SHOULD A CONTRACTOR STOP WORK DUE TO NONPAYMENT?

As owners and contractors feel the bite of shrinking revenues due to the economic slowdown, contractors are bound to see payment problems arise on ongoing projects. Contractors may find themselves contemplating whether to stop work on-site in response to nonpayment.

At first blush, stopping work on-site may seem like a simple and obvious solution for nonpayment. But in reality, stopping work is fraught with risk, and almost always involves a difficult and complicated decision. If the contractor's entitlement to payment is unclear or in dispute, a work stoppage by the contractor could amount to a breach of contract exposing the contractor to potential liability for substantial damages. For example, the owner may claim to have an arguable contractual right to withhold payment due to some prior alleged breach by the contractor, such as defective work, or a lien claim asserted by a sub-contractor. Particularly on large and complex projects, it may not be difficult for an owner to find some arguable basis justifying nonpayment. A contractor that stops work due to nonpayment faces the risk that a court may later hold that the owner was legally entitled to withhold payment and that the contractor was not entitled to stop work.

The contract documents may govern how, and under what circumstances, a contractor may stop work due to nonpayment. Often, the contract imposes procedural requirements that a contractor may need to comply with before a work stoppage can be justified. For example, under Article 9.7 of the AIA A201-2017 General Conditions, a contractor is required to give the owner and the architect seven days' written notice before the contractor may stop work for nonpayment. Additionally, a contractor may be required to comply with Article 15, which contains a specific procedure for relevant claims and disputes. Similarly, under Article 9.5 of the ConcensusDocs 200, a contractor must give seven days' written notice to the owner before the contractor may stop work due to nonpayment.

A contractor should always consult legal counsel when considering whether to stop work due to nonpayment. The decision of whether or not to stop work usually requires analysis of the background facts, the contract documents, and the applicable law. The answer is seldom written in black or white, but rather in shades of gray. The contractor and its counsel must carefully identify, judge, and weigh all the risks. If you have questions or need assistance, contact Steve Slawinski at 414-276-5000 or steve.slawinski@wilaw.com.

CITY OF MILWAUKEE'S STAY AT HOME ORDER EXEMPTS CONSTRUCTION

On Tuesday, March 24, 2020, the City of Milwaukee's Health Department issued a written Stay at Home Order, which goes into effect on Wednesday, March 25, 2020. In general, the Order requires City of Milwaukee residents to stay at home, and requires all businesses located within the City to "cease all activities at facilities located within the City except Minimum Basic Operations," as defined in the Order. The Order includes a list of exceptions for "Essential Businesses and Operations," which does not prevent employees from working at facilities that are deemed to qualify.

Under paragraph 13h of the City's Stay at Home Order, construction and construction-related activities are defined as "Essential Businesses and Operations," which have been exempted from the mandate of the Stay at Home Order. The Order lists "Building and Construction Tradesman and Tradeswomen" along with "plumbers, electricians . . . operating engineers, HVAC, [and] painting" as "Critical Trades" that are exempt from the Order. "Construction" is also listed in the definition of "Essential Infrastructure," exempt from the Order under paragraph 10.

Suppliers of materials and equipment for construction activities are also exempt from the Stay at Home Order. Under paragraph 13u, "manufacturing companies, distributors, and supply chain companies producing and supplying essential products and services in and for industries such as . . . Construction" are listed among exempt "Essential Businesses and Operations." Although the Order does not specifically mention architects, engineers or other design professionals, such professionals are arguably also exempt from the Stay at Home Order, as "other service providers who provide services that are necessary to . . . Essential Businesses and Operations" under paragraph 13h—the provision which exempts "critical trades," including construction.

At least for the time being, the construction industry in Milwaukee will remain open for business.

The full Order can be found here.

If you have questions contact Steve Slawinski at 414-276-5000
or steve.slawinski@wilaw.com.

