



WISCONSIN CIVIL JUSTICE COUNCIL PRESIDENT'S REPORT

DECEMBER 2018



WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System

December 2018

Dear WCJC Board Members and Partners:

2018 was another successful year for the Wisconsin Civil Justice Council (WCJC). Earlier this year, WCJC lobbied in support of 2017 Assembly Bill 773, which was signed into law by Gov. Scott Walker as 2017 Wisconsin Act 235. This comprehensive legislation amended Wisconsin's civil discovery laws, which will reduce costs for businesses by curtailing the amounts of unnecessary, expensive discovery.

With the enactment of Act 235, Wisconsin also became the first state in the nation to shine the light on third-party litigation funding, the growing practice in which third parties "invest" in litigation and drive up the cost of lawsuits. Act 235 also allows for an automatic stay of discovery to prevent defendants from having to expend large amounts of money in the event the case is dismissed. The new law also amended Wisconsin's class action statutes to allow any party in the case to automatically appeal the class certification by the trial court.

In addition, Act 235 amended Wisconsin's statute of limitations, statute of repose, third-party audits, and interest rates on untimely payment of insurance claims. As a result of Act 235, WCJC once again garnered national recognition for its leadership in passing important legal reforms. This report provides an in-depth summary of the new law.

WCJC will face some headwinds going into 2019 with a Republican-controlled legislature and the election of a new governor. We will likely be playing defense to protect the civil justice reforms enacted over the past eight years. We also plan an aggressive offense and to continue passage of proactive civil justice reforms.

In addition to legislation, WCJC is also vigilant with respect to the courts. Through its Appellate Program, WCJC has filed *amicus* (friend of the court) briefs with the Supreme Court of Wisconsin and Court of Appeals. The biggest victory in 2018 before the Supreme Court was *Mayo v. Wisconsin Injured Patients and Families Compensation Fund*, where the Court upheld Wisconsin's statutory limit on noneconomic damages in medical malpractice cases. In doing so, the Supreme Court overturned its previous decision, *Ferdon v. Wisconsin*, where the Court struck down the caps on noneconomic damages as unconstitutional. WCJC recognizes that while passing legislation is important, it is equally important that the courts enforce the laws as written.

Finally, WCJC issued its comprehensive *2018 Guide to the Wisconsin Supreme Court and Judicial Evaluation*, which reviews the most important cases decided by the Court affecting the business community.

WCJC has been extremely active again this year, and looks forward to continued success in 2019.

Sincerely,

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

WCJC's 2017-18 LEGISLATIVE SESSION

Groundbreaking Civil Litigation Reforms Lower Costs for Wisconsin Businesses

During the 2017-18 Wisconsin legislative session, WCJC focused on an agenda of common-sense reforms to address the high transactional cost of litigation. WCJC advanced several significant reforms in 2017 Act 235 that promote efficiency and reduce costs while ensuring the Wisconsin civil justice system remains fair to all parties.

THIRD PARTY LITIGATION FINANCING.

Act 235 makes Wisconsin the first state in the country to require disclosure of any third party litigation financing arrangements.

DISCOVERY PROCEDURES. Act 235 provides that, upon a motion of a party, a court shall limit the frequency or extent of discovery if discovery is duplicative or the burden of discovery is not proportional to the claims. The Act also adds new language clarifying the scope of discovery. Furthermore, the Act provides an automatic stay of discovery upon the filing of a motion to dismiss, motion for judgment on the pleadings, or motion for a more definite statement. The bill limits discovery to 10 depositions, 25 interrogatories, and production of documents going back no more than five years.

CLASS ACTIONS. Act 235 updated Wisconsin's class action rules for the first time since 1849. The original legislation included language identical to federal class action Rule 23, and the Wisconsin Supreme Court adopted Federal Rule 23

in December 2017. Act 235 included another class action provision providing that any party has a nondiscretionary right to appeal an interlocutory appeal of class certification. This means that once a trial court certifies a class, either party can appeal the court's decision before the case can move forward on the merits.

Combined with the recent Supreme Court order adopting Federal Rule 23, Act 235's right to appeal the class certification, Wisconsin's class action rules will finally be in line with nearly every other state.

"When businesses have no choice but to settle cases that are completely meritless because they cannot afford their day in court, the system has failed them. We commend Wisconsin's Legislature for standing up to the trial bar and offering reforms that can restore justice in Wisconsin courts."

**- Tiger Joyce, President
American Tort Reform Association**

ELECTRONICALLY STORED INFORMATION. Act 235 provides that, absent a showing by the moving party of substantial need and good cause, a party is not required to provide discovery of certain categories of electronically stored information, including duplicative back-up data, legacy data, or any other data not reasonably accessible.

STATUTE OF LIMITATIONS. Act 235 reduced the statute of limitations for several causes of action, including an action for fraud, an action for injury to character or other rights, and an action where no other limitation is provided.

STATUTE OF REPOSE. Act 235 reduces the total exposure period for actions for damages resulting from a defect to improvement of real property from 13 years to 10 years.

INTEREST RATES ON UNTIMELY PAYMENT OF INSURANCE CLAIMS. Act 235 reduces the rate an insurer must pay for overdue insurance claims from 12 percent to 7 percent.

UNCLAIMED PROPERTY. Act 235 prohibits the Wisconsin Department of Revenue (DOR) from entering into a contract that includes contingency fee audits for in-state companies. Additionally, the Act limits contingency fees to 12 percent of unclaimed property recovered. The Act also Prohibits DOR from entering into an agreement to administer the unclaimed property law that allows a person engaging in an audit of

another person's documents or records to use statistical sampling to estimate the liability of that person unless the person consents to the use of an estimate.

