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.

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.

LEGISLATIVE ALERT: NEW RULES AND PROCEDURES REGARDING MORTGAGE

FORECLOSURES

Wisconsin recently enacted Act 376 modifying certain aspects of mortgage foreclosure proceedings, most notably a reduction to the period of time that owner-occupied, non-commercial property may be redeemed and the process of declaring a property abandoned.

Under current law, a judgment of foreclosure must specify a length of time, called a redemption period, during which a mortgagor may redeem the mortgaged property by paying the entire amount of the mortgage debt. Upon redemption, the judgment of foreclosure and the underlying mortgage are discharged, and the mortgagor retains the property. Act 376 reduces the foreclosure redemption periods applicable to mortgages upon owner-occupied, non-commercial property that are executed on or after April 26, 2016:

- The period of redemption is reduced from 12 months to 6 months after entry of judgment. This new 6-month redemption period may be extended to 8 months if, upon motion of a mortgagor, a court finds that the mortgagor is attempting in good faith to sell the mortgaged premises and has entered into a listing agreement with a licensed broker.
- If a mortgagee, however, waives its right to a judgment for any deficiency that may remain following sale, the newly enacted 6-month redemption period is cut in half to 3 months. Similarly, the redemption period in such a case may be extended to 5 months if, upon motion of a mortgagor, a court finds that the mortgagor is attempting in good faith to sell the mortgaged premises and has entered into a listing agreement with a licensed broker.

Act 376 also provides that only a foreclosing plaintiff or the city, town, village or county where the mortgaged property is located may petition the presiding court for a finding that the mortgaged property has been abandoned by the mortgagor and its assigns.

If the court makes a finding of abandonment, Act 376 requires immediate entry of a foreclosure judgment and requires the foreclosing plaintiff, within 12 months of such entry of judgment, to hold a sale of the mortgaged premises and have the sale confirmed or release or satisfy its mortgage lien and vacate the judgment of foreclosure with prejudice. If a foreclosing plaintiff fails to complete either of the above requirements within 12 months of entry of judgment, any party to the foreclosure action or the city, town, village, or county where the mortgaged property is located may petition the court for an order compelling a sale of the property.

If you have any questions, please contact attorney John R. Schreiber at john.schreiber@wilaw.com or 414-276-5000.

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.
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> 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."

ATTACK OF THE ZOMBIE PROPERTY

On February 17, 2015, the Wisconsin Supreme Court, in *The Bank of New York Mellon v. Carson,* 2015 WI 15, decided that, under Section 846.102 of the Wisconsin Statutes, banks and others who file mortgage foreclosure cases may be legally compelled to hold judicial sales of abandoned properties within a reasonable time after the borrower's redemption period expires. This decision flies in the face of the foreclosure practices of many lenders and, therefore, is worthy of careful consideration.

To avoid the problems highlighted by this case, it may be wise for lenders and others who foreclose mortgages to consider taking advantage of the receivership process to liquidate and dispose of abandoned or "zombie" properties, rather than using conventional mortgage foreclosure proceedings.

The facts of *BoNY v. Carson* are straightforward. In 2007, Countrywide loaned $52,000 to Carson, who signed a note and mortgage, pledging her Milwaukee home as collateral. Carson later defaulted on her loan payments and, BoNY, acting as the trustee for Countrywide, filed a foreclosure lawsuit. BoNY was unable to serve Carson with the foreclosure pleadings, but in the process of attempting service, BoNY's process server noted that Carson's house appeared vacant because the garage was boarded, the snow was not shoveled, and there were no footprints around the house.

Given its inability to serve Carson personally, BoNY published notice of the foreclosure action in a local newspaper and Countrywide's servicer filed a Registration of Abandoned Property with the City of Milwaukee. Carson did not respond and, in July 2011, a judgment for foreclosure and ordering sale of the property was entered in favor of BoNY. The circuit court declared Carson's indebtedness and directed that the property be sold at a sheriff's auction at any time after three months had passed based on Section 846.102.

Sixteen months later, BoNY still had not sold the mortgaged property via a sheriff's sale and had no plans to do so. Thus, the case involved what is sometimes called an "abandoned foreclosure," "bank walkaway," "zombie title/property," or "limbo loan." Moreover, despite obtaining a judgment of foreclosure, BoNY took no steps to secure the property. It was repeatedly burglarized and vandalized and, at one point, a fire started in the garage. The Department of Neighborhood Services ordered that the property be maintained, but neither BoNY nor Carson did so. As a result, Carson received notices of accumulated trash and overgrown vegetation and was fined $1,800 by the City of Milwaukee.

