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Supreme Court of Wisconsin Upholds Exclusion Limiting UIM Coverage to Damages for Bodily Injury Sustained by Insured Persons in *Brey v. State Farm*
Kaitlyn Gradecki

Wisconsin Defense Counsel
Defending Individuals And Businesses In Civil Litigation

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Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

In This Issue…

Journal Policy

WDC Members and other readers are encouraged to submit articles for possible publication in the *Wisconsin Civil Trial Journal*, particularly articles of use to defense trial attorneys. No compensation is made for articles published and all articles may be subjected to editing.

Statements and expression of opinions in this publication are those of the authors and not necessarily those of the WDC or Editor. Letters to the Editor are encouraged and should be sent to the WDC office at 6737 W. Washington St., Suite 4210, Milwaukee, WI 53214. The Editor reserves the right to publish and edit all such letters received and to reply to them.

President's Message: Great Things Happening with WDC

by: Christopher R. Bandt, President, Wisconsin Defense Counsel

I would like to thank all of the members and sponsors who attended our Winter Conference. It was a huge success! We had great speakers and attendance was near pre-pandemic numbers. Hopefully, despite the current state of COVID in our lives, we will continue to be able to provide in-person conferences to our members. Our next conference is the Spring Conference, April 7-8, 2022, at the American Club in Kohler. We will continue to monitor the status of COVID numbers leading up to the Spring Conference and keep all our members and sponsors advised as the event approaches.

My last message started with, "Why WDC?" What I would like to focus on in this message is the great opportunities our members have to be actively involved in WDC. We have many committees to make membership in WDC more meaningful for all members across a broad range of practice skills and demographics. We encourage our members to join one or more of the committees as they provide an excellent opportunity to share ideas and discuss matters important to WDC and to further your own development as a skilled defense attorney.

At our last board meeting, we approved changing the Diversity, Equity & Inclusion Committee from an *ad hoc* committee to a formal committee. Charles Polk is the chair of this committee and has done tremendous work developing the committee. Please look for more information on the work this committee is undertaking and consider joining.

The Law School Committee, chaired by Grace Kulkoski and Monte Weiss, has been working with the Marquette and UW law schools to make WDC a recognizable organization for law students. We received great reviews from the presentation conducted at UW Law this fall. The future of WDC is with our young lawyers and those law students who have an interest in civil litigation. We hope to continue to build on this committee's work.

Similarly, the Young Lawyers Committee, chaired by Nicole Radler, has been very active in developing programming and content for our young lawyers. Nicole is working with Crystal Uebelher to provide a day-long training sometime during 2022. Please watch for further details. Thanks to Sean Bukowski and Beau Krueger for presenting on behalf of the Young Lawyers Committee at the Winter Conference. It is not easy being a young lawyer and learning to be a skilled defense attorney. It takes a lot of time and training and having this committee to allow the young lawyers to discuss topics, issues, and development is vital to the overall success of WDC.

We have also seen great articles and presentations from our Insurance Law Committee chaired by Brad Markvart. The Amicus Curiae Committee, chaired by Brian Anderson, has been actively involved in several appellate matters on behalf of WDC members and organizations.

Our Women in the Law Committee, chaired by Andrea Goode, continues to do phenomenal work not only with scheduling events, but also with the community support they provide as part of their annual Spring Professional Clothing Drive. Please watch for more events by the Women in Law Committee.

I have only touched on a few of the committees, and I encourage our membership to review the list of committees at http://www.wdc-online.org/about-wdc/committees and contact the chairs and co-chairs to get involved. WDC is here to make our membership stronger and develop the most skilled defense attorneys in the state.

In the past year we developed an Awards Committee, that is chaired by myself, Grace Kulkoski, and Christine Burck. This will be the first year that the revamped awards process will take place. This committee came out of a strategic planning session to encourage and reward WDC members who demonstrate active and effective representation of the standards of excellence that is WDC.

You may have already seen emails regarding the nomination process and there will be more to come. Please review these and consider nominating individuals who are deserving of the respective awards. We look forward to presenting the first set of committee awards at the Spring Conference.

Our sponsorship has remained strong throughout the pandemic, and I want to personally thank all of our sponsors for sticking with us through the various obstacles that have arisen during the last couple of years. Please continue to visit our sponsor booths at the conferences and look for various sponsor webinars during the year.

Lastly, please consider submitting content for our WDC Journal. Our Journal Editor, Vince Scipior, is always looking for new and fresh articles, trials/verdicts, settlements, and significant motion hearing results. You can contact Vince directly at vscipior@cnsbb.com. This is another great way to be active in WDC.

I look forward to a great Spring Conference and see you at Kohler, April 7-8, 2022!

Author Biography:

Christopher R. Bandt is a partner in the Manitowoc office of Nash, Spindler, Grimstad & McCracken, LLP. He has been with the firm since 1996 and his practice focuses on all aspects of civil litigation with a concentration on insurance defense. He also provides mediation/ADR services. He has represented clients and tried cases throughout the State of Wisconsin and has argued before the Wisconsin Supreme Court. He is admitted to practice in the State of Wisconsin and before the U.S. District Courts for the Eastern and Western Districts of Wisconsin. He has served on the faculty for the University of Wisconsin Law School Lawyering Skills course. He is the current President of WDC and is also the chair of the Civil Jury Instruction Committee and co-chair of the Awards Committee. He is also a member of the Defense Research Institute. He has previously presented before WDC and the State Bar, and routinely provides presentations to clients and peer groups.

Jacek Salachna v. Edgebrook Radiology: Using Change of Venue Motions to Fight Forum Shopping

by: John P. Pinzl, von Briesen & Roper, S.C.

In *Jacek Salachna v. Edgebrook Radiology*, the Wisconsin Court of Appeals reversed a circuit court order denying defendant's change of venue motion.[1] The court of appeals ruled that the circuit court committed error when it denied the motion and kept the case in Milwaukee County, even though the case involved an accident that occurred in Barron County. In doing so, the court of appeals provided helpful language for defending against forum shopping litigants.

Salachna arose from a motor vehicle accident between the plaintiff, Jacek Salachna, and defendant, Shem Wark, that occurred in Barron County while Wark was in the course of his employment with Defendant Marten Transport, Ltd.[2] The plaintiff was a resident of Illinois, and the defendant was a resident of Idaho.[3] Marten Transport's principal place of business was in Buffalo County, Wisconsin. Plaintiff filed suit in Milwaukee County.

Defendants filed a motion to change venue pursuant to Wis. Stat. § 801.51, which provides:

> Any party may challenge venue, on the grounds of noncompliance with s. 801.50 or any other statute designating proper venue, by filing a motion for change of venue:
>
> **(1)** At or before the time the party serves his or her first motion or responsive pleading in the action.
>
> **(2)** After the time set forth in sub. (1), upon a showing that despite reasonable diligence, the party did not discover the grounds therefor at or before that time.

Defendants argued that proper venue was in Barron County "where the claim arose" under Wis. Stat. § 801.50(2), which provides:

> Except as otherwise provided by statute, venue in civil actions or special proceedings shall be as follows:
>
> (a) In the county where the claim arose;
>
> (b) In the county where the real or tangible personal property, or some part thereof, which is the subject of the claim, is situated;
>
> (c) In the county where a defendant resides or does substantial business; or
>
> (d) If the provisions under par. (a) to (c) do not apply, then venue shall be in any county designated by the plaintiff.

Defendants further argued that Barron County would be more convenient for the witnesses, including local law enforcement officers who responded to the accident, Defendant Wark who resided in Idaho, and for Marten representatives located in Buffalo County.[4]

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Plaintiff argued that Milwaukee County was the proper venue because Marten does substantial business in Milwaukee.[5] Further, even if venue was not proper under Wis. Stat. § 801.50(2), plaintiff argued that the court has discretionary power under Wis. Stat. § 801.52 to "change venue" to Milwaukee County.[6] Section 801.52 states that, "[t]he court may at any time, upon its own motion, the motion of a party or the stipulation of the parties, change the venue to any county in the interest of justice or for the convenience of the parties or witnesses …" Plaintiff argued that Milwaukee was more convenient for him and most of the subrogated parties who were based in Illinois.[7] From the information available, no witnesses lived in Milwaukee County.[8]

The circuit court initially rejected plaintiff's arguments.[9] The court (correctly) stated that "before we even get to the convenience part, you got to get through the venue statute, [Wis. Stat. §] 801.50(2)[.]"[10] The court further stated that if plaintiff was correct, then "people could be bringing lawsuits anywhere that they choose to bring them."[11]

After a hearing, the circuit court found that Marten transport did not do substantial business in Milwaukee County.[12] Nevertheless, the court held that the convenience of the parties and witnesses warranted a discretionary change of venue under Wis. Stat. § 801.52 and entered an Order denying defendants' motion.[13] Defendants petitioned the Wisconsin Court of Appeals for leave to file an interlocutory appeal pursuant to Wis. Stat. § 808.03(2), which was granted.[14]

On review, the court of appeals reversed the lower court's decision and ordered the case be transferred to Barron County.[15] The court of appeals framed the issue as, "whether a plaintiff must comply with the requirements for venue in Wis. Stat. § 801.50(2) to commence a civil action, or if a plaintiff may file an action in any county and request that the circuit court exercise its discretion under Wis. Stat. § 801.52 to keep the case."[16] The court of appeals chose the former, observing that the use of the word "shall" in Wis. Stat. 801.50(2) indicates that compliance with the statute is mandatory, not discretionary.[17] The court indicated that Wis. Stat. § 801.50(6), stating venue "may be changed under Wis. Stat. § 801.52" is not available until venue is established under § 801.50(2).[18] Lastly, the court reasoned that Wis. Stat. § 801.52 stating a court may "change the venue to any county" does not say a court may "grant venue in any county," suggesting Wis. Stat. § 801.52 cannot serve as the basis for proper venue in a complaint, only a motion to change venue.[19]

Notably, no insurance company was a party in *Salachna*, however, lessons from the case may nonetheless apply in cases involving insurance companies. It is safe to assume readers of this article frequently see complaints attempting to establish venue in a county other than the one where an accident occurred by alleging a defendant insurance company "does substantial business" in the county. Defendants in *Salachna* defeated this same argument regarding the defendant driver's employer by citing an affidavit establishing that only 0.08% of the employer's total business revenue is derived from Milwaukee County.[20] In cases where a plaintiff attempts to establish venue in a county other than where the claim arose by alleging the "substantial business" connection, parties should seek to defeat this allegation in the same fashion when warranted and cite *Salachna* in arguing that, because no other provisions establishing venue under Wis. Stat. § 801.50(2) apply, venue must be in the county where the claim arose.

Author Biography:

John P. Pinzl is an associate at von Briesen & Roper, S.C. in Madison. He is a member of the firm's Litigation and Risk Management Practice Group. He focuses his practice on insurance coverage and litigation, third party recovery, medical malpractice and product liability. John obtained a bachelor's degree from the University of Wisconsin 2010. He graduated from UW Law School in 2015. He is admitted to practice in Wisconsin state courts and both federal district courts. He is a member of the State Bar of Wisconsin and Wisconsin Defense Counsel. He was selected as a Wisconsin Rising Star by Super Lawyers in 2020-21.

