Wisconsin Civil Trial Journal

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Daniel Finerty & Adam M. Fitzpatrick

Wisconsin Defense Counsel
Defending Individuals And Businesses In Civil Litigation

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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: WDC Keeps Growing and Improving

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

As I publish my last message as President of WDC, I would like to thank all our members, sponsors, board of directors, executive committee members, and our outstanding executive director, Jenni Kilpatrick. It has been an honor to serve on the WDC board since 2014 and as President for the past year. As I transition to Past President, I am confident WDC's leadership will remain strong. Nicole Marklein will take over as President at our Annual Meeting in August. Nicole will be an excellent leader of our organization and we have a hard working and dedicated executive committee and board of directors that will continue to focus on making WDC an important organization for those that focus their practice on defending individuals, businesses, and insurance companies in a wide range of legal matters.

In my first message, I asked, "Why WDC?" I hope during the past year our members found ways to understand why WDC matters to their practice and their clients. We have made great strides at WDC to find new ways to impact our existing members and offer opportunities for new members. Our Young Lawyers Committee, led by Nicole Radler, continues to grow, and I anticipate many opportunities for that committee to engage with our young lawyers and attract new young lawyers to our organization. By the time this journal is published, the Wisconsin Defense Counsel Young Lawyers Insurance Seminar, presented by Crystal M. Uebelher, will have taken place. This is just one of the many examples of opportunities within WDC for professional development.

I anticipate our Law School Committee, led by Grace Kukoski and Monte Weiss, will continue to work with the UW Law School and Marquette Law School to make WDC a recognizable organization for the next wave of new lawyers entering the practice of law. Our recently formed Diversity, Equity, and Inclusion Committee, led by Charles Polk III, provides a refreshing approach to make sure WDC is an organization open to all, and provides necessary discussion to make all of us better stewards of our practice. Our Employment Law Committee, led by Elizabeth Rowicki, is an important expansion to our committees and provides added resources and opportunities for membership growth. Our Amicus Committee, led by Brian Anderson, has been actively involved in various appellate matters that impact our members and their clients. I could go on and on about the many great things WDC is doing at the committee level, but I would rather leave it at this – join a committee! It is rewarding and you will not only improve your practice but will be an example to others within our organization.

Our Spring Conference was an enormous success with many interesting topics and outstanding speakers. Congratulations to all the committee award winners at our inaugural committee awards presentations. I anticipate Heather Nelson, our program chair, will have another fantastic lineup at our Annual Conference at the Wilderness Resort & Glacier Canyon Conference Center in the Wisconsin Dells on August 4-5, 2022. If you have not signed up, please do - check your inbox! The return to in-person conferences has been terrific and

our conference attendance is back to normal pre-pandemic attendance figures.

From a fiscal side, WDC has effectively managed the various obstacles over the past two plus years and remains on sound fiscal footing. We have made strategic decisions with many of our sponsors and vendors which has benefitted all sides. We have solid membership numbers, but are always looking to increase membership, a topic that is expected to be addressed by the board in the next year.

From a technology side, the board of directors has gone forward with a plan to revamp our current website. It was only 4-5 years ago I was leading the charge on our current design, but technology has changed so much that our current website is basically obsolete. The new website will be ready to launch around the time of our Annual Conference this August.

WDC has also been actively participating in various legislative matters, and even collaborating with the plaintiff's bar. We have been consulting with the Hamilton Consulting Group on various matters. While nothing was passed that impacted our membership, we will continue to be active in seeking to have our voices heard at the legislative level.

I am proud to have been a member of WDC for over 25 years and to have spent the past eight years on the board/executive level of WDC. We have great people who really care about the practice of law and who are professional in how they not only represent their clients, but their colleagues. I have thoroughly enjoyed meeting so many great lawyers and people who I can now call friends. I look forward to maintaining an active involvement in WDC and thank you for allowing me to be your President.

I look forward to seeing many of you at the Wilderness on August 4-5, 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, 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, the State Bar and routinely provides presentations to clients and peer groups.

Challenging Service of Process and Unique Issues Which Can Arise

by: Patricia Epstein Putney, Bell, Moore & Richter, S.C.

Defense attorneys should always pay close and careful attention to circumstances surrounding service of process when a new case comes in. Never assume service was properly effectuated. Far too often, process servers a) are unfamiliar with the strict statutory requirements of service; b) are familiar with the requirements but disregard them out of laziness or carelessness; and/or c) are untruthful on their affidavits of service (unfortunately something that happens too often). A careful analysis should be undertaken of the individuals and corporate entities who received the "summons and complaint" to ensure strict compliance. This includes prompt interviews of the individuals served to determine exactly how service was carried out, including where and how it was delivered, and whether the person served was authorized to accept service (for a corporate entity) or whether substitute service was appropriate. Since the client likely will be unfamiliar with whether service was proper, you need to ask the right questions and soon – before they forget.

If service of process is ever in question, it must be raised as an affirmative defense in the answer or it is waived.[1] This affirmative defense can include failure to serve an "authenticated" copy of the summons and complaint, or failure to properly comply with the strict and mandatory statutory provisions governing service on a natural person or corporate entity. If you have not yet confirmed the circumstances of service with your clients or have any reason to doubt the sufficiency of service, it is advisable to raise the affirmative defense. An affirmative defense can always be withdrawn later if you determine service was proper.

This Article will not focus upon the strict requirements for proper service of process under Wis. Stat. §§ 801.11(a)-(c). Rather, the focus of this Article is how best to proceed once you have reason to believe service was defective. In addition, the article will explore potential ramifications and concerns if you are unsuccessful in your pursuit of this defense on behalf of the client following an evidentiary hearing. Specifically, what can, or should you do when the judge concludes that your client has taken the stand and testified untruthfully?

I. How to Proceed When You Have a Viable Service of Process Defense

An initial determination must be made as to when the applicable statute of limitations will run. A plaintiff has 90 days from filing of the complaint to effectuate service.[2] If the lawsuit was filed shortly before the expiration of the statute of limitations, you should calculate that deadline carefully. A motion filed *too early* will defeat the purpose of securing dismissal as it gives the plaintiff ample time and opportunity to re-serve the defendant. Many forego the service defense on this basis if there is plenty of time for a process server to re-do it and get it right. However, this author always raises the defense where appropriate, even if there is plenty of time left, and calendars the expiration of the statute of limitations. Oftentimes, affirmative defenses are overlooked by busy plaintiffs' attorneys. This affirmative defense is simply too important to give up.

Once you have determined that you have a valid argument that service was defective, and when the time is right, you file a motion on this basis. This

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can be done in lieu of an answer or more typically, after the answer is filed preserving the affirmative defense; either is appropriate – it depends on the timing. There is some dispute as to whether this should be fashioned as a *motion to dismiss* under Wis. Stat. § 802.06[3] or a *summary judgment* motion under Wis. Stat. § 802.08. In a recent matter the author handled, the judge converted the motion to dismiss to a summary judgment motion because affidavits were filed in support. It is well established that trial courts have the authority to convert a motion to dismiss to a motion for summary judgment when matters outside of the pleadings are considered.[4] Wis. Stat. § 802.06(2)(b) simply requires the Court to provide the parties with reasonable notice that it *will or might* convert a motion to dismiss into a motion for summary judgment, but it does not require the Court to request additional briefs or affidavits.[5] It is recommended that in the motion, you reserve the right to file a summary judgment on the merits at a later date to preserve the right to do so (since this is a threshold jurisdictional issue, there should be no argument that one has waived a dispositive summary judgment motion).

If it is a situation of 'he said/she said,' which is often the case, an evidentiary hearing is envisioned and appropriate under the Wisconsin statutes. Wis. Stat. § 802.06 (4) provides that: "The hearing on the defense of lack of jurisdiction over the person or property shall be conducted in accordance with s. 801.08." Wis. Stat. § 801.08(1) provides that:

> All issues of fact and law raised by an objection to the court's jurisdiction over the person or property as provided by s. 802.06 (2) **shall be heard by the court without a jury in advance of any issue going to the merits of the case**. If, after such a hearing on the objection, the court decides that it has jurisdiction, the case may proceed on the merits; **if the court decides that it lacks jurisdiction, the defendant shall be given the relief required by such decision**.[6]

This express statutory scheme allows the judge to make a credibility determination as to the service of process issue. Notably, the burden of proof at such a hearing lies with the plaintiff when a defendant challenges service.[7] However, the affidavit of service by the process server is afforded a statutory advantage or presumption as the statute states that "personal or substituted personal service shall be proved by the affidavit of the server…." This language *arguably* shifts the burden of proof to the defense in an evidentiary hearing when service is challenged.

Wis. Stat. § 802.06(2) also provides that "(f)actual determinations made by the court in determining the question of personal jurisdiction over the defendant shall not be binding on the parties in the trial of the action on the merits."[8] A reasonable interpretation of this provision is that when the court assesses the credibility of witnesses and makes factual determinations to resolve the threshold issue of personal jurisdiction, it is not unlawfully usurping power from the jury. If the case proceeds to trial, the jury will be permitted to reach its own credibility determinations at trial in regard to the merits of the underlying action.

II. What Problems Arise if Defendant Loses the Evidentiary Hearing on Service of Process?

You file your motion and ask for an evidentiary hearing where the judge must decide the credibility of the witnesses. The witnesses will generally include the defendant, any witnesses involved in the attempted service (*e.g.*, a spouse), and the process server. It is wise to subpoena the process server to the hearing unless your adversary agrees to produce him or her in writing. If you prevail, your clients are dismissed and the case either goes on with the remaining parties or is dismissed outright if none remain. But what happens if you lose?

By filing your motion to dismiss based on defective service, you have expressly authorized and asked the circuit court judge to rule upon the credibility of the witnesses to decide the jurisdictional issue.

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If you put a defendant on the stand and perhaps supporting witnesses as well, such as a spouse who was present during the service attempt, and if the court chooses to believe the process server over your client, this inherently means that the court has concluded that your client has been untruthful on the stand.

How do you move forward with the same judge who has decided that your client has been untruthful? That presents quite the quandary. If your case is being tried to a jury, you could rationalize that it will be the jury ultimately deciding your client's credibility later on. If it is a bench trial, however, you have a problem. Even if it is a jury case, however, additional issues may come up during trial which hinge on your client's testimony and credibility. What do you do? How do you advocate for your client in this scenario?

III. Whether or Not to Seek Judicial Recusal

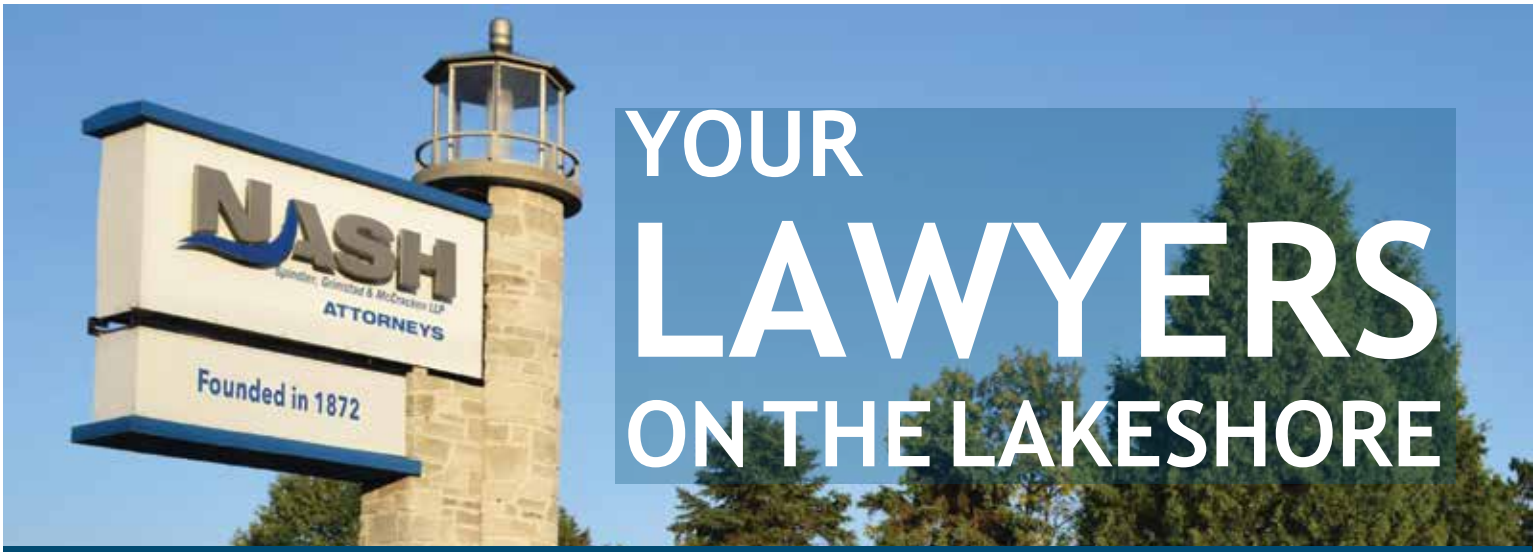
An obvious thought that comes to mind is whether the judge – who concluded that your client was untruthful on the stand – should recuse him or herself. But the recusal standard in this situation is entirely determined by the judge. And if you request that the judge recuse him or herself, and the request is denied, you run the risk of incurring the ire of a judge who already thinks your client is a liar. So, the judge will thereafter potentially be mad at your client *and at you*. Not a great situation as the litigation continues.

