



WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System

PRESIDENT'S REPORT FALL 2013





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Dear Colleagues,

The Wisconsin Civil Justice Council's mission is to promote fairness and equity in Wisconsin's civil justice system, with the ultimate goal of making Wisconsin a better place to work and live. WCJC achieves this objective through policy development, legislative lobbying, and our appellate programs.

Our positions are set by WCJC's 18-member board that consists of representatives from Wisconsin's leading business and professional organizations. While our coalition has been active for decades, we are in our third session since we reorganized. *The purpose of this report is to provide an overview of our efforts to date.*

In our inaugural session (2009-10), we defeated a plaintiffs' bar initiative in the proposed state budget that would have dramatically altered Wisconsin's joint and several liability law. If passed, it would have forced defendants as little as one percent at fault to pay for 100 percent of the damages. We defeated every other bill advanced by the plaintiffs' bar that first session.

In our second session (2011-12), we passed important reforms relating to product liability, expert testimony, risk contribution, caps on punitive damages and other legislation of interest to Wisconsin's business community. Our agenda for the 2013-14 legislative session remains aggressive. As I write, several reform bills have passed and are awaiting Gov. Walker's signature, including AB 27, providing greater transparency when the State hires private plaintiff attorneys, AB 200, reforming Wisconsin's lemon law, and AB 139, clarifying physicians duty of informed consent. Other bills described in this report are also advancing.

In addition to legislation, WCJC is vigilant with respect to our courts. Through our Appellate Program, we have filed *amicus* briefs in Wisconsin Supreme Court cases on business issues: *MercyCare*, relating to the judicial deference given an agency's interpretation of statutes; *Casper*, relating to default judgments, interpretation of the direct action statute, and corporate officer liability; and, *Rasmussen*, which addressed the distinction between parent and subsidiary corporations and related limits on personal jurisdiction. We also publish a biennial evaluation of the Wisconsin Supreme Court.

Our work has not gone unnoticed. WCJC was selected as the recipient of the 2013 U.S. Chamber of Commerce, Institute for Legal Reform Outstanding Organization Award. These successes arise out of a collaborative effort of the entire business community; a product of our diverse board of 18 Wisconsin business associations, their members, and scores of our partners.

Please consider continuing your support for this exceptional organization, and thanks for all your help to date.

Sincerely,

Bill G. Smith
President, Wisconsin Civil Justice Council, Inc.
State Director, National Federation of Independent Business

OUR INAUGURAL 2009-10 SESSION

THE FIGHT COMES TO US

In a defining session, our first as WCJC, we successfully defeated policies that would have severely damaged Wisconsin's business climate. During that 2009-10 session, the plaintiffs' bar pushed an aggressive anti-business agenda. We defeated every bill advanced by them, including the following:

Joint and Several Liability (AB 75): Alter Wisconsin's joint and several liability law by forcing defendants as little as one percent at fault to pay for 100 percent of the damages.

Combined Fault (AB 75): Allow someone that is less at fault than the plaintiff to be sued if the combined fault of all the persons sued is equal to or greater than that of the plaintiff.

Jury Instruction (AB 75): Require the court to explain to the jury how the percentage of negligence they find attributable to each party will impact liabilities and damages.

"Proposed changes to our liability system that were recently defeated would have been devastating to Wisconsin's tourism industry and overall economic development. This victory could not have been accomplished without the leadership of the Wisconsin Civil Justice Council."

Tom Diehl
President, Tommy Bartlett, Inc.

Other legislation defeated during the 2009-10 session included the following bills that would have made adverse changes to our civil justice laws.

Medical Records and Medical Exams (SB 628/AB 815): Allow plaintiffs to hide prior injuries by limiting access to medical records and restricting independent medical exams.

Medical Malpractice Liability

(SB 203/AB 291): Expand medical liability by allowing adult children and their parents to sue for loss of society and companionship damages.

False Claims (SB 447/AB 792): Provide a 15 to 25 percent bounty plus attorney fees for private parties that file false claim lawsuits on behalf of the state.

