



WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System



**PRESIDENT'S REPORT
FALL 2023**



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Dear Colleagues,

Thank you for your support of the Wisconsin Civil Justice Council and its mission of promoting fairness and equity in our state's civil justice system. For nearly 15 years, we have relentlessly pursued liability and litigation reform while pushing back on costly initiatives proposed by the plaintiff's bar.

Last session, WCJC ensured that Wisconsin employers are protected from ordinary negligence claims related to COVID exposure. We also successfully countered several proposals to create new causes of action and began educating legislators about the need to regulate consumer litigation advances.

Our legislative priorities for the current session include:

- Create reasonable consumer protections related to nonrecourse civil litigation advances by placing limits on interest rates and fees and requiring certain standard contract provisions.
- Limit noneconomic damages against trucking companies and commercial drivers to protect employers from unreasonable verdicts and stabilize insurance costs for the logistics industry.
- Support legislation to provide liability relief for businesses and property owners that use a certified deicer service to remove snow and ice from their premises.
- Oppose the creation of new civil causes of action.
- Monitor and counter the efforts of the Wisconsin Judicial Council to expand its role and secure funding for staff, offices, and other activities.

Now in our eighth session as an organization, WCJC is continuing to build on past victories, making Wisconsin a better place to live and do business. None of our past and future victories would be possible without the broad, active support WCJC receives from our board of directors and generous partners.

As the state faces significant political and policy challenges, WCJC will remain uncompromising in our pursuit of a fairer and more equitable civil justice system.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill G. Smith".

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

OUR INAUGURAL SESSION: 2009-10

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 that session included the following changes to our civil justice laws, to the severe detriment of our litigation climate:

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.

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

SWEEPING REFORMS ENACTED

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 that put Wisconsin at a competitive disadvantage.

Product Liability (2011 Wis. Act 2): Assists small and large businesses by requiring proof of a "reasonable alternative design" in an alleged defective design of a product, moving Wisconsin away from the broad "consumer expectation" test. By adopting this provision, Wisconsin joined 46 other states.

Expert Opinion (*Daubert*) (2011 Wis. Act 2): Wisconsin joined 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 overturned 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 pen an editorial describing Wisconsin's litigation climate 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.

Interest on Judgments (2011 Wis. Act 69): Amended Wisconsin's then-static interest rate on pre- and post-judgments to the federal prime rate, plus one percent.

Trespasser Liability Act (2011 Wis. Act 93): Prevents courts from adopting the new *Restatement (Third) of Torts* which expanded liability for injuries to trespassers. The legislation simply codified Wisconsin's existing law, which adequately protects landowners and renters from unwanted trespassers.

Reasonable Attorney Fees (2011 Wis. Act 92): Codified 14 criteria that courts must consider when awarding attorney fees for the plaintiff. Also included a rebuttable presumption that reasonable attorney fees are three times compensatory damages.

Punitive/Compensatory Damages under Fair Employment Act (2011 Wis. Act 219): Repealed 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

2013-16 SESSIONS

CONTINUED RECORD OF SUCCESS

While the 2011-12 Legislative Session focused on correcting major deficiencies in our civil liability system that were making Wisconsin less competitive, sessions since then have provided 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 advanced with our allies in the legislature and business community included:

Personal Injury Trust Claims Transparency (2013 Wis. Act 154): 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 (2013 Wis. Act 105): 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.

"[2013 Wis. Act 105] 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 (2003-2019)

Physician's Duty of Informed Consent (2013 Wis. 111): 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.

Lemon Law Reforms (2013 Wis. Act 101): 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.

Statement of Apology by a Health Care Provider (2013 Wis. Act 242): 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.

Reforming Liability for Damages Caused by Dogs (2015 Wis. Act 112): Provides that dog owners are liable for double damages only when the dog bites a person with sufficient force to break the skin and cause permanent physical scarring or disfigurement and the owner knew that the dog had previously bitten a person with such force.

2017-20 SESSIONS

MOVING WISCONSIN FORWARD

In recent sessions, WCJC continued to move Wisconsin forward by working to enact additional civil justice reforms. Though the plaintiffs' bar has gained new allies within the Wisconsin Legislature, we continued our track record of enacting civil litigation reforms.

Addressing the High Transaction Costs of Litigation (2017 Wis. Act 235): In the 2017 legislative session, WCJC worked with our members and allies such as the American Tort Reform Association and the U.S. Chamber's Institute for Legal Reform to draft widespread legislation to modernize many rules of civil procedure in Wisconsin to address what can be the high costs of litigation.

Championed by Reps. Mark Born and John Nygren and Sens. Tom Tiffany and David Craig and signed into law by Gov. Walker, 2017 Wis. Act 235:

- Sets reasonable rules and limits for discovery of electronically-stored information;
- Absent a showing of good cause, stays discovery upon the filing of a motion to dismiss, a motion for judgment on the pleadings, or a motion for more definite statement;
- Updated Wisconsin's antiquated class action rules and created an interlocutory right to appeal class certification;
- Made Wisconsin the first state in the country to require disclosure when third parties invest in lawsuits in return for a cut of any settlement or judgment; and
- Reformed and provided transparency to the Department of Revenue's use of third-party auditors to determine liability for unclaimed property.

Reducing the Statute of Repose for Improvements to Real Property

(2017 Wis. Act 235): Reduces the exposure period from ten to seven years for claims arising from an improvement to real property.