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References

1 *Jacek Salachna v. Edgebrook Radiology*, 2021 Wisc. App. LEXIS 914, 2021 WL 4738850, 399 Wis. 2d 759, 966 N.W.2d 923 (single judge opinion) (recommended for publication).
2 *Id*. ¶ 2.
3 *Id*. ¶¶ 3-4.
4 *Id*. ¶ 3.
5 *Id*. ¶ 4.
6 *Id*. ¶ 5.
7 *Id*. ¶ 4.
8 *Id*. ¶¶ 3-4.
9 *Id*. ¶ 6.
10 *Id*.
11 *Id*.
12 *Id*. ¶ 7.
13 *Id*.
14 *Id*. ¶ 8.
15 *Id*. ¶ 20.
16 *Id*. ¶ 9.
17 *Id*. ¶ 14.
18 *Id*. ¶ 15 (internal citation omitted).
19 *Id*. ¶ 16.
20 *Id*. (citing *Vermont Yogurt Co. v. Blanke Baer Fruit & Flavor Co.,* 107 Wis.2d 603, 613, 321 N.W.2d 315, 320 (Ct. App. 1982) (Holding Defendant that conducted about 3% of its business in the given forum was not found to be enough to constitute substantial business)).

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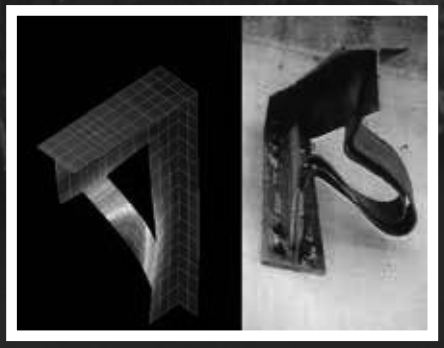

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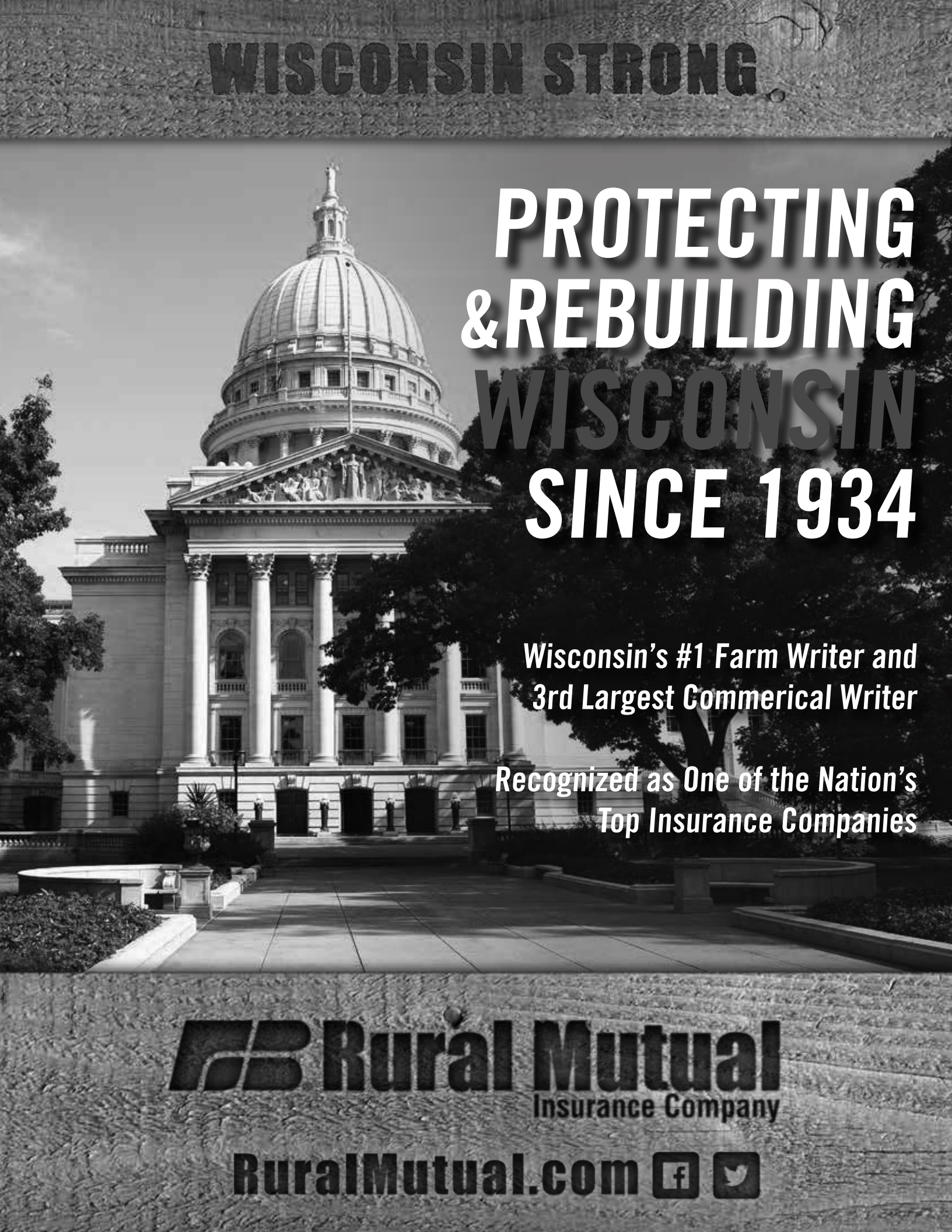
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2022 Diversity, Equity & Inclusion Committee Award: Heather L. Nelson

Congratulations to Heather L. Nelson for being selected by the Diversity, Equity & Inclusion Committee and the Awards Committee for the 2022 Diversity, Equity & Inclusion Committee Award! The WDC Spring Committee Awards recognize the talent, effort, and accomplishments of our incredible committee members and volunteer leaders.

Heather is an active member of the WDC Board of Directors and the current Executive Committee Program Chair. Heather has presented CLE topics at WDC conferences, has authored articles for the Wisconsin Civil Trial Journal, is the Chair of the Women in the Law Committee, and runs the annual WDC clothing drive.

Heather is a Shareholder at The Everson Law Firm in Green Bay. She is an experienced trial attorney, having successfully tried cases before juries in state and federal courts throughout Wisconsin and Illinois. She obtained her J.D. from DePaul University College of Law in Chicago and launched her legal career in the Chicago area. Heather became licensed to practice law in Wisconsin in 2000, defending cases in both Illinois and Wisconsin. Joining The Everson Law Firm in 2016 brought Heather back to her Green Bay roots. Her practice areas include motor vehicle accidents, premises liability, wrongful death, and products liability.

Heather will be recognized during the WDC 2022 Spring Conference on Friday, April 8, 2022, at The American Club in Kohler.

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2022 Women in the Law Committee Award: Mollie T. Kugler

Congratulations to Mollie T. Kugler for being selected by the Women in the Law Committee and the Awards Committee for the 2022 Women in the Law Committee Award! The WDC Spring Committee Awards recognize the talent, effort, and accomplishments of our incredible committee members and volunteer leaders.

Mollie is an active member of the Women in the Law Committee. She is a frequent presenter at WDC conferences and events. She is also an author and contributor to the Wisconsin Civil Trial Journal. The Women in the Law Committee would like to recognize the hard work that Mollie has put into the committee's professional clothing drive. This includes making multiple calls and deliveries of clothing to local organizations during a pandemic, when many facilities were shut down and not accepting donations.

Mollie is a shareholder in the Litigation and Risk Management Practice Group at von Briesen & Roper, S.C. in Milwaukee. She focuses her practice on representing and counseling insurance companies in litigation and disputes. Mollie graduated from Georgetown University, *cum laude*, in 2008. She earned her JD from Fordham University in 2022. She is admitted to practice in Wisconsin and Illinois state courts, the eastern and western federal district courts in Wisconsin, the central and northern federal district courts in Illinois, the eastern federal district court in Michigan, and the U.S. Court of Appeals for the 7th Circuit. In addition to WDC, Mollie is a member of the Defense Research Institute, the National Association of Women Lawyers, the Association for Women Lawyers, the State Bar of Wisconsin, and the Milwaukee Bar Association. She also serves as Georgetown's Milwaukee-area Chair and Alumni Interviewer for the Georgetown University Alumni Admissions Program. Mollie was selected by *The Best Lawyers in America*© in Insurance Law in 2022.

Mollie will be recognized during the WDC 2022 Spring Conference on Thursday, April 7, 2022, at The American Club in Kohler.

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2022 Amicus Curiae Committee Award: Vincent J. Scipior

Congratulations to Vincent J. Scipior for being selected by the Amicus Curiae Committee and the Awards Committee for the 2022 Amicus Curiae Committee Award! The WDC Spring Committee Awards recognize the talent, effort, and accomplishments of our incredible committee members and volunteer leaders.

Vince is the current Editor of the *Wisconsin Civil Trial Journal* and a frequent content contributor. He is a member of the Amicus Curiae Committee and was co-author of an amicus brief filed on behalf of WDC in *Brey v. State Farm Mutual Automobile Insurance Company*.[1]

Vince is a shareholder at Coyne, Schultz, Becker & Bauer, S.C. where he practices insurance defense, personal injury, professional liability, long-term care defense, and general litigation. He received his bachelor's degree in 2007 from the University of Wisconsin-Madison and his J.D. in 2011 from the University of Wisconsin Law School. He is admitted to practice in all Wisconsin state and federal courts. He has tried cases in Adams, Columbia, Grant, Green, and Dane Counties. In addition to WDC, Vince is a member of the American Inns of Court James E. Doyle Chapter, the Dane County Bar Association, and the State Bar of Wisconsin. He was recognized as a 2017 Up and Coming Lawyer by the Wisconsin Law Journal and has been included in the Wisconsin Rising Stars List by Super Lawyers Magazine since 2016.

Vince will be recognized during the WDC 2022 Spring Conference on Thursday, April 7, 2022, at The American Club in Kohler.

References

1 *Brey v. State Farm Mut. Auto. Ins. Co.*, 2022 WI 7, 2022 Wisc. LEXIS 9, 2022 WL 453473.

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WDC Amicus Curiae Committee Support in *Brey v. State Farm*

by: Brian D. Anderson, Everson, Whitney, Everson & Brehm, S.C.

In 2021, the WDC Amicus Curiae Committee filed an amicus brief with the Wisconsin Supreme Court in support of WDC member and Past President Andrew Hebl and his client, State Farm, in *Brey v. State Farm Mutual Automobile Insurance Co*mpany.[1] The Amicus Committee determined that support of State Farm and its arguments regarding policy interpretation under Wisconsin's omnibus statute, Wis. Stat. 632.32, furthered the goals and mission of WDC and its members. On February 15, 2022, the Wisconsin Supreme Court issued a unanimous opinion in *Brey* adopting the arguments of the defense and amicus parties. *Editor's Note: For a detailed discussion and analysis of the Brey opinion, see Page 22.*

Any WDC member (or others who believe WDC is an appropriate amicus curiae—Latin for "friend of the court") can request support from the Committee. When an appeal presents facts and issues important to WDC and its members, the Committee will offer its support. If a request is accepted, the Committee will work to enhance arguments made on appeal, by developing finer points of arguments and/or presenting new arguments from a different viewpoint. Since *Brey,* the Committee has petitioned to file non-party briefs in two other cases, both with the Court of Appeals, with one being accepted and an amicus brief having been filed.

