

# 21 FIRM ATTORNEYS RECOGNIZED BY SUPER LAWYERS

Each year, *Super Lawyers* surveys the State of Wisconsin's 15,000 attorneys and judges, seeking the State's top attorneys. In November 2020, *Super Lawyers* published its lists for 2020, which include the Top 10 Attorneys in Wisconsin, Top 50 Attorneys in Wisconsin, Top 25 Attorneys in Milwaukee, Super Lawyers (consisting of the top 5% of attorneys in Wisconsin), and Rising Stars (consisting of attorneys who are 40 years old or younger or who have been in practice for 10 years or less).

Twenty-one of our attorneys were recognized by *Super Lawyers*, which has referred to the firm as "the Milwaukee mid-sized powerhouse." Those attorneys are the following:

- Dean P. Laing:
  - Top 10 Attorneys in Wisconsin
  - Top 50 Attorneys in Wisconsin
  - Top 25 Attorneys in Milwaukee
  - Super Lawyer
- Seth E. Dizard:
  - Top 50 Attorneys in Wisconsin
  - Top 25 Attorneys in Milwaukee
  - Super Lawyer
- Douglas P. Dehler:
  - Super Lawyer
- James G. DeJong:
  - Super Lawyer
- Peter J. Faust:
  - Super Lawyer
- John G. Gehringer:
  - Super Lawyer
- Joseph E. Gumina:
  - Super Lawyer
- Gregory W. Lyons:
  - Super Lawyer
- Patrick G. McBride:
  - Super Lawyer
- Joseph D. Newbold:
  - Super Lawyer

- Chad J. Richter:
  - Super Lawyer
- John R. Schreiber:
  - Super Lawyer
- Jason R. Scoby:
  - Super Lawyer
- Steven J. Slawinski:
  - Super Lawyer
- JB Koenings:
  - Rising Stars
- Trevor C. Lippman:
  - Rising Stars
- Erica N. Reib:
  - Rising Stars
- Christa D. Wittenberg:
  - Rising Stars

*Super Lawyers* is a national rating service that rates attorneys in all 50 states. The selection process utilized by *Super Lawyers* is multi-phased and includes independent research, peer nominations, and peer evaluations. One court recently had this to say about *Super Lawyers*:

“[T]he selection procedures employed by [*Super Lawyers*] are very sophisticated, comprehensive and complex.

It is abundantly 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.”

We are proud to be one of the few firms in Wisconsin that had over 50% of its attorneys receive recognition by *Super Lawyers*.

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## 20 OCHDL LAWYERS SELECTED AS 2021 BEST

# LAWYERS®; ANOTHER 5 NAMED BEST LAWYERS: ONES TO WATCH

We are pleased to announce 20 of our lawyers have been included in the 2021 Edition of *The Best Lawyers in America*, and an additional five have been selected as 2021 *Best Lawyers: Ones to Watch*.

The following are the O'Neil, Cannon, Hollman, DeJong and Laing lawyers named to the 2021 lists:

## *Best Lawyers in America*

- Douglas P. Dehler - Litigation - Insurance
- James G. DeJong - Corporate Law, Mergers and Acquisitions Law, and Securities / Capital Markets Law
- Seth E. Dizard - Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law and Litigation - Bankruptcy
- Peter J. Faust - Corporate Law and Mergers and Acquisitions Law
- John G. Gehringer - Commercial Litigation, Construction Law, Corporate Law, and Real Estate Law
- Joseph E. Gumina - Employment Law - Management and Litigation - Labor and Employment
- Dennis W. Hollman - Corporate Law and Trusts and Estates
- Grant C. Killoran - Commercial Litigation and Litigation - Health Care
- JB Koenings - Corporate Law
- Dean P. Laing - Commercial Litigation, Personal Injury Litigation - Plaintiffs, and Product Liability Litigation - Defendants
- Gregory W. Lyons - Commercial Litigation and Litigation - Insurance
- Patrick G. McBride - Commercial Litigation
- Thomas A. Merkle - Family Law
- Joseph D. Newbold - Commercial Litigation
- Chad J. Richter - Business Organizations (including LLCs and Partnerships) and Corporate Law
- John R. Schreiber - Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law and Litigation - Bankruptcy

- Jason R. Scoby – Corporate Law
- Steven J. Slawinski – Construction Law

### Best Lawyers: Ones to Watch

- Kelly M. Spott – Trusts and Estates
- Trevor C. Lippman – Litigation – Trusts and Estates
- Erica N. Reib – Labor and Employment Law – Management and Litigation – Labor and Employment
- Christa D. Wittenberg – Commercial Litigation

### **About Best Lawyers**

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.

Best Lawyers: Ones to Watch recognizes associates and other lawyers who are earlier in their careers for their outstanding professional excellence in private practice in the United States.

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

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## **SMALL BUSINESS ADMINISTRATION LOAN RELIEF OPPORTUNITIES IN RESPONSE TO THE CORONAVIRUS PANDEMIC**

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) in response to the coronavirus pandemic.