Reducing the Statute of Limitations for Certain Types of Claims (2017 Wis. Act 235):

Reduces the statute of limitations from six to three years for the following types of actions:

- Actions to recover damages for injury to one's character or rights;
- Fraud claims, except for claims involving motor vehicle warranty reimbursements or promotional allowances; and
- Actions upon a liability created by statute, when a limitation is not otherwise specified by law.

Protecting Employers Who Hire Ex-

Offenders (2019 Wis. Act 123): Creates liability protections for employers who hire those convicted of non-violent crimes and who have earned a "certificate of qualification for employment" from the State of Wisconsin.

2021-22 SESSION

MEETING NEW CHALLENGES

A politically divided government and the emergence of COVID-19 introduced many new challenges for our state. WCJC rose to the occasion, working to safeguard our past accomplishments while protecting employers from frivolous COVID exposure claims.

Protecting Employers from Frivolous COVID Exposure Claims (2021 Wis. Act 4): Provides civil immunity from ordinary negligence claims related to COVID exposure for Wisconsin employers, governments, schools, and other entities as well as their employees, agents, and independent contractors. This immunity does not apply if an act or omission involves reckless or wanton conduct or intentional misconduct.

Holding the Line on New Civil Causes of Action (2021 Wis. Act 58): The governor's executive budget proposed new civil causes of action for employment discrimination, unfair honesty or genetic testing, broadband service denial, and unnecessarily summoning a law enforcement officer. It also would have restored the ability of private parties to bring a *qui tam* action against a person for making a false claim with the state. WCJC worked with legislators to ensure that these concerning policies were removed early in the budget process.

Monitoring the Wisconsin Judicial Council (2021 Wis. Act 58): The final budget did not include any funding for staff or activities of the Wisconsin Judicial Council.

"We applaud the leadership of the Wisconsin Civil Justice Council to enact critical reforms in Wisconsin. WCJC's efforts resulted in the COVID-19 liability protections in Act 4, which are some of the strongest protections I've seen enacted in the country."

Tiger Joyce
President, American Tort Reform Association

Wisconsin Supreme Court Guide

The power of the Wisconsin Supreme Court to affect 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 the economy.

This year, WCJC released its fifth *Guide to the Wisconsin Supreme Court and Judicial Evaluation*. The purpose of this publication is to educate WCJC's members, partners, and the public about the role of the courts in the state's business climate and to identify trends in how individual justices voted.

2023-24 SESSION

LOOKING TO THE FUTURE

While the session is ongoing, WCJC has so far successfully protected Wisconsin's litigation climate by advising legislators working on the state budget and standalone pieces of legislation against the creation of new civil causes of action. Meanwhile, we are working to advance several targeted reform proposals to address emerging policy issues.

2023-25 State Budget (2023 Wis. Act 19): Once again, the governor's executive budget proposed several problematic civil justice policies, including the creation of multiple new private causes of action, the restoration of *qui tam* actions for false claims against the state, and the elimination of a prohibition on judicial deference to agency interpretations of state law. WCJC worked with the Joint Committee on Finance to ensure that these provisions were removed during the budget-writing process. The final budget also included no funding or position authority for the Wisconsin Judicial Council.

Regulating Nonrecourse Litigation Advances (2023 Assembly Bill 464): WCJC worked with legislators to re-introduce an improved version of our bill from last session to create reasonable consumer protections related to nonrecourse civil litigation advances by placing limits on interest rates and fees and requiring certain standard contract provisions.

Protecting Diligent Property Owners from Premises Liability (2023 Senate Bill 52): This bill provides liability relief for businesses and property owners that use a registered deicer service to remove snow and ice from their premises. WCJC successfully combated an attempt to weaken the liability protections in the bill, supporting an amendment that retains strong language providing immunity from ordinary negligence claims. The relevant committee in each house has recommended the bill and the amendment for passage.

Ensure Stability for the Transportation Sector (circulating as LRB-3116 and -4847): WCJC is supporting legislation to limit noneconomic damages against trucking companies and commercial drivers. The aim of the bill is to protect employers from unreasonable "nuclear" verdicts and stabilize insurance costs for the logistics industry.

Implements of Animal Husbandry (2023 Assembly Bill 14): This legislation, which passed the Assembly in June and is pending committee action in the Senate, creates requirements for the repair and replacement of defective implements of animal husbandry under warranty. WCJC successfully supported an amendment to the bill removing a new cause of action, including certain damages and costs, for violations of the bill's requirements.

Other Pending Legislation: WCJC has worked with legislators during the drafting process to advise against the inclusion of new private causes of action in several bills, including a bill to regulate social media companies (2023 Assembly Bill 373) and a bill to regulate the use of consumer data (2023 Assembly Bill 466).

OFFICERS & BOARD MEMBERS

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National Federation of Independent Business

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Truck Dealers Association*

Chad Zuleger
Dairy Business Association

WCJC Policy and Lobbying Team

The board and our partners are the backbone of our advocacy team. To augment the efforts of these member associations and companies, the Hamilton Consulting Group provides support under the direction of WCJC's officers and board.

R.J. Pirlot – Executive Director. Along with lobbying for WCJC, R.J. is responsible for member development and daily operations. He received his law degree from the University of Wisconsin.

Adam Jordahl – Lobbyist & Communications Manager. Adam, in addition to lobbying and conducting policy research, leads on our top-quality communications services.



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.