As WDC members, you can support the Amicus Curiae Committee in the following ways:

- Reach out to the Committee about your cases on appeal for which the WDC can serve as amicus curiae to protect the rights of individuals and businesses who are defendants in civil lawsuits.
- Join the Amicus Curiae Committee and volunteer.
- Recruit colleagues to join—whether young lawyers or experienced practitioners—all are welcome!

Author Biography:

Brian D. Anderson is an attorney at Everson, Whitney, Everson & Brehm, S.C. in Green Bay. He practices in the areas of insurance defense, insurance coverage, and medical negligence defense, and handles appeals in state and federal courts. Brian Anderson is an experienced trial attorney who defends insurance companies and insureds, litigates insurance coverage issues, and practices appellate advocacy in state and federal courts. He also defends physicians and hospitals in civil litigation and administrative actions. Brian graduated with high honors from the Claude W. Pettit College of Law at Ohio Northern University, where he was Editor-in-Chief of the Law Review, a member of the Moot Court Board of Advocates, and was inducted into the Willis Society, the highest academic honor society at the College of Law. Brian began his legal career as the law clerk and legal advisor to the Chief Justice of the Supreme Court of Rwanda. He spent one year living in Kigali and working at the Supreme Court and supporting a USAID-funded project supporting promoting reforms to laws and legal institutions in Rwanda. Prior to joining Everson, Whitney, Everson & Brehm, S.C., Brian was an Assistant Professor of

Law teaching international and comparative law subjects, courses in legal research, and a required first-year course at the College of Law at Ohio Northern University. He was also engaged in law reform projects as a rule of law advisor in Eastern Europe, the Balkans, and sub-Saharan Africa.

Reference

1 *Brey v. State Farm Mut. Auto. Ins. Co.*, 2022 WI 7, 2022 Wisc. LEXIS 9, 2022 WL 453473.

Supreme Court of Wisconsin Upholds Exclusion Limiting UIM Coverage to Damages for Bodily Injury Sustained by Insured Persons in *Brey v. State Farm*

by: Kaitlyn Gradecki, Everson, Whitney, Everson & Brehm, S.C.

In *Brey v. State Farm Mutual Automobile Insurance Co*mpany,[1] a unanimous Wisconsin Supreme Court held that an auto insurer may properly exclude underinsured motorist (UIM) coverage for damages arising out of injury or death to a non-insured person. In doing so, the supreme court held that the court of appeals improperly broadened the definition of UIM coverage under Wisconsin's omnibus statute, Wis. Stat. § 632.32.

I. Procedural History

Elliot Brey, a minor, sought to recover damages for the death of his father.[2] At the time of his father's death, Brey was insured by State Farm under a policy issued to his mother.[3] At the time of his death, Brey's father was a passenger in a vehicle being operated by Channing Mathews.[4] Neither Brey's father nor Mr. Mathews was insured under State Farm's policy.[5] Nor was the vehicle being operated by Mr. Mathews an insured vehicle under the policy.[6] Despite no insured person or vehicle having been involved in the accident and no insured having sustained any bodily injury, Brey sought UIM benefits from State Farm.[7]

State Farm's policy included UIM coverage. It provided that State Farm "will pay compensatory damages for bodily injury an insured is legally entitled to recover from the owner or driver of an underinsured motor vehicle."[8] It further stated, however, that the "bodily injury must be … [s]ustained by an insured."[9]

State Farm argued that its policy did not provide coverage for Brey's UIM claim because the person who sustained injury—his father—was not an insured under the policy.[10] Brey argued that State Farm's policy language violated the omnibus statute, Wis. Stat. § 632.32, which "sets the minimum requirements all motor vehicle insurance policies in Wisconsin must satisfy."[11]

The circuit court granted summary judgment to State Farm citing the language of the policy, the history of the omnibus statute, and the Wisconsin Court of Appeals' decision in *Ledman v. State Farm Mutual Automobile Insurance Co*.[12] In *Ledman*, the court of appeals held that an insured person could not recover UIM damages from State Farm for the wrongful death of their adult daughter who died in an automobile accident.[13] The *Ledman* court reasoned that the insurance policy, when considered as a whole, "showed an 'expected nexus of bodily injury to the insured as part of the overall general scheme and intent' of the policy" and to read it differently would lead to an "unreasonable result."[14]

On review, the court of appeals reversed the circuit court's decision in *Brey*, holding that the *Ledman* decision was distinguishable, and that Wis. Stat. §§ 632.32(1) and (2)(d) "bar an insurer from limiting UIM coverage to only those insureds who suffer bodily injury or death."[15] State Farm appealed.

II. The Wisconsin Supreme Court's Decision

Reversing the court of appeals, the Wisconsin Supreme Court undertook a lengthy analysis of the omnibus statute. First, the court noted that Wis. Stat. § 632.32(5)(g)—which permits insurers to implement anti-stacking policy provisions preventing insureds

from increasing the total coverage limit—states that "underinsured motorist coverage [is] available for bodily injury or death suffered by a person" and refers specifically to "the person … insured."[16] The court reasoned that this language presumes that the omnibus statute's reference to "a person" means an insured. [17]

Similarly, the court noted that Wis. Stat. § 632.32(5)(f) —which also allows for anti-stacking policy provisions—states that "insurance coverage [is] available for bodily injury or death suffered by a person in any one accident," and thus limits UIM coverage to the person injured in an accident.[18] Extending UIM coverage to a person not injured in the accident or for damages arising out of injuries to a non-insured would be illogical.[19]

Next, the court considered how subparagraph (5)(j) supports State Farm's interpretation of Wis. Stat. § 632.32(2)(d) and a lack of coverage under the policy for Brey.[20] Section (5)(j), the Court explained, targets the "free rider" problem and "keeps an insured from using insurance coverage of one car to provide coverage on another vehicle the insured owns but has not insured."[21] In light of paragraph (5)(j), which permits an insurer to exclude UIM coverage for an insured injured in a vehicle not covered by the policy, the court reasoned that "[t]o interpret § 632.32(2)(d) to require an insurer to extend UIM coverage for an accident involving neither an insured nor a covered vehicle" would be utterly inconsistent.[22]

Fourth, the court considered Wis. Stat. § 632.32(5)(e), which permits an insurer to include exclusion not permitted under § 632.32(6), even if the provision excludes "persons, uses or coverages that could not be directly excluded under sub. (6)(b)."[23] In *Vieau v. American Family Mutual Insurance Company*,[24] the Supreme Court of Wisconsin "upheld a definitional exclusion denying an injured insured UIM coverage under his mother's policy."[25] While under Wis. Stat. § 632.32(6)(b) the injured insured was covered as a relative, he was not covered in that instance because he owned his own car and the court declined to set a precedent allowing "resident relatives who own their own vehicles from piggyback[ing] … on the UIM coverage of a single insured."[26] The court determined that if an otherwise injured insured could be denied UIM coverage under a policy's "own-other-car" exclusion, it would be irreconcilable to hold that the same statutory scheme requires an insurer to extend UIM coverage to an individual not insured under any policy.[27]

Finally, the court considered the definition of "underinsured motorist coverage" under Wis. Stat. § 632.32(2)(d), which provides:

> "Underinsured motorist coverage" means coverage for the protection of persons insured under that coverage who are legally entitled to recover damages for bodily injury, death, sickness, or disease from owners or operators of underinsured motor vehicles.[28]

Interpreting the plain meaning of Wis. Stat. § 632.32(2)(d), the Wisconsin Supreme Court noted that "ascertaining the plain meaning of a statute requires more than focusing on a single sentence or portion thereof."[29] The supreme court rejected the court of appeals' "hyper-literal" interpretation of the statute, finding it clashed "with parts of the same statute."[30] It held that the court of appeals incorrectly interpreted the statue "by strictly construing the statutory definition in isolation rather than interpreting it in the context of the omnibus statute's pertinent text as a whole."[31] After considering Wis. Stat. § 632.32(2)(d) in context with other parts of the same statute, the supreme court concluded that "UIM coverage exists only when an insured suffers bodily injury or death."[32]

III. Conclusion

In *Brey*, Wisconsin joined the majority of other jurisdictions which have held that auto insurers may properly limit UIM coverage to claims for bodily injury sustained by an insured. In doing so, our supreme court rejected the insured's plea to expand UIM coverage beyond its intended purpose.

A unanimous supreme court made clear that the omnibus statute must be read as a whole and that statutes should not be read in isolation or in a "hyper-literal" way that reaches an absurd result.

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To Try in Court or to Try to Arbitrate? Legal and Practical Considerations When Enforcing an Arbitration Agreement

by: Myranda Stencil, Coyne, Schultz, Becker & Bauer, S.C.

I. Introduction

A complaint has just been filed against your client. Before answering the complaint have you inquired into whether there might be an enforceable arbitration agreement that applies to the plaintiff's claims? This is a good first question especially if you are defending a long term care provider or other sophisticated party. Wisconsin provides distinct and specific statutory mechanisms for enforcing an arbitration agreement both before and after a lawsuit has been filed. There are also common hurdles to enforcement that, if anticipated early on and investigated into, can be overcome. If there is a potentially enforceable arbitration agreement a good second question is whether it is advantageous to pursue defense of the claims in arbitration or whether it might be more beneficial to waive arbitration and proceed to defend the case in a court of law. This article will provide an overview of: (1) the legal mechanisms for enforcing an arbitration agreement; (2) common hurdles to enforcing an arbitration agreement, along with information to gather in preparing to defend the enforceability of the agreement; and (3) practical considerations as to whether trying the case in court or through arbitration may be better for your client.