Wis. Stat. § 757.19(2) sets forth circumstances under which a judge must disqualify him or herself from proceedings. It states:

757.19 Disqualification of judge.

> … **(2)** Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:
>
> > **(a)** When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship.
> >
> > **(b)** When a judge is a party or a material witness, except that a judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.
> >
> > **(c)** When a judge previously acted as counsel to any party in the same action or proceeding.
> >
> > **(d)** When a judge prepared as counsel any legal instrument or paper whose validity or construction is at issue.
> >
> > **(e)** When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court.
> >
> > **(f)** When a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party.
> >
> > **(g)** When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.[9]

The Wisconsin Supreme Court has held that subsections (a)-(f) contain objective standards that require recusal if established, but subsection (g) contains a standard that is determined entirely by the judge.[10] Subsection (g) requires disqualification "only when that judge makes a determination that, in fact or in appearance, he or she cannot act in an impartial manner."[11] In other words, under subsection (g), the self-disqualification is subjective, and a judge must disqualify herself from a case if she subjectively determines, in fact or appearance, that she is unable to remain impartial.[12]



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Of note, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion."[13] Further, opinions formed by the judge based on facts introduced or events occurring, during current or prior proceedings, do not establish a basis for a bias or partiality motion unless they demonstrate a "deep-seated favoritism or antagonism that would make fair judgment impossible."[14] Judicial disqualification based on general allegations of prejudice or bias is only required in the most extreme cases.[15]

IV. Conclusion

While there is no clear answer to when you should ask the judge to consider self-recusal based upon the inability to be impartial moving forward, one should tread lightly. It is recommended that if your client's credibility will be a significant factor in the underlying case (*e.g.*, if there is a credibility dispute about what happened in the underlying matter which the judge may ultimately need to resolve), then it is worth seriously considering filing a motion for the judge to recuse him or herself. But one runs the risk of an insulted judge and future rulings that might reflect the judge's subconscious feelings towards both the client and his or her attorney.

Author Biography:

Patricia (Patti) Epstein Putney is a Shareholder at Bell, Moore & Richter, S.C. in Madison. She obtained her Bachelor of Arts degree in Art History from Bryn Mawr College in 1984 and her Juris Doctor degree from Brooklyn Law School in 1989. She moved from New York City to Madison in 1995. Patti's practice area relates to the defense of all types of civil litigation. This includes defense of physicians, nurses, and other health care professionals in medical malpractice cases, as well as in licensing, disciplinary and credentialing disputes. She regularly defends personal injury and wrongful death actions, including automobile accidents, premises liability, products liability, insurance agent negligence as well as insurance coverage disputes. Patti has had numerous jury trials throughout the state, has litigated in federal courts and appellate courts and has argued before the Wisconsin Supreme Court and the 7th Circuit Court of Appeals. Patti is a member of the State Bar of Wisconsin, Wisconsin Defense Counsel and the Dane County Bar Association. She also started a group called "Lawyer Moms" for working women lawyers with children.

References

1 With special thanks to associates Morgan Stippel and Kelsey Pelegrin, and law clerk Alexander Gordon.

2 Wis. Stat. § 802.06(8)(a) ("Waiver or preservation of certain defenses. … A defense of lack of jurisdiction over the person or the property, insufficiency of process, untimeliness or insufficiency of service of process or another action pending between the same parties for the same cause is waived only if any of the following conditions is met: … The defense is omitted from a motion in the circumstances described in sub. (7). … The defense is neither made by motion under this section nor included in a responsive pleading.").

3 Wis. Stat. § 801.02(1) ("Commencement of action. **…** A civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court, provided service of an authenticated copy of the summons and of the complaint is made upon the defendant under this chapter within 90 days after filing.").

4 If the motion is brought pursuant to Wis. Stat. § 802.06, subsection (1)(b) provides that "all discovery and other proceedings shall be stayed for a period of 180 days after the filing of the motion or until the ruling of the court on the motion, whichever is sooner, unless the court finds good cause upon the motion of any party that particularized discovery is necessary."

5 Wis. Stat. § 802.06(2)(b) (2019-20); *see also Schopper v. Gehring*, 210 Wis. 2d 208, 216, 565 N.W.2d 187 (Ct. App. 1997).

6 *Alliance Laundry Sys. LLC v. Stroh Die Casting Co., Inc.*, 2008 WI App 180, ¶ 20, 315 Wis. 2d 143, 763 N.W.2d 167.

7 (Emphasis added).

8 *Kavanaugh Restaurant Supply, Inc. v. M.C.M. Stainless Fabricating, Inc.*, 2006 WI App 236, 297 Wis. 2d 532, 724 N.W.2d 893.

9 Wis. Stat. § 802.06(2).

10 (Emphasis added).

11 *State v. American TV & Appliance of Madison, Inc.,* 151 Wis. 2d 175, 181–82, 443 N.W.2d 662 (1989).

12 *Id.*

13 *State v. Walberg*, 109 Wis. 2d 96, 105-06, 325 N.W.2d 687 (1982).

14 *Liteky v. U.S.*, 510 U.S. 540, 555 (1994) ("The judge who presides at a [prior] trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant,

who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice [in another trial involving defendant], since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task.").

15 *State v. Rodriguez*, 2006 WI App 163, 295 Wis. 2d 801, 722 N.W.2d 136 (Trial court was not required to recuse itself from hearing defendant's postconviction motion alleging ineffective assistance of counsel, even though trial court, in response to defendant's comment at sentencing that he did not believe that defense counsel had given him good representation, stated in part that defense counsel was "very competent" in how he handled case; defendant did not allege a pervasive and perverse animus on part of trial court).

16 *In re Paternity of B.J.M.*, 2020 WI 56, ¶ 25, 392 Wis. 2d 49, 944 N.W.2d 542 ("We acknowledge that it is the exceptional case with 'extreme facts' which rises to the level of a 'serious risk of actual bias.'") (holding that recusal was appropriate because the judge was Facebook friends with the mother in the paternity case, and they publicly interacted on the site before the judge decided in favor of the mother).

2022 Advocate of the Year Award: Gino M. Alia, *Alia, DuMez & McTernan, S.C.*

Congratulations to Gino M. Alia for being selected by the WDC Board of Directors as the 2022 Advocate of the Year! The Advocate of the Year Award recognizes the member with the most defense work success of the prior calendar year.

Gino is a shareholder at Alia, DuMez & McTernan, S.C. in Kenosha. Prior to joining Alia, DuMez, Dunn & McTernan, S.C., Gino worked for a large, national law firm. He also served as a "*Public Service Special Assistant District Attorney*" for Milwaukee County. He is an experienced trial attorney whose practice focus is in the areas of personal injury and business litigation. Gino has been lead counsel in over 75 jury trials, as well as hundreds of mediations and arbitrations.

Gino's litigation and courtroom experience provide him with the skills needed to help clients—both individuals and corporate—resolve legal issues before they arise. His current practice areas include personal injury, wrongful death, municipal liability, section 1983 civil rights litigation, and partnership/business litigation. Gino has maintained a "*Distinguished Rating*" by Martindale-Hubbell. One local judge summarized Mr. Alia's ability as a civil trial advocate as follows: "*He is an excellent advocate for his clients, an intelligent and articulate speaker and a personable, respectful attorney*."

In the last year, Gino has taken four cases to trial, all of which resulted in defense verdicts:

Branden A. Bogan, et al. v. Founders Insurance Company, et al.
Kenosha County Case No. 19-CV-422
Trial Dates: April 20-22, 2021

Aaron McBeth v. Jennifer Mitchell, et al.
Kenosha County Case No. 17-CV-426
Trial Dates: September 13-16, 2021

Martin Bose, et al. v. Gunnar Lawler, et al.
Kenosha County Case No. 19-CV-1516
Trial Dates: December 6-8, 2021

Patti G. Rushing v. State Farm Mut. Auto. Ins. Co., et al.
Racine County Case. No. 18-CV-1342
Trial Dates: January 25-28, 2022

Gino is a longstanding member of the WDC and defense bar. He is a mentor to many attorneys in southeastern Wisconsin. Outside of work, Gino is active in numerous civic, community, and charitable organizations in Kenosha County. He has served as President of the Pleasant Prairie Basketball Association, Chairman and Board of Directors of St. Joseph Catholic Academy, Board Member and Director of Development/Operations for Red Star Soccer Club, member of United Way of Kenosha's Community Caring Team, various St. Anne Catholic Church service ministries and as the head coach of varsity boys' soccer (past 7 years) and girls' soccer (past 4 years) for Kenosha St. Joe's. Gino lives in Kenosha with his wife, Vicki, and their three children, Nicholas, Elizabeth, and Andrew.

Nominated By: Matthew J. Richer, *Alia, DuMez & McTernan, S.C.*

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2022 Distinguished Professional Service Award: Ariella Schreiber, *Rural Mutual Insurance Company*

Congratulations to Ariella Schreiber for being selected by the WDC Board of Directors as the recipient of the 2022 Distinguished Professional Service Award! The Distinguished Professional Service Award recognizes a longtime member who has given consistent effort to grow and improve WDC.

Ariella is the Vice President of Claims and General Counsel for Rural Mutual Insurance Company. She earned her law degree from Seton Hall Law School in New Jersey, and her MBA from the University of Wisconsin School of Business.

Ariella is an extremely active member of WDC. She has served on the WDC Board of Directors and Executive Committee, is a former Editor of the Journal, and is a Past President. She is also a frequent presenter at WDC conferences. Ariella has demonstrated consistent commitment and dedication to the organization, regardless of her position. She goes out of her way to provide educational and development opportunities for young attorneys and new members. She contributes her time and resources to our organization's efforts. Ariella has been an engaged, energetic member of the organization.

Thank you, Ariella, for your contributions to WDC!

Nominated By: Nicole Marklein, *Cross Jenks Mercer & Maffei LLP*

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2022 Young Lawyer Award: Charles E. Polk III, *Crivello Carlson S.C.*

Congratulations to Charles Polk III for being selected by the WDC Board of Directors as the recipient of the 2022 Young Lawyer Award! The Young Lawyer Award recognizes a young lawyer (up to 10 years past their first bar admission date) who has shown not only excellence in their work and achievements in their career to date, but also a commitment to professional and ethical standards, as well as a commitment to the larger community.

Charles is an associate at Crivello Carlson S.C. in Milwaukee. He earned his undergraduate degree from Colgate University in 2016 and graduated from Marquette University Law School in 2019. His practice areas include civil rights litigation, insurance defense, asbestos litigation, and municipal law. Charles is the Chairman of his firm's Diversity & Inclusion Committee, and a member of the Wisconsin Association of African American Lawyers, the Milwaukee Bar Association, the American Bar Association, and Wisconsin Defense Counsel. Recently, he has been featured in the Wisconsin Law Journal and was selected as a top volunteer amongst Sojourner advocates against domestic violence.

While in law school, Charles focused on growing his passion for litigation – competing in moot court, mock trial, and a host of litigation-based classes, including being on the board of a law review journal. Additionally, Charles focused on growing connections with his fellow peers and was elected class representative for all six semesters he attended law school. During his time outside of class, Charles focused on serving others. He was inducted into the Pro Bono Honors Society for his service work with domestic violence victims, the Milwaukee Police Department, and the Sojourner Truth House. Charles also loves staying active – playing basketball at the Marquette Recreational Center, going kayaking in the Milwaukee Bay, and going running with his friends.

Charles is the Chair of WDC's Diversity, Equity, and Inclusion Committee. He participated in a WDC panel presentation to students at the UW Law School about what it means to be a defense lawyer. He also organized and moderated a panel at the WDC Spring Conference entitled "Navigating Through Cancel Culture, Inclusion and Work Life."

Dedication, punctuality, hard work, and willingness to learn are the qualities of a good attorney in the early years of practice. Charles has all these attributes which, along with his volunteer and community activities, make him a real asset to the profession and his clients. He has been a welcome infusion of energy and action into the organization. Charles is a very deserving recipient of the WDC Young Lawyer Award.

Nominated By: Megan L. McKenzie, *American Family Mutual Insurance Company*; Heather L. Nelson, *Everson, Whitney, Everson & Brehm, S.C.*; and Patrick W. Brennan, *Crivello Carlson, S.C.*

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2022 Publication Award: Maria del Pizzo Sanders, *von Briesen & Roper, S.C.*

Congratulations to Maria del Pizzo Sanders for being selected by the WDC Journal Editor and Board of Directors as the recipient of the 2022 Publication Award! The Publication Award recognizes a well-written cutting-edge article written for the Wisconsin Civil Trial Journal. Maria receives the award for her article, "The History of Mandatory Vaccinations in the United States and the Ongoing Debate Concerning the COVID-19 Vaccination for Employers," which appeared in the 2021 Summer Special Employment Law Issue.

Maria is a shareholder in the Labor and Employment and Litigations Sections at von Briesen & Roper, S.C. She focuses her practice on labor and employment, employment litigation, discrimination, non-compete agreements, employee handbooks, civil rights, severance agreements and unemployment benefits. She was selected by her peers for inclusion in The Best Lawyers in America© in the field Insurance Law (2018-2021). She is a member of the American Bar Association, the State Bar of Wisconsin, and the Association for Women Lawyers. She is a member and serves as a Wisconsin Firm Liaison for The Harmonie Group. Maria is a member of the Board of Directors of The Women's Center in Waukesha, which serves women, children, and men impacted by domestic abuse, sexual violence, child abuse, and trafficking.

Thank you, Maria, for your contribution to the WDC's Wisconsin Civil Trial Journal!

