

# ATTORNEY SLAWINSKI PRESENTED AT THE WLTA SPRING CONFERENCE

Steven Slawinski presented at the Wisconsin Land Title Association's Spring Conference in Madison on May 13, 2015. He discussed the recent opinion of the United States Court of Appeals for the Seventh Circuit in *BB-Syndication Services, Inc. v. First American Title Insurance Co.* Mr. Slawinski had represented the prevailing party, First American, in that litigation. Attorney Slawinski is a member of the Litigation and Real Estate Practice Groups at O'Neil Cannon, and may be contacted by telephone at 414-276-5000, or via e-mail at [steve.slawinski@wilaw.com](mailto:steve.slawinski@wilaw.com).

---

## SEVENTH CIRCUIT RULES THAT LENDER'S TITLE INSURANCE POLICY DOES NOT COVER RISK OF INADEQUATE CONSTRUCTION FUNDING

Does a Lender's title insurance policy cover construction liens filed by unpaid contractors where the lender has discontinued disbursing its construction loan mid-stream due to insufficient funds to complete the project? In *BB-Syndication Services, Inc. v. First American Title Insurance Co.*, 780 F.3d 825 (7<sup>th</sup> Cir. 2015), the United States Court of Appeals for the Seventh Circuit has emphatically answered "No."

The *BB-Syndication Services, Inc. v. First American Title Insurance Co.* litigation arose from the financial collapse of a major Kansas City mixed-use construction project. At the inception of construction, a dispute arose between the general contractor and the owner-borrower regarding the cost of construction. The contractor claimed that design changes made by the owner and its architect entitled the contractor to a price increase of over \$22M. If the contractor's allegations were true, then the construction project would be underfunded by over \$22M. The borrower disputed the price increase, and construction continued while the dispute between the contractor and the borrower progressed through arbitration.

With knowledge of the potential funding shortfall, the construction lender chose to proceed with financing the costs of construction as it progressed. The lender continued to fund the monthly construction draws for over one and one-half years, before it finally elected to cease all further construction loan disbursements, citing the huge loan imbalance and other defaults by the borrower. By then, the lender had disbursed about \$61M of its \$86M construction loan. Construction stopped, unpaid contractors filed construction liens totaling

millions of dollars against the property, and the borrower filed bankruptcy.

In response to the liens, which had priority under Missouri law, the lender made a claim against the title insurance policy that insured the priority of its mortgage. The lender demanded that First American pay off all of the liens under the loan policy's construction lien coverage. First American ultimately denied coverage on grounds that the lender's own conduct—ceasing all funding of construction and refusing to release undisbursed loan proceeds to pay the contractors—had caused the liens to be filed, triggering policy exclusion 3(a). Exclusion 3(a) bars coverage for liens and encumbrances that are “created, suffered, assumed, or agreed” to by the insured.

BB-Syndication ultimately filed suit against First American. The District Court granted summary judgment in favor of First American, holding that exclusion 3(a) barred all coverage for all of the construction liens. BB-Syndication appealed. In a pivotal opinion, the Seventh Circuit affirmed the District Court's decision, holding that the lender had “created” the liens.

Perhaps the most significant aspect of the Seventh Circuit's opinion is its reasoning. In the few court decisions in other prior cases facing this issue, the outcome has turned upon the following two factors: 1) the existence or nonexistence of a disbursement agreement between the construction lender and the title company; and 2) whether or not the lender had disbursed the entire loan amount. The Seventh Circuit expressly criticized the reasoning of those prior decisions, and charted its own course. The Court recognized that construction lenders typically possess the power to exercise significant control over the loan transaction and over the construction project, particularly with regard to the project's finances. The Seventh Circuit concluded that construction lenders have both the ability and the duty to investigate, monitor, and to ensure the construction project's economic viability, both at inception and throughout construction. The Court held that “[w]hen liens arise from insufficient funds, the insured lender has ‘created’ them by failing to discover and prevent cost overruns—either at the beginning of the project or later.” Consequently, the Seventh Circuit adopted a simple rule that “exclusion 3(a) excludes coverage for liens that arise as a result of insufficient funds.”