II. The Legal Mechanisms for Enforcing an Arbitration Agreement

The correct statutory mechanism for enforcing an arbitration agreement depends on whether suit has been filed or not. If suit has already been filed, the applicable statute is Wis. Stat. § 788.02, which provides:

> If any suit or proceeding be brought upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."[1]

A defendant in a pending lawsuit may file a motion to compel arbitration under Wis. Stat. § 788.02 in lieu of an answer to the complaint.[2] "In essence, in determining whether a dispute is arbitrable, the court's 'function is limited to a determination of whether: (1) there is a construction of the arbitration clause that would cover the grievance on its face; and (2) whether any other provision of the contract specifically excludes it.'"[3]

If a lawsuit has not already been filed, the applicable statute for enforcing an arbitration agreement is Wis. Stat. § 788.03, which provides, in part: "The party aggrieved by the alleged failure, neglect or refusal of another to perform under a written agreement for arbitration may petition any court of record having jurisdiction of the parties or of the property for an order directing that such arbitration

proceed as provided for in such agreement."[4] The Wisconsin Court of Appeals has confirmed that "when a lawsuit has been commenced, a party may not use the special procedure outlined in § 788.03 to compel arbitration."[5] Under Wis. Stat. § 788.03, the request to compel arbitration is a matter separate from, but related to, the parties' underlying dispute, and resolution of a petition under Wis. Stat. § 788.03 does not, and cannot, reach the merits of the matter to be arbitrated.[6]

The Wisconsin Supreme Court has recognized that "the procedure under Wis. Stat. § 788.02 is somewhat truncated in comparison to Wis. Stat. § 788.03, but the circuit court's responsibility is essentially the same. Both statutes require the circuit court to do nothing more than determine whether the parties must arbitrate their dispute, and then ensure they do."[7] The primary difference is whether the determination is made in the context of an existing lawsuit or not.[8]

III. Common Hurdles to Enforcing an Arbitration Agreement

Although the arbitration agreement you located might seem straightforward, plaintiff's counsel will often look for any reason to make it unenforceable. Such arguments concern the making, execution, and conscionability of the agreement. Some common hurdles to enforcing an arbitration agreement that you may encounter, along with investigation and inquiries you should conduct to be ready to combat such arguments, are as follows:

- Who drafted the arbitration agreement? Information about the author of the contract and how the terms of the agreement were made, as well as whether the other party was given an opportunity to review and make changes to the terms, will be helpful in addressing arguments regarding the making of the contract.
- How was the arbitration agreement executed? Information about whether the arbitration agreement was fully read through, whether the terms were explained, whether a copy was given to the plaintiff, and whether the plaintiff had an opportunity to ask questions, will be important in addressing arguments regarding the execution of the contract.
- When was the arbitration agreement executed? Ensure that the arbitration agreement was entered into prior to the date of the alleged incident.
- When and who signed the arbitration agreement? If the answer is anyone other than the plaintiff, then information about any activated power of attorney or legal guardian, and documents to support such authority, will be necessary to establish that the contract was legally entered into on behalf of the plaintiff. If the plaintiff had more than one guardian, check the guardianship documents and statutes to confirm whether one could sign or if both needed to sign.
- What claims are covered by the arbitration agreement? Read the arbitration agreement carefully and ensure that the language is adequate and broad enough to cover the specific claims made by the plaintiff. Look for possible exclusions such as intentional acts and wrongful death.
- Who is covered by the arbitration agreement? If the lawsuit or claim is being brought by the plaintiff's family members or guardians for claims such as loss of consortium or loss of society and companionship, read the arbitration agreement to ensure that coverage extends to the heirs, relatives, guardians, etc., and their derivative claims.

IV. Practical Considerations as to Whether Trying the Case in Court or Through Arbitration is Better for Your Client

When a case proceeds through the court, the rules of the proceeding are governed by statutes, local rules, and the judge's scheduling order. When a case proceeds through arbitration, the rules of the

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proceeding are governed by the parties' contract (or a set of arbitration rules, such as JAMS or the FAA, that the parties' arbitration agreement specifies will apply). Each arbitration agreement is different and should be carefully reviewed prior to enforcement.

In court, the venue in civil actions is generally: (a) in the county where the claim arose; (b) in the county where the real or tangible personal property, or some part thereof, which is the subject of the claim, is situated; (c) in the county where a defendant resides or does substantial business; or (d) if the provisions under (a) to (c) do not apply, then in any county designated by the plaintiff.[9] With arbitration, the venue will likely be specified in the agreement. In some arbitration agreements, the location of the proceeding will be dependent on the location of the defendant's facility—perhaps even limited to a certain distance away. The agreement may also specify the maximum number of days the arbitration proceeding can last and the timeframe for each of those days. You will want to know where the arbitration proceeding is going to be held and how long it will last. Also, be sure you know who is paying for the arbitrators' fees and costs and whether they will be split equally between the parties. The Wisconsin Supreme Court has noted: "The whole purpose of arbitration is to substitute a less-expensive and less-formal method of settling differences between parties for normal court litigation."[10]

In Wisconsin courts, a jury verdict in a civil action must be agreed to by five-sixths of the jurors.[11] If more than one question must be answered to arrive at a verdict on the same claim, the same five jurors must agree on all questions.[12] However, when a case goes through arbitration, the agreement controls whether the arbitration award must be unanimous or whether it may be decided by a majority of arbitrators. This can be a crucial distinction based on the arbitrators selected. The arbitration agreement may also control the number of arbitrators. A common number of arbitrators for an arbitration proceeding is three—with one being selected by the plaintiff, one being selected by the defense, and the third being a selected "neutral" arbitrator, chosen either by the arbitrators or by the parties. This is a stark difference from a case being tried to a six- or twelve-person jury.[13]

Perhaps the single most important consideration in whether to arbitrate a case rather than try it in court is the decisionmaker involved in each process. To qualify as a juror, the requirements are that you are a resident of the area served by a circuit court who is at least 18 years of age, a U.S. citizen, able to understand the English language, and have not been convicted of a felony with unrestored civil rights.[14] The only way to control a randomly selected jury is through limited *voir dire*. Contrast that with an arbitration proceeding in which each side usually has the opportunity to carefully and thoughtfully select an arbitrator of their choosing, whether it be a fellow attorney or retired judge. An arbitration panel can feel akin to a mediator—where your case is being heard by someone who understands the law and can apply a neutral, non-biased version of the facts to the applicable legal standards.

Consider whether your case would be better defended in front of a panel of legal professionals or by a jury of lay persons. For example, in cases involving significant and compelling pictorial evidence (think serious pressure wounds or extensive vehicle damage) where causation is disputed, an arbitration panel may be able to better separate the emotional impact of such evidence from the legal impact of it. If your case requires an understanding of extremely technical issues, arbitration might be a better bet. "In arbitration greater use may be made of persons who have a particular expertise that may permit them to adjudicate and settle differences that may exist on highly technical matters."[15] On the other hand, if your case comes down to a shaky credibility contrast, you might want a jury. Further consider the extra time and cost it takes to enforce an arbitration agreement, potentially argue about its validity, and then proceed to the merits. If your client is hoping for quick resolution by way of settlement, or if the claimed damages are relatively low, it may make more sense to proceed in court.

It is also important to remember that the arbitration

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panel acts as both judge and jury. In a court of law, the jury is the finder of fact.[16] The judge acts as a gatekeeper to resolve preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence.[17] In arbitration, the arbitration panel acts as both factfinder and gatekeeper. That means that if there is a motion *in limine* to exclude certain evidence, the same persons (the arbitration panel) that will decide the merits of the case will hear the evidence anyway in deciding whether it may or may not be admissible. They will also be aware of any other pre-arbitration pleadings, such as motions to dismiss and motions for summary judgment.

V. Conclusion

An arbitration agreement, if applicable and enforceable, can be a powerful defense mechanism depending on the type of lawsuit filed and the claims alleged. Having a case decided by a panel of sophisticated arbitrators rather than a jury could make the difference for your case, especially when there are aspects of the case that would not be well received by a jury, even if they are not causative of the outcome. However, there may be instances where it makes more sense to proceed with the regularly scheduled program and try the case, waiving the contractual agreement to arbitrate. The method, hurdles, and practicalities for enforcing an arbitration agreement and proceeding through arbitration should be carefully considered and discussed so that you and your client can make an informed recommendation and decision whether to try the case in court or try to arbitrate.

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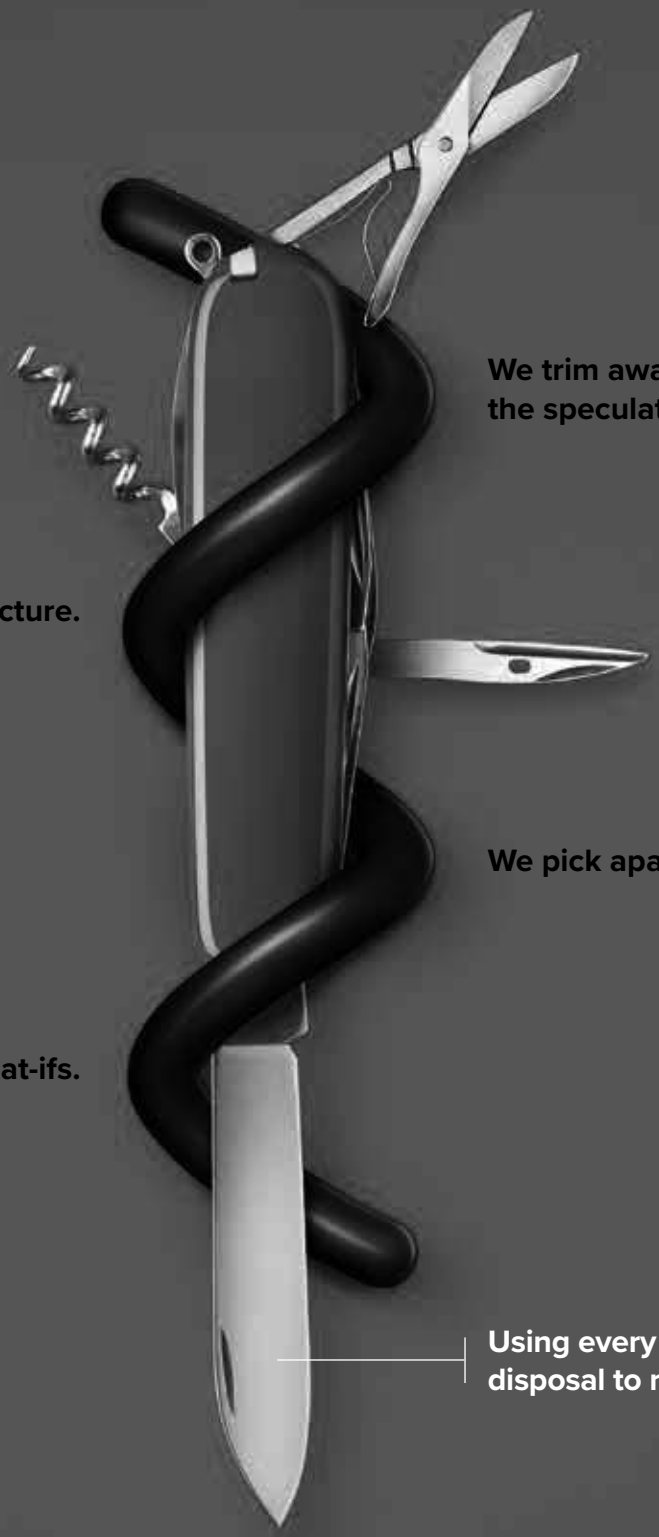

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Duncan v. Asset Recovery Specialists Inc.: Another Example of the Wisconsin Courts' Expansive Interpretation of the Wisconsin Consumer Act

by: John H. Healy and Alyssa N. Chojnacki, Corneille Law Group LLC

I. Introduction

The Wisconsin Supreme Court's recent decision in *Duncan v. Asset Recovery Specialists, Inc.*[1] follows the state courts' consistent pattern of interpreting the Wisconsin Consumer Act ("WCA") in a consumer-friendly manner. In the case, the court sought to answer two questions: 1) Whether a "dwelling used by a consumer as a residence" includes an underground/ground floor apartment garage; and 2) Whether the consumer may bring a claim of unconscionability during a nonjudicial repossession. The court concluded: 1) An underground/ground floor garage constitutes a portion of an individual's dwelling used as a residence; and 2) Claims of unconscionability are not available to consumers after a non-judicial repossession.