Defending Native American Clients and Their Carrier Partners – The Impact of Wisconsin's Tribal Gaming Compacts

by: Daniel Finerty, Lindner & Marsack, S.C., and Adam M. Fitzpatrick, Corneille Law Group, LLC

I. Introduction

When the sovereign, federally-recognized Native American or American Indian tribes entered into separate tribal gaming compacts ("compact(s)") with the state of Wisconsin ("state" or "Wisconsin"), a *quid pro quo* provided benefits to each of the signatories.[1] In general, the tribes obtained the sole and exclusive right to conduct certain Class II and Class III gaming enterprises in Wisconsin; in turn, each tribe agreed to pay the state of Wisconsin a percentage of gaming revenue realized each year. Most compacts require the state to spend that revenue in certain specific areas that may benefit the tribes, such as economic development initiatives in regions around tribal casinos and promotion of tourism within Wisconsin targeted at tribal tourism. Anyone that has seen an advertisement lauding the tourism opportunities provided by Wisconsin's nations has seen this compact money put toward this effort. In fact, annual revenue from tribal gaming is estimated at approximately $1.9 billion dollars (setting aside the pandemic years).[2]

As part of the *quid pro quo* to gain access to gaming opportunities, tribes were asked to secure liability insurance and a carrier endorsement that limited the carrier from asserting sovereign immunity within a limited amount of required insurance. In doing so, the tribes did not, and have not since, waived their tribal sovereign immunity. This article examines the background of the compacts, the strong tradition of tribal sovereign immunity in Wisconsin, the compact-based limitation on the assertion of immunity by carriers, and best practices in addressing these issues for defense counsel called upon to defend a tribe.

II. Background

The eleven federally recognized[3] sovereign tribes entered into gaming compact agreements with Wisconsin, as authorized by the Indian Gaming Regulatory Act of 1988 ("Act").[4] By passing the Act, Congress recognized that tribes had become engaged in or had licensed gaming activities on their own tribal lands as a means of generating tribal revenue. As one of the principal "goal[s] of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government," the Act sought to clarify regulation of these gaming activities through the Secretary of the Interior, the Interior Department's Bureau of Indian Affairs ("BIA"), and the various states that did not authorize or later chose to authorize gaming activity.[5] The Act permitted tribes to conduct certain gaming activities on tribal lands.[6] While the general content of the compacts are beyond the scope of this article, it suffices to say that, generally, each tribe has committed to and does regulate its own gaming activities, subject to oversight by the National Indian Gaming Commission,[7] in line with its compact with the state. As such, the Act recognized a role for the states within which these nations were located to determine whether to permit gaming and upon what conditions. To seize this opportunity, Wisconsin-

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based tribes began to negotiate with Wisconsin's Department of Administration. Over time, each of the tribes negotiated their own gaming compact in 1991 and 1992.

Each compact specifically disclaims any contractual waiver of sovereign immunity by either the signatory tribe or the state;[8] however, instead, the compacts contain a provision which requires the tribes to carry liability insurance up to a specified amount between $250,000 and $500,000. Further, while the tribes never agreed to waive their sovereign immunity to suit by third-party non-signatories, the compacts required each tribe to secure an endorsement with their chosen carrier which required the carrier to limit any assertion of the tribe's sovereign immunity defense unless and until a certain defined liability limit was reached.

While these provisions could hardly be called a waiver of tribal sovereign immunity, as the standard for showing such a waiver is a very high burden that is addressed below, these provisions require discussion amongst insurance defense practitioners in order to ensure that tribes can be consistently and competently appraised of their obligation to secure insurance as specified, to obtain the carrier endorsement, and to ensure the carriers are aware of the sovereign immunity defense limitation contained within the compacts. With that said, it also bears mentioning that the compacts generally provide that "[t]his Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact,;"[9] thus, tribes and carriers can assert any basis for a motion to dismiss due to service-related or other failures under Chapter 804 at the outset.

III. Tribal Sovereign Immunity

"Tribal sovereign immunity is 'a necessary corollary to Indian sovereignty and self-governance.'"[10] "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."[11]

Like their federal counterparts, Wisconsin courts have also recognized sovereign immunity from suit. "It is well settled that Native American tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers."[12] "… Indian tribes possess common-law sovereign immunity from suit akin to that enjoyed by other sovereigns is part of this Nation's long-standing tradition."[13] "Like foreign sovereign immunity, 'tribal [sovereign] immunity is a matter of federal law and is not subject to diminution by the States."[14] As the Court of Appeals recognized in *Koscielak v. Stockbridge-Munsee Community,* when reaffirming sovereign immunity for tribal businesses:

> Tribes must surmount many development challenges, including tribal remoteness, lack of a tax base, capital access barriers, and the paternalistic attitudes of federal policymakers. Because of these barriers … tribal economic development–often in the form of tribally owned and controlled business–is necessary to generate revenue to support tribal government and services. Tribal immunity promotes this economic development, as well as tribal self-determination and cultural autonomy.[[15]]

The Court of Appeals in *Koscielak* also identified the Supreme Court's declaration of tribal immunity in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* as "settled law."[16]

"The sovereign immunity of the tribe [also] extends to its business arms."[17] Accordingly, the broad grant of sovereign immunity to the tribes also extends to their business arms such as tribal casinos, gaming operations, convenience stores, and other commercial entities.[18]

IV. Immunity Waiver

Like most legal protection from suit, sovereign immunity can be waived. Specifically, Wisconsin

courts have recognized that, "in a state court lawsuit against a tribal entity, sovereign immunity applies unless 'Congress has authorized the suit or the tribe has waived its immunity.'"[19]

However, for there to be a true waiver of sovereign immunity, that waiver cannot be simply implied and cannot be inadvertent; rather, the waiver must be unequivocally expressed.[20] "Like a waiver by the United States, an Indian tribe's waiver of sovereign immunity must be unequivocal."[21] Further, if any waiver can be found, that waiver of sovereign immunity is strictly construed in favor of the sovereign.[22] Any defense attorney selected by a carrier or third-party administrator to handle defense of a Wisconsin tribe must ensure a working knowledge of tribal sovereign immunity as well as the compact to which that tribe is a party.

V. Tribal Gaming Compacts

For the most part, the 1991-92 compacts explicitly set forth no waiver of sovereign immunity whatsoever by either the state or the tribes to third-parties. "Except as expressly provided in section XIX., neither the State nor the Tribe waive their sovereign immunity, under either state or federal law, by entering into this Compact and no provision of this Compact is intended to constitute a waiver of State or Tribal sovereign immunity."[23] While a waiver of immunity would not generally be read into the compacts if not asserted, it is common practice for practitioners to specifically insert a provision to counteract any suggestion that waiver may exist or should be implied, even despite the strength of the existing case law noted above.

However, as tribes would be operating casinos and other gaming enterprises open to the public, the state had an interest in seeing there was some protection to injured members of the public. To accomplish that goal, the compacts required each tribe to have some form of liability insurance. Generally, the original compacts provided that a tribe was obligated to "maintain public liability insurance with limits of not less than $250,000 for any one person and $4,000,000 for any one occurrence for personal injury, and $2,000,000 for any one occurrence for property damage."[24] All the Wisconsin tribal compacts require *at least* $250,000 in public liability insurance.

To be clear, this language could hardly be called any sort of unequivocal or clear waiver required to establish that a tribe has waived its sovereign immunity.[25] It is not. Further, even if this language could arguably provide for any sort of waiver, the fact that a Wisconsin court must strictly construe that alleged waiver of sovereign immunity in favor of the tribe counsels rejection of any implied waiver.[26] Rather, the compacts merely provide an obligation to secure and maintain insurance – nothing more.

Assuming a tribe complies with this insurance provision and maintains the required level of insurance specified under its compact, that does not mean that anyone allegedly injured at a Wisconsin-based tribal casino can simply present proof of an injury and secure ready access to insurance proceeds without any objection. That is certainly not true, especially since the compacts not only reassert the tribe's immunity[27] but also do not disturb, in any way, the allocation of jurisdiction under Wisconsin law.[28] Arguably, the jurisdiction sections of the compacts noted above require any plaintiff wishing to sue a tribe, its casino entity, and its carrier partner, to initiate suit against them within the statute of limitations, to sue the correct tribal entities, to substitute within a permissible timeframe if misnomer occurred, to substitute the proper name of any "ABC Insurance Company" identified in the complaint within the statutory timeframe prior to the expiration of the limitations period or any extension provided by Wisconsin case law, to provide effective service of process upon the entities sued, and to follow all the other obligations to initiate suit under Chapter 802. Wisconsin defense attorneys know these defenses well and, to be clear, the tribal compacts do not lessen or mitigate these obligations placed upon plaintiffs wishing to sue in Wisconsin.

While an additional section arguably expands the reach of the insurance requirement, that section also


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does not waive tribal sovereign immunity. Instead, their carrier partner is required, by virtue of entering into an insurance contract with its Wisconsin-based tribe, to promise not to assert tribal sovereign immunity up to the specified amount.[29] The compacts provide that a tribe's "insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity" up to the limits that are specified.[30]

Several issues appear clear from this language. First, the sovereign immunity of the tribes themselves is not compromised or impacted whatsoever. Second, while a tribe's insurance carrier is obligated by virtue of Wisconsin law to not assert any sovereign immunity argument that could otherwise be made by virtue of its privity of contract and insuring agreement with a sovereign tribal entity, the defense limitation only applies up to a certain amount. The chart below highlights the language of each compact regarding the allocation of civil jurisdiction, required insurance amounts, and the required endorsement limitation. Third, again, while the insurance carrier's ability to initially assert a sovereign immunity defense by virtue of its privity of contract with a tribe may be limited, regardless of the propriety of doing so, its ability to assert any other existing dispositive defenses under Chapter 804 of the Wisconsin Statutes or Rule 12 of the Federal Rules of Civil Procedure are not limited in any way. To the contrary, these defenses not only are available to a carrier required to defend a tribe but are highlighted by the very language of the compacts themselves which provides that the compacts do not change the allocation of civil jurisdiction among federal, state, and tribal courts.[31] In this way, more specifically, the compacts do not interfere with or replace, in any sense, the obligation upon a plaintiff to effectively obtain personal jurisdiction over any sued defendants through effective service of process. Fourth, there are no existing Wisconsin Supreme Court or Court of Appeals decisions which interpret or apply this language to a given situation and, as such, the limitation upon a carrier's assertion of the sovereign immunity defense has not been tested in court. That leaves room for practitioners handling defense of tribes to ensure that a proper reading and interpretation of the tribal compacts is provided which ensures tribal immunity and holds plaintiffs to their obligations to, among other things, effect proper service of process, sue the correct tribal entities, and discover and substitute the appropriate carrier. Fifth, the simple fact that an amount of insurance may be available does not equate to *assumed* liability; rather, the same substantive defenses available to carriers under Wisconsin law require the plaintiff to carry the burden of proof at trial. A reasoned analysis of all procedural and substantive defenses is essential to ensuring the tripartite relationship between counsel, the tribe, and the carrier remains strong and a solid defense strategy can be agreed to and employed at the earliest possible stage.

VI. Best Practices

Insurance defense practitioners in Wisconsin may never be called upon to defend a tribe related to an accident; however, if called upon to do so, it is important to keep several critical best practices in mind. First, upon being assigned, counsel should ensure a working awareness of the tribe's background, language, history, and tribal sovereign immunity to ensure that appropriate respect is shown in all dealings to the tribe and its history in line with the best our profession represents. Second, counsel should ensure that a thorough review of tribe's gaming compact (and any amendments) and its relevant provisions that may govern an insured dispute are reviewed in advance of any substantive discussions with the client or with opposing counsel. Third, counsel should request all liability policies that may apply to an incident to ensure that the applicable tribal compact requirements have been followed and, if any questions may exist, that such questions are addressed and discussed with the tribe's leadership. Fourth, the sovereign immunity assertion limitation that applies must be discussed with the tribe and the carrier to ensure a full understanding of the parties' relative position – there is no limitation on the tribe's assertion of immunity; however, the carrier's assertion may be limited going forward. Fifth, evidence of procedural and substantive defenses must be preserved and

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gathered along with any witness statements. Sixth, counsel should review the progress of the matter to date. What, if any, tribal entity has been named? Which entity was served? Who was served? In what county was the tribe sued? This background should be gathered to ensure that procedural and other defenses can be initially considered to bring an end to any litigation. For example, if the tribe was sued in federal court based on diversity of citizenship and amount in controversy under 28 U.S.C. § 1332, a motion to dismiss should be considered as tribes are not "citizens."[32] Even in the unlikely event the tribe has fully waived sovereign immunity, such a waiver does not resolve the question of subject matter or personal jurisdiction over both the tribe and its carrier.[33]

VII. Conclusion

Like other public and private sector clients, Wisconsin tribes and their insurance partners need competent defense counsel to thoughtfully defend their interests. For tribes, sovereign immunity is, and always should be, front and center of any defense strategy. However, as the compacts make clear by reaffirming civil jurisdiction, tribes are entitled to all the same procedural and substantive defenses that a Wisconsin-based bar, hardware store, or car dealership would be able to assert in defense of a case filed in circuit court. In this way, tribes are like any other Wisconsin-based entities entitled to the same rights to service of process and other rights along with sovereign immunity. As counsel would do with any other Wisconsin-based client and its carrier, these defenses should be considered and, if a reasonably grounded procedural defenses can be asserted, the defenses should be pressed to resolution.

Tribal Compacts and Amendments
Assertion of Immunity Defense Limitation Upon Carriers

Tribe	Allocation of Jurisdiction	Required Insurance Amount	Carrier Limitation
Bad River Band of Lake Superior Chippewa[34]	Article XVIII. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XIX. A. During the term of this Compact, the Tribe shall maintain general liability insurance for bodily injury and property damage with combined limits of at least $4,000,000 per individual or occurrence. The requirements of this section are not intended to permit causes of action for injuries outside the coverage of the general liability insurance required by this section.	Article XIX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.
Forest County Potawatomi Community of Wisconsin[35]	Article XVIII. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XIX. A. During the term of this Compact, the Tribe shall maintain public liability insurance with limits of not less than $250,000 for any one person and $4,000,000 for any one occurrence for personal injury, and $2,000,000 for any one occurrence for property damage.	Article XIX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.
Ho-Chunk Nation[36] (formerly known as the Wisconsin Winnebago Tribe)	Article XIX. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact	Article XX. A. During the term of this Compact, the Tribe shall maintain public liability insurance with limits of not less than $250,000 for any one person and $4,000,000 for any one occurrence for personal injury, and $2,000,000 for any one occurrence for property damage.	Article XX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.