The lesson for construction lenders is clear. They can no longer rely upon title insurance as a safety net against construction liens that arise due to insufficient construction funding. Instead, they must rely upon their own due diligence and other financial instruments, such as third-party guarantees or performance bonds. On the other hand, title insurers can take comfort that they will not be left holding the bag when a construction lender decides to quit disbursing a construction loan due to insufficient funding.

Mr. Slawinski represented the First American Title Insurance Co. in the BB-Syndication Services, Inc. litigation. He may be contacted by telephone at 414-276-5000 or via e-mail at [steve.slawinski@wilaw.com](mailto:steve.slawinski@wilaw.com).

---

# WISCONSIN ADOPTS NEW "SINGLE-PRIME" DELIVERY METHOD FOR STATE CONSTRUCTION PROJECTS

Effective January 1, 2014, a fundamental change was made to the method by which public construction projects are led by the State of Wisconsin's Department of Administration. Wisconsin adopted a new single-prime delivery method to replace its former multiple-prime method. Under the former multiple-prime method, the State would contract with a principal contractor, but would also enter separate contracts directly with mechanical, electrical, plumbing, and fire protection (MEP) subcontractors. Under the new single-prime method, the State will only enter into a single contract with a general prime contractor.

Wisconsin's new single-prime delivery method is actually a unique hybrid, because the State will continue to solicit competitive public bids from the MEP subcontractors, as was done under prior law. However, the successful MEP bidders will enter subcontracts with the general prime contractor, rather than with the State.

Under the new law, all contractors must first be certified by the Division of Facilities Development before submitting any bid. The bidding process begins with the submission of competitive public bids by the MEP subcontractors. The successful low MEP bidders are then selected and identified by the Department of Administration, and the Division of Facilities Development must post the bidders' names and the amounts of the successful MEP bids on its website. Within five (5) days thereafter competitive public bids for the general prime contract must be submitted. The bidders must include the bids of the successful MEP contractors in their own bids for the general prime contract. The general prime contract is then awarded to the lowest qualified responsible bidder.

The general prime contractor is required by law to enter into subcontracts with each of the successful MEP subcontract bidders selected by the Department. The law mandates that each subcontract must contain certain terms prescribed by statute, including provisions pertaining to prompt payment, insurance and bonding, indemnification, and retainage. The law generally precludes alteration of the scope or price of the subcontract work. It is up to the general prime contractor and each of the MEP subcontractors to negotiate all other subcontract terms. Reaching agreement on the many remaining critical subcontract terms could prove problematic, however, given the arranged marriage between the general prime contractor and each MEP subcontractor that results from Wisconsin's hybrid single-prime delivery method. The general prime contractor will probably find it difficult or impossible to dictate terms unfavorable to the MEP subcontractors, because it has no voice in the selection

of the MEP subcontractors and the law does not require the MEP subcontractors to accept any terms besides those imposed by statute.

Wisconsin's new hybrid single-prime system affords protection to MEP subcontractors against bid shopping, and continues the relative autonomy they enjoyed under the old multiple prime system. Those benefits come at a price, however. The new law requires each MEP subcontractor to obtain a 100% performance bond and a separate 100% payment bond naming the general prime contractor as the obligee.

Of perhaps greatest concern to MEP subcontractors are the new law's indemnification provisions. The new law mandates the inclusion into all MEP subcontracts of certain extensive and complex indemnification terms, which generally obligate the MEP subcontractor to "defend, indemnify, and hold harmless" the general prime contractor and its principals for damages and fines for "bodily injury, sickness, disease, or death, or injury to or destruction of property, including... loss of use" arising from the performance of the subcontract work. This includes an obligation to indemnify the general prime contractor for claims arising from its own negligence or fault in providing supervision or oversight of the MEP subcontractor's work. MEP subcontractors may find that these indemnification obligations expose them to potential liability for which they may have no insurance coverage under their general liability policies.

