WISCONSIN CIVIL JUSTICE COUNCIL, INC.
Promoting Fairness and Equity in Wisconsin's Civil Justice System

Wisconsin Civil Justice Council
End of Session Report

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Overview

Although there has been no official adjournment sine die - Latin for "without assigning a day for a further meeting or hearing" - both the Senate and the Assembly have adjourned with the stated intent of not returning. We will take them at their word; thus, here is Wisconsin Civil Justice Council's end-of-session report.

Surpassing the successes of the past two sessions was from the onset a challenging goal. Nevertheless, WCJC had another successful session. We saw enacted into law virtually all of those bills WCJC supported and defeated every bill WCJC opposed. Each of these initiatives are discussed in more detail below.

Final Status of Legislation Supported by WCJC

- Repeal of "False Claims for Medical Assistance Act" - Signed into Law (Act 55)
- Collateral Source (Phantom Damages) Reform - Failed to Pass
- Adult Sponsor of Minor Driver Liability Reform - Signed into Law (Act 202)
- Liability Limitations under Wisconsin's Dog Bite Law - Signed into Law (Act 112)
- Liability Limits for Ski Area Operators - Signed into Law (Act 168)
- Immunity for Private Campgrounds - Awaiting Governor's Signature

Final Status of Legislation Opposed by WCJC

- Interest Rates on Small Claims Judgments - Failed to Pass
- Repeal of Asbestos Trust Reforms - Failed to Pass
- Statute of Limitations for Sexual Contact with a Child - Failed to Pass
- Medical Malpractice Claims of Adult Child - Failed to Pass

The most significant disappointment for the session was the failure to pass collateral source reform legislation. We expect this will be a priority once again next session, but with a more concerted effort to reach a compromise with health insurers.

Given the makeup of the legislature, some of those bills opposed by WCJC never gained momentum, with the exception of the interest rates on judgment bill. But even if they did not move this session, we expect they will be back and more threatening if the legislative makeup shifts. WCJC was particularly alert to legislation that would have repealed the hard-fought victory last session on asbestos trust reforms.

Also relevant to maintaining our past successes will be the upcoming Supreme Court election. Recall, many of our prior legislative priorities were bills to reverse bad Supreme Court decisions, such as those

establishing risk contribution liability and expanding products liability exposure. We will provide a special report on the upcoming Supreme Court election.

Please call R.J. Pirlot or Bob Fassbender if you have any questions on these or other civil justice matters.

For a complete listing of those bills of interest, see WCJC's 2015-2016 Legislative Tracking Report.

End of Session Report

Signed into Law: Repeal of "False Claims for Medical Assistance Act"

Earlier this session, WCJC accomplished one of its major objectives in the 2015-2017 state budget with the repeal of Wis. Stat. §20.931, Wisconsin's "False Claims for Medical Assistance Act". See WCJC's letter to Gov. Walker.

The act allows private individuals, unaffiliated with the government, to sue private businesses alleging fraud against the state's medical assistance program. The act rewards private individuals for filing these actions by providing that the person who brings a private cause of action may be awarded up to 30 percent of amounts recovered in addition to expenses, costs, and reasonable attorney fees. While the original intent of the act, to root out fraud, is admirable this law was ineffective and unnecessary.

The act, originally created in the 2007-2009 state budget act, is ineffective because the Department of Justice (DOJ) proactively prosecutes these claims on its own. Furthermore, DOJ has stated the repeal of the act could increase recoveries for the Medical Assistance program because the state will not have to pay the 30 percent "bounty" to the whistleblowers who bring a private cause of action.

The repeal of this act will not discourage legitimate whistleblowers from bringing information about fraud forward. There are already other avenues in place for whistleblowers to contact state officials, anonymously if need be, such as the governor or attorney general and report fraud. Studies have also shown that whistleblowers with legitimate claims do not have a profit motive and thus the lack of a financial award is unlikely to result in less whistleblowers coming forward. Thus the act is unnecessary.