Credit Histories (SB 275/AB 367): Allow job applicants/employees to sue for punitive and compensatory damages if an employer "discriminates" against them based on credit history.

Workplace Bullying (AB 894): Add a cause of action, along with punitive and compensatory damages, for alleged workplace bullying.

Statute of Limitations (SB 319/AB 453): Provide a three-year window for plaintiffs to file childhood sexual abuse claims, regardless of the previously expired statute of limitations.

Gender-based Cause of Action

(SB 337/AB 480): Create a cause of action, with a seven year statute of limitations, for a person who suffers physical, emotional, or economic harm due to a gender-based act.



Medical Malpractice Statute of Limitations

(SB 563): Extend the wrongful death statute of limitations in cases dealing with medical malpractice (overturning *Estate of Genrich v. OHIC Ins. Co.*).

Bifurcation of Trials (AB 938): Provide that if a trial court bifurcates a trial relating to interest that is due on insurance proceeds that were not timely paid, all claims must be heard by the same jury.

THE 2011-12 SESSION

MOVING WISCONSIN FORWARD

The 2011-12 Legislative Session was in complete contrast to the prior session. With Gov. Walker's leadership, the Wisconsin Legislature was prepared to advance sweeping civil justice reforms. WCJC board members and partners led these efforts to reverse debilitating court decisions and laws.

Product Liability (2011 Wis. Act 2):

The new law helps small and large businesses by requiring proof of a "reasonable alternative design" when defective design of a product is alleged, moving Wisconsin from the broad "consumer expectation" test to a standard found in 46 other states.

Expert Opinion (*Daubert*) (2011 Wis.

Act 2): Wisconsin joins more than 30 other states, and the entire federal court system, by adopting the *Daubert* standards limiting testimony of experts and evidence to that which is based on sufficient facts or data and is the product of reliable principles and methods.



Risk Contribution (2011 Wis. Act 2):

This provision overturns the Wisconsin Supreme Court's 2005 decision, *Thomas v. Mallet*, where the Court adopted the deeply flawed "risk contribution" theory in cases involving lead-based paint.

Wisconsin was the only state in the country with such a sweeping liability theory, leading *The Wall Street Journal* to describe Wisconsin as "Alabama North."

Caps on Punitive Damages (2011 Wis.

Act 2): Sets a cap on punitive damages at \$200,000 or two times compensatory damages, whichever is greater.

Frivolous Lawsuits (2011 Wis. Act 2):

Reduces frivolous lawsuits by holding a party liable for costs and fees for bringing

a lawsuit or claim that is done solely for the purpose of harassing or maliciously injuring another party.

Quality Improvement Act (2011 Wis. Act 2):

The Quality Improvement Act broadens the definition of "health care provider" to include all types of medical personnel, and addresses the confidentiality of reports prepared for the purpose of quality review, and disallows their use in most civil and criminal proceedings.

Interest on Judgments (2011 Wis. Act 69): Amends Wisconsin's unjustifiably high interest rate on pre- and post-judgments from 12 percent to the federal prime rate, plus one percent.

Trespasser Liability Act (2011 Wis.

Act 93): By codifying existing law, prevents courts from adopting the new *Restatement Third of Torts* which expands liability for injuries to trespassers.

Reasonable Attorney Fees (2011 Wis.

Act 92): Codifies 14 criteria that courts must consider when awarding attorney fees for the plaintiff. Also includes a rebuttable presumption that reasonable attorney fees are three times compensatory damages.

Punitive/Compensatory Damages under

Fair Employment Act (2011 Wis. Act 219): Repeals 2009 Wis. Act 20, which for the first time imposed punitive and compensatory damages in lawsuits filed under the Wisconsin Fair Employment Act (WFEA).

"The Wisconsin Civil Justice Council was the driving force behind enactment of numerous key civil justice reforms in 2011. WCJC achieved a record of outstanding accomplishments that will substantially enhance fairness in Wisconsin's civil justice system while promoting economic growth."