In an effort to force BoNY to sell the property, Carson filed a motion seeking to amend the judgment to include a finding that the property was abandoned, along with an order requiring

that the property be sold after five weeks had passed from the date of the amended judgment, relying on Section 846.102. The circuit court denied the motion, concluding that the statute did not grant it any authority to order BoNY to sell the property *at a specific time*.

On appeal, Carson argued that the trial court had the authority to order a sale of the property promptly upon expiration of the redemption period. The Court of Appeals agreed, deciding that "the plain language of the statute directs the court to ensure that an abandoned property is sold without delay, and it logically follows that if a party to a foreclosure moves the court to order a sale, the court may use its contempt authority to do so." BoNY sought review by the Wisconsin Supreme Court, which granted BoNY's request and identified two issues: (1) whether the statute authorizes a court to order a mortgagee to bring a property to sale; and (2) whether a court can require a mortgagee to bring a property to sale at a certain point in time.

After considering the plain language of Section 846.102 and related statutes, the Wisconsin Supreme Court rejected BoNY's argument that a mortgagee could not be ordered to sell a property within a particular time. Rather, the plain meaning of the statute gave the circuit court authority to order a sheriff's sale of abandoned property. But, the Supreme Court did not stop there. It went on to interpret Section 846.102 as *mandating* that a circuit court order the sale of abandoned property if certain conditions are met: "Those conditions do not depend on action by the mortgagee alone and are not dependent on its acquiescence or consent."

Having determined that a circuit court may (or sometimes must) compel a bank to sell an abandoned property, the Supreme Court next turned to the question of whether a circuit court has authority to order *when* the property must be sold. After again considering the plain language of Section 846.102, along with legislative history showing an intent to alleviate the problem of abandoned homes in Milwaukee's inner-city through prompt sales, the Supreme Court held that circuit courts indeed have authority to order a sale within a reasonable time after expiration of the statutory redemption period. Accordingly, *BoNY v. Carson* holds that a circuit court not only has the legal authority to order a prompt sale of abandoned property, but also that, if a circuit court issues such an order, it may require that such a sale take place within a reasonable time based on a totality of the circumstances of the case.

When abandoned properties are the subject of lien foreclosure actions, lenders should consider the benefits of appointing a receiver for such properties. A receivership not only prevents a finding of abandonment, but also is a way to liquidate property without going through the judicial foreclosure process.

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

UNITED STATES SUPREME COURT CLARIFIES THAT NOTICE, AS OPPOSED TO FILING A LAWSUIT, IS A PROPER METHOD OF EXERCISING TILA RESCISSION RIGHTS

In an opinion dated January 13, 2015, the Supreme Court of the United States reversed a decision of the Eighth Circuit Court of Appeals, unanimously holding that borrowers may exercise their three-year right of rescission under the Truth in Lending Act (TILA) simply by providing written notice to their lender.

The Court in *Jesinoski v. Countrywide Home Loans, Inc.* held that the petitioners' written notice to Countrywide of their election to exercise the right to rescind their loan was sufficient, resolving conflicting authority among federal circuit and district courts that interpret TILA as requiring a borrower to file a lawsuit within three years of loan consummation in order to exercise such rescission rights.

According to the Court's opinion delivered by Justice Scalia, TILA explains in unequivocal terms that a borrower shall have the right to rescind a loan by notifying the creditor of his intention to do so. According to Justice Scalia, "[this] language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. … The statute does not also require him to sue within three years."

Interestingly, the Court's opinion goes on to provide that, unlike the elements of common-law rescission which require a party to tender back what it received in order to be entitled to such relief, a borrower does not necessarily need to tender to a creditor funds received under the loan in order to effectuate its election to exercise its rescission rights under TILA. In the words of the Court, "[t]o the extent [TILA] alters the traditional process for unwinding such a unilaterally rescinded transaction, this is simply a case in which statutory law modifies common-law practice."

The full opinion of the Supreme Court of the United States in *Jesinoski v. Countrywide Home Loans, Inc.* can be found at: http://www.supremecourt.gov/opinions/14pdf/13-684_ba7d.pdf.

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

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.
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> 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.