Lac Courte Oreilles Band of Lake Superior Chippewa[37]	Article XVIII. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XIX. A. During the term of this Compact, the Tribe shall maintain general liability insurance with limits of not less than $250,000 for any one person and $4,000,000 for any one occurrence for personal injury, and $2,000,000 for any one occurrence for property damage. The requirements of this section are not intended to permit causes of action for injuries outside the coverage of the general liability insurance required by this section.	Article XIX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.
Lac du Flambeau Band of Lake Superior Chippewa[38]	Article XVIII. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XIX. A. During the term of this Compact, the Tribe shall maintain public liability insurance with limits of not less than $250,000 for any one person and $4,000,000 for any one occurrence for personal injury, and $2,000,000 for any one occurrence for property damage.	Article XIX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.
Menominee Tribe of Indians of Wisconsin[39]	Article XIX. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XX. A. During the term of this Compact, the Tribe shall maintain general liability insurance with limits of not less than $250,000 for any one person and $4,000,000 for any one occurrence for personal injury, and $2,000,000 for any one occurrence of property damage. The requirements of this section are not intended to permit causes of action for injuries outside the coverage of the general liability insurance required by this Section.	Article XX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A
Oneida Nation[40]	Article XIX. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XX. A. During the term of this Compact, the Tribe shall maintain public liability insurance with limits of not less than $250,000 for any one person and $4,000,000 for any one occurrence for personal injury, and $2,000,000 for any one occurrence for property damage.	Article XX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.
Red Cliff Band of Lake Superior Chippewa[41]	Article XVIII. A. This Compact does not change. the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XIX. A. During the term of this Compact, the Tribe shall maintain general liability insurance for bodily injury and property damage with combined limits of at least $4,000,000 per individual or occurrence. The requirements of this section are not intended to permit causes of action for injuries outside the coverage of the general liability insurance required by this section.	Article XIX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.
Sokaogon Chippewa Community (Mole Lake Chippewa)[42]	Article XVIII. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XIX. A. During the term of this Compact, the Tribe shall maintain general liability insurance for bodily injury and property damage with combined limits of not less than $250,000 for any one person and $4,000,000 for any one occurrence for personal injury, and $2,000,000 for any one occurrence for property damage. The requirements of this section are not intended to permit causes of action for injuries outside the coverage of the general liability insurance required by this section.	Article XIX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.

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St. Croix Chippewa Indians of Wisconsin[43]	Article XIX. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XX. A. During the term of this Compact, the Tribe shall maintain general liability insurance with limits of not less than $250,000 for any one person and $4,000,000 for any one occurrence for personal injury, and $2,000,000 for any one occurrence for property damage. The requirements of this section are not intended to permit causes of action for injuries outside the coverage of the general liability insurance required by this section.	Article XX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.
Stockbridge-Munsee Band - Mohican Nation[44]	Article XVIII. A. This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.	Article XIX. A. During the term of this Compact, the Tribe shall maintain public liability insurance with limits of not less than $250,000 for any one person and $4,000,000 for any one occurrence for personal injury; and $2,000,000 for any one occurrence for property damage.	Article XIX. B. The Tribe's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy required under subsec. A.

Author Biographies:

Daniel Finerty (Marquette University Law School, 1998) is a Shareholder with Lindner & Marsack, S.C. in Milwaukee, Wisconsin, where he regularly counsels and defends private-sector, public-sector, non-profit and Native American tribal clients, also representing the interests of their insurance carriers, in employment litigation disputes involving wage and hour, discrimination, harassment, retaliation, family and medical leave, disability accommodation in federal, state and tribal courts and other matters in administrative agency venues. In 2019, Finerty was appointed by the Defense Research Institute to The Native Nations Law Task Force, a first-of-its-kind initiative, that provides networking and educational opportunities for defense litigators, tribal in-house counsel and insurance companies called upon to defend native nations faced with civil lawsuits in tribal court and other venues. Finerty would like to thank those that have entrusted him with the ability to represent tribes and carriers in Wisconsin throughout the years and their learned counsel during these matters. While they are not mentioned here, their dedication to the protection of Wisconsin's tribes has always left its mark and their ability to discuss solutions to difficult problems has always been very much appreciated. Daniel would also like to thank Alexandra (Sasha) Chepov (Marquette University Law School, 2022) for her assistance in preparing the graphic to this article.

Adam M. Fitzpatrick (University of Minnesota Law School, 2014) is a Partner with Corneille Law Group, LLC in Madison, Wisconsin where he defends medical malpractice claims, nursing home and long-term care litigation matters, alleged abuse and neglect and related claims against providers, and a wide range of general liability defense cases, including personal injury, large construction losses including construction defect and delay matters, product liability claims, premises liability and insurance coverage matters. Most recently, Adam successfully completed a rigorous application and testing process to achieve Board Certification as a civil practice advocate from the National Board of Trial Advocacy (NBTA), a distinction only achieved by approximately three percent of attorneys.

References

1 The eleven tribes include: The Bad River Band of Lake Superior Chippewa; The Forest County Potawatomi Community of Wisconsin; The Ho-Chunk Nation; The Lac Courte Oreilles Band of Lake Superior Chippewa; The Lac du Flambeau Band of Lake Superior Chippewa; The Menominee Tribe of Indians of Wisconsin; The Oneida Nation; The Red Cliff Band of Lake Superior Chippewa; The Sokaogon Chippewa Community (Mole Lake Chippewa); The St. Croix Chippewa Indians of Wisconsin; and the Stockbridge-Munsee Band - Mohican Nation. While great respect is due, in word and in deed, to every tribal nation, this group of 11 sovereign entities located is what is now Wisconsin will be referred to, for ease of reference, as "tribes" or "nations." All the compacts, amendments, and memoranda of understanding

for each can be found online at https://doa.wi.gov/Pages/AboutDOA/TribalCompactsAndAmendments.aspx (last visited May 27, 2022).

2 *See* https://doa.wi.gov/Gaming/TribalNetWinSummary.pdf (last visited June 3, 2022).

3 To be federally recognized, a tribe is specifically recognized within federal law and in the Federal Register. As an example, the Sokaogon Chippewa Community (Mole Lake Chippewa) is a federally recognized Indian tribe organized pursuant to federal law. *See*, *e.g.*, 25 U.S.C. § 476; FED. REG., Vol. 84, No. 22 (Friday, Feb. 1, 2019), at p. 1203. Obtaining federal recognition is necessary to gain access to federal financial support provided to certain tribes such as health care and other services. Only one Wisconsin tribe, the Brothertown Nation, "is not recognized by the state or federal government." https://wisconsinfirstnations.org/frequently-asked-questions/#q1 (last visited May 27, 2022).

4 25 U.S.C. § 2701 *et seq*.

5 25 U.S.C. §§ 2701(4), (5).

6 The Act's approval of Class II and Class III gaming activities can be found in §§ 2710 (b), (d). Class I gaming is not regulated under the Act but may be regulated by the state. 25 U.S.C. § 2710(c).

7 *Id*., § 2706 (b); *see also Id*., § 20704.

8 The compacts do, to some extent, contain a very limited waiver to both the state and each tribe in order to permit enforcement of compact-based promises; however, there is no waiver by either a tribe or the state with regard to claims by third-parties. *See* n. 23, *infra*.

9 Section XIX.(A) ("Civil Jurisdiction"), Wisconsin Winnebago Tribe and State of Wisconsin Gaming Compact of 1992 ("Ho-Chunk Compact"); Section XVIII (A.) ("Allocation of Jurisdiction"), Forest County Potawatomi Community of Wisconsin and State of Wisconsin Gaming Compact of 1992 ("Potawatomi Compact"). Note that, in November 1994, with the passage of the Constitution of the Ho-Chunk Nation, the Tribe officially changed its name from Wisconsin Winnebago Tribe to the Ho-Chunk Nation, owing to its origin as the People of the Big Voice. https://ho-chunknation.com/wisconsin-winnebago-fades-into-history-as-signing-of-the-new-constitution-brings-on-the-ho-chunk-nation/ (last visited May 27, 2022); https://wisconsinfirstnations.org/ho-chunk-nation/ (last visited May 27, 2022).

10 *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 928 (7th Cir. 2008) (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 894 (1986)).

11 *Id*. (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)).

12 *C&B Invs. v. Wis. Winnebago Health Dept*., 198 Wis. 2d 105, 108, 542 N.W.2d 168 (Ct. App. 1995); *see also Harris v. Lake of the Torches Resort & Casino*, App. No. No. 2014AP1692, 363 Wis. 2d 656, 862 N.W.2d 903 (Table) (Ct. App. 2015) (unpublished).

13 *Koscielak v. Stockbridge-Munsee Comm.*, 2012 WI App 30, ¶ 7, 340 Wis. 2d 409, 811 N.W.2d 451.

14 *Id*. ¶ 7 (quoting *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc*., 523 U.S. 751, 756 (1998)).

15 *Id*. ¶ 15 (internal citation and quotations omitted).

16 *Id*. ¶ 16 (quoting *Kiowa*, 523 U.S. at 756, 759-60).

17 *C&B Invs*., 198 Wis.2d at 108-09 (citing *Weeks Constr., Inc. v. Oglala Sioux Housing Auth*., 797 F.2d 668, 670-71 (8th Cir. 1986) (Native American housing authority possessed attributes of sovereign immunity)); *see also Koscielak*, 340 Wis. 2d 409, ¶ 9.

18 *See C&B Invs*., 198 Wis. 2d at 108-09; *Koscielak*, 340 Wis. 2d 409, ¶ 9; *see also Kiowa*, 523 U.S. at 754-55 (noting no distinction for immunity purposes between governmental and commercial activities of a tribe).

19 *Koscielak*, 340 Wis. 2d 409, ¶ 8 (quoting *Kiowa*, 523 U.S. at 754).

20 *C&B Invs*., 198 Wis. 2d at 108-112.

21 *Schilling v. Wis. Dept. of Natural Resources*, 298 F.Supp.2d 800, 804 (W.D. Wis. 2003) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978) ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.")).

22 *Orff v. U.S.*, 545 U.S. 596, 601–02 (2005).

23 Ho-Chunk Compact Section XXIV (A.). Despite that seemingly clear refusal to waive immunity to suit, the state and the tribes agreed that "both the State and the Tribe agree that suit to enforce any provision of this Compact may be brought in federal court by either the State or the Tribe against any official or employe[e] of either the State or the Tribe. Said suit may be brought for any violation of the terms of this Compact or violation of any applicable state or federal law," limited to "prospective declaratory or injunctive" relief only. *Id*., Section XXIV (C.). So, it is somewhat clear, considering this language, that the only state and the tribe can sue each other for compact enforcement in certain circumstances.

24 Ho-Chunk Compact, Section XX (A.); Potawatomi Compact, Section XIX (A.).

25 *See C&B Invs*., 198 Wis. 2d at 108-112.

26 *See Orff*, 545 U.S. at 601–02.

27 Ho-Chunk Compact Section XXIV (A.).

28 Ho-Chunk Compact, Section XIX.(A); Potawatomi Compact, Section XVIII (A.).

29 This obligation presumably is based upon a belief, mistaken or not, that a carrier which insures a tribe or any other tribal-owned entity could assert the tribe's sovereign immunity by virtue of its privity of contract with the tribe for its own benefit.

30 Ho-Chunk Compact, Section XX (B.); Potawatomi Compact, Section XIX (B.).

31 Ho-Chunk Compact, Section XIX.(A); Potawatomi Compact, Section XVIII (A.).

32 "It is well established that the Indian tribe itself-the constitutional tribe-is a 'stateless entity' that is never subject to federal diversity jurisdiction. A federal court cannot hear a case in which an Indian tribe is a party unless there is another basis for subject matter jurisdiction, such as federal

question jurisdiction." Graham Safty, "Federal Diversity Jurisdiction and American Indian Tribal Corporations," U. of Chi. Law Rev., Vol. 79.4 (Fall 2012), *available online at* https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/08%20Safty%20CMT.pdf (last visited June 16, 2022).

33 *Auto-Owners Ins. Co. v. Tribal Court of Spirit Lake Indian Reservation*, 495 F.3d 1017, 1020 (8th Cir. 2007) ("Even if an Indian tribe waives its sovereign immunity, such a waiver does not automatically confer jurisdiction on federal courts."); *Weeks Const., Inc. v. Oglala Sioux Hous. Auth.,* 797 F.2d 668, 671 (8th Cir. 1986) ("Mere consent to be sued, even consent to be sued in a particular court, does not alone confer jurisdiction upon that court to hear a case if that court would not otherwise have jurisdiction over the suit.").

34 https://doa.wi.gov/Pages/AboutDOA/Bad-River-Band-of-Lake-Superior-Chippewa.aspx.

35 https://doa.wi.gov/Pages/AboutDOA/Forest-County-Potawatomi-Community-of-Wisconsin.aspx.

36 https://doa.wi.gov/Pages/AboutDOA/Ho-ChunkNation.aspx.

37 https://doa.wi.gov/Pages/AboutDOA/Lac-Courte-Orielles-Band-of-Lake-Superior-Chippewa.aspx.

38 https://doa.wi.gov/Pages/AboutDOA/Lac-du-Flambeau-Band-of-Lake-Superior-Chippewa.aspx.

39 https://doa.wi.gov/Pages/AboutDOA/Menominee-Tribe-of-Indians-of-Wisconsin.aspx.

40 https://doa.wi.gov/Pages/AboutDOA/Oneida-Tribe-of-Indians-of-Wisconsin.aspx.

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43 https://doa.wi.gov/Pages/AboutDOA/St.-Croix-Chippewa-Indians-of-Wisconsin.aspx.