Tiger Joyce

President, American Tort Reform Association

THE CURRENT 2013-14 SESSION

TAKING A LEADERSHIP POSITION

While the 2011-12 Session focused on correcting major deficiencies in our civil liability system that were making Wisconsin less competitive, the current 2013-14 session is providing opportunities to transform our litigation climate into one of the best in the nation. WCJC and our partners are now recognized across the country as being on the cutting edge of litigation reform.

Legislation we are advancing with our allies in the legislature and business community includes:

Personal Injury Trust Claims

Transparency (SB 13/AB 19): Prevents double-dipping in personal injury cases that also involve potential compensation from trust funds created under the federal bankruptcy law. The most common types of lawsuits that also include potential compensation from federal trust funds are those involving asbestos exposure.

Transparency in Private Attorney

Contracting (SB 19/AB 27): Provides greater transparency and oversight when the State of Wisconsin hires private plaintiff attorneys on a contingency fee basis. The bill also imposes caps on attorney's fees for private plaintiff attorneys hired to represent the state on a contingency fee basis.

"AB 27 is the nation's strongest outside counsel sunshine measure to date. In particular, it includes a prohibition on the use of civil penalties or fines to calculate contingency fee awards and a strong cap on the total amount of money that outside lawyers can collect."

Lisa A. Rickard

President, U.S. Chamber Institute for Legal Reform

Physician's Duty of Informed Consent

(SB 137/AB 139): Clarifies a Wisconsin Supreme Court decision (*Jandre v. Wisconsin Injured Patients and Families Compensation Fund*) dealing with a physician's duty of informed consent. Specifically, the bill establishes a reasonable physician standard and rejects strict liability for a missed diagnosis by a physician.

Amending Wisconsin's Collateral Source Rule

(SB 22/AB 29): Allows juries in personal injury cases to see all the evidence when determining the amount required to compensate the plaintiff for his or her past medical expenses.

Lemon Law Reforms

(SB 182/AB 200): Reforms Wisconsin's lemon law, often cited as the nation's worst, by removing automatic double damages; provides a realistic time period for providing a comparable vehicle; establishes a more reasonable statute of limitations; and makes other reforms.



Eliminating Felony Conviction Records from WFEA

(SB 207/AB 286): Protects employers by allowing consideration of an individual's felony conviction record when deciding whether to hire or terminate the person.

Statement of Apology by a Health Care Provider

(SB 129/AB 120): Provides that statements from a health care provider expressing an apology, sympathy, or compassion are not admissible into evidence or subject to discovery in any civil action or administrative hearing. The bill has been amended since introduction.

WCJC APPELLATE PROGRAM

Recognizing that the courts have a role in Wisconsin's litigation climate, WCJC established an Appellate Program, providing WCJC a voice in court decisions that impact our state's civil justice system.

Under the Wisconsin *Court Watch* initiative, WCJC monitors Wisconsin Court of Appeals and Supreme Court decisions. As needed, the WCJC Appellate Committee will determine if it is appropriate to file *amicus curiae* (friend of the court) briefs with the Wisconsin Supreme Court. These briefs are prepared by Great Lakes Legal Foundation lawyers or outside counsel under our supervision.

To date, WCJC has filed *amicus* briefs in three Wisconsin Supreme Court cases:

MercyCare Ins. Co. et al. v. Wis. Commissioner of Ins. – In this case we argued against giving great weight deference to agency interpretation of a statute.

Casper, et al. v. American Int. South Ins. Co., et al. – WCJC urged the court to reverse the Court of Appeals decision pertaining to officer liability.

Rasmussen, et al. v. General Motors Corp., et al. – For the purpose of personal jurisdiction, WCJC asked the court to maintain the distinction between parent and subsidiary corporations.

