Wisconsin Civil Trial Journal

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Wisconsin Supreme Court Overrules *Pharmacal* and Rejects "Other Property" Requirement for Initial Grant of CGL Coverage
Joseph M. Mirabella, Doug Raines and Henry E. Koltz

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.

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Our Mission: Wisconsin Defense Counsel exists to promote and protect the interests of civil litigation defense attorneys and their clients by providing professional education and development, fostering collegiality, promoting principles of diversity and inclusion and striving to ensure equal access to justice for all defendants.

Our Vision: Delivering superior legal services with integrity and professionalism.

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President's Message: Networking Opportunities in a Post-COVID World

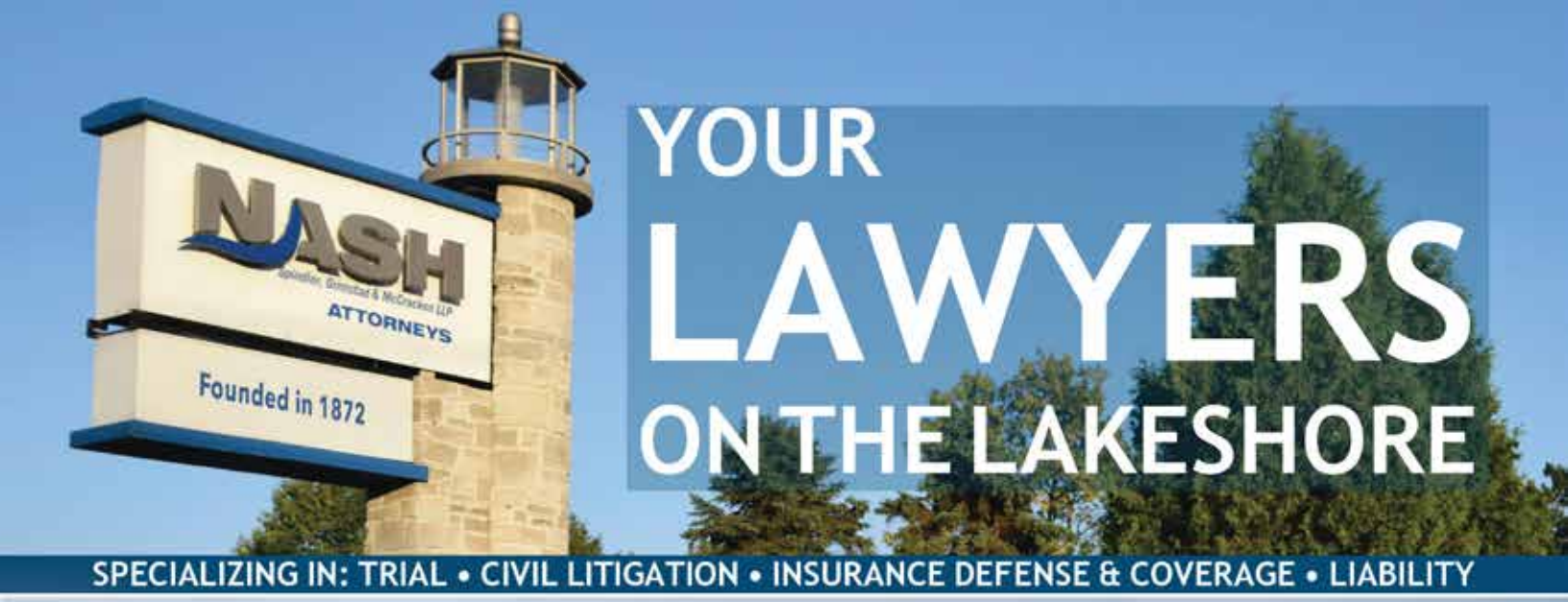
by: Monte E. Weiss, President, Wisconsin Defense Counsel