Repeal of the act was included in the Joint Finance Committee motion #495, the committee's omnibus motion on Medical Assistance. The motion was adopted by the committee on Thursday, May 21, 2015.

Interest Rates on Judgments Legislation Passes Assembly, Dies in Senate

Assembly Bill 95, authored by Rep. Jeremy Thiesfeldt (R-Fond du Lac), and Senate Bill 76, authored by Sen. Stephen Nass (R-Whitewater), sought to change the interest rate for pre- and post- judgment interest for verdicts in small claims court. AB 95 would revise the formula created in 2011 Wisconsin Act 69 back to the pre-Act 69 rate of 12 percent per year.

WCJC opposed the legislation as it would partially repeal a top priority, namely 2011 Wisconsin Act 69. The bill died in the Senate, but we anticipate proponents will next session again push for a change to interest rates on judgments in small claims action.

While introduced in March 2015, the Assembly Committee on Judiciary passed AB 95, 5-4 in January 2016. The Assembly passed the legislation via a voice vote in February with an amendment changing the rate to 8 percent. Though a Senate hearing was held on the bill, no further action occurred in the Senate.

Under current Wisconsin law, plaintiffs who win favorable verdicts are usually entitled to recover interest on the monetary judgments awarded to them. There are two types of interest. There is post-judgment interest, which is meant to compensate the plaintiff for loss of the use of the money while a defendant

appeals an unfavorable judgment. Post-judgment interest accrues from the time the judgment is made until the time the judgment is paid. There is also pre-judgment interest, which accrues from the time the plaintiff makes an offer of settlement until the settlement is paid, provided the judgment amount is not less than the settlement amount.

Prior to 2011, pre- and post- judgment interest rates were set at 12 percent. Because appeals or settlement agreements and payment can take time, plaintiffs could receive a significant windfall due to the high interest rate. 2011 Senate Bill 14 signed into law as 2011 Act 69 changed the interest formula from 12 percent to the prime rate set by the Federal Reserve Board plus one percent. This ensures that plaintiffs do not receive a windfall while also ensuring that defendants pay a reasonable interest rate.

Collateral Source (Phantom Damages) Reform Fails to Pass

In December 2015, Sen. Chris Kapenga (R-Delafield) and Rep. Mike Kuglitsch (R-New Berlin) introduced Senate Bill 405/Assembly Bill 539 relating to how a jury determines damages relating to medical costs arising from injuries. The bills would allow the introduction into evidence of both the amounts billed and the amounts paid for such services. WCJC supported this legislation that failed to pass this session.

The current Wisconsin collateral source rule holds that the amount billed by medical providers is the measure of the reasonable value of medical expenses in personal injury actions, and the defendant may not introduce evidence of the amount actually paid by third parties, such as health insurers, even though the amount actually paid is often a fraction of the billed amount.

Both bills had a public hearing. The Senate Committee on Judiciary and Public Safety recommended SB 405 for passage on a party-line vote of 3-2. Neither bill made it to the floor and are dead for this session.

Opposition to the bills, in addition to the plaintiff's bar, came from Wisconsin health insurers. Among other concerns, the health insurers' fundamental problem was the lower award using paid medical expenses as the measure of damages could limit the amounts they could recoup through subrogation for their health care coverage.

For a history of Wisconsin's collateral source rule, go to *Wisconsin Defense Counsel Journal* (Spring 2013): Legislation Introduced Will Allow Juries to See Evidence of Collateral Source Payments When Determining Medical Expenses in Personal Injury Cases.

Signed into Law: Adult Sponsor of Minor Driver Liability Reform

On March 1, 2016, Governor Scott Walker signed into law 2015 Wisconsin Act 202, which limits the liability of a parent or other adult sponsoring a minor obtaining a driver's license. Sen. Kapenga (R-Delafield) and Rep. Kuglitsch (R-New Berlin) championed the legislation (Assembly Bill 540/Senate Bill 408). WCJC supported this important liability reform.