As a preliminary matter, the WCA is a broadly worded law with the stated intention of protecting consumers from unfair or deceptive practices. Specifically, The WCA states the law "shall be liberally construed and applied . . . to protect customers against unfair, deceptive, false, misleading, and unconscionable practices by merchants."[2] In other words, the WCA is a very consumer friendly law as drafted and is consistently consumer friendly in its application.

When a customer defaults on a loan for a motor vehicle, a creditor has two available methods to repossess the car under the WCA. The first available option is judicial repossession under Wis. Stat. § 425.205. Under this section, the creditor initiates a formal legal proceeding against the consumer. The second option available to creditors is a nonjudicial repossession under Wis. Stat. § 425.06. When performing a nonjudicial repossession, the creditor and other parties, such as the repossession agency, do not need to inform the court of the repossession upon the consumer's default on a loan, if certain procedures are followed.

Wis. Stat. § 425.206(2) governs nonjudicial enforcement of repossessions and states that in the process of repossessing a car, a debt collector may not "a) commit a breach of the peace" or "b) enter ***a dwelling used by a customer as a residence*** except at the voluntary request of a customer."[3] If a lender or repossession agency violates Wis. Stat. § 425 during a non-judicial repossession, the parties face exposure for more damages than likely anticipated. The damages under Wis. Stat. § 421.304 (the section applying to nonjudicial repossessions) include statutory damages, return of the vehicle to the consumer, return of costs paid on the loan and deletion of loan remainder, reasonable attorney fees (which increase greatly as litigation proceeds) and potentially punitive damages. These damages are to be "liberally administered."[4]

II. *Duncan v. Asset Recovery Specialists, et al.*

In *Duncan,* the defendants, repossession agency Asset Recovery Specialists, arrived at the apartment building of plaintiff Danelle Duncan to perform a nonjudicial repossession of her vehicle

after she defaulted on a loan.[5] Ms. Duncan's car was parked in a ground floor parking garage, which constituted the first floor of her multi-unit apartment building.[6] The door to the parking garage was open, and the repossession agent entered the parking garage without trouble and repossessed the vehicle, without Ms. Duncan's knowledge.[7] Ms. Duncan then sued Asset Recovery Specialists under Wis. Stat. § 425.206(2)(b) and Wis. Stat. § 425.107(1), alleging that the agent had entered her dwelling without her permission and that the agent acted in an unconscionable manner.[8]

Plaintiff first filed this case in federal court.[9] At that stage Ms. Duncan made statements regarding the extent of her use of the garage, admitting that she "never lived or resided in the garage."[10] The case was dismissed from federal court and then refiled in Dane County Circuit Court.[11] Plaintiff filed a motion for summary judgment, arguing that the garage constituted a dwelling and that the unconscionability claims applied to her lawsuit.[12]

The circuit court held that the garage did not qualify as a dwelling used as a residence because Ms. Duncan did not have the right to exclude others from the garage and did not conduct any activities of daily life in the residence.[13] Therefore, the repossession did not violate Wis. Stat. § 425. The court compared the garage of a multi-unit apartment building to that of a garage of single-family home, which occupants typically use in a more intimate manner.[14] The court of appeals reversed the circuit court's decision, holding that the garage qualified as a portion of the residence.[15] Neither ruled on the issue of unconscionability.[16]

A. Whether a Garage Attached to a Residence Constitutes a Dwelling Used as a Residence under Wis. Stat. 425.206(2)(b)

The Wisconsin Supreme Court first analyzed whether a ground floor/underground parking lot constitutes a part of a dwelling used as a residence. Ultimately, the court affirmed the court of appeals, and held that a ground floor parking garage of a multi-unit apartment building qualifies as a dwelling used as a residence. Therefore, the agent violated Wis. Stat. § 425.

As stated above, Wis. Stat. § 425.206(2) prohibits a repossessing agent from "enter[ing] ***a dwelling used by a customer as a residence*** except at the voluntary request of a customer."[17] The court notes that the WCA does not define dwelling. Next, the court stated that the common definition of a dwelling is a "building in which at least one person lives."[18] Further, a dwelling is "not just parts of the building in which the residents might eat, sleep or shower."[19] The court then turned to definitions of dwelling in other statutes and even the Wisconsin Administrative Code to confirm its interpretation of the word dwelling.[20]

After concluding a garage is a dwelling, the court analyzed whether the second part of the statute, "used by the customer as a residence," could be read to exclude the garage as part of a dwelling. The court held that the use of the word "residence" does not exclude the garage as a part of a dwelling.

The parties offered differing interpretations of the phrase "used by the customer as a residence." The defendants proposed that the phrase was meant to indicate a location where the consumer actually lived and performed daily living activities such as eating, sleeping, and showering.[21] In other words, places that are "integral parts" of a residence.[22] By contrast, the plaintiff proposed the phrase was only meant to distinguish the consumer's residence from all other residences, and that the garage constituted a part of a consumer's residence.[23] The court agreed with the plaintiff, stating that the more "natural reading" of the phrase "used by the customer as a residence" is meant to apply to the entire dwelling, and not just part of the dwelling.[24] Arguably, such an interpretation ignores the plain meaning of the statute. The court explained, however, that its decision would help to provide clear guidance moving forward regarding repossessions and added further strength to their decision to interpret the garage as a dwelling a consumer uses as a residence.[25]

Writing in dissent, Justice Patience D. Roggensack noted that the majority ignored the plain meaning of the statute, instead focusing on a patchwork like analysis to affirm the court of appeals' decision that a ground floor/underground parking garage constitutes a dwelling that a consumer uses as a residence.[26] Justice Roggensack's dissent seems to be a more "natural reading" of the phrase "dwelling used as a residence." Under a plain reading of the statute, specifically the phrase "used as a residence," one would assume the place must constitute the location where one eats, sleeps, and generally lives their life. As stated above, Ms. Duncan admitted at one point that she did not reside in the garage or perform any kind of activities in the garage. She did not have the ability to exclude others from the garage, and a third party cleaned and maintained the garage rather than Ms. Duncan herself. Holding that the garage constitutes a part of a dwelling that a customer uses a residence is not a natural reading but is not surprising given the courts' propensity to read these statues in favor of consumers.

Overall, the court's holding demonstrates that the court is willing and likely to continue to read the Wisconsin Consumer Act in a manner favorable to consumers. Arguably, the most natural definition of "residence" is the location in which a person actually lives, as initially ruled by the circuit court, proposed by the defendants, and emphasized in the dissent.

B. Availability of Unconscionability Defense Against Creditors in Non-Judicial Repossessions under Wis. Stat. 425.107(1)

The court next held that claims of unconscionability are not available to consumers in lawsuits regarding nonjudicial repossessions. Notably, the decision is more favorable to defendants as it places a limiting factor on damages. However, the damages available to consumers under the WCA are still significant and the court's decision likely will not have a significant impact on the litigation of non-judicial repossession cases.

Wis. Stat. 427.107(1) states:

> With respect to a consumer credit transaction, if the court as a matter of law finds that any aspect of the transaction. . . ***.is unconscionable,*** the court shall, in addition to the remedy and penalty authorized in sub. (5), either refuse to enforce the transaction against the customer, or so limit the application of any unconscionable aspect or conduct to avoid any unconscionable result.[27]

If the court finds that an aspect of the transaction was unconscionable, the plaintiff is entitled to greater damages, such as statutory damages, than those initially available for a violation of Wis. Stat. § 425.206(2)(b).

In its decision, the Wisconsin Supreme Court held that a non-judicial repossession is not an "action or proceeding brought by a creditor" and therefore consumers cannot allege unconscionability claims after nonjudicial repossessions.[28] The court limits "action or proceeding" to highly formalized circumstances, such as the initiation of litigation, and not the informal demands placed upon a non-judicial repossession.[29] Since a non-judicial repossession is not an "action or proceeding brought by a creditor" claims of unconscionability are not available to the consumers.[30]

While this holding is more favorable to defendants than consumers, it is less indicative of the court's reading of the statutes, if for no reason other than the holding is less consequential than that posed by the first question. The damages available to a plaintiff alleging a violation of Wis. Stat. § 425 are still often largely outsized compared to the egregiousness of the act or error performed during a repossession.

III. Recommendations

Following the decision in *Duncan*, it is recommended that lenders, forwarding agencies,

repossession agencies, and their counsel in the State of Wisconsin make a concerted effort to ensure their employees are up to date on the consumer-friendly nature of the Wisconsin Consumer Act. Counsel for these parties cannot emphasize enough that when faced with a questionable, borderline, or ambiguous situation, repossession agencies should simply abandon that attempt to repossess the vehicle and try again at a different time. While this may lead to initial frustration or further complicate an already complicated job, it will reduce the amount and likelihood of litigation regarding nonjudicial repossessions.

IV. Conclusion

In *Duncan v. Asset Recovery Specialists*, the Wisconsin Supreme Court held that: 1) An underground/ground floor garage constitutes a portion of an individual's dwelling; and 2) Claims of unconscionability are not available to consumers after a non-judicial repossession. The first holding is much more relevant to both consumers and potential defendants because it demonstrates Wisconsin Courts' propensity to broadly favor the consumer in actions under the WCA, even when such a decision may go against the plain language meaning of the statute. Accordingly, creditors, lenders, and repossession agencies need to be aware of this pattern and adjust their practices so as not to face potential liability.

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3 (Emphasis added.) Interpretation of breach of peace is a good example of the courts' willingness to read the WCA in favor of consumers. A breach of peace does not necessarily have to be a loud and obvious confrontation between parties; a simple verbal protest over the repossession of a vehicle constitutes a breach of peace. *Hollibush v. Ford Motor Credit Co.,* 179 Wis. 2d 799, 808 (1993) (an oral statement that is an "unequivocal protest" qualifies as a breach of peace).
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Disparate Impact Claims Remain a Significant Concern for Employers

by: Storm B. Larson, Boardman & Clark, LLP

I. Introduction

The Fox and the Stork is a beloved children's fable written many years ago by Aesop. It tells the story of two acquaintances, Fox and Stork, who played pranks on each other at dinner. As the story goes, Fox first invited Stork to his home and served soup in a shallow dish. This made it impossible for Stork to eat, given his long, slender bill. So, Stork devised a plan to retaliate and invited Fox to his own home where he served fish in tall, narrow jars which Fox's short snout could not reach. The story's moral is that it is important to always treat others fairly and, perhaps more subtly, how "fairness" can be a relative term.