Although everything changes with time, over the last several years especially, we have noticed a sea of change in terms of how we practice law. COVID forced the judicial system to substantially modify how litigants and attorneys accessed the courtroom and likewise, the pandemic forced attorneys to make major shifts in how we practice. During COVID, even though the world shut down, our obligations to represent our clients did not. We had to find ways to do virtually what we used to do in person. Zoom, Teams, Google Meet and other videoconferencing systems transported us electronically to our trials, our court conferences, our depositions, our meetings with our clients, and contact with other counsel. For some it was perhaps done reluctantly, but we learned during COVID that we did not need to be somewhere physically to effectively communicate with others and fulfill our obligations to clients and to the courts. There was, is, and continues to be a great benefit in using these internet-based meeting tools. But there may also be a cost to replacing face-to-face human connection with these online meeting platforms.

In some ways, although we have gained efficiency, we have lost the personal touch of communication. Recently, I was at a law firm function celebrating one of the numerous year-end holidays. An attorney I knew for many years came up to me and relayed a story about one of our meetings long ago in court which, in all candor, I did not recall. It was a scheduling conference and when I showed up, opposing counsel (who was regaling me with this memory in present time) was already present. The court was not ready for us and as I had miraculously arrived early, we had an opportunity to chat. After talking for a bit, I turned the discussion to the case at hand. I advised counsel, who at that time was just starting his legal career, that one of the claims he was asserting was not recognized in Wisconsin and I suggested that we simply draft a stipulation and order to eliminate that cause of action, allowing the rest of his case to go forward.

What struck me about this story was the impact this casual interaction had on opposing counsel. He remembered that courtesy and how I handled the situation to this day. He commented that I was kind and respectful about the issue with his case and our interaction made an impression upon him. Since that time, I have had a number of cases with this attorney, and we have worked professionally and cordially in each instance.

When counsel retold this story to me at the year-end function, it reminded me of how "we used to do things." We used to attend court scheduling conferences in person. We would, hopefully, show up a little early and we would chat with opposing counsel before the conference and get to know each other a bit. Sometimes, the judge would even come out early and casually interact with the attorneys before starting the proceedings. After the conference was over, counsel would often leave the court room and continue our conversations about practice, the case or really, anything else on the way to the elevators and eventually, to our vehicles. What I did not realize at the time was that we were building a rapport with other counsel through these seemingly simple interactions. We were establishing a network of counsel that we could call upon.



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With Zoom, Teams, and other virtual platforms, we have largely ceased showing up to court in person. The concomitant reduction in travel time and corresponding expense has been a boon to attorneys and our clients. For example, we no longer have to travel an hour for a 15-minute conference. Our clients no longer have to pay us to travel to the conference. Once the modern-day virtual conference is over, we disconnect and continue to work at our desk.

This convenience, however, has come at a cost. We no longer have those invaluable minutes to chat with opposing counsel before the court calls the case. We no longer have the opportunity to walk out of court or a deposition with counsel and discuss the case or the Bucks or our families or anything else for that matter. In short, our opportunity for meeting new counsel, for establishing a rapport with our colleagues, and for building a network has been dramatically reduced. For older attorneys this is not as much of an issue as we have spent our entire careers showing up in person and it is only in the last few years that personal appearances have been curtailed. But it is the younger generation that will feel the impact of the post-COVID virtual appearance world. The younger generation will be limited in their ability to meet opposing counsel in a manner that is conducive to creating a network in the same way the older attorneys have previously done.

But, alas, there is hope for this younger generation. The Wisconsin Defense Counsel provides several fantastic ways to build a network. First, young attorneys especially should attend the invaluable seminars put on by our organization. There are only three seminars each year for WDC members but by attending these seminars in person, younger attorneys have a meaningful opportunity to meet other WDC members and valuable contacts like possible experts and supportive vendors.