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Stopping Counsel from Floating Large Non-Economic Damages Numbers to the Jury During Opening Statements

by: Austin Doan, Boardman & Clark LLP

During closing argument, plaintiff's counsel will present damages figures, even ascribing numbers to the non-economic damages such as pain and suffering. The reason is simple, to attempt to argue to a jury a number that encapsulates all the testimony and evidence the jury heard throughout trial. A recent trend, however, among plaintiff's counsel is to float large damages numbers for non-economic damages, like pain and suffering, during opening statements. The purpose is to "anchor" the jury—to expose the jury to a large damages figure early before the introduction of evidence to try to desensitize the jury to the large damages figure once the trial concludes.

Floating large non-economic damages to the jury during opening statements is improper. The purpose of opening statements is to introduce jurors to the facts. Arguments made during opening statements are therefore prohibited, as opposed to closing arguments.[1] Given the amorphous nature of non-economic damages—placing a number value on pain and suffering, for example—proposing a non-economic damages number to a jury during opening statements not a statement based on the fact but argument.

Defense counsel should seek to move *in limine* to limit or outright exclude such arguments during opening statements.

I. Argument During Opening Statements is Improper

The purpose of opening statements is to introduce jurors to the facts. For that reason, an opening statement is not an occasion for argument.[2] Counsel is prohibited, for example, from arguing the law during the opening statements.[3] Instead, counsel look to preview the anticipated testimony, exhibits, and other evidence. As one commentor has stated, "[t]hink of the opening statement as a forecast, designed to provide a general understanding and provoke further interest, similar to the kind of preview that you might see for a television movie."[4] Examples of permissible statements typically include, "the evidence will show X." Examples of impermissible statements during openings would be ones that express a lawyer's opinions or ones that express conclusions from the facts or the law. As the American Bar Association states, "Ask yourself this question: Are you describing to the jury what a witness or document states, or are you drawing a conclusion from the testimony or the document? Only the description is permissible in your opening statement; the conclusion must be saved for your closing argument."[5]

This is in stark contrast to closing arguments, where arguments can be made to the jury, with the understanding that the arguments are not evidence. Because arguments are permitted during closing, counsel can propose damages figures—even for non-economic damages—at closing. Typically, in these situations, the use of lump sum figures is permitted. However, the supervision of closing arguments is left to the trial court's discretion. The lump sum figure is permitted based on the understanding that the figure is based on argument, not based on a statement of fact.[6] Trial courts repeatedly remind juries of such.[7]

II. What is Anchoring?

Recently, members of the plaintiff's bar have sought to float large non-economic damages numbers to the jury during opening statements in an attempt to desensitize the jury to the large damages figure. Studies have shown that his attempt of "anchoring" can be highly effective. As one court observed, "[w]hen asked to make a judgment, decision makers take an initial starting value (*i.e.,* the anchor) and then adjust up or down. Studies underscore the significance of that initial anchor; judgments tend to be strongly biased in its direction."[8] The thinking is that the longer the jury sits with large non-economic damages numbers, the less the shock value will be as the trial progresses. This is in contrast to exposing the jury to a non-economic damages number at closing, where the potential to shock the jury is higher, given that the members of the jury have already been exposed to the evidence.

The effects of "anchoring" cannot be understated. Even arbitrary or extreme anchors can have large effects. In one study, for example, "a request for $500,000 produced a median mock jury award of $300,000, whereas a request of $100,000, in the identical case, produced a median award of $90,000."[9]

An attempt to disabuse oneself of the effects of anchoring have also shown to be futile. Studies have recognized that "[a]n anchor is operating even when people think that it is not; . . . making people aware of an anchor's effect does not reduce anchoring. It follows that 'debiasing' is very difficult in this context."[10]

III. Exclusion at Trial

However, it is well-settled that anchoring is inappropriate during opening statements. Unlike economic damages figures, which typically rest on expert evidence regarding lost wages or the amount of past or future medical care, non-economic damages numbers are not "facts." Instead, an attorney's proposed non-economic number is merely argument.

Indeed, other jurisdictions have recognized the prejudicial effect that floating non-economic numbers can have on the jury. In New York, for example, a court has called the practice of floating non-economic numbers to a jury in opening statements as "unprecedented."[11] The New York court found that such a statement during opening statement warranted a mistrial.[12]

Defense counsel should therefore seek to exclude or limit any attempt by plaintiff's counsel to float numbers for non-economic damages by moving *in limine* to bar counsel from mentioning any non-economic damage numbers during opening. After seeking to bar or limit such impermissible comments, defense counsel should be ready to object in a timely fashion should plaintiff's counsel attempt to mention any non-economic damage numbers during opening. Finally, defense counsel should then seek a curative admonition or, in some extreme circumstances, seek a mistrial.

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Austin Doan is an associate at Boardman & Clark LLP in Madison, where he is a member of the firm's litigation practice group. His practice primarily lies in the area of commercial litigation, real estate, and insurance defense. Before joining the firm, Austin was an attorney with a local Madison law firm, focusing on class action and commercial litigation. Austin obtained his undergraduate degree cum laude from the University of Southern California in 2014 and his law degree from the University of Wisconsin Law School in 2017.

References

1 *See U.S. v. Dinitz*, 424 U.S. 600, 612 (1976) ("An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument.") (Burger, C.J., concurring).

2 *See Testa v. Vill. of Mundelein, Ill.*, 89 F.3d 443, 446 (7th Cir. 1996).

3 *See Schwartz v. Sys. Software Assocs., Inc.*, 32 F.3d 284, 288 (7th Cir. 1994).

4 Pamela W. Carter, The Opening Statement, 61 No. 12 DRI

For Def. 60.

5 American Bar Association, Effective Opening Statements, available online at https://www.law.uh.edu/center4clp/streetlaw/Mock%20Trial/Mock%20Trial%20AY%202017-18/Handouts%20&%20Activities/Opening%20Statements%20Handout%202.pdf.

6 *See Merco Distrib. Corp. v. O.R. Engines, Inc.*, 71 Wis. 2d 792, 795, 239 N.W.2d 97 (1976) ("Arguments or statements made by counsel during argument are not to be considered or given weight as evidence.").

7 *See* Wis. JI-Civil 110 (Arguments of Counsel).

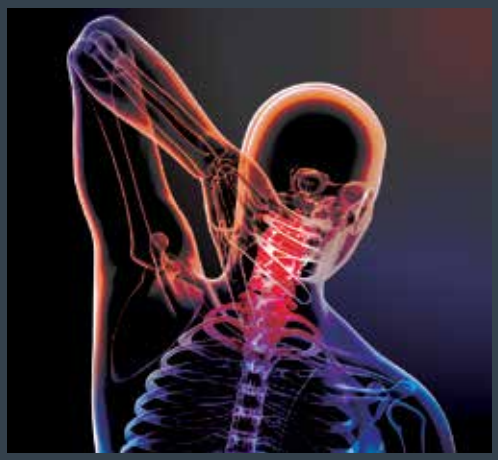
8 *U.S. v. Rojas*, No. 06CR269 MRK, 2010 WL 5253203, at *4 (D. Conn. Dec. 13, 2010) (quoting Nancy Gertner, Thoughts on Reasonableness (2007) 19 Fed. Sent'g Rep. 165, 167-68).

9 Cass R. Sunstein, U. of Chicago Law & Economics Working Paper No. 165, 2002, available online at https://chicagounbound.uchicago.edu/law_and_economics/228/ (internal citation omitted).

10 Cass R. Sunstein, U. of Chicago Law & Economics Working Paper No. 165, 2002, available online at https://chicagounbound.uchicago.edu/law_and_economics/228/ (internal citations omitted); *see also* Christopher T. Stein & Michelle Drouin, *Cognitive Bias in the Courtroom: Combatting the Anchoring Effect Through Tactical Debiasing*, 52 U.S.F.L. Rev. 393, 398, 404 (2018) (anchoring affects "the starting point from which one adjusts an estimate" and "[r]esearch has shown anchoring has a strong effect on civil court jury awards"; people "genuinely do not see themselves as biased . . . [and] are unwilling or unable to recognize their bias, even when told ...."); Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychol. 519, 522, 534 (1996) (summarizing "studies demonstrate[ing] that juror decision making is influenced by monetary anchors" and finding that "anchoring effects represent biases rather than the use of relevant information").

11 *See Miller v. Owen*, 184 Misc. 2d 570, 572, 709 N.Y.S.2d 378 (Sup. Ct. 2000) ("plaintiff's counsel took the unprecedented tactic of, during opening statement, telling the jury that he intended to ask them to award his client the amount of $[600,000] [for forty years of future pain and suffering.]").

12 *See id.* at 184 Misc. 2d at 572; *see also* § 45:19. Permissible scope of opening statements, 4A N.Y.Prac., Com. Litig. in New York State Courts § 45:19 (5th ed.) ("The law therefore permits only a prayer for general relief for such damages, both in the pleadings and in opening statements. Specific amounts for pain and suffering can be suggested in closing argument, but will be subject to statutorily mandated cautions to the jury, to the effect that this is mere argument by the attorney and they are not bound to agree.") (citations omitted).



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How to Avoid Spoliation: Communication and Preservation

by: Brent P. Smith, Johns, Flaherty & Collins, S.C.

While spoliation motions are probably not a part of a defense lawyer's everyday practice, the consequences to a defendant if a spoliation issue raised by the plaintiff is successful can be catastrophic. Therefore, it is imperative that the defense lawyers know how to defend a spoliation issue when raised and, even more importantly, to advise their clients so that the issue never gets to the courtroom.

I can say that in over 40 years of doing defense work, I do not know if I have ever had a spoliation of evidence motion regarding a client of mine. I have been part of cases that have had spoliation motions filed, but they have not involved my clients. Within the last year, I was involved in a case where the plaintiff's counsel indicated several times that he might file such a motion, but the case settled, and no motion was ever brought. In that case, I represented a bar owner in La Crescent, Minnesota, and its insurer. The plaintiff, while visiting from Texas (and wearing a Dallas Cowboys football jersey!), entered the bar, sat in the bar area, and had a drink. She then got up and was going into a room behind the bar where several of her friends (hopefully not all Dallas Cowboys fans) were gathering. She fell as she walked by the bar with allegations of either a slip or some kind of defect in the floor.

Like many bars, there is a camera running 24/7 that probably captured her fall. Like many systems, you can usually go back and capture the video for thirty days before it is taped over. This was the case here and by the time the lawsuit was filed, there was no video of the incident.

My bar owner knew that the plaintiff had fallen and was injured. I believe there would have been testimony that his insurance company was notified, and that the insurer had at least talked to him over the phone about the circumstances surrounding the fall. We never really got around to the details of that conversation and whether a potential claim was discussed.

Under these circumstances—and we should assume Minnesota law is similar to Wisconsin law—would there be a spoliation issue? Did the insured have enough knowledge of a potential claim that he should have retained the video of the fall? If so, what would is the remedy? A finding of liability? A jury instruction? A monetary fine?

As a general rule, parties are required to take action to preserve evidence and this includes not only physical evidence, but also documents and electronically stored information. Spoliation has been defined as the "destruction or withholding of critically probative evidence resulting in prejudice to the other party." [1] The purpose of having a doctrine or remedy for spoliation of evidence is to uphold the judicial system's truth-seeking function and deter parties from destroying evidence.[2]

Spoliation can occur both pre- and post-litigation. Perhaps it is obvious, but the duty to preserve evidence exists before a lawsuit is filed. Also, it applies not just to parties, but can also apply to the conduct of an expert witness retained by one of the parties.

So, is the law that you can never destroy evidence

without incurring some type of penalty? No, that is not the law in Wisconsin. A party can destroy evidence after giving notice to the other party and giving the other party an opportunity to inspect or test the evidence.

What are the penalties for spoliation? It can range from a jury instruction to the striking of evidence to monetary fines to the ultimate sanction of dismissal of the case or a finding of liability.

Wisconsin Civil Jury Instruction 400 is the pattern jury instruction for spoliation. It provides:

> **SPOLIATION: INFERENCE**
>
> [Describe the conduct the court has found to constitute spoliation of evidence.]
>
> You may, but are not required to, infer that (plaintiff) (defendant) (describe spoliation) because producing that evidence would have been unfavorable to (plaintiff)'s (defendant)'s interest.
>
> (For example: The defendant destroyed all of his medical records for patient care provided prior to 2005. You may, but are not required to, infer that the defendant destroyed his medical records from prior to 2005 because producing that evidence would have been unfavorable to defendant's interest.)

This jury instruction permits, but does not require, the jury to infer that the party who committed spoliation did so because producing the evidence would have been unfavorable to that party's interest.

Wisconsin appellate courts have issued several decisions setting forth guidelines for judges to consider when deciding whether spoliation The first case is *Milwaukee Constructors II v. Milwaukee Metropolitan Sewerage District*,[3] which held that for a finding of spoliation of evidence, the court would have to find intentional and egregious conduct or a knowing disregard of judicial process. Another early case was *William K. Garfoot v. Fireman's Fund Insurance Company,*[4] which again required a finding of egregious conduct, which consists of a conscious attempt to affect the outcome of litigation or a flagrant knowing disregard of the judicial process.

These two cases and others stood for several principles. First was the idea that the duty to preserve evidence exists whether litigation is pending or not. In evaluating an allegation of document destruction, a court should examine whether the party knew or should have known at the time it caused the destruction of the documents that litigation against (the opposing parties) was a distinct possibility. The second test that the court should consider was whether the offending party destroyed documents which they knew or should have known would constitute evidence relevant to the pending or potential litigation.

Every discussion of evidence spoliation in Wisconsin cites as a major case *American Family Mutual Insurance Company v. Golke*.[5] In *Golke,* a house insured by American Family was destroyed by a fire on February 13, 2000 (allegedly caused by negligent repair of the roof). American Family notified the roofers of the fire damage by letter dated March 13, 2000, and the conclusion that their negligence caused the loss. Furthermore, American Family indicated that they should contact their liability carrier to provide time for investigation, testing, etc. A second letter was sent out by certified mail on April 6, 2000. Sometime after April 11, 2000, the home was razed and rebuilt. American Family brought suit against the roofers and the insurance company for damages arising from the fire. The case was dismissed at the circuit court level based upon a finding of spoliation (the home being razed and rebuilt).