WISCONSIN'S MASS GATHERING BAN DOES NOT APPLY TO CONSTRUCTION SITES

On Friday, March 20, 2020, the Evers administration issued Emergency Order #8 Updated Mass Gathering Ban. This Order updated and clarified Emergency Order #5, which had been issued three days earlier. Emergency Order #5 imposed "a statewide moratorium on mass gatherings of 10 people or more to mitigate the spread of Covid-19." Under Emergency Order #5, there were numerous exemptions to the "moratorium on mass gatherings," but it was unclear whether or not the mass gathering ban applied to construction work, particularly if being performed outdoors. Emergency Order #5 did not specifically address construction sites. Among other things, Emergency Order #8 clarifies and elaborates on the various exemptions to the statewide ban on mass gatherings. Emergency Order #8 adds a specific exemption for "construction sites and projects, including public works and remodeling projects." It clarifies that the mass gathering ban does not apply to on site construction work. The construction exemption would appear to apply not only to work done outdoors or in open air conditions, but also to construction work performed indoors. Emergency Order #8 therefore makes clear that the statewide mass gathering ban does not require construction work to be shut down.

If you have questions contact Steve Slawinski at 414-276-5000 or steve.slawinski@wilaw.com.

KEY WISCONSIN TITLE LITIGATION DECISIONS: RESTRICTIVE COVENANTS, ANTICIPATED PRIVATE NUISANCE, STATUTE OF LIMITATIONS APPLICABLE TO FORECLOSURES, AND STIPULATED DISMISSAL OF PRIOR FORECLOSURE

Recently, Wisconsin Courts have handed down several key decisions concerning title litigation that deal with the issues of restrictive covenants, anticipated private nuisance, the statute of limitations applicable to foreclosure actions, and stipulated dismissal of prior foreclosures.

Below is a brief summary of the most important of these court decisions.

Restrictive Covenants

The Wisconsin Supreme Court faced the question of whether the short-term rental of a residential property constitutes "commercial activity" under a restrictive covenant. In *Forshee v. Nueschwander*, a 4-3 majority of the court held that because the term "commercial activity" was ambiguous, the restrictive covenant in place did not prohibit the Nueschwanders from using their property for short-term rentals.

Lee and Mary Jo Nueschwander bought the property in question on Hayward Lake in Hayward, Wisconsin in 2014, renovated it, and began renting it out for short-term rentals to vacationers through the popular VRBO (Vacation Rental By Owner) website. The Nueschwanders' neighbors sued in Sawyer County Circuit Court to enforce the covenant, contending that the short-term rentals were "commercial activity" under a restrictive covenant that provided, "There shall be no commercial activity allowed on any of the lots."

The circuit court agreed with the neighbors and granted an injunction to stop the Nueschwanders' rental activity; the Court of Appeals reversed the circuit court's decision and lifted the injunction.

On appeal, writing for the majority, Chief Justice Patience Drake Roggensack reasoned that public policy favors the free and unrestricted use of property. Moreover, wrote Justice Roggensack, deed restrictions "must be expressed in clear, unambiguous, and preemptory terms" and strictly construed to favor free use.

Turning to the covenant at hand, the court found that "commercial activity" was undefined and ambiguous as written. Accordingly, the court ruled that the term should be construed in favor of free use and affirmed the appellate court's decision to lift the injunction.

Justice Shirley Abrahamson concurred, writing that the term "commercial activity" was unambiguous and that it meant activity undertaken for profit. Justice Abrahamson focused on the occupants' activities on the property and concluded that no "commercial activity" was conducted on the property.

Justice Daniel Kelly's concurrence, which was joined by Justice Rebecca Bradley, also focused on the occupants' activities on the property but found that the renters were not engaging in "commercial activity" on the property. Justice Kelly also wrote that the covenant does not preclude renting out the property.

In dissent, Justice Ann Walsh Bradley found that the term "commercial activity" was not ambiguous and that it means "of or relating to commerce." Justice Bradley noted that the Nueschwanders made $56,000 renting out the property in 2015, which made it a lucrative

enterprise and, therefore, a “commercial activity.” She openly questioned whether the numerous covenants that use the same term or a similar term will be enforceable in the burgeoning short-term rental industry.