Wisconsin law requires a minor have an adult sponsor as a condition to obtaining a driver's license. A separate provision in Wisconsin statutes provides that parents or adult sponsors of a minor's driver's license had unlimited liability for that minor's driving. Act 202 protects otherwise innocent parents/sponsors by limiting the liability imputed to a parent or other adult sponsor to the greater of $300,000 or the limits of any insurance coverage.

The Senate passed SB 408 on a voice vote in January, while the Assembly concurred in the legislation on a voice vote at the end of February.

In the United States, 26 states do not have a statute imputing liability to sponsors. Of the remaining 23 states having a statute imputing liability to the parent or other adult sponsor, 13 do not impute any liability if the minor has liability insurance at the state required minimums. Prior to Act 202, Wisconsin law was one of only eight states in which a parent or other adult sponsor has unlimited liability for injuries caused by the minor's negligent acts while driving. See Wisconsin Defense Counsel's testimony for a chart on other state laws.

In contrast, Wisconsin has a $5,000 limit on liability imputed to a parent "for personal injury attributable to a willful, malicious, or wanton act of the child." When testifying at the Assembly public hearing, supporters of the bill expressed that the legislation can "guarantee that those who are injured by a minor driver can still be awarded properly, but protects against catastrophic liability and financial ruin for the sponsor or parent of the minor."

Signed into Law: Liability Limitations under Wisconsin's Dog Bite Law

Senator Frank Lasee (R-De Pere) introduced Senate Bill 286 to reform Wisconsin's long standing "dog bite" statute. The legislation, supported by WCJC, was signed into law on November 11, 2015, as 2015 Wisconsin Act 112.

Under prior law, Wis. Stat. § 174.02(1)(b) dog owners were liable for double damages for dogs that cause injury to people, domestic animals, or property if they have previously done so. The prior law did not take into account the severity or type of the damage done. For instance, a dog could cause minor property damage, which would count as the first bite, and then cause physical damage to an individual on the second bite. The owner would be liable for double damages for the second incident despite the innocuous nature of the "first bite."

The most important change in this act is to the double damages provisions. Now, an owner may only be liable for double damages for injuries caused by their dog if a dog bites a person with "sufficient force to break the skin and cause permanent physical scarring or disfigurement" if the owner knew the dog had previously done so. That is, both bites must break the skin and cause permanent scarring or disfigurement and the owner must have known of the first bite.

Act 112 also increases the monetary forfeitures (i.e., penalties imposed by a governmental entity) for dog owners. Under current law, for first time damage to "a person, domestic property, deer, game birds or the nests of eggs of game birds" the maximum forfeiture is $500. The act allows for $2,500. Under current law, the maximum penalty for subsequent injuries for owner with notice of the first injury is $1,000. Under the Act, it is raised to $5,000.

Act 112 also changes who can request a court to order that a dog be killed. Under prior law only the state or a municipality may ask a court to order a dog be killed if the dog caused serious injury to a person or domestic animal on at least two separate occasions. Under Act 112, in addition to the state and municipality being able to make this request, a person injured by the dog or whose child was injured by the dog, or whose domestic animal was injured by the dog may also make this request.

Attempts to Repeal Asbestos Trust Reforms Die in Committee

Assembly Bill 862, authored by Rep. Dana Wachs (D-Eau Claire), and Senate Bill 723, authored by Sen. Kathleen Vinehout (D-Alma), would have reversed a major WCJC priority from last session relating to fraud in asbestos lawsuits involving personal injury trusts. WCJC opposed AB 862/SB 723. Both bills died in committee.