Reversing the trial court's decision, the Wisconsin Supreme Court held that a party or litigant with a legitimate reason to destroy evidence discharges its

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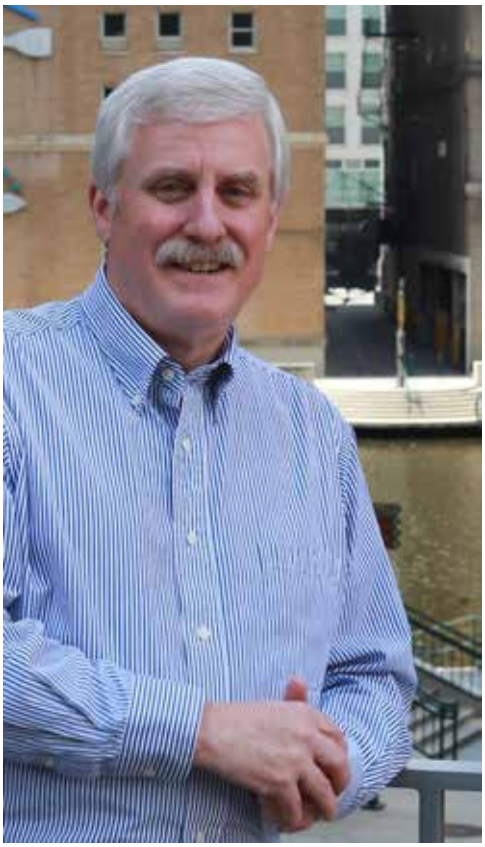

Jim Mathie established Mathie Mediation Services in 2016. Since devoting his entire practice to mediation, hundreds of attorneys have retained his services to mediate their disputes. Jim's four-office downtown Milwaukee suite provides ample space for any mediation. Jim also travels throughout Wisconsin – at no travel expense – to mediate cases. So, if it works best to have a mediation where you are, Jim will accommodate.

Before mediating fulltime Jim litigated cases for 30 years, primarily defending clients in personal injury, property damage, product liability, environmental, construction and transportation lawsuits. His varied background also includes stints as a plaintiff personal injury attorney and in-house counsel for a major insurer. He is a past president of WDC.

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duty to preserve relevant evidence within its control by providing the opposing party or potential litigant with reasonable notice of possible claim, basis for that claim, existence of evidence relevant to the claim, and reasonable opportunity to inspect the evidence.

The five-step process for evaluating the destruction of evidence post-*Golke* is as follows:

1. Identification, with as much specificity as possible, of the evidence destroyed;

2. The relationship of that evidence to the issues in the action;

3. The extent to which such evidence can now be obtained from other sources;

4. Whether the party responsible for the evidence destruction knew or should have known at the time it caused the destruction of evidence that litigation against the opposing party was a distinct possibility; and

5. Whether, in light of the circumstances disclosed by the factual inquiry, sanctions should be imposed upon the party responsible for the evidence destruction and, if so, what those sanctions should be.

There are two recent appellate cases involving evidence spoliation in Wisconsin. In *Gundersen v. Franks*,[6] an unpublished opinion from District IV of the Court of Appeals, the question was whether failure to download and preserve evidence from an electronic control module (black box) in a truck constituted spoliation in an auto accident case. Although liability was not at issue, the speed of the truck was potentially relevant to damages. The court of appeals ruled that the data could have easily been downloaded and should have been preserved, even though it was not requested until three years after the accident. The court levied sanctions in the amount of a monetary fine of $3,852.00. The five-part test mentioned above was applied. The court stressed that the speed of the vehicle related to the claimed injuries, the device or preservation of evidence was clearly identified, the relationship to the case was clearly "yes" (you did not need an expert), the eyewitnesses could not provide this type of analysis and a reasonable anticipation of litigation in the case should have alerted the parties to the fact that this type of evidence should have been preserved.

In *Mueller v. Bull's Eye Sport Shop, LLC*,[7] another decision from the District IV of the Court of Appeals, the court considered a case where discharge of a gun during a hunting trip resulted in injury to the plaintiff. After the accident, the gun owner, whose knowledge of the incident and the potential for litigation, had the gun materially altered and, indeed, part of the gun was missing. A spoliation motion for sanctions followed. The court found that the gun owner had intentionally altered and destroyed the evidence (the gun). The court determined that the sanction was going to be an instruction to the jury that it could draw an adverse inference against the gun owner for the spoliation of the evidence. This decision was appealed on the basis that the sanction was not sufficient, and the court should have dismissed some or all of the claims. The court again went through the five-part test in reviewing the trial court's decision. It did find that the conduct was intentional, but not egregious! Therefore, the trial court's decision on sanctions was upheld.

Several federal court decisions have addressed the issue of destruction of electronic data. Overall, courts have required additional efforts by parties to preserve electronically stored information.

A key concept in these cases has been a "litigation hold." This was discussed in the case of *Zubulake v. UBS Warburg, LLC*.[8] In *Zubulake V*, the court indicated counsel should put a hold on the regular retention/destruction policy and to communicate this to key players when litigation is occurring. Counsel should also make sure that all backup media with relevant information is identified and stored as well. Finally, counsel must also take affirmative steps to monitor compliance with the above.

What event(s) trigger a litigation hold?

1. The filing of a complaint.

2. A preservation of evidence demand letter.

3. Discovery requesting particular documents or information.

4. Letter from opposing counsel indicating that litigation is likely.

5. A demand letter requesting a particular settlement.

In sum, counsel must focus on making sure that the documents potentially related to a litigation are preserved, that the custodians of those documents are communicated with as to the duty to preserve, and that monitoring of that litigation hold is done by counsel to make sure of ongoing compliance.

Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC,[9] is another federal case where it was found that the plaintiffs failed to implement a legal hold and engaged in careless efforts after the duty to preserve arose. The court found that a failure to issue a written litigation hold letter constituted gross negligence.

Zubulake V and *Pension Committee* are the framework for analyzing allegations of spoliation involving electronically stored information. Clear guidelines require counsel to take steps to ensure the electronically stored data is preserved during the course of litigation. If these guidelines are not followed, sanctions can be imposed on a graduated basis, depending on the party's state of mind and the likelihood that relevant data was destroyed. The failure to implement a written legal hold can be, and has been, held to constitute gross negligence.

As I have outlined above, the consequences for a successful spoliation claim can be catastrophic. So, how does a party best avoid a spoliation claim?

1. **Scene:** As best as possible, preserve the scene of a particular incident for inspection by all parties (where evidence might well exist).

2. **Communication:** There must be communication to all sides that can be identified that there exists evidence as to a potential claim (perhaps explaining the basis of the claim) and you are allowing the other parties to inspect that evidence.

3. **Testing/Inspection/Protocol/Chain of Custody:** It is imperative that the party holding the relevant evidence provide the parties with the ability to inspect and potentially test the evidence. Careful consideration should be given to a protocol agreed to by all parties and documentation of the chain of custody with regard to the handling of the evidence.

4. **Preserving Evidence:** Even after testing and inspection is done by all parties, the evidence still needs to be preserved unless all parties agree that it can be destroyed.

5. **Litigation Hold for Electronic Evidence/ Retention and Destruction Policy:** Again, as indicated above, an absolute necessity that, if not done, will often tip the scale for a court to hold that spoliation has occurred, and sanctions should apply.

6. **Notice to All Individuals Impacted by Litigation Hold:** This is part of the common litigation hold responsibilities with often the responsibility lying with the lawyer representing the party who potentially has relevant evidence. Any judgment in this regard should reflect erring on the side of caution with any potential individual who could have relevant evidence to be notified of his or her duties to preserve.

The bottom line is that there are many things for counsel to consider and implement to avoid a spoliation claim. Two requirements that are at the core of avoiding such a claim are communication and preservation. If legal counsel can make those

two concepts the cornerstone of a policy to avoid spoliation claims, the chances for success of defending any such claim are increased dramatically.

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Link v. Link: Examining the Essential Duty of Cooperation with Coverage Counsel

by: Andrew J. Lawton, Coyne, Schultz, Becker & Bauer, S.C.

It has long been recognized in Wisconsin that a person may invoke their rights under the Fifth Amendment granted by the U.S. Constitution to refuse to give testimony in a civil case in order to protect themselves from the use of such evidence against him in a real or possible subsequent criminal action.[1] Unlike in a criminal case, however, invoking the Fifth Amendment right against self-incrimination can be used against a defendant in a civil case. For this reason, it is often in the best interest of a defendant to move to stay civil proceedings until a parallel criminal case is resolved. Courts may exercise their discretion to stay civil proceedings in the face of a parallel criminal investigation, examining the circumstances and competing interests involved in the case.[2]

But can a defendant similarly shield inculpatory information from his insurer because such would be harmful to the underlying civil case? Can the mere threat of future criminal charges be used as an excuse not to provide information to an insurance company? A recent decision by the Wisconsin Court of Appeals, *Link v. Link*[3], emphatically states that the answer is "No." Regardless of the consequences, a defendant cannot demand defense from their insurance company while shirking their own contractual obligations of cooperation and honesty.

I. A Restated Precedent: *Link* and *Walker*

In *Link*, eight plaintiffs brought suit against Jay Link alleging that he posted sexually suggestive photographs of them online.[4] Mr. Link tendered his defense to Midwest Family Mutual Insurance ("Midwest"), seeking coverage under the personal injury endorsement to his homeowner's policy.[5] Midwest defended Mr. Link under a reservation of rights and moved to intervene, bifurcate, and stay further proceedings on the merits.[6] Midwest then served various discovery requests on Mr. Link in the proceedings on coverage.[7] Mr. Link refused to respond to the requests, instead invoking his Fifth Amendment privilege to avoid self-incrimination.[8]

Mr. Link's policy contained a concealment clause stating, "We do not provide coverage to an 'insured' who, whether before or after a loss, has . . . [c]oncealed or misrepresented any fact upon which we rely, if the concealment or misrepresentation is material and is made with intent to deceive."[9] The policy also contained a cooperation clause, requiring Mr. Link to "[c]ooperate with [Midwest] in the investigation, settlement or defense of any claim or suit," and stating that Midwest had "no duty to provide coverage" if Mr. Link's failure to do so was prejudicial to Midwest.[10]

Midwest argued that Mr. Link breached the policy's concealment and cooperation clauses by not responding to Midwest's interrogatories, requests for admission, and requests for document production, all of which inquired into Mr. Link's posting of photographs and commentary about the plaintiffs, and his intent for doing so.[11]

Mr. Link's central argument was that an insured's invocation of a Fifth Amendment privilege in a coverage dispute could not be grounds for coverage denial.[12] The court of appeals noted it had considered and rejected a similar argument in *State*

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Farm Fire & Casualty Insurance Co. v. Walker,[13] and that the principles of that decision applied to the concealment and cooperation provisions of Mr. Link's policy.[14]

In *Walker*, an insurer was investigating a claim under a fire insurance policy and sought to question one of its insureds under oath.[15] The insured was facing unrelated homicide charges in Colorado, and invoked his Fifth Amendment privilege to not answer those questions from his insurer.[16] The insurer denied coverage and sought declaratory judgment on the grounds that the insured's refusal to answer material questions violated the concealment clause of the policy.[17] The circuit court concluded that the insured had breached the concealment clause by refusing to answer questions material to his insurer's coverage investigation.[18]

On appeal, the insured argued that an insurance company should not be allowed to interpret the failure to answer questions as concealment when the insured, following an attorney's advice, invokes a Fifth Amendment to avoid self-incrimination.[19] The *Walker* court rejected this contention, and held that the Fifth Amendment protects a defendant only when it is the state that is the questioner, and that fear of self-incrimination does not exempt one from contractual duties.[20] The *Walker* court also rejected the insured's contention that the questions he failed to answer were not material to the insurance policy.[21] The court wrote that a material question "concerns a subject relevant and germane to the insurer's investigation as it was then proceeding."[22] The insured refused to answer questions about his name change and financial position, which the court held were relevant in the insurance company's arson investigation.[23]

The court in *Link* noted that the *Walker* case broadly considered the contractual impact of an insured invoking a Fifth Amendment privilege.[24] Relying on *Walker,* the *Link* court concluded that "[c]onstitutional immunity has no application to a private examination arising out of a contractual relationship," and therefore did not depend on the language of the concealment clause, but on the scope of Fifth Amendment privilege.[25]

Mr. Link tried to argue that the *Walker* case did not control because that case involved a first-party claim, whereas his own claim was a third-party suit.[26] The court found that the *Walker* case was in no way dependent on this distinction, and instead, *Walker* broadly considered whether collateral civil consequences may attach to the invocation of privilege in a coverage dispute.[27] The insured's contractual obligation to assist with an investigation remained the same regardless of the claim being made.[28]

Mr. Link also argued that *Walker* should not apply because in *Walker*, the insurer's questioning was prior to any civil lawsuit.[29] Mr. Link's obligation to respond to Midwest's requests were also based on discovery statutes, and therefore, Mr. Link argued, the remedies for non-compliance with discovery should be limited to those statutes, or perhaps an adverse inference instruction could be given to the jury because of his invocation of a Fifth Amendment privilege.[30]

The court was similarly not persuaded and wrote that Mr. Link provided no legal support for why the existence of other remedies for his non-compliance precluded Midwest from pursuing the remedy it chose, moving for declaratory judgment.[31] The *Link* court therefore concluded that the *Walker* decision controlled, and that the threat or possibility of parallel criminal charges did not relieve Link of his contractual duties under the policy. [32]