So, why is this story relevant to a legal discussion? It was famously cited in the U.S. Supreme Court's decision in *Griggs v. Duke Power Co.* to illustrate the principle of disparate impact claims.[1] Disparate impact claims challenge facially neutral employment practices which have the effect of discriminating against protected groups under Title VII of the Civil Rights Act of 1964 or other anti-discrimination laws. Disparate impact claims do not require plaintiffs to demonstrate that the party who administered the challenged practice or policy *intended* to discriminate.[2]

Although disparate impact claims garner less attention than individual disparate treatment claims, a recent decision from the U.S. Court of Appeals for the Seventh Circuit demonstrates that disparate impact claims remain a significant concern for employers and the lawyers who defend against them. In *Simpson v. Dart*, the Seventh Circuit reiterated that disparate impact claims must be analyzed differently from disparate treatment claims, thereby underscoring the importance for employers to understand their obligations to reduce legal risk.[3]

II. General Overview of Disparate Impact and Disparate Treatment Claims Under Title VII

Title VII authorizes plaintiffs to bring claims for disparate impact as well as disparate treatment.[4] As most may know, Title VII includes the following protected classes: race, color, national origin, religion, sex, gender identity, and sexual orientation.[5] Ordinarily, to establish discrimination, a plaintiff must demonstrate that an employer had the intent to discriminate against the complaining individual. However, disparate impact claims are different and generally require plaintiffs to demonstrate that a certain policy or practice had the *effect* of discrimination, regardless of whether it was designed to discriminate.[6]

To guide this discussion, it is helpful to review the actual text of Title VII to illustrate how disparate impact claims function in relation to disparate treatment claims. The relevant section provides as follows:

> An unlawful employment practice based on disparate impact is established under [Title VII] only if-
>
> (i) a complaining party demonstrates that a respondent uses a particular

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> employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the [required] demonstration . . . with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.[7]

By contrast, disparate treatment claims are authorized as follows:

> It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of** such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, **because of** such individual's race, color, religion, sex, or national origin.[8] (emphasis added).

The language between these two sections is somewhat similar but differs primarily based on the bolded "because of" language which courts generally interpret as requiring a showing of intent.[9]

Disparate impact claims are also notable because they allow defendants to argue that a challenged policy is nonetheless lawful if it is consistent with "business necessity."[10] The U.S. Supreme Court has explained that employment practices such as pre-employment tests will generally satisfy the business necessity standard if the tests "bear a demonstrable relationship to successful performance of the jobs for which it was used."[11] So, for example, a pre-employment test which measures an applicant's typing speed would likely bear a demonstrable relationship to a position for an administrative office assistant. Even if an applicant could demonstrate that such a test had a disparate impact on a protected class, the employer would have an argument that the test was required by legitimate need for fast typists.

Because disparate impact claims challenge policies and practices, they can often involve a large number of individuals. So, disparate impact claims are sometimes brought as class actions under Rule 23 of the Federal Rules of Civil Procedure. As a brief reminder, plaintiffs seeking to bring a class action must meet each of the threshold requirements of Rule 23(a) to have a class certified. Rule 23(a) contains four threshold requirements as follows:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.[12]


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As a general matter, if a proposed class meets all four criteria, it must be certified even if it is clear that the claim will fail on the merits.[13]

From a practical perspective, it makes general sense for disparate impact claims to be brought as class action lawsuits. This is because disparate impact claims challenge policies and practices which generally have the effect of harming a group of people, and class action lawsuits allow groups of people to join together and sue for a common purpose subject to the requirements of Rule 23. Although disparate treatment claims can also be brought as class action lawsuits, as a practical matter, it is more difficult to succeed in doing so. This is because disparate treatment claims are more narrowly focused on an employer's specific reasons for taking an adverse employment action against an *individual*, and those reasons may vary from person to person.[14] For this reason, it can be more difficult for disparate treatment claims to satisfy the requirement that there be "questions of law or fact common to the class."

III. *Simpson v. Dart* and Disparate Impact Claims

In *Simpson v. Dart*, the Seventh Circuit explained how disparate impact claims differ from disparate treatment claims and why the distinction matters in the class action context. The decision further serves as an important reminder that successfully defending against a disparate treatment claim does not automatically guarantee dismissal of a related disparate impact claim.

The relevant facts of the *Simpson* case are as follows: Between the years 2014 and 2017, Joseph Simpson submitted four separate applications to work for the Cook County Department of Corrections (DOC) as a Correctional Officer.[15] During the years he applied, the DOC used a five-step hiring process to consider applicants, and an applicant could be eliminated at any step.[16] The first four steps included: (1) an initial written exam; (2) a written situational exam; (3) a physical fitness test; and (4) a discretionary "final review," which includes a background check, drug testing, and multiple interviews.[17] Successful applicants who were certified as "eligible for hire" then proceeded to the final step, which involved a discretionary "file review" before the final hiring decision was made.[18] Notably, the first three steps of the application process involved objective, pre-employment examinations; this fact will become highly relevant later. Ultimately, Simpson was never hired by the DOC.[19] As a result, he brought claims for disparate treatment and disparate impact against the DOC under Title VII.[20]

Simpson's disparate treatment claim alleged that the DOC's multistep process was designed to discriminate against Black applicants.[21] In the alternative, he alleged that the pre-employment screening process disparately impacted Black applicants because Black applicants were hired at significantly lower rates than white applicants.[22] As evidence, Simpson produced statistical evidence which purportedly showed that at each of the five steps of the hiring process, Black applicants were rejected more often than White applicants.[23]

Simpson opted to bring his claims (disparate treatment and disparate impact) as a class action on behalf of other Black individuals who had been rejected.[24] He first moved to certify just one class of *all* unsuccessful Black applicants dating back to March of 2015.[25] However, he later added five subclasses for candidates rejected at each of the five challenged steps of the hiring process.[26] The district court permitted him to add these subclasses before it ruled on whether to certify the class.[27]

Ultimately, the district court denied class certification.[28] The district court's decision focused mainly on Rule 23(a)(2)'s commonality requirement which requires that there be "questions of law or fact common to the class."[29] It concluded that there were not such commons questions of law or fact as to the class members.[30] Notably, the district court's opinion did not differentiate or separate its analysis of Simpson's disparate impact claims from its consideration of his disparate treatment claims on this commonality point.[31] Instead, it rejected certification "in its entirety."[32]

As to his disparate impact claim, Simpson appealed the denial of class certification for individuals who were rejected at Steps 1, 2, and 3 of the pre-employment screening process.[33] He did not appeal the denial of certification for his disparate treatment claims, nor did he appeal denial of certification for individuals who were rejected at Steps 4 and 5 (the Merit Board's final review and the Sheriff's Office's final review).[34] As for Steps 1, 2, and 3, those steps were the objective examination portions.

On appeal, the Seventh Circuit reversed the district court's denial of class certification as to individuals who were rejected at the first three stages.[35] The Seventh Circuit observed that the exams constituted a uniform practice which was common to each class member and therefore constituted a valid basis for bringing a disparate impact claim.[36] In other words, to satisfy the class certification stage, it was sufficient for Simpson to have alleged that the Black applicants had all been adversely affected by the same examination at Steps 1-3, and so there were common questions of law or fact which merited class certification.[37] According to the court, the district court had improperly weighed evidence which went to the merits of Simpson's claims at the class certification stage.[38] Thus, certification should have been granted.

IV. Practical Considerations for Employers and Defense Counsel

Simpson serves as a reminder that disparate impact claims remain a significant concern for employers for a few reasons. First, claims can arise based on a policy which the employer believes to be legal because it is applied equally to all individuals without respect to protected-class status. Employers may therefore unwittingly be inviting claims by enforcing an invalid policy or practice under the mistaken assumption that equal application will defeat any claim for discrimination. Employers should therefore carefully evaluate their employment practices and, if applicable, any pre-employment examinations they use to ensure that they are not inadvertently applying standards or using tests which may invite legal risk

Second, disparate impact claims can be expensive and complicated to litigate. Employment discrimination cases are notoriously fact-intensive, and cases which involve just one plaintiff—let alone an entire group—can quickly become expensive due to discovery and expert witness costs. Disparate impact cases are also unique in that expert witnesses are often central to the success of demonstrating that a policy or practice is proper. This is because statistical analysis of data showing that a particular protected group was more negatively affected as compared to another is often central to the success of such claims. Employers are often required to retain their own experts as well which further adds cost and complication.

V. Conclusion

Simpson highlights that disparate impact claims are thriving and serves as a reminder that job requirements must be job related and must not have the effect of (even unintentionally) harming protected classes of individuals. Employers and their counsel should therefore take note that such claims remain a concern.

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Valuation of Loss of Society and Companionship in Wrongful Death Cases

by: Robert A. Maniak, Everson, Whitney, Everson, & Brehm S.C.

I. Introduction

Assessing non-economic damages in negligence cases can be difficult, which is especially true for loss of society and companionship claims in wrongful death cases. While "loss of society and companionship" is a simple phrase, its definition is nebulous in the case law, and is best defined in terms of what it is not. This article seeks to give the definition a more robust shape and outlines the contours of the doctrine as best as possible.

Of course, nothing in this article should be construed as legal advice. Each situation is different and unique and requires a thorough evaluation of specific facts. For example, situations involving the death of the parent of a minor child implicate additional statutory schemes, and as such should be treated with care. This article's purpose is much narrower, in that it is solely focused on the definition of "loss of society and companionship" in wrongful death cases.

II. Statutory Guidelines on Wrongful Death Damages

The starting point to evaluate damages in wrongful death cases begins by reading Wis. Stat. §§ 895.03 and 895.04. The Wisconsin Supreme Court has considered these sections to be "inextricably intertwined" and therefore must be read together.[1] Interestingly, these two Sections are some of the oldest statutes in Wisconsin, having been enacted in 1857.[2] Together, they codify the cause of action for wrongful death.[3] Wis. Stat. § 895.03 defines the cause of action for death by wrongful act in Wisconsin. Section 895.04 details who may be a plaintiff in a wrongful death action, and what specific damages they may recover. In a wrongful death action, the plaintiff is not seeking recovery for the injuries suffered by the deceased but is seeking recovery for the loss sustained by themselves as a beneficiary or relative of the deceased.[4] Notably, a wrongful death claim is not a separate cause of action but is an additional element of damages recoverable in the cause of action for wrongful death.[5]

Subsection (4) of Wis. Stat. § 895.04 limits how much a party can recover in a wrongful death action.[6] Additional damages for post-death "loss of society and companionship" are capped at $500,000 per occurrence in the case of a deceased minor, and $350,000 per occurrence of a deceased adult. The Wisconsin Supreme Court has noted that the statutory cap on post-death damages cannot be waived by counsel.[7]

In terms of *who* can bring an action for loss of society and companionship in a wrongful death action, the statute generally says that an action may be brought by "the personal representative of the deceased person or by the person to whom the amount recovered belongs."[8] To determine "the person to whom the amount recovered belongs" requires cross-reference to Wis. Stat. § 895.04(4). There, it notes that damages may be claimed only by the "spouse, children or parents of the deceased, or to the siblings of the deceased, if the siblings were minors at the time of the death."[9]

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III. Wisconsin Civil Jury Instructions 1895 and 1897

Wisconsin Civil Jury Instructions 1895 and 1897 are the model instructions for "loss of society and companionship."[10] Jury Instruction 1895 relates to the death of a minor child, while 1897 relates to the death of a parent. Both are essentially the same instruction with respect to defining "loss of society and companionship." Both state that society and companionship include "the love, affection, care, protection, [and] guidance" the surviving party would have received from the deceased.