On March 27, 2014, Gov. Scott Walker signed 2013 AB 19 into law as 2013 Wisconsin Act 154. The act provides for greater transparency by:

- Requiring asbestos plaintiffs to disclose any and all claims that they have filed or will file with asbestos trust funds, along with all of the documents and information that support the trust claims.
- Requiring judges to admit trust claims and supporting materials into evidence at trial; prohibiting plaintiffs from spuriously alleging that trust claims and their supporting documents are privileged.
- Providing defendants with a powerful tool to ensure that plaintiffs file and disclose all possible claims with asbestos trusts. Act 154 authorizes defendants to identify trust claims that the plaintiff could and should file. If a judge agrees, the case is stayed until that claim is filed and disclosed.

For more information on this issue go to WCJC's page on Limiting Double-Dipping in Personal Injury Cases.

Signed into Law: Liability Limits for Ski Area Operators

Governor Scott Walker signed Assembly Bill 596/Senate Bill 463 into law as 2015 Wisconsin Act 168 on March 1, 2016. The new statute, introduced by Rep. Adam Jarchow (R-Balsam Lake) and Sen. Duey Stroebel (R-Saukville), changes the term "snow sport" to "alpine sport" and adds "biking" to the list of activities included in the term. WCJC supported these limits on liability for ski area operators from biking accidents.

Previous law imposed proportional liability for an injury or death resulting from participation in a "recreational activity," including riding a bicycle, on a premises that is open to the public for such purposes. However, under certain circumstances, ski area operators have immunity from liability for injury or death resulting from participation in a "snow sport" within a ski area. Among other changes, the new law reconciles these requirements for bicycling within ski areas.

An individual who participates in a recreational activity assumes the "risks inherent in the recreational activity of which the ordinary prudent person is or should be aware" and must satisfy certain behavioral duties. [s. 895.525, Stats.] If a participant is injured or killed, the owner of the premises may be liable, but the damages that may be collected from the owner are reduced in proportion to the amount of negligence attributable to the participant.

An individual who participates in a snow sport within a ski area assumes certain risks and must satisfy certain duties. Likewise, ski area operators must satisfy certain duties related to safety and to give notice of assumed risks. A ski area operator that satisfies all of the required duties owes no further duty of care to a participant and is immune from liability for an injury or death sustained by a participant that results from the assumed risks of participation in a snow sport.

The act removes biking from the definition of "recreational activity," defines the risks assumed by individuals who participate in biking, and establishes the duties participants must satisfy. It also establishes the duties of ski area operators related to biking. Under the act, a ski area operator that satisfies all of the required duties owes no further duty of care to a participant who engages in biking and is immune from liability for an injury or death sustained by a participant that results from the assumed risks of participation in an alpine sport.

Awaiting Governor's Signature: Immunity for Private Campgrounds

Assembly Bill 174/Senate Bill 131, introduced by Rep. Joel Kitchens (R-Sturgeon Bay) and Sen. Devin LeMahieu (R-Oostburg), as amended, would create immunity from civil liability for a private campground in certain circumstances. WCJC supported this legislation that passed the Assembly on February 16, 2016, and the Senate on March 16. The enrolled legislation now awaits gubernatorial approval.

Under the legislation, as amended by substitute amendments, a private campground owner, operator or employee is immune from civil liability if a person is injured or killed, or property is damaged, as a result of an inherent risk of camping. "Inherent risk of camping" means a danger or condition that is an integral part of camping, including dangers posed by any of the following:

- Features of the natural world, such as trees, tree stumps, roots, brush, rocks, mud, sand, and soil
- Uneven or unpredictable terrain
- Natural bodies of water
- Another camper or visitor at the private campground acting in a negligent manner
- A lack of lighting, including lighting at campsites
- Campfires in a fire pit or enclosure provided by the campground
- Weather
- Insects, birds, and other wildlife

The legislation would not provide immunity if the person seeking immunity does any of the following:

- Intentionally causes the injury, death, or property damage.
- Acts with a willful or wanton disregard for the safety of the party or the property damaged. "Willful or wanton disregard" means conduct committed with an intentional or reckless disregard for the safety of others.
- Fails to conspicuously post warning signs of a dangerous inconspicuous condition known to him or her on the property that he or she owns, leases, rents, or is otherwise in lawful control of or possession.