The court then considered whether Midwest successfully showed that Mr. Link breached the concealment and cooperation clauses of his policy. The concealment clause stated that Midwest "do[es] not provide coverage to an 'insured' who, whether before or after a loss, has . . . [c]oncealed or misrepresented any fact upon which we rely, if the concealment or misrepresentation is material and is made with intent to deceive."[33] Mr. Link acknowledged that he intentionally concealed information, but implied that any concealed facts were not material to the policy.[34] Again, the court disagreed with Mr. Link and concluded that the basic information sought by Midwest was directly

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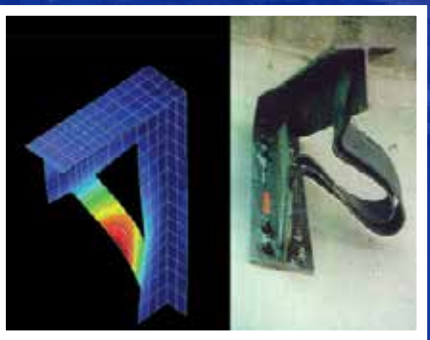

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relevant to its investigation into whether Mr. Link posted photographs and commentary online about the respective plaintiffs.[35]

Mr. Link's personal injury endorsement excluded coverage for injury caused by the publication of material that the insured knew was false.[36] But Mr. Link, the court noted, refused to answer *any* questions pertaining to his knowledge or state of mind in posting any material.[37] Another exclusion denied coverage where the first publication occurred before the beginning of the policy period, but Mr. Link refused to provide information about when he made any of the posts.[38] Under the *Walker* precedent, the *Link* court stated that determining whether requested information met the "materiality" standard is not a high bar requirement, and the information Mr. Link refused to provide met this requirement.[39]

The court also rejected Mr. Link's argument that Midwest could not deny coverage because it did not establish his noncompliance was prejudicial, which is required to deny coverage based on noncooperation. [40] Under Mr. Link's policy's cooperation clause, his duty "[in] the event of a covered offense" was that he "[c]ooperate with [Midwest] in the investigation, settlement or defense of any claim or suit."[41] Midwest had "no duty to provide coverage under [the] policy if [Mr. Link's] failure to comply with [the duty to cooperate] is prejudicial to" Midwest.[42]

Mr. Link implied that he did not breach the policy because he cooperated with his merits counsel in the lawsuits brought against him, which the court labeled as a nonstarter argument.[43] Even if the court assumed that Mr. Link did cooperate with merits counsel, this was not his sole contractual duty:

> [Mr. Link's] policy requires his cooperation with "us," i.e., *Midwest*, in the "investigation, settlement or defense of any claim or suit," meaning Link was required to cooperate with Midwest in its coverage investigation. [Mr. Link] cannot reasonably argue that he fulfilled this duty by participating in his own defense.[44]

Mr. Link also argued that any admission of fault in the coverage dispute would have harmed his defense in the underlying lawsuit.[45] But the court noted that this argument ignored the fact that Mr. Link himself first demanded defense and performance by Midwest under his policy:

> After invoking the policy, [Mr. Link] was required to abide by its terms, including that he cooperate with coverage counsel and truthfully represent all material facts in the coverage dispute. [Mr. Link] does not explain why fulfilling these duties in the coverage cross-claim would have interfered with his defense on the merits or breached his duty of cooperation with respect to merits/liability counsel. And, as Midwest notes, if [Mr. Link] believed that fulfilling these duties ultimately would have harmed his defense, he could have foregone a defense paid for by his insurer.[46]

The court noted that Midwest followed a well-established course where insurers provide defense under a reservation of rights, and that a free exchange of information was necessary to ultimately determine coverage.[47] Further, the court concluded that as a matter of law, the cooperation clause in Mr. Link's contract put him on notice that he must respond to discovery requests, and that Midwest had no duty to enumerate all of the potential consequences for failing to respond to the same.[48]

Mr. Link also invoked public policy and stated a ruling against him would cause harm to innocent third parties, but the court noted that public policy also favors the enforcement of contracts and the principle of fortuitousness, which courts can read into insurance policies to further public policy

objectives, including (1) avoiding profit from wrongdoing; (2) deterring crime; (3) avoiding fraud against insurers; and (4) maintaining coverage of a scope consistent with the reasonable expectations of the contracting parties on matters as to which no intention or expectation was expressed.[49]

The *Link* court, in applying these concepts, stated:

> [I]t makes little sense to require most insureds to cooperate in the typical coverage investigation while allowing those accused of more egregious, and potentially criminal, acts to invoke privilege and still receive coverage. As demonstrated by *Walker*, the decision to invoke the Fifth Amendment does not have to be—and sometimes should not be—consequence-free.[50]

Mr. Link's position, the court concluded in agreeing with Midwest, would allow him to use his Fifth Amendment privilege "as both a sword and a shield," in that coverage could never be determined so long as he continued to invoke privilege.[51]

II. The Consequences of Noncompliance

Staying a civil case for a defendant so that they may fully exercise their constitutional rights in a criminal proceeding threatening their liberty was not the direct issue presented in *Link*. The issue in *Link* was whether a defendant can assert those same privileges against their own insurance company exercising its reservation of rights and trying to determine whether coverage exists for the underlying suit. Mr. Link argued that cooperating with his insurance company's coverage counsel's requests would be detrimental to the same civil case that he had requested defense on. The court of appeals emphasized that even if Mr. Link was concerned about the effect of cooperating with his insurance company's request for coverage related information on the underlying case, he could simply have chosen not to demand that a defense by his insurance company be provided. He could not escape complying with the contractual duties he agreed to by hiding facts which obfuscated whether exceptions to coverage existed.

Although it is not clear if Mr. Link ever asserted that he was directly fearful of criminal charges based on the allegations in the civil actions against him, the court made clear that even the threat or possibility of parallel criminal charges would not relieve Mr. Link from his contractual duties. This too must be a point well counseled to clients by their merits counsel. While it may seem like a Catch-22, as Mr. Link described, a defendant may have to decide whether to prioritize their freedom in a criminal proceeding, or their financial position in a civil case if they are relying on insurance-provided counsel. Indeed, hiring a non-insurance provided attorney would solve the issues outlined in *Link* and *Walker*, but without the benefit of insurance coverage in the event of an adverse judgment.

The *Walker* decision has also been noted to permit the result of loss of coverage for *any* party to an insurance contract, even if separately innocent of any concealment to an insurance company, so long as the policy explicitly provides for that result.[52] This too should be a major consideration in multi-party cases for counsel.

Most insurance contracts include language regarding concealment and cooperation with an insurance company for those seeking indemnification, defense, or disbursement of funds. A defendant may indeed find it disconcerting to provide adverse information to insurance coverage counsel in discovery. It would likely lead to any such information being turned over to a plaintiff, and potentially lead to the defendant losing insurance paid assistance of counsel altogether, leaving him financially exposed and scrambling for a new attorney.

While *Link* and *Walker* are cases with allegations that were very likely exempted from coverage from the outset, these cases underscore the necessity of any merit counsel to fully comply with requests for information from coverage counsel. Many cases will not be so one sided against a defendant in a

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coverage situation, and the dangers of objecting to certain requests or providing discovery responses that fail to fully inform an insurance company risk the filing of dispositive motions that result in a court ruling that there is no coverage for a defendant.

This result should be fiercely guarded against. The risk of suddenly leaving a client with financial exposure and the sudden need to hire a new attorney on their own at personal expense is greater and more catastrophic in a situation where an attorney or their client simply fails to provide sufficient information. Far better to eagerly provide all non-privileged information possible to coverage counsel so that an appropriate decision on coverage can be fully determined or litigated at an earlier stage of proceedings instead of a drawn out and contentious discovery process that might resolve in an insurance company's favor because of a poor discovery strategy, rather than any policy language-based reasons.

The result of fully disclosing facts that eventually lead to a defendant's denial of coverage is one that would likely have been unavoidable to begin with, given clear and specific contract language and equally clear facts. But a result in which the stonewalling tactics of an attorney or client result in denial of coverage could, in the right circumstance, possibly form the basis of legal malpractice on the part of an attorney failing to adequately respond to coverage counsel's requests, or an ill-advised client seeking to be unnecessarily adversarial to all interests opposed to their own. This could be equally detrimental to innocent co-defendants.

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Legislative Update: Wisconsin Avoids Adverse Changes to Medical Records Fees and Access, For Now

by: Adam Jordahl, The Hamilton Consulting Group, LLC

I. Introduction

For attorneys working on personal injury suits, automobile accidents, worker's compensation claims, and in so many other areas of the law, health care records[1] are a daily business expense. Whether representing plaintiffs or defendants, policyholders or insurers, or employees or employers, attorneys must be able to reliably predict litigation-related costs in order to best advise their clients and offer cost-effective legal services.

To that end, Wisconsin law limits the fees that a health care provider can charge to produce copies of patient medical records.[2] However, state law does not specifically address electronic records, which has led to inconsistent administration across the state, even as nearly all health care records today are created and stored in an electronic format.

The issue of what fees, if any, that providers can legally charge for copies of electronic records is currently being litigated before the Wisconsin Supreme Court. Meanwhile, conflicting policies to address the issue were presented to the Wisconsin Legislature this year, with both ultimately failing to pass. This article will begin by reviewing the statutory history and case law behind the issue and then compare the two proposals.

II. Statutory History

For more than 40 years, Wisconsin law has required health care providers to produce copies of health care records for patients and their authorized representatives "upon payment of reasonable costs."[3] In 2002, the Wisconsin Legislature directed the state Department of Health Services to issue an administrative rule setting maximum allowable fees for copies of medical records, based on the department's estimate of the actual costs of producing the records.[4]

In 2011, the Wisconsin Legislature created a fee schedule, including automatic adjustments for inflation, establishing allowable per-page fees for paper and microfilm record copies, a per-print fee for X-ray copies, as well as actual shipping costs and taxes. Certification and retrieval fees can be charged on a per-request basis to requesters other than a patient or a patient's authorized representative.[5]

Since this fee schedule was established, most health care providers have adopted an electronic health records (EHR) system, meaning that today most medical records are created and stored originally in an electronic format. For example, according to the federal office for health information technology:

> As of 2019, about three-quarters of office-based physicians (72%) and nearly all non-federal acute care hospitals (96%) had adopted a certified EHR. This marks substantial progress from 2013 when only 59% of hospitals and 48% of physicians had adopted a basic EHR with clinician notes.[6]

Wisconsin law does not explicitly address a fee for copies of electronic records, although it did at one time.[7] This has led to varying arrangements among

health care providers, medical records vendors, and those who regularly make record requests, such as attorneys and insurers. This in turn has led parties to seek clarification and resolution from the courts.

III. Case Law

Wisconsin law includes a civil cause of action for both willful and negligent violations of its medical records provisions, including the limits on fees.[8] Various lawsuits filed under this provision have alleged that health care providers and records vendors overcharged patients and their attorneys. For instance, a class action lawsuit against a hospital and a records management company is underway after the District II Court of Appeals last year upheld the circuit court's certification of a class.[9]

Since the establishment of a fee schedule in 2011, several cases involving records fees have reached the Wisconsin Supreme Court. In 2017, the court held in *Moya v. HealthPort Technologies*[10] that an attorney authorized in writing by a client via a HIPAA release form[11] qualified as a "person authorized by the patient"[12] and thus should not have been charged certification and retrieval fees[13] for copies of his client's records.

Late last year, the Wisconsin Supreme Court held in *Townsend v. ChartSwap* that the vendor ChartSwap "is not a health care provider" as defined in the records access statutes "and, therefore, it is not subject to the fee restrictions."[14] Following its decision in *Townsend*, the court mooted a class action case against another medical records vendor, under the same reasoning that the company was not a "health care provider" and thus not subject to the fee schedule.[15]

Most recently, in March of this year, the Wisconsin Supreme Court agreed to hear an appeal in *Banuelos v. University of Wisconsin Hospitals and Clinics Authority*.[16] Banuelos requested copies of her records for her attorneys from the health system commonly known as UW Health. Banuelos and her attorneys received electronic copies of the records along with an invoice. The invoice charged Banuelos for the electronic records based on the maximum allowable fees for paper copies. Banuelos sued, alleging that the fees were charged to her unlawfully.[17]

The circuit court dismissed Banuelos' complaint, reasoning that because state law makes no mention of a limit on fees for electronic records, Banuelos' claim could not prevail.[18] The District IV Court of Appeals reversed, reasoning Wisconsin's fee schedule "defines the total universe of fees that a provider may collect from a requester for the service of fulfilling a request for patient health care records," and thus providers cannot charge anything for electronic copies.[19]

The Wisconsin Supreme Court is considering UW Health's challenge to the appellate court's finding. No matter the outcome in *Banuelos*, the lack of an explicit statutory fee limit for electronic records has caused problems for practitioners who need a reliable system for obtaining records at a predictable, reasonable cost.

IV. Changes Proposed by a Medical Records Vendor

Earlier this year, Ciox Health, a large medical records management company, proposed changes to state law. The company services several major health systems and hospitals in Wisconsin, responding to records requests on their behalf. The main feature of the vendor's proposal is a per-page fee schedule for electronic records:

- 90 cents per page for the first 25 pages
- 67 cents per page for pages 26 to 50
- 44 cents per page for pages 51 to 100
- 26 cents per page for pages 101 and above up to a maximum of $300

Moreover, Ciox proposes narrowing the definition of a "person authorized by the patient" to access medical records. Current law exempts a patient and "any person authorized in writing by the patient"[20] from certification and retrieval fees,[21] which are presently capped at $9.38 and $23.45 per request, respectively.[22]

The vendor's proposal would limit this to "any person authorized in writing by the patient *to make health care decisions for the patient*" (emphasis added). This change would make it more difficult and expensive for a patient's attorney or insurer to obtain copies of his or her records, in particular by allowing providers to assess certification and retrieval fees to almost any requestor, even those with written patient authorization such as a signed HIPAA release form.