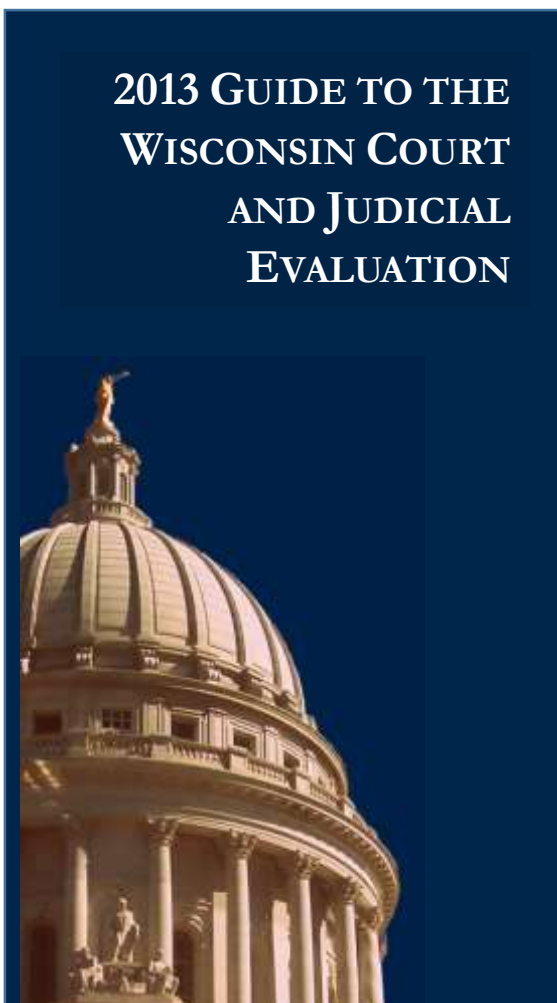
WCJC WISCONSIN SUPREME COURT GUIDE

The power of the Wisconsin Supreme Court to impact individuals and businesses can equal or exceed that of the Legislature or the Governor. Yet, few people understand who the justices are and how their decisions shape our lives and economy.

WCJC, with support from the lawyers at the Great Lakes Legal Foundation, has undertaken a biennial Judicial Evaluation of the Wisconsin Supreme Court. The purpose is to provide a summary of the most important decisions issued by the Court which have had an effect on Wisconsin's business climate and to identify trends in how individual justices voted.

In 2011, WCJC undertook its first Judicial Evaluation of the Wisconsin Supreme Court. While WCJC does not provide endorsements in judicial races, the Evaluation provided timely and vital information on the April 2011 reelection of conservative Justice David T. Prosser, Jr.

The 2013 edition provided context for the April 2013 Supreme Court race, in which Justice Patience Roggensack easily won a second term, overcoming Marquette University law professor Ed Fallone.



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WCJC POLICY AND LOBBYING TEAM

The board and our partners are the foundation of our advocacy team. To augment the efforts by these member associations and companies, however, the Hamilton Consulting Group's lawyers and lobbyists provide support under the direction of WCJC's officers and board.

Robert Fassbender – Executive Director. In addition to being a WCJC lobbyist, Bob is responsible for member development and day-to-day operations. He received his law degree from the University of San Diego School of Law.

Andrew Cook – Legislative Director. Andy heads up WCJC's legislative campaigns, including spearheading member, partner and other coalitional efforts. He has related experience with the Pacific Legal Foundation, and received his law degree from The John Marshall Law School in Chicago.

James A. Buchen – Contract Lobbyist. James was the Wisconsin business community's preeminent advocate at Wisconsin Manufacturers & Commerce, served as an officer of WCJC and had an instrumental role on civil justice initiatives for WMC and WCJC. James has a law degree from the University of Wisconsin Law School.

Policy Research Interns. Through Hamilton Consulting, WCJC works with legal interns from the University of Wisconsin School of Law. In addition to policy research, our interns help support our communications services, including WCJC's web site, newsletters, and blog updates.

*The Wisconsin Civil Justice Council is
honored to receive the*

**2013 Outstanding
Organization Award**

from the

**U.S. Chamber Institute
for Legal Reform**

**The recognition highlights WCJC's
history of commitment to legal reform,
and in particular, the instrumental role
WCJC played in passing sweeping
reforms in 2011.**