"The complexity and high transaction costs of civil lawsuits can be especially challenging expenses for small business owners. This legislation is a great step towards mitigating against future damages, increasing fairness and improving the predictability of Wisconsin's civil justice system."

**- Bill G. Smith, State Director
National Federation of Independent Business**



Wisconsin Gov. Scott Walker signs 2017 Act 235 civil litigation reforms into law.

National Recognition for

2017 WISCONSIN ACT 235

Wisconsin Forward: State Enacts Groundbreaking Litigation Funding Transparency Law

Lisa Rickard, U.S. Chamber Institute for Legal Reform

Small Business Applauds Legal Reforms Signed by Governor

National Federation for Independent Business, Wisconsin Chapter

Wisconsin Governor Walker Signs Into Law New Reforms

Federalist Society

Who Is Paying for That Lawsuit?

Wisconsin a leader in third party litigation financing disclosure.

John Beisner, Federalist Society

Litigation Funding Deals Must Be Disclosed Under Groundbreaking Wisconsin Law

National Law Journal

Wisconsin Becomes First State to Mandate Disclosure of Litigation Funding Arrangements

D&O Diary

La Croix: It's Time to Talk About Third Party Litigation Funding

Wisconsin became the first state to pass disclosure law.

U. S. Chamber Institute for Legal Reform

ILR's Rickard: Hope "Other States Will Follow" Wisconsin's Lead on TPLF

U. S. Chamber Institute for Legal Reform

Wisconsin Governor Signs First-in-the-Nation TPLF Transparency Bill

U. S. Chamber Institute for Legal Reform

PA Small Business Advocate Sees Hurdles to Legal Reform That Targets Litigation Funders

NFIB Pennsylvania says Wisconsin is "blazing a trail" for improved business climate.

Penn Record

Legal Experts: TPLF Transparency Likely to Catch On

Legal and business experts say more states will follow Wisconsin's lead.

U.S. Chamber Institute for Legal Reform

Landmark Bill Would Pull Back Curtain on Secretive Lawsuit Funding Deals

Wisconsin leads the way as lawsuit transparency reforms are introduced in Congress.

U.S. Chamber Institute for Legal Reform

WCJC APPELLATE PROGRAM

Recognizing that courts have a vital, and sometimes debilitating, role in Wisconsin's litigation climate, WCJC's appellate program monitors Wisconsin Court of Appeals and Supreme Court decisions. As needed, the WCJC Executive Committee determines when it is appropriate to file amicus curiae briefs with the Wisconsin appellate courts in cases with significant impact to the business community. Recent amicus briefs filed by WCJC include:

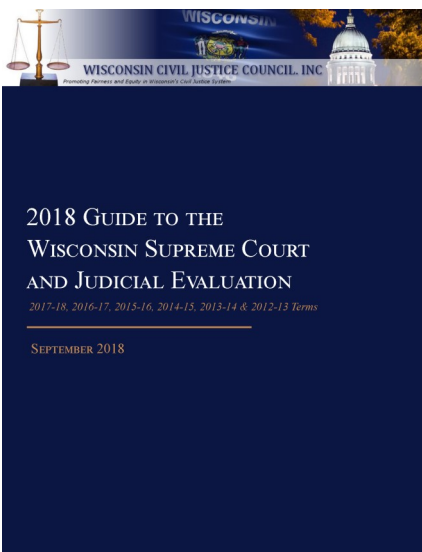
ASCARIS MAYO, ET. AL. V. WIS. INJURED PATIENTS AND FAMILIES COMPENSATION FUND, ET. AL. In June 2018, the Wisconsin Supreme Court in a 5-2 decision upheld Wisconsin's \$750,000 limit on noneconomic damages in medical malpractice cases. Importantly, the Court reversed its 2005 decision, *Ferdon v. Wisconsin Patients Compensation Fund*, which held unconstitutional Wisconsin's previous limit on noneconomic damages.

Case Status: *Decided by Supreme Court*

YANDOLI V. REV GROUP, INC. WCJC's brief argues the Waukesha County Circuit Court erred by denying the defendants' motion to stay the court proceeding in a securities class action lawsuit when an identical class action case was filed first in federal court. The brief argues that the circuit court's decision not to stay the state level proceedings will harm Wisconsin businesses by allowing for meritless duplicative securities litigation and would contravene the purpose of the Commercial Court Pilot Project to increase efficiency and predictability in business litigation in Wisconsin.

Case Status: *Pending in Court of Appeals*

Follow the latest Wisconsin Supreme Court and Court of Appeals decisions on the WCJC Blog (www.wisciviljusticecouncil.org/wcjc-blog/).



WISCONSIN SUPREME COURT GUIDE

In September 2018, WCJC issued its 2018 Guide to the Wisconsin Supreme Court and Judicial Evaluation, which reviews the most important cases decided by the Supreme Court affecting the business community. The *2018 Judicial Evaluation* covers six terms, spanning from 2012 through the most recent term that ended in summer of 2018. The *2018 Judicial Evaluation* provides a discussion of the facts and the court's holding in each of the decisions and lists how each justice decided the case, along with WCJC's position on the court's decision. This is the third WCJC judicial evaluation since 2011.

Download the 2018 Guide to the Supreme Court and Judicial Evaluation: (<http://www.wisciviljusticecouncil.org/judicial-evaluation/>)

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SUPPORT WCJC

Advancing the Wisconsin Civil Justice Council's mission of promoting fairness and equity in Wisconsin's civil justice system takes substantial resources. Please consider making a contribution to WCJC:

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For WCJC email updates & more information: www.wisciviljusticecouncil.org/get-involved