Notably, the damage cap that is described by Wis Stat. § 895.04(4) only relates to the loss of society and companionship that occurs due to the death of the deceased.[11] *Pre-death* loss of society and companionship damages are otherwise uncapped by statute.[12] Thus, care should be taken when evaluating cases where a party claims pre-death loss of society and companionship. Defendants should be aware that the claimed damages for the period of time when the injured party was still living are not subject to the statutory cap that post-death loss of society and companionship damages are. To be clear, a plaintiff can bring both a pre-death and post-death claim for loss of society and companionship. Only the loss that occurs due to death is capped by statute.[13]

IV. Interpretation of Loss of Society and Companionship Damages in Caselaw

Both Jury Instruction 1895 and 1897, state that society and companionship does not include "loss of monetary support or the grief and mental suffering caused by the parent's death." Unsurprisingly case law is in conformity with this instruction. In *Pierce v. Physicians Ins. Co. of Wisconsin*, the plaintiff's child was stillborn due to a cascade of alleged medical errors.[14] The Wisconsin Supreme Court noted that the "wrongful death claim does not and cannot compensate the mother for the pain and anguish that she suffered associated with the stillbirth of her child[.]"[15] The Wisconsin Supreme Court approvingly cited to the 1995 version of Civil Jury Instruction 1895, which states that society and companionship does not include "grief and mental suffering."[16]

In *Olson v. Berg*, the parents of a deceased child sought to introduce evidence of the mental anguish they experienced due to the death of their son.[17] The trial court only allowed them to introduce evidence that the mother persistently cried and did not want to leave the house, but denied her request to introduce evidence that she suffered from clinical depression, was prescribed medication, and prohibited argument attempting to make a causal connection between the accident and her job change.[18]

The court of appeals upheld the exclusion of the evidence in *Olson*, finding that emotional distress, (defined as "… mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea.") is only compensable under either an intentional infliction of emotional distress or negligent infliction of emotional distress theory.[19]

The court of appeals noted that Wisconsin courts have been reluctant to compensate plaintiffs for emotional harm.[20] It is reversable error when juries are not instructed to exclude damages for sorrow and grief.[21] Awards have been reduced when the jury includes compensation for grief.[22]

When a minor dies, the unique parent-child relationship plays an important part in determining whether loss of society and companionship exists. In *Estate of Hegarty v. Beauchaine*, a 12-year-old child was misdiagnosed at a hospital in Milwaukee and developed severe complications which ultimately caused the child to undergo 89 surgeries before her death at 17.[23] There was a laundry list of issues on appeal, but one involved an analysis of "society and companionship."[24] Specifically, one of the defendants challenged the award for loss of society and companionship because they believed the jury considered improper factors.[25] Both the trial court and court of appeals disagreed.[26] Noting that while

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the child was alive, she never lived a normal life, being addicted to morphine, and unable to eat solid foods, the jury properly concluded that the "love, affection, care, protection, and guidance" the child would have given to her parents was drastically limited due to her condition.[27]

An interesting unpublished Wisconsin Court of Appeals decision suggests that if the parent-child relationship is closer to an "adult friendship," then no recovery is possible under a "society and companionship" theory. In *King v. Pietz*, the court of appeals was tasked with reviewing a wrongful death lawsuit brought by an adult child for the death of her father.[28] At trial, evidence was presented that the daughter's relationship with her father did not begin until after she reached adulthood, as her father was largely absent from her life.[29] Her father and mother had ended their relationship when she was only two years old and she lived with her mother exclusively during childhood.[30] The plaintiff saw her father only once when she was nine years old and only for a single day when they got pizza together.[31] The plaintiff reached out to her father when she was 20 and they communicated every few months thereafter.[32]

The jury awarded nothing for her loss of society and companionship claim.[33] She appealed this verdict on the theory that the jury's finding of zero damages was unsupported by the evidence.[34] She requested a new trial which the trial court denied.[35] The court of appeals affirmed, noting that the relationship lacked a degree of "love, affection, care, and protection" one would expect to have from a parent-child relationship.[36] The court of appeals found that it was plausible for the jury to find there was no parent-child relationship between the deceased and the plaintiff.[37] Rather, the plaintiff and the deceased relationship was one of adult friends not of parent and child.[38]

The emphasis on the uniqueness of the parent-child relationship, as noted in *Hegarty*, was extended to a relationship in which the parent had perished in *King*. The caselaw seems to suggest that the loss of society and companionship inquiry is a narrow one and is predicated on the unique relationship between parent and child. This appears to be a high bar if an adult friendship between child and parent does not fulfill the requirements of "loss of society and companionship" because the foundation of that relationship it is not based on "love, affection, care, protection, and guidance" that a parent would give a child during their upbringing. To be clear, adult children can recover under a theory of loss of society and companionship, but the factual underpinnings of a claim must be examined closely. This has implications when children and parents are estranged. For example, if a couple were to divorce, and one parent is largely absent from the child's life while the other parent maintains an active role in the child's life then a jury ought to consider the differences in the parent-child relationship when determining damages.

V. Conclusion

Determining "loss of society and companionship" is a fact intensive inquiry. The more information available about the contours of the child's or parents' relationship the better. Applicable case law seems to place the relationships on a sort of sliding scale, where the more loving the relationship, the greater an award is due. Essentially, the more "normal" a parent-child relationship is the greater the potential award.

Author Biography:

Robert A. Maniak is an associate at Everson, Whitney, Everson, and Brehm S.C. He focuses his practice on civil litigation, insurance defense, personal injury defense, and criminal defense. Prior to joining the Everson Law Firm, Robert served in the United States Marine Corps before attending Marquette University Law School. In law school, Robert performed 120 hours of Pro Bono work for low-income clients in the Milwaukee area and received the Jon Allen Pace Setter award in 2020 and 2021 from the Milwaukee Justice Center as recognition for his volunteer work. Robert also served as the managing editor of the Marquette Benefits and Social Welfare Law Review, where

he was in charge of editing the work of fellow students. He also received a CALI award for having the highest score in one of his law school classes. Robert held internships at the Wisconsin Court of Appeals, where he researched and analyzed party briefings. He also worked with the City of Muskego to prosecute municipal violations and perform research.

References

1 *Waranka v. Wadena Ins. Co.*, 2014 WI 28, ¶ 20, 353 Wis. 2d 619, 847 N.W.2d 324.
2 *Id.*
3 *Id.*
4 *Day v. Allstate Indem. Co.*, 2011 WI 24, ¶ 61, 332 Wis. 2d 571, 798 N.W.2d 199.
5 *Nichols v. U.S. Fid. & Guar. Co.*, 13 Wis. 2d 491, 497, 109 N.W.2d 131 (1961).
6 Importantly Wis. JI Civil 1880 misstates the law in the comments following the instruction, by stating that loss of society and companionship is limited to "spouse, unemancipated or dependent children, or parents of the deceased." This is incorrect as *Pierce v. American Family Insurance Co.*, 2007 WI APP 152, 303 Wis. 2d 726, 736 N.W.2d 247, allows for adult children to recover for loss of society and companionship.
7 *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 647, 273 N.W.2d 233 (1979).
8 Wis. Stat. § 895.04(1).
9 Wis. Stat. § 895.04(4).
10 Both instructions were most recently updated in 2019.
11 *Estate of Hegarty v. Beauchaine*, 2006 WI App 248, 297 Wis. 2d 70, 727 N.W.2d 857.
12 *Id.* ¶ 138.
13 *Id.*
14 *Pierce v. Physicians Ins. Co. of Wisconsin*, 2005 WI 14, 278 Wis. 2d 82, 692 N.W.2d 558.
15 *Id.* ¶ 23.
16 *Id.*
17 *Olson v. Berg*, 2001 WI App 121, 244 Wis. 2d 287, 628 N.W.2d 437 (unpublished decision).
18 *Id.* ¶ 10 n.5.
19 *Id.* ¶ 8 (quoting *Alsteen v. Gehl*, 21 Wis. 2d 349, 356–57, 124 N.W.2d 312 (1963) and *Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis. 2d 627, 660, 517 N.W.2d 432 (1994)).
20 *See Bowen*, 183 Wis. 2d at 638.
21 *Prange v. Rognstad*, 205 Wis. 62, 65, 236 N.W. 650 (1931).
22 *Crossman v. Gipp*, 17 Wis. 2d 54, 60, 115 N.W. 547 (1962).
23 *Hegarty,* 297 Wis. 2d 70.
24 *Id.* ¶ 6.
25 *Id.* ¶ 142.
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27 *Id.* ¶ 144.
28 *King v. Pietz*, 2013 WI App 41, 346 Wis. 2d 731, 828 N.W.2d 593 (unpublished decision).
29 *Id.* ¶¶ 8-9.
30 *Id.* ¶ 8.
31 *Id.*
32 *Id.* ¶ 9.
33 *Id.* ¶ 10.
34 *Id.* ¶ 6.
35 *Id.* ¶ 4.
36 *Id.*
37 *Id.* ¶ 10
38 *Id.*

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News from Around the State: Trials and Verdicts

Amber R. Knorn v. State Farm Mut. Auto. Ins. Co., et al.
Brown County Case No. 20-CV-186
December 20-21, 2021

Facts: A motor vehicle accident occurred on January 30, 2018, at the intersection of Lombardi Avenue and Ridge Road in Green Bay. 17-year-old Joe Carlson made a left turn in front of Plaintiff Amber Knorn who was travelling through the intersection and had the right-of-way on a green light. Photographs showed a significant front-end impact.

Although ambulatory at the scene and complaining only of a wrist injury, the 26-year-old plaintiff developed neck, back, and knee pain. She initially treated with a chiropractor (total 1.5 years for neck and back) and ten months after the accident sought an orthopedic consult for ongoing right knee pain. Ultimately, Dr. Harold Schock, MD diagnosed plaintiff with a torn meniscus and performed arthroscopic surgery to repair same eleven months after the accident. Her condition improved, but the pain continued. A subsequent re-tearing of the meniscus was diagnosed, and Dr. Schock performed a second arthroscopic surgery on the knee. Plaintiff continued to complain of pain after the second surgery and underwent various injection therapies with some limited success.

Issues for Trial: The parties stipulated to past medical bills of $72,755.15. The parties also stipulated to liability with no contributory negligence. State Farm's insured, Joe Carlson, and his father Dan Carlson (license sponsorship) were dismissed from the case. State's Farm's total available policy limit was $1.25 million.

At Trial: Dr. Schock testified that plaintiff's knee pain was permanent and would deteriorate. He opined that plaintiff would need a total knee replacement in 25 to 30 years. Claimed future medical bills were $72,932.50 (including injections and the knee replacement surgery).

Defense Medical Expert Dr. Thomas Viehe, MD agreed that the accident caused the knee injury and past surgeries, but noted her ongoing pain was "unexplained" due to there being no objective mechanical issue remaining in the knee. He also opined that the future total knee replacement was speculative and that, in effect, only about 15% of her meniscus was removed, leaving a very thick supporting area still present. Plaintiff also had no signs of arthritis in the knee at this point, which Dr. Schock conceded on cross-examination. Defense further noted that both treater and defense doctor agree she should not have to cut short her career as a cosmetologist (on her feet all day). Plaintiff continued to perform home maintenance work, jet ski, snowmobile, and ride her bike. She was previously a runner, and her main complaint was that she could not do so any longer.