Second, young attorneys should make every effort possible to join a WDC committee. WDC has twelve different committees: the Amicus Curiae Committee, the Awards Committee, the Bylaws Committee, the Diversity, Equity & Inclusion Committee, the Employment Law Committee, the Insurance Law Committee, the Law School Committee, the Litigation Skills Committee, the Membership Committee, the Website and Social Media Committee, the Women in the Law Committee, and the Young Lawyers Committee. I would encourage each of you to read Heather Nelson's (President-Elect) article in the Winter edition of the Wisconsin Civil Trial Journal. Heather discusses each of the WDC Committees in detail and it is a great place to start thinking about which committee or committees interest you.

Finally, young lawyers—and all of our members for that matter—should read the Wisconsin Civil Trial Journal and for those especially motivated and adventurous members, please consider contributing to this resource. If you have written a brief or research memorandum, consider reworking it as an article. If you have been working on a matter and the court of appeals or the supreme court has released an opinion on one of the issues in your matter, consider writing an article about that case and what it means to the practice of law. By writing an article, you draw attention to yourself and begin making connections with other attorneys.

I cannot stress enough the importance of having a good network. I have lost count of the number of times I have reached out to my network for help with an issue. I recall one time, I reached out to another attorney about an issue in a case that had just been referred to me. We chatted on the phone for a bit and then, on his way home, he stopped off at my office and dropped off several cases and briefs that he had regarding the very issue I had been dealing with in this new referral. The cases and briefs decreased the grade of my learning curve of the issue tremendously. I would have spent substantially more time than I would have wanted to in order to learn about the issue had it not been for my network.

With all the benefits of virtual appearances, there are costs. One of the costs is the negative impact virtual appearances have on networking. However, WDC has so many ways to overcome the impediments

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to networking created by virtual appearances. Take advantage of what WDC has to offer; there are many ways to build your professional network here. I guarantee that you will not regret being involved in WDC.

Author Biography:

Monte E. Weiss, Case Western Reserve Univ., 1991, of Weiss Law Office, S.C., Mequon, practices primarily in the defense of bodily injury, property damage, and professional negligence claims for insurance companies and self-insured companies. In conjunction with this area of practice, he has drafted several personal lines insurance policies, including homeowner and automobile policies. He routinely represents insurance companies on insurance contract interpretation issues and is a frequent lecturer and author on insurance topics. He also represents policyholders dealing with coverage denials from their carriers. He the current President of the Wisconsin Defense Counsel. Attorney Weiss can be reached at via his firm's website at www.mweisslaw.net.

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2024 WDC Spring Committee Awards

The WDC Spring Committee Awards recognize the talent, effort, and accomplishments of our incredible committee members and volunteer leaders. Congratulations to the following award recipients who will be recognized during the WDC 2024 Spring Conference on April 4-5, 2024!

Women in the Law Committee Award Recipient: Amy F. Scholl

Congratulations to Amy Scholl for being selected by the Women in the Law Committee and the Awards Committee for the 2024 Women in the Law Committee Award!

In addition to her busy practice, Amy is an active member of WDC and the WITL Committee. She volunteered to be a collection point in Madison for the spring clothing drive this year. She also participated in DRI's day of service at Way Forward in September where the WITL Committee volunteered to organize food orders at the pantry. In addition, she presented at the winter conference on ethics. She is more than deserving of our WITL Committee award.

Amy is a shareholder with Coyne, Schultz, Becker and Bauer, S.C. She specializes in civil litigation with a focus on defending insurers and businesses. Amy has a general civil practice which involves automotive, premise and general liability claims and insurance coverage. She also is involved in defending healthcare providers, long-term healthcare providers and other providers of professional services in Court and before regulatory agencies. Amy is AV Preeminent rated by Martindale-Hubbell and is a member of ABOTA. She is a Fellow in the American College of Trial Lawyers. She has been named to Super Lawyers as one of the Top 25 Attorneys in Madison and Top 25 Female Attorneys in the State. Amy is certified as a Civil Trial Advocate and Civil Pretrial Practice Advocate by The National Board of Trial Advocacy. Amy has tried cases throughout Wisconsin including Adams, Columbia, Dane, Green, Iowa, La Crosse, Marquette, Richland, Rock, and Sauk Counties.