By creating its own unique hybrid delivery method, Wisconsin has ventured into uncharted territory. Time will tell whether this experiment meets with success or failure. The new law raises many unanswered questions. Prospective bidders need to know that the rules have changed, how they have changed, and the significant implications of those changes.

---

## **BEST LAWYERS® HONORS 14 ATTORNEYS IN 2015**

O'Neil, Cannon, Hollman, DeJong and Laing S.C. is pleased to announce that 14 lawyers have been named to the 2015 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 65 countries. 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.

O'Neil, Cannon, Hollman, DeJong and Laing S.C. would like to congratulate the following attorneys named to the 2015 *Best Lawyers in America*® list:

- 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
- Dennis W. Hollman – Corporate Law, and Trusts and Estates
- Grant C. Killoran – Litigation-Health Care
- 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
- 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 52,000 leading attorneys cast more than 5.5 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.”

---

## **MILWAUKEE JUSTICE CENTER VOLUNTEERS RECOGNIZED ON THE STATE BAR OF WISCONSIN PRO BONO HONOR ROLL**

The Milwaukee Justice Center, organized by Milwaukee County, the Milwaukee Bar Association and the Marquette University School of Law, provides civil legal assistance to people who cannot afford an attorney. In 2012, the volunteers of the Center provided nearly 9,000 hours of *pro bono* service to 10,659 unrepresented litigants.

Fifteen attorneys from the law firm of O'Neil, Cannon, Hollman, DeJong and Laing contributed the success of the Milwaukee Justice Center in 2012 to include:

- Doug Dehler
- Megan Eisch
- Miles Goodwin
- Grant Killoran
- Justinian Koenings
- Claude Krawczyk
- Gregory Lyons
- Sarah Matt
- Joseph Newbold
- Laura Now
- Jason Scoby
- Steven Slawinski
- Steven Strye
- Timothy Van de Kamp
- Peter Walsh

---

## **BEST LAWYERS® RECOGNIZES 12 ATTORNEYS FROM O'NEIL CANNON**

Twelve attorneys from the law firm of O'Neil Cannon were selected for inclusion in the 2013 edition of *The Best Lawyers in America*®. Nearly 1/3 of the firm's attorneys were listed in 16 distinct practice areas to include:

- 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
- Dennis W. Hollman – Corporate Law; Trusts and Estates
- Dean P. Laing – Commercial Litigation; Personal Injury Litigation–Plaintiffs; Product Liability Litigation–Defendants
- Gregory W. Lyons – Commercial Litigation
- Thomas A. Merkle – Family Law
- Steven J. Slawinski – Construction Law

Since its inception in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. Because *Best Lawyers* is based on an exhaustive peer-review

survey in which more than 39,000 leading attorneys cast almost 3.1 million votes on the legal abilities of other lawyers in their practice areas, and because lawyers are not required or allowed to pay a fee to be listed, inclusion in *Best Lawyers* is considered a prestigious honor. *Corporate Counsel* magazine has called *Best Lawyers* “the most respected referral list of attorneys in practice.”

(Copyright 2013 by Woodward/White, Inc., of Aiken, S.C.)