The CARES Act directs \$349 billion towards job retention and business operating expenses by allowing small businesses to obtain forgivable loans of up to \$10 million to be used for payroll, rent, health benefits, retirement benefits, utilities and other expenses (referred to as the Paycheck Protection Program).

Click [here](#) for an article authored by attorney Jason Scoby of OCHDL which summarizes the

key provisions relating to the Paycheck Protection Program, including requirements as to eligibility, use, and forgiveness of loans obtained thereunder.

You will soon be able to apply for a Paycheck Protection Program Loan at any lending institution that is approved to participate in the program through the existing SBA 7(a) lending program as well as additional lenders approved by the Department of Treasury. Businesses are eligible to apply for loans under this program through June 30, 2020.

As an alternative to or prior to obtaining a loan under the Paycheck Protection Program, the SBA offers small businesses an opportunity to apply for other economic relief in light of the coronavirus pandemic:

## **Economic Injury Disaster Loans and Loan Advance**

The SBA's Economic Injury Disaster Loan program provides small businesses the ability to obtain working capital loans of up to \$2 million, which can provide vital economic support to small businesses to help overcome the temporary loss of revenue they are experiencing.

Small business owners may immediately apply for an Economic Injury Disaster Loan advance of up to \$10,000. Funds will be made available within three days of a successful application and will not have to be repaid.

If you receive an Economic Injury Disaster Loan related to coronavirus prior to the date which the Paycheck Protection Program becomes available, you may be able to refinance the Economic Injury Disaster Loan into the Paycheck Protection Program Loan for loan forgiveness purposes. However, you may not take out an Economic Injury Disaster Loan and a Paycheck Protection Program Loan for the same purposes. Remaining portions of the Economic Injury Disaster Loan, for purposes other than those laid out in loan forgiveness terms for a Paycheck Protection Program Loan, would remain a loan.

**To apply for a COVID-19 Economic Injury Disaster Loan, [click here](#).**

## **SBA Debt Relief**

The SBA Debt Relief program provides a reprieve to small businesses as they overcome the challenges created by the coronavirus crisis.

Under this program:

- The SBA will pay the principal, interest and fees of **new 7(a) loans** issued prior to September 27, 2020 for a period of six months.
- The SBA will pay the principal, interest and fees of **current 7(a) loans** for a period of six months.

# SBA Express Bridge Loans

**The SBA's Express Bridge Loan Pilot Program** allows small businesses who currently have a business relationship with an SBA Express Lender to access up to \$25,000 with less paperwork. These loans can provide vital economic support to small businesses to help overcome the temporary loss of revenue they are experiencing as a result of the coronavirus and can be a term loan or used to bridge the gap while applying for an Economic Injury Disaster Loan. If a small business has an urgent need for cash while waiting for a decision and disbursement on an Economic Injury Disaster Loan, they may qualify for an SBA Express Disaster Bridge Loan. Find an Express Bridge Loan Lender by connecting with your [local SBA District Office](#).

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to SBA loan relief, please speak to your regular OCHDL contact, or the author of this article, attorney [John Schreiber](#).

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## 18 OCHDL ATTORNEYS RECOGNIZED BY SUPER LAWYERS

Each year, *Super Lawyers* surveys the State of Wisconsin's 25,000 attorneys and judges, seeking the State's top attorneys. *Super Lawyers* then selects the Top 10 Attorneys in Wisconsin, Top 50 Attorneys in Wisconsin, Top 25 Attorneys in Milwaukee, and Super Lawyers (consisting of the top 5% of attorneys in Wisconsin).

The 2019 lists were published by *Super Lawyers* in December 2019, and include the following attorneys from O'Neil Cannon:

- Dean P. Laing:
  - Top 10 Attorneys in Wisconsin (Ranked #2)
  - Top 50 Attorneys in Wisconsin
  - Top 25 Attorneys in Milwaukee
  - Super Lawyer
- Seth E. Dizard:
  - Top 50 Attorneys in Wisconsin
  - Top 25 Attorneys in Milwaukee
  - Super Lawyer
- Douglas P. Dehler: Super Lawyer
- James G. DeJong: Super Lawyer
- Peter J. Faust: Super Lawyer

- John G. Gehringer: Super Lawyer
- Joseph E. Gumina: Super Lawyer
- Gregory W. Lyons: Super Lawyer
- Patrick G. McBride: Super Lawyer
- Joseph D. Newbold: Super Lawyer
- Chad J. Richter: Super Lawyer
- John R. Schreiber: Super Lawyer
- Jason R. Scoby: Super Lawyer
- Steven J. Slawinski: Super Lawyer

In addition, Erica N. Reib was selected by *Super Lawyers* as Rising Stars (a Rising Star must be 40 years old or younger or in practice for 10 years or less).

In total, 18 attorneys of O'Neil, Cannon, Hollman, DeJong and Laing were recognized by *Super Lawyers*, which has called the firm "the Milwaukee mid-sized powerhouse."

*Super Lawyers* is a national rating service that rates attorneys in all 50 states. The selection process utilized by *Super Lawyers* is multi-phased and includes independent research, peer nominations, and peer evaluations.