Also in restrictive covenant news, the Wisconsin Court of Appeals held that a treehouse was a “structure” covered by a restrictive covenant that provided, “All structures to be place or constructed upon lots . . . shall, prior to construction, be approved in writing, by C&B Investments.”

In *C and B Investments v. Murphy*, James Murphy and Rebecca Richards-Bria were homeowners in a subdivision developed by C and B Investments. In June 2015, without the approval of C and B, Murphy began building a treehouse that would be 10 feet long by 8 feet wide by 7 feet high at its completion. C and B filed suit to enforce the covenant requiring its consent to construct “structures” on its property.

The Circuit Court of Juneau County ruled that the treehouse was not a “structure,” and C and B appealed the decision. The Court of Appeals, in a per curiam opinion, reversed the circuit court, finding that the term “structure” was unambiguous and means something that is built or constructed. As the covenant applied to “all structures,” it covered a treehouse, according to the appellate court.

Anticipated Private Nuisance

In *Krueger v. AllEnergy Hilton, LLC*, the Court of Appeals addressed whether Wisconsin recognizes a cause of action for anticipated private nuisance. The appellate court held that the state does recognize such a claim but that the complaint in the case before it was deficient.

AllEnergy sought to construct a frac sand mine in the town of Hixton, but town landowners, including Greg Krueger the lead plaintiff, sought a permanent injunction to stop that from happening.

The group of landowners alleged that the proposed mine would operate 24 hours a day, 7 days a week, and would cause air, water, noise, and light pollution as well as vibration. Moreover, they alleged, the mine would deplete ground water, interfere with quiet, peaceful enjoyment, and also cause a drop in property values and an increase in traffic congestion and road damage.

The Circuit Court of Jackson County granted AllEnergy’s motion to dismiss the case, and the Court of Appeals affirmed. The court held that Wisconsin does, indeed, recognize a cause of action for anticipated nuisance, and laid out the elements:

(1) Defendant’s proposed conduct will “necessarily” or “certainly” create a nuisance; and

(2) The resulting nuisance will cause the claimant harm that is “inevitable and undoubted.”

Turning to the case at hand, the Court of Appeals affirmed the circuit court and ruled that the complaint failed to state a claim because the allegations contained within it were “too sparse” and did not support the conclusion that the mine would necessarily create a nuisance and inevitably result in harm.

Statute of Limitations Applicable to Foreclosure Actions

In 2018 in *Bank of New York Mellon v. Klomsten*, the Court of Appeals faced the question of whether Wisconsin’s six-year statute of limitations for contract actions bars a mortgage foreclosure action.

Gloria J. and Steven S. Klomsten executed a note and mortgage in 2003 and defaulted in 2005. A foreclosure action against them was not filed until 2016. The Klomstens moved to dismiss while the bank requested summary judgment. The Jefferson County Circuit Court sided with the bank, granted summary judgment, and denied the Klomstens’ motion to dismiss. The Klomstens appealed.

The Court of Appeals affirmed the circuit court. The appellate court ruled that while action on the note was barred by the six-year statute of limitations in Wis. Stat. § 893.43, the 30-year limitations period under Wis. Stat. § 893.33 applies, allowing foreclosure of the mortgage.

Stipulated Dismissal of Prior Foreclosure

In *Deutsche Bank Nat’l Trust Co. v. Buboltz*, the Court of Appeals reversed the Milwaukee County Circuit Court and held that the stipulated dismissal of a prior foreclosure action did not bar a lender from filing a subsequent foreclosure action.

In 2006, Alexander Groysman purchased a residential property for which he secured a mortgage with Bank United, FSB. He then deeded the property to EAG Investments, LLC. Bank United assigned the note and mortgage to OneWest Bank, the predecessor of Deutsche Bank.