Dies in Committee: Reviver Statute – Statute of Limitations for Sexual Contact with a Child

Under current law, the time a person has to bring an action for an injury resulting from being sexually assaulted or subject to incest as a child, or from being subject to sexual contact by a member of the clergy as a child, is any time before the injured party reaches the age of 35. Sen. Julie Lassa (D-Stevens Point) and Rep. Evan Goyke (D-Milwaukee) introduced Senate Bill 262/Assembly Bill 348 which would provide a three-year reviver window for plaintiffs to file childhood sexual abuse claims, regardless of the previous expiration of the statute of limitations.

The legislation had bipartisan support, with Republican Reps. Horlacher, A. Ott, Neylon, Rohrkaste, and Sen. Olsen signing on as co-authors. But both bills died in committee. WCJC opposed the legislation.

For over 100 years, the Wisconsin Supreme Court has consistently rejected reviver statutes as unconstitutional. The court subscribes to the view that the expiration of a statute of limitations vests a property right in a defendant. The resurrection of a time-barred claim therefore amounts to a taking of property without due process of law.

Despite the appalling nature of these abuses, WCJC agrees with the court's rationale and believes the proposed reviver statute would lay a foundation for suspending other statute of limitations. This, in turn, brings uncertainty and unfairness to our civil justice system.

For more on the constitutional issues arising from reviver statutes, see this legal memo provided in the context of prior Wisconsin reviver legislation.

Dies in Committee: Medical Malpractice Claims

Under current law, as stated in *Estate of Wells v. Mt. Sinai Medical Center*, 183 Wis. 2d 677 (1994), a parent does not have the right to recover for the loss of society and companionship of an adult child who dies as the result of medical malpractice. Sen. Nikiya Harris Dodd (D-Milwaukee) and Rep. Dana Wachs (D-Eau Claire) introduced Senate Bill 378/Assembly Bill 498 which would provide that a parent has the right to recover for loss of society and companionship if the parent's adult child dies as the result of medical malpractice, and the adult child had not reached the age of 27 when he or she died. WCJC opposed SB 378/AB 498.

Senate Bill 378 was referred to the Senate Committee on Judiciary and Public Safety and Assembly Bill 498 was referred to the Assembly Committee on Judiciary. No committee action was taken and both bills died in committee. WCJC opposed this legislation.

Dies in Committee: Loss-of-Use Liability for Rental Motor Vehicles

Under Assembly Bill 672/Senate Bill 495, introduced by Rep. Nancy VanderMeer (R-Tomah) and Sen. Chris Kapenga (R-Delafield), a rental company may hold a renter or driver of a rental car liable for loss of use that results from an accident if the renter or driver is cited or charged with inattentive or reckless driving or other violations of law. Little action was taken on these bills this session. SB 495 only received a public hearing before dying in the Senate, and there was no hearing or committee action on AB 672.

Signed into Law: Statutes of Limitation on Claims Involving Property Damage or Motor Vehicle Accident

Governor Walker signed Assembly Bill 223/Senate Bill 149 (Rep. John Spiros (R-Marshfield)/Sen. Frank Lasee (R-De Pere)) into law as 2015 Wisconsin Act 133 on February 4, 2016. The new law changes the six-year statute of limitation to three years for actions on a motor vehicle insurance policy and for actions to recover for property damage or death arising from a motor vehicle accident. See Wisconsin Legislative Council Act 133 memo on additional changes.

Signed into Law: Immunity for Performing a Body Cavity Search

Introduced by Rep. Terry Katsma (R-Oostburg) and Sen. Devin LeMahieu (R-Oostburg), Assembly Bill 508/Senate Bill 383 would create immunity from civil and criminal liability to a physician, physician assistant, or registered nurse, and to their employer or the health care facility, who performs a body cavity search under circumstances allowed under current law. Governor Walker signed the legislation into law as 2015 Wisconsin Act 238 on March 2, 2016.