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## **EIGHTEEN OCHDL ATTORNEYS NAMED 2020 BEST LAWYERS IN AMERICA®**

O'Neil Cannon is pleased to announce that eighteen lawyers have been named to the 2020 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.

We would like to congratulate the following attorneys named to the 2020 *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
- 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
- Patrick G. McBride – Commercial Litigation
- Thomas A. Merkle – Family Law
- Chad J. Richter – Business Organizations (including LLCs and Partnerships)
- John Schreiber – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law, Litigation – Bankruptcy
- 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.”

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## **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](tel:414-276-5000) or [John.Schreiber@wilaw.com](mailto:John.Schreiber@wilaw.com).

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## **20 OCHDL ATTORNEYS NAMED 2019 BEST LAWYERS IN AMERICA**

O'Neil Cannon is pleased to announce that 20 lawyers have been named to the 2019 Edition

of *Best Lawyers*, the oldest and most respected peer-review publication in the legal profession.

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O’Neil Cannon would like to congratulate the following attorneys named to the 2019 *Best Lawyers in America* list:

- Douglas P. Dehler – Litigation – Insurance
- James G. DeJong – Mergers and Acquisitions Law, Corporate Law, Securities / Capital Markets Law
- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law, Litigation – Bankruptcy
- Peter J. Faust – Mergers and Acquisitions Law, Corporate Law
- Robert R. Gagan – Municipal Law
- John G. Gehringer – Real Estate Law, Construction Law, Commercial Litigation, Corporate Law
- Joseph E. Gumina – Litigation – Labor and Employment
- Dennis W. Hollman – Trusts and Estates, Corporate Law
- 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
- Chad J. Richter – Business Organizations (including LLCs and Partnerships)
- Steven J. Slawinski – Construction Law
- John Schreiber – Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, Litigation – Bankruptcy

Additionally, Attorney Dean P. Laing has been named the 2019 Milwaukee Lawyer of the Year in Product Liability Litigation-Defendants.

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.”

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## SEVENTEEN ATTORNEYS NAMED SUPER LAWYERS

Each year, *Super Lawyers* surveys the State’s attorneys and judges, seeking the State’s top attorneys. The lists for 2017 were recently 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 third time. He was also named one of the Top 50 attorneys in Wisconsin for the twelfth straight year. In doing so, he is one of only six attorneys out of over 15,000 attorneys in Wisconsin—and the only commercial litigator in Wisconsin—to make the list all twelve years. Dean was also named one of the Top 25 attorneys in Milwaukee.

Seth Dizard and Patrick McBride were also named among the Top 50 attorneys in Wisconsin. This is the fifth time that Seth has made the list. Seth was 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.

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

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

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## 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. Bielick*, 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

## SECURED CREDITORS MUST FILE BANKRUPTCY PROOFS OF CLAIM IN THE SEVENTH CIRCUIT

In a reversal of a decision of the U.S. Bankruptcy Court for the Northern District of Illinois, the United States Seventh Circuit Court of Appeals in *In re Pajian* rejected a common bankruptcy court practice of not requiring secured creditors to file proofs of claim in order to receive distributions toward pre-petition secured arrearages as part of a debtor's chapter 13 plan of reorganization.

*Pajian* involved a chapter 13 bankruptcy debtor indebted to Lisle Savings Bank, a secured creditor. Lisle filed a late proof of its secured claim and the debtor objected to the claim based upon its untimeliness. Formerly, courts would allow a secured creditor such as Lisle Savings Bank to abstain from filing a proof of claim and, instead, wait to object to a proposed plan of reorganization that failed to include payments toward the creditor's secured pre-petition arrearage claim.

In opining that Rule 3002(c) of the bankruptcy code requires all (not only unsecured) creditors to file proofs of claim within 90 days of a Section 341 meeting of creditors, the Court of Appeals effectively barred Lisle Savings Bank from receiving distributions on its pre-petition secured arrearage claim as part of the debtor's plan of reorganization. While the Court of Appeals acknowledged that a secured creditor's lien (and right to foreclose the same) remains unaffected by its failure to timely file a proof of claim, the court's decision means that a debtor need not make plan payments to its tardy secured lender during its plan of reorganization (presumably 5 years), but is only required to make loan payments to its lender coming due during the plan in order to avoid a foreclosure of the bank's lien.

As a result, the debtor in *Pajian* was not required to make plan payments of loan arrearages during the course of its entire plan of reorganization. Because Lisle's lien was not avoided, however, the bank remained entitled to realize upon its pre-petition secured arrearage to the extent of the value of its security, but only after completion of the debtor's plan of reorganization or default under the terms thereof.

Many deadlines are very short under the bankruptcy rules. If you are a creditor, whether secured or unsecured, it is of utmost importance to contact bankruptcy counsel immediately upon receiving a notice of bankruptcy. Failure to comply with bankruptcy deadlines, including the filing of a timely proof of claim, may prejudice the rights of a secured creditor

as displayed by *Pajian*.

For further information, please contact John Schreiber or any of the attorneys in OCHD&L's Banking and Creditors' Rights Practice Group.