsin receiving the highest point totals in the nomination, research and blue ribbon review process. The list of Top 25 Lawyers in the Milwaukee area consists of the 25 lawyers in the Milwaukee area receiving the highest point totals in that same process.

ATTORNEY SCOBY REAPPOINTED TO SECOND TERM AS CHAIR OF MBA'S CORPORATE, BANKING AND BUSINESS SECTION

Attorney Jason Scoby of O'Neil Cannon was recently reappointed to serve as Chair of the Corporate, Banking and Business Section of the Milwaukee Bar Association ("MBA"). In this role, Attorney Scoby focuses on providing continuing legal education presentations and resources, as well as networking opportunities for attorneys and other professionals in the corporate, banking, and business field.

Some of the topics to be addressed in upcoming presentations may include:

- Choice of Business Entity and the Associated Business and Tax Implications
- Various Subjects in Mergers and Acquisitions
- Lending Issues
- Ethical Issues Involved in Business Transactions
- Contract Drafting

If you would like further information regarding an upcoming MBA event, or if you are interested in making a presentation for the MBA's Corporate, Banking and Business Section, please contact Jason at jason.scoby@wilaw.com.

Attorney Scoby is an associate at O'Neil Cannon, where he assists clients on a wide variety of corporate and business-related issues, including commercial transactions, mergers and acquisitions, general corporate law, franchising, contract preparation and negotiation, business entity selection, and regulatory compliance.

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.

ATTORNEY JASON SCOBY QUOTED IN WISCONSIN LAW JOURNAL

Jason Scoby was recently quoted in the *Wisconsin Law Journal* in an article about the proposed Bucyrus-Caterpillar merger. The article, titled "Bucyrus Clears Hurdle in Merger Lawsuits," describes the Jan. 19 decision by Judge Charles Clevert Jr. of the Eastern District Court of Wisconsin in which he denied plaintiff shareholders' motion for a preliminary injunction seeking to prevent the shareholder vote to approve the merger. The excerpt containing Jason's quote reads:

- Attorney Jason Scoby, chairman of the Business, Banking and Corporate Law Section of the Milwaukee Bar Association, pointed out that under relevant case law, the plaintiffs needed to satisfy three requirements: irreparable harm, inadequate traditional legal remedies and a likelihood of success on the merits.
- Scoby, of O'Neil, Cannon, Hollman, DeJong and Laing SC, Milwaukee, said the court clearly explained why the plaintiffs failed to satisfy any of the three requirements.
- "The court could've denied the plaintiffs' motion based on the fact that they couldn't satisfy the first requirement, that they faced irreparable harm if the injunction was not granted," he said. "However, the court took care to also hold that the plaintiffs failed to satisfy the other two requirements."
- In arriving at its decision, the court alluded to the Business Judgment Rule, Scoby said. That rule provides that a court will rarely substitute its own judgment for that of the corporation's board when the board engaged in sufficient due diligence prior to arriving at its decision.

Read the full article here. The case is *City of Sterling Heights Police* and *Fire Retirement System v. Bucyrus International, Inc., et. al.*, Case No. 10-CV-1106.

Jason advises individuals and closely held businesses on a variety of corporate and business-related issues, including mergers and acquisitions, commercial transactions, corporate issues, franchising, contract negotiation and preparation, and business entity selection and formation.

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.