Plaintiff's Final Pre-Trial Demand: Plaintiff's last formal demand at mediation was $735,000.

Defendant's Final Pre-Trial Offer: State Farm's last offer prior to trial was $220,000.

Verdict: The jury awarded the stipulated past medical bills of $72,755.15, $25,000 in future medical bills (approximately three rounds of injections, but not the future total knee replacement), $100,000 in past pain

and suffering, and $75,000 in future pain and suffering, for a total verdict of $272,755.15.

For more information, please contact Heather L. Nelson at hnelson@eversonlaw.com.

Steven M. Cherne, et al. v. Todd M. Wollenzien, et al.
Sheboygan County Case No. 19-CV-535
November 15, 2021

Facts: On October 14, 2016, Plaintiff Steven Cherne was traveling westbound on County Highway W when a vehicle driven by Defendant Todd Wollenzien slowed in front of him to execute a left turn. Plaintiff crossed the double yellow line to pass defendant, lost control of his vehicle, hit nearby rail-road tracks, became airborne, and landed in a ditch. Plaintiff sustained severe back injuries resulting in several surgeries and a diagnosis of failed back syndrome.

Issues for Trial: Prior to trial, the parties stipulated to damages at the policy limits. The sole issue for trial was liability.

At Trial: There were only two witnesses: plaintiff and defendant. The plaintiff testified that he never saw a turn signal from defendant and thought that he was slowing down for a yield sign. He further testified that he crossed the double yellow line at approximately 45 miles per hour to pass defendant and accelerated as he approached him. According to plaintiff, he was partially past defendant's vehicle when he suddenly turned left. This caused plaintiff to make a corrective measure to avoid t-boning defendant and led to the accident.

Defendant, a commercial truck driver, testified that he drives his personal vehicle just as carefully as he drives his work truck. He testified that he turned his blinker on and slowed to a reasonable speed prior to turning. He was unaware of any vehicle behind him until plaintiff was nearly broadside with him.

Verdict: After 45 minutes of deliberation the jury returned a verdict that plaintiff was 90% negligent and defendant was 10% negligent.

For more information, please contact Erik Pless at epless@eversonlaw.com.

Patricia Adele Boudreau, et al. v. Stephen G. Counard, et al.
Marinette County Case No. 18-CV-114
November 9-11, 2021

Facts: On June 19, 2015, Plaintiff Patricia Boudreau—a Canadian citizen employed as a chiropractor—was traveling through Marinette when she was rear-ended by Defendant Stephen Counard. Plaintiff did not immediately seek medical treatment but began treatment a few weeks later in Vancouver and reported significant neck, back, and shoulder pain. Her shoulder pain was her primary concern, and she would eventually be diagnosed with a rotator cuff tear which required surgery. In addition to the medical bills that were incurred, Ms. Boudreau also made a significant wage loss claim.

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Issues for Trial: The parties stipulated to liability prior to trial. The only issue for trial was damages.

At Trial: Plaintiff testified to her injuries and the accident itself. Her treating physician also testified via video deposition. He opined that the shoulder injury was the result of a traumatic event and not the result of any sort of degenerative condition. The defense had an IME but elected not to play the video deposition. Because plaintiff's treatment all occurred in Canada, the issue of converting her medical bills from Canadian dollars into American dollars had to be addressed.

Figures from the Canadian government were used to calculate past and future medical bills. The plaintiff blurted out on direct examination that her medical care was "free." At this point the collateral source rule was violated, so plaintiff argued that she "may" have to repay some of the bills out of the verdict and that the shoulder surgery "may not be covered."

Verdict: Despite the parties asking for damages in American dollars, the jury—for reasons that were not clear—rendered a verdict in Canadian dollars. The Honorable Judge James Morrison instructed the jury to go back and recalculate the amount in American dollars. While the jury was recalculating the damages, the parties stipulated to damages of $141,600 USD, significantly less than the final pre-suit offer.

For more information, please contact Erik Pless at epless@eversonlaw.com.

Jeffrey S. Mahoney, et al. v. The Cincinnati Ins. Co., et al.
Sauk County Case No. 18-CV-292
October 11-13, 2021

Facts: Defendants' dump truck rear-ended the plaintiff's SUV on Highway 12. Defendants asserted that an unidentified driver caused the accident by cutting in front of plaintiff's vehicle, slamming on his brakes, and then making an unexpected U-turn in the middle of the highway. Plaintiff denied the unidentified driver's actions were a cause of the accident. Plaintiff driver claims he sustained injuries to his neck and back in the accident rendering him completely disabled.

Issues for Trial: Liability and damages were contested.

At Trial: Plaintiff called Dr. Sara Christenson Holz, MD and Kevin Blau, DC to support his disability claim. Defense called Dr. Morris Marc Soriano, MD who performed an IME. Plaintiff also called a vocational expert, Leslie Goldsmith, to support his complete loss of earning capacity claim. The defense called vocational expert John Meltzer. An independent witness failed to comply with a trial subpoena served by the defense, so his discovery deposition transcript was read into the record which supported the defense position regarding the accident facts and the actions of the unidentified driver.

During closing arguments, plaintiff asked the jury to award approximately $2.4 million.

The jury returned a verdict of only $35,000 and assigned only 10% of the causal negligence to defendants (the other 90% was assigned to the unidentified driver).

Plaintiff's Final Pre-Trial Demand: $1.1 million.

Defendant's Final Pre-Trial Offer: Defendants offered $127,000 at mediation, which was rejected. After mediation, defendants served a statutory offer to allow judgment for $127,000. Just before trial, defendants increased their settlement offer to $150,000, which was rejected.

Verdict: After verdict, plaintiff agreed to waive the $3,500 judgment against defendants and waive appeal rights in exchange for defendants' waiver of costs arising from their statutory offer to allow judgment.

For more information, contact Paul D. Curtis at pcurtis@axley.com.

Lori A. VanHandel, et al. v. State Farm Mut. Auto. Ins. Co., et al.
Outagamie County Case No. 18-CV-759
March 7-8, 2022

Facts: This case involved a low-speed, rear-end, chain reaction auto accident. State Farm's insured was the last in line at a red light and started pulling forward before the other cars began to move. She rear-ended the plaintiff's vehicle which then rolled into the two cars ahead of her. Plaintiff's vehicle showed a cracked bumper and dented trunk. The other vehicles suffered only cosmetic damage.

After the accident, plaintiff complained of clavicle pain. She had no prior history of complaints. She made a good recovery but started to experience impingement pain about three months after the accident. She treated fairly consistently for four years with a combination of injections, physical therapy, and chiropractic care before undergoing a shoulder arthroscopy. While the surgery helped, the plaintiff claimed to still experience daily pain. The plaintiff also made a claim for future medical bills based on the surgeon's testimony that she would benefit from periodic physical therapy.

Issues for Trial: The parties stipulated to liability and some medical expenses. The only question for trial was total damages.

At Trial: The plaintiff's surgeon, relying on the lack of prior documentation of shoulder pain, testified that the surgery and all the claimed treatment were related. An IME doctor testified for the defense that impingement is a repetitive use injury which was unrelated to the accident. He also testified that impingement is rarely caused by a single, traumatic event. The IME doctor opined that the plaintiff likely experienced some myofascial pain from the accident and the first 3-5 months of treatment was reasonable.

Plaintiff's Final Pre-Trial Demand: $175,000
Plaintiff's Request at Trial: $280,674.95
Defendant's Final Pre-Trial Offer: $100,000
Verdict: $159,974.20

For more information, contact Gabriel G. Siehr at gsiehr@eversonlaw.com.

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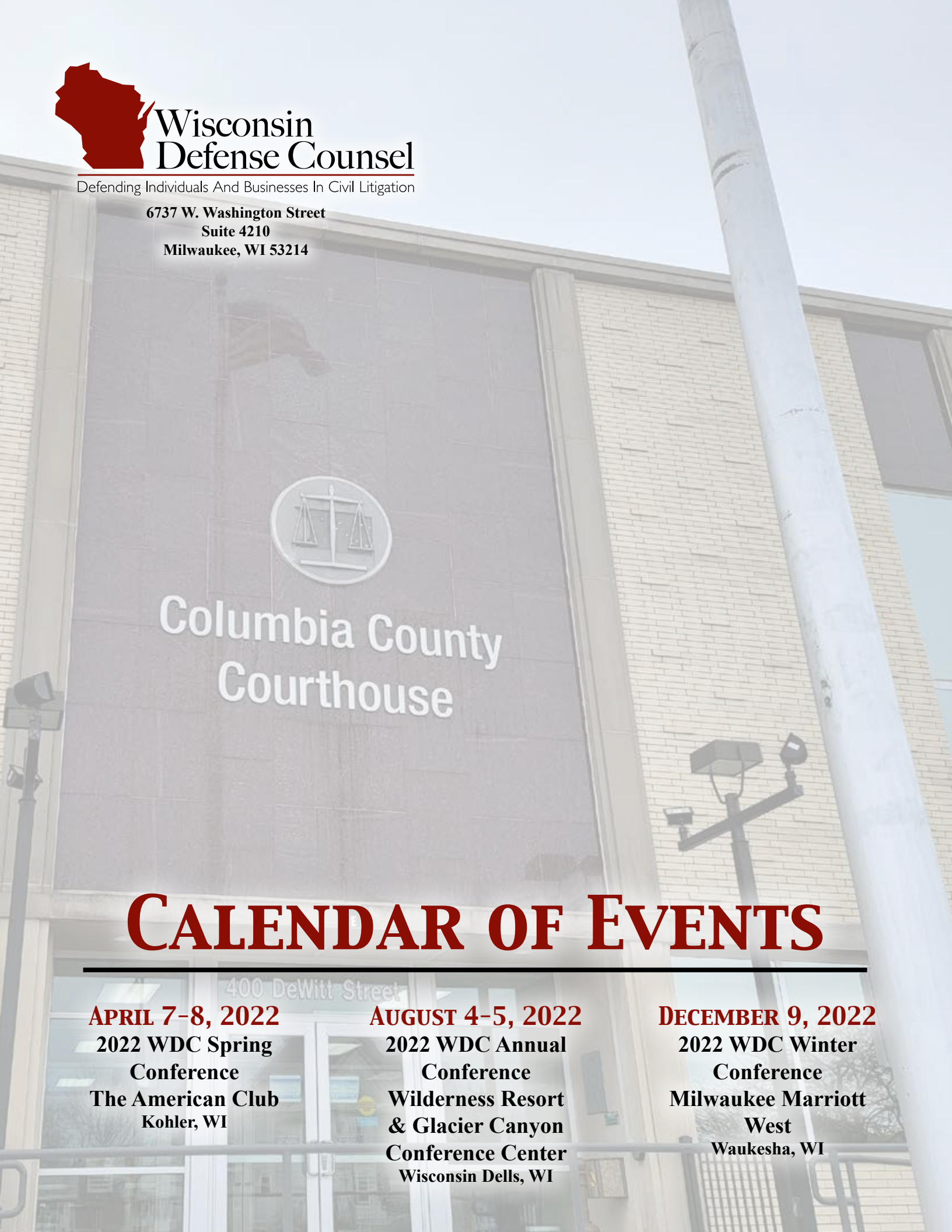

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