Diversity, Equity & Inclusion Committee Award Recipient: Patricia Epstein Putney

Congratulations to Patricia (Patti) Epstein Putney for being selected by the Diversity, Equity & Inclusion Committee and the Awards Committee for the 2024 Diversity, Equity & Inclusion Committee Award!

Patti is a regular attendee of the DE&I meetings and is very involved, often providing thoughtful comments during our robust discussions. Committee members were particularly struck by her sharing her experiences and providing her perspective as a Jewish woman. Her experiences were eye-opening and

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thought-provoking, which is a large part the purpose of the DE&I Committee. In addition, Patti volunteered to speak on the DE&I Panel at the Winter Conference, despite having already presented independently at the Summer Conference. Her commitment to the DE&I Committee's activities and noteworthy participation make her deserving of this award.

Patti 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.

Amicus Committee Award Recipient: Erik M. Gustafson

Congratulations to Erik Gustafson for being selected by the Amicus Committee and the Awards Committee for the 2024 Amicus Committee Award!

Erik has been an active and contributing member of the Amicus Committee for the past several years. Erik is an experienced and talented appellate attorney, and his insight and contributions during meetings are always valuable—whether the Committee is making decisions to become involved in a case or reviewing and contributing as an author of amicus briefs. Erik is a reliable contributor and leader of this committee and is always ready to ensure that WDC will be engaged when needed in appellate matters before Wisconsin courts. Recognition of his contributions is well-deserved.

Erik is an associate in the Milwaukee office of Borgelt, Powell, Peterson & Frauen, S.C. His practice is entirely devoted to representing Wisconsin insurance companies, with his practice focused on first-party property and third-party liability insurance coverage. Erik earned his B.A., *summa cum laude*, from Creighton University in 2014, and his J.D., *magna cum laude*, from Marquette University Law School in 2017. Before joining Borgelt, Powell, Peterson & Frauen, S.C., Erik clerked for Justice Michael J. Gableman of the Wisconsin Supreme Court during the 2017-2018 court term.

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"Talk Less, Smile More": Embracing Collegiality to Improve Your Success as a Lawyer

by: Erik J. Pless, One Law Group S.C., and Kristen S. Scheuerman, Weiss Law Office, S.C.

To be clear up front, we are not actually advocating that lawyers stop talking; as trial attorneys, we ultimately advance the best interests of our clients in front a jury by doing just that. But as two Hamilton fans, we could not pass up the chance to use Aaron Burr's quip to Alexander Hamilton as sound advice when it comes to the considerations we think everyone should give to invoking collegiality as we manage and handle our caseloads.

Although we may each have varied practices, we all share one thing in common: we are officers of the court. Too often, though, that title becomes much more hortatory and less practically meaningful. Depending on the dictionary you consult, collegiality is generally accepted to mean a cooperative interaction among colleagues. And while the core of our profession is adversarial, we think that all too often, practitioners assume that a scorched-Earth, contentious approach to litigation and opposing counsel is somehow the most effective way to advance a client's interests. We would encourage folks who practice this way to consider whether a more cooperative and collegial approach to interacting with other attorneys may actually produce more favorable results and reduce some stress along the way.

Ethically speaking, we are each required to behave and practice in a manner consistent with the oath we all took when we were accepted into the Bar.[1] In case you may have forgotten what we affirmed to do as lawyers, it was this:

> *I will support the constitution of the United States and the constitution of the State of Wisconsin;*
>
> *I will maintain the respect due to courts of justice and judicial officers;*
>
> *I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, or any defense, except such as I believe to be honestly debatable under the law of the land;*
>
> *I will employ, for the purpose of maintaining the causes confided to me, such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;*
>
> *I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with my client's business except from my client or with my client's knowledge and approval;*
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> *I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required*

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by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice. So help me God.[2]

We will resist the temptation to analyze what abstaining from "offensive personality" could mean, but we also wonder how often in the hustle and bustle of our busy practices we reflect on the words we all spoke when we were young, scrappy, and hungry.