---

## **WISCONSIN ELIMINATES BUILDING CONTRACTOR REGISTRATION PROGRAM**

Effective July 2, 2013, Wisconsin eliminated its Building Contractor Registration Program.[1] The Building Contractor Registration Program was eliminated in connection with the passage of Wisconsin’s Biennial Budget Act. A new statute was also enacted that prohibits the Department of Safety and Professional Services from creating or enforcing any administrative rule that would require any person engaging in the construction business to hold any license, except a license specifically required by statute.[2]

Under former law, no person or entity could legally work in the construction business in Wisconsin without being registered as a Building Contractor, unless the person or entity held a Dwelling Contractor Certification or some other Wisconsin construction license. The Building Contractor Registration requirement was therefore the “catch-all” credential requirement for those who held no other credential. In order to obtain the Building Contractor credential, the applicant was merely required to submit the appropriate application form, certify compliance with Wisconsin’s statutory worker’s compensation and unemployment compensation requirements, and pay the registration fee. The registration had to be renewed every four years. There was no requirement that an applicant possess any special skills or qualifications. The Building Contractor Registration Program had therefore been criticized as being little more than an excuse to charge a fee.

If you have any questions regarding this article, please contact Attorney [Steve Slawinski](#) at O’Neil, Cannon, Hollman, DeJong and Laing S.C. at 414-276-5000.

---

[1] 2013 Wis. Act 20 § 1708e, repealing Wis. Stat. § 101.147.

[2] 2013 Wis. Act 20 § 1708f, enacting Wis. Stat. § 101.1472(2) (2013).

---

## **STATE BAR OF WISCONSIN RECOGNIZES MILWAUKEE JUSTICE CENTER VOLUNTEERS ON 2012 HONOR ROLL**

The Milwaukee Justice Center, organized by Milwaukee County, Milwaukee Bar Association, and Marquette University School of Law provides legal assistance to individuals who cannot afford legal representation. In 2012, the volunteers of the Center served nearly 9,000 hours of *pro bono* service to 10,659 unrepresented civil litigants.

Sixteen attorneys from the law firm of O'Neil, Cannon, Hollman, DeJong and Laing contributed to the success of the Milwaukee Justice Center to include:

- Doug Dehler
- Megan Eisch
- Miles Goodwin
- Megan Heinzelman
- Grant Killoran
- Justinian Koenings
- Claude Krawczyk
- Gregory Lyons
- Sarah Matt
- Joseph Newbold
- Laura Now
- Jason Scoby
- Steven Slawinski
- Steven Strye
- Timothy Van de Kamp
- Peter Walsh

---

## **OVER 50% OF O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING ATTORNEYS RECOGNIZED ON SUPER LAWYERS 2010 LIST**

Fifteen attorneys from O'Neil Cannon have been selected for inclusion on the Wisconsin *Super Lawyers* 2010 list.

*Super Lawyers* is a peer-nominated award that recognizes the top 5% of outstanding attorneys across the state of Wisconsin. The *Super Lawyers* are selected using a rigorous, multiphase rating process. Peer nominations and evaluations are combined with third party research, and each candidate is evaluated based on 12 indicators of peer recognition and professional achievement.

*Super Lawyers:*

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

*Rising Stars:*

- Timothy C. Caprez
- Gregory S. Mager
- Chad J. Richter
- John R. Schreiber
- Robert J. Tess

*\*Top 50 Super Lawyers Recipient*

---

## **SIXTEEN OCHD ATTORNEYS AWARDED WITH SUPER LAWYERS DESIGNATION**

Sixteen attorneys from O'Neil Cannon have been selected for inclusion on the Wisconsin *Super Lawyers* 2009 list.

*Super Lawyers* is a peer-nominated award that recognizes the top 5% of outstanding attorneys across the state of Wisconsin. The *Super Lawyers* are selected using a rigorous, multiphase rating process. Peer nominations and evaluations are combined with third party research, and each candidate is evaluated based on 12 indicators of peer recognition and professional achievement.

*Super Lawyers:*

- James G. DeJong
- Peter J. Faust
- John G. Gehringer
- Grant C. Killoran
- Dean P. Laing\*
- Gregory W. Lyons
- Patrick G. McBride
- Steven J. Slawinski

*Rising Stars:*

- Timothy C. Caprez
- Seth E. Dizard
- Gregory S. Mager
- Chad J. Richter
- John R. Schreiber
- Robert J. Tess

*\*Top 50 Super Lawyers Recipient*