Payments on the mortgage stopped in 2008 and OneWest Bank filed a foreclosure action in June 2009. In April 2013, a foreclosure judgment was entered. Two years later, in April 2015, the foreclosure was reopened and dismissed without prejudice by stipulation, which stated that the stipulation and order was “due to payoff of the loan.”

The loan had not been paid off, however, and OneWest assigned the mortgage to Deutsche in June 2016. In April 2016, Groysman/EAG sold the property, and the title company discovered the unsatisfied mortgage and requested from Groysman the loan number and contact information for the bank. In response, Groysman provided an old letter from the bank that

said the load was paid off “contingent” on final audit of Groysman’s check, but no payment had actually been made.

Deutsche filed a foreclosure action on May 12, 2017. The purchasers filed a summary judgment motion seeking dismissal of the action, arguing that the prior foreclosure was “dismissed due to payoff of loan,” and therefore Deutsche’s only option would have been to reopen the old dismissed case, but it was too late under Wis. Stat. § 806.07(2).

The bank countered that the prior case was dismissed without prejudice, allowing the bank to file a new case of its own.

Judge Rothstein in the circuit court dismissed the foreclosure action, and the bank appealed. The Court of Appeals reversed and remanded the case, concluding that a dismissal without prejudice is not final on the merits and “by definition” allows a plaintiff to sue again. The court therefore ruled that the bank was not barred by Wis. Stat. § 806.07 from filing a new foreclosure action.

If you have questions about these cases or title litigation in Wisconsin contact Steve Slawinski at 414-276-5000 or steve.slawinski@wilaw.com.

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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.

WISCONSIN ADOPTS LAW ALLOWING REMOTE ONLINE NOTARIZATION

Wisconsin has now joined a growing group of more than 20 states that allow electronic Remote Online Notarization (RON) of documents. On March 3, 2020, Wisconsin enacted 2019 Wisconsin Act 125, Wisconsin's New RON law. The Act takes effect on May 1, 2020 and requires the Wisconsin Department of Financial Institutions to promulgate new rules regarding the performance of a RON notarial act.

Under prior law, all documents that required notarized signatures had to be executed while in the physical presence of a notary public, who would witness or attest the signature. The new RON law updates document notarization requirements to meet the demands of modern 21st century business practices and technology.

With RON, a signatory no longer needs to be in the physical presence of the notary when the document is executed. In fact, a signatory can be in another city, state, or even another

country. The notary may use approved online tools to perform the notarial act while the signatory executes the document at a remote location. The RON law requires the notary and the signatory to have an online audio and visual connection allowing them to communicate with each other in real time, and the notary must make an audio and visual recording of the notarial act.

The use of RON has its limits, however. It cannot be used to notarize certain types of documents, including wills and testamentary trusts, living trusts, powers of attorney, marital property agreements, authorizations for disclosure of health care information, and health care powers of attorney and living trusts. But the new RON law will help to simplify and facilitate the closing of real estate transactions and other business deals.

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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20 OCHDL ATTORNEYS NAMED 2019 BEST LAWYERS IN AMERICA

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- 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.

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STEVE SLAWINSKI ELECTED TO THE ABC OF WISCONSIN BOARD OF DIRECTORS

Effective January 1, 2018, Attorney Steve Slawinski was elected to the Board of Directors for the Associated Builders and Contractors (ABC) of Wisconsin. Throughout the country, the ABC is an effective force in business development, education, labor relations, and legislation. The ABC actively promotes merit, or performance-based construction.

For 30 years, Steve has represented his clients in complex construction, business, and real estate litigation. His practice emphasizes the areas of construction litigation and construction law—representing general contractors, subcontractors, owners, design professionals, lenders, and title insurers in construction disputes, both in court and in arbitration.

Steve is pleased to be elected for a three-year term and looks forward to adding his expertise to the board.

BEST LAWYERS® HONORS 18 ATTORNEYS IN 2018

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