This is a direct reference to and an attempt to undo the Wisconsin Supreme Court's decision in *Moya*. Indeed, *Moya* defendant HealthPort Technologies merged with several other health care information companies to form Ciox Health while *Moya* was being litigated.[23] Accordingly, Ciox's proposal increases the allowable retrieval fee to $30, a 50 percent increase over the $20 retrieval fee established in 2011. The proposal also would allow providers and vendors to charge a $20 fee for any request resulting in no records.

All of this adds up to a financial windfall for health information managers, at the expense of Wisconsin attorneys and insurers and the consumers and employers that they serve.

V. Changes Proposed by Wisconsin Attorneys and Insurers

The policy proposal described above is problematic, primarily because the concept of a per-page fee does not match with the idea of a record that is created, stored, and shared electronically. To contest the vendor's proposal and advance an alternative solution, WDC partnered with the state's civil trial bar (the Wisconsin Association for Justice or WAJ) and the Wisconsin Insurance Alliance. Our coalition presented a proposal, developed by WAJ, including several straightforward provisions.

a. Setting a Flat Fee for Electronic Records

The core of the coalition's proposal, in contrast to the per-page fee sought by Ciox Health, is a flat per-request fee of $6.50 to provide electronic copies of medical records. By comparison, for a 100-page document, the vendor's proposed fee schedule works out to $61.25 for an electronic record, while a provider can currently charge $81 for a paper copy of the same (excluding the certification and retrieval fees or shipping costs that might apply).[24] That fee for an electronic record would be about 75 percent of the allowable charge for a paper copy.

Health information management companies have never explained how or why it costs nearly the same amount to prepare and deliver an electronic record as compared to a paper one. The coalition's proposed flat rate of $6.50 matches the federal limit on what providers and vendors can charge a patient requesting an electronic copy of his or her own records.[25] For several years, under federal rules, the $6.50 rate also applied to electronic records requests from a patient's authorized representative, such as an attorney or insurer. However, the application of the patient rate to third parties was invalidated because of a lawsuit brought by Ciox Health.[26]

b. Requiring Providers to Furnish Electronic Copies Upon Request

The second piece of the coalition's proposal is to require that, "If requested by the patient or by a person authorized by the patient, the health care provider shall provide electronic copies of all patient health care records that were either created in electronic format or are stored in electronic format by the health care provider." This change would provide much-needed clarity and reliability by ensuring that requestors can obtain copies of electronic records in their native format (and, at a lower cost).

At one time, Wisconsin law required providers to furnish records in an electronic format upon request whenever possible. This language was repealed when the current fee schedule was established in 2011. It is not clear why the legislature chose to remove any mention of electronic records from these provisions. Notably, in *Banuelos*, the appellate court rejected UW Health's argument that this

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repeal demonstrated the Wisconsin Legislature's intent to exempt electronic records from any kind of fee limit.[27]

c. Treating Records Vendors as Health Care Providers

The final piece of the coalition's proposal would add "An agent, independent contractor, or release of information vendor of any health care provider" to the definition of "health care provider" that applies to the statutes on access to health care records. This would address the state supreme court's *Townsend* decision, which found that the statutory fee limits do not apply to records management companies and that those companies cannot be held liable for overcharging for copies of records because they are not "health care providers" as defined in that section of the statutes. Clearly, as a policy matter, it is desirable for attorneys and insurers that the same fee limits apply to any entity that responds to records requests, whether it is a hospital, clinic, or independent practice, or an agent, contractor, or vendor working on a provider's behalf.

VI. Proposed Compromise on Complex Record Sets

Ciox responded to the coalition's proposal by arguing that a flat per-request fee of $6.50 does not cover the cost of producing some sets of electronic records, in particular "blended record sets" containing a mix of paper and electronic records and "legacy paper records" that have been scanned into an electronic format. As a compromise, the coalition suggested an additional provision in the fee schedule limited to blended and legacy record sets:

> For electronic copies of patient health care records that were not created electronically, but are stored by the provider in electronic format, a per page fee of 20 percent of the rate applicable to paper copies… up to a maximum charge of $26 per request.

As the attorney/insurer coalition wrote in a February 9 letter to a legislative leader, "Allowing per page fees for records that require substantial review and processing represents a genuine compromise that serves the interests of records providers as well as the individuals and businesses who must pay these costs."

VII. Conclusion

The Wisconsin Legislature adjourned its biennial regular session on March 8, effectively killing any outstanding proposals and keeping the status quo in place with respect to medical records law. Because this issue arose during the final few months of the session, there was not enough time for it to move through the typical legislative process, absent some extraordinary political pressure.

Yet, Wisconsin attorneys continue to need clarity and consistency when it comes to health care records access and fees. Health care providers and the records vendors they use will also remain interested in this issue, particularly if the Wisconsin Supreme Court upholds the appellate court's decision in *Banuelos*. It appears very likely that the Wisconsin Legislature will be faced with this issue during the next regular legislative session, which will begin in January 2023.

Author Biography:

Adam Jordahl is the Communications & Government Relations Manager for the Hamilton Consulting Group, a full-service government affairs firm located in Madison. On behalf of the firm and its clients, including Wisconsin Defense Counsel, he monitors legislation, rules, and public meetings, researches policy issues, and produces reports and communications. Adam earned a B.A. in religious studies and sociology from Rice University in Houston, graduating cum laude with distinction for his senior thesis on internet memes and political messaging.

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1 Wisconsin law refers to "patient health care records." This article uses the terms "health care records" and "medical records" interchangeably.

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4 2001 Wisconsin Act 109 at 152, available at: https://docs.legis.wisconsin.gov/2001/related/acts/109.pdf (last visited June 6, 2022).

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7 *See* Section V, Part b of this article.

8 Wis. Stat. § 146.84.

9 *Hammetter v. Verisma Systems*, 2021 WI App 53, 399 Wis. 2d 211, 963 N.W.2d 874.

10 *Moya v. HealthPort Technologies*, 2017 WI 45, 375 Wis. 2d 38, 894 N.W.2d 405.

11 A form authorizing the disclosure of protected health information under the federal Health Insurance Portability and Accountability Act or HIPAA.

12 Wis. Stat. § 146.81(5).

13 Wis. Stat. § 146.83(3f)(b)4-5.

14 *Townsend v. ChartSwap*, 2021 WI 86, ¶ 2, 399 Wis 2d. 599, 967 N.W.2d 21.

15 *Rave v. SVA Healthcare Services*, 2022 WI 3, 400 Wis. 2d 384, 968 N.W.2d 703.

16 *Banuelos v. University of Wisconsin Hospitals and Clinics Authority*, 2021 WI App 70, 399 Wis. 2d 568, 966 N.W.2d 78.

17 *Id.* ¶ 2.

18 *Id.* ¶ 4.

19 *Id.* ¶ 15.

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26 *See* Jacob Simpson, "HIPAA $6.50 Copy Fee Limitation Does Not Apply to Lawyers and Other Third Party Record Requests" (2020) for a discussion of the federal side of this issue, available at: https://www.bswllp.com/hipaa-650-copy-fee-limitation-does-not-apply-to-lawyers-and-other-third-party-record-requests (last visited June 10, 2022).

27 *See* the appellate court's discussion of this issue in *Banuelos*, 399 Wis. 2d 568, ¶¶ 36-37.

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News from Around the State: Trials and Verdicts

Donna L. Morris, et al. v. Rural Mutual Insurance Company, et al.
Sauk County Case No. 17-CV-400
Trial Dates: March 8-10, 2022

Facts: A motor vehicle accident occurred when the insured driver was at a stop sign facing south and failed to see the plaintiff's westbound vehicle. The insured proceeded into the intersection and struck the plaintiff's vehicle in the rear passenger side door. The plaintiff's vehicle sustained minor damage. The forces of the accident were sufficient, however, to rotate the plaintiff's vehicle 135 degrees. After the collision, the plaintiff was able to exit her vehicle and speak with the insured. Plaintiff complained of neck pain but told emergency personnel that it was not necessary to call an ambulance.

Plaintiff was 50 years old at the time of the accident. She initially sought treatment for neck and tailbone pain in the two weeks after the accident. The plaintiff then went approximately six months without seeking any accident-related treatment before resuming treatment again less than two weeks after retaining counsel. When she resumed treatment, she was referred to physical therapy for pain in her low back that was shooting into her left leg. There was a second gap in treatment from March of 2017 to March of 2018. In March of 2018, plaintiff resumed treatment for pain in her low back and ultimately underwent low back surgery. The post-operative report revealed arthritic changes indicative of pre-existing degenerative disease. The surgery was successful, but the plaintiff testified that she still had to be careful with her daily activities and that she would "pay for it" the next day if she did too much.

The defendant's independent medical expert was neurosurgeon Dr. Morris Marc Soriano, MD. Dr. Soriano related ten weeks of treatment to the accident and opined that the cause of the plaintiff's ongoing low back pain was her pre-existing degenerative facet disease in the L4-5 region. By contrast, plaintiff's treating experts opined that the 2015 accident accelerated plaintiff's degenerative condition beyond its normal progression and necessitated the 2018 surgery.

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

At Trial: The main issue for trial was whether the 2018 surgery was reasonable and necessary to treat accident-related injuries. Other than brief testimony from the insured driver, the defendant's only witness was Dr. Soriano. At closing, plaintiff's counsel asked for $62,796.56 in past medical expenses, $6,157.67 for wage loss, and $100,000 in past pain, suffering and disability. Defense counsel argued that only $5,522.01 in past medical expenses was related to the accident. Additionally, defense counsel argued that plaintiff only sustained $1,183.76 in wage loss, and suggested $25,000 as an appropriate award for the plaintiff's past pain, suffering, and disability.

Plaintiff's Final Pre-Trial Demand: $160,000
Defendant's Final Pre-Trial Offer: $65,000

Verdict

Past Medical Expenses:	$5,522.01
Past Wage Loss:	$1,183.76
Past Pain and Suffering:	$7,500.00
Total:	**$14,205.77**

For more information, contact Wayne L. Maffei at wmaffei@cjmmlaw.com or Nicole Marklein at nmarklein@cjmmlaw.com.

Jacquelyn Stuart, et al. v. ARHC LMFKNWI01, LLC, et al.
Milwaukee County Case No. 20-CV-446
Trial Dates: December 6-10, 2021

Facts: This lawsuit arises from a winter slip and fall accident at an Advanced Pain Management facility. The plaintiff parked her vehicle in a designated handicap parking spot, exited her vehicle, and almost immediately slipped on ice. After the fall, the plaintiff proceeded into the pain management clinic for her previously scheduled appointment. There was nothing mentioned in her medical records from that date about the slip and fall, despite plaintiff's contention that she notified numerous people at the pain management clinic. The first medical notation of the slip and fall was from an ER visit the next day.

As a result of the accident, Plaintiff alleged she injured her back and claimed approximately $420,000 in past medical expenses for a seven-level back fusion and approximately $560,000 to $960,000 in future medical treatment that consisted of annual diagnostic tests, occupational therapy, physical therapy, and injections. Plaintiff's total claimed special damages were approximately $980,000 to $1,380,000.

Plaintiff asserted common law negligence claims against the pain management clinic's building owner, property manager, and snow removal contractor. Additionally, plaintiff brought safe place claims against the building owner and property manager.

The snow removal contractor preserved daily salt logs and time sheets that confirmed snow and ice removal operations took place a few hours before plaintiff's appointment.

Plaintiff had over two decades of prior back issues relating to a late 1990s work injury. The injury was the basis for her receiving Social Security Disability benefits in the early 2000s and necessitated an earlier back surgery.

Leading up to the 2017 slip and fall, plaintiff had approximately six surgical procedures performed on her back, was using a spinal cord stimulator for pain management, was receiving various types of injections, and was on an extensive pain management prescription regime that involved her taking approximately 1,600 pills on an annual basis for nearly twenty years.

Given her extensive medical history, plaintiff tried to differentiate her back issues. She claimed that her pre-accident back issues were limited to the lumbar region, while her post-accident back issues extended into her thoracic region. Her pre-accident medical records documented lumbar and thoracic back complaints.

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Issues for Trial: A few weeks before trial, the property owner and management company settled with the plaintiff. The snow removal contractor proceeded to trial. Liability and damages were contested.

At Trial: The jury concluded that neither the defendant nor the plaintiff was negligent. The jury also concluded that the plaintiff sustained no injury as a result of the slip-and-fall accident.

For more information, please contact Frederick J. Strampe at fstrampe@borgelt.com or Matthew L. Granitz at mgranitz@borgelt.com.

Judith Anderson, et al. vs. Rural Mutual Insurance Company, et al.
Chippewa County Case No.: 20-CV-45
Trial Dates: November 30, 2021 – December 1, 2021

Facts: On March 31, 2018, Rural's insured rear-ended the plaintiff, Judith Anderson, on Highway 53 north of Eau Claire. Plaintiff claimed the following injuries: traumatic brain injury, neck strain, PTSD, along with aggravation of pre-existing degenerative disc disease and anxiety disorder.

Issues for Trial: The parties stipulated to liability. Trial was on damages only, including the husband's loss of consortium claim.

At Trial: Dr. William Schneider (an IME doctor) testified for the plaintiff. Dr. John Dowdle (an IME doctor) testified for the defense. Plaintiff argued past medical bills were $10,195. The defense argued past medical specials were $3,222. Dr. Schneider opined plaintiff would need future care, including physical therapy, injections, and medication. The cost of this future care was approximately $68,800.

Plaintiff's Final Pre-Trial Demand: $55,000
Defendant's Final Pre-Trial Offer: $20,000

Verdict:

Past Medical Expenses:	$10,195.00
Future Medical Expenses:	$3,000.00
Past Pain and Suffering:	$20,000.00
Future Pain and Suffering:	$10,000.00
Loss of Consortium:	$500.00
Total:	$43,695.00

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