Beyond the oath we all took, the Wisconsin Supreme Court Rules state that, "[a]dherence to standards of professionalism and courtesy, good manners and dignity is the responsibility of each judge, court commissioner, lawyer, clerk, and other personnel of the court who assist the public."[3] The Rules require members of the bar to do all of the following:

- Maintain a cordial and respectful demeanor and be guided by a fundamental sense of integrity and fair play in all their professional activities.
- Be civil in their dealings with one another and with the public and conduct all court and court-related proceedings, whether written or oral, including discovery proceedings, with civility and respect for each of the participants.
- Abstain from making disparaging, demeaning or sarcastic remarks or comments about one another.
- Abstain from any conduct that may be characterized as uncivil, abrasive, abusive, hostile or obstructive.
- Make all reasonable efforts to reach informal agreement on preliminary and procedural matters.
- Attempt expeditiously to reconcile differences through negotiation, without needless expense and waste of time.
- Abstain from pursuing or opposing discovery arbitrarily or for the purpose of harassment or undue delay.
- If an adversary is entitled to assistance, information or documents, provide them to the adversary without unnecessary formalities.
- Abstain from knowingly deceiving or misleading another lawyer or the court.
- Clearly identify for the court and other counsel changes that he or she has made in documents submitted to him or her by counsel or by the court.
- Act in good faith and honor promises and commitments to other lawyers and to the court.[4]

Generally speaking, most legal communities in Wisconsin, even the "large" ones, are fairly small when it comes to crossing paths with our colleagues. This is particularly true in our industry of civil – often personal injury – litigation. There are so many karmic adages that fit in terms of why collegiality can be so important to truly advancing the best interests of one's client: what goes around comes around; what's good for the goose is good for the gander, and so on. Because none of us, despite Burr's declaration otherwise, are in fact inimitable, we will all make mistakes and miss deadlines and require some grace throughout our careers. Collegiality should not be confused with weakness or docility. For example, when you agree to give opposing counsel an extension on discovery; or forgive a missed deadline and allow for supplemental documents to be filed, you are not necessarily "giving in" or "letting things slide." Rather, you have created a credit in the bank of favors and when, inevitably, you find yourself in need of an extension, you will be much more likely to receive this kindness without the need for motions (that may not go your way and come with additional cost and investment of time) or protracted arguments. Moreover, as almost every judge will tell you, discovery motions are disfavored both in law and in practice. Refusing to permit opposing counsel a courtesy that is often given as a matter of course will reflect poorly upon the attorney who forces the matter into court. While an attorney may feel that refusing to grant extensions or extending grace to opposing counsel makes them a formidable adversary, this behavior often may shape an attorney's reputation in the local legal community and with the courts. Judges are people too – they talk about which attorneys are reasonable and which are not. And while judges will do their best to apply the law to the facts of a case before them, do not doubt that when an obstinate,

uncooperative attorney finds themselves seeking reprieve from the court, they may not find the court all too willing to offer forgiveness.

We think it is also worth noting that while collegiality between counselors is recommended, this cooperative and professional manner of interaction should also extend from attorney to staff. It is not uncommon in our line of work to need to communicate frequently with paralegals, office administrators, and legal assistants from offices other than our own. We are confident in suggesting that if you treat opposing counsel's staff with respect, patience, and general courtesy, you will accomplish far more in achieving whatever goal it is you have than if you are condescending, patronizing, and demanding. How you interact with staff can also impact your relationship with trial counsel. After all, our staff are usually in the room where it happens and are integral in getting a case across the finish line. We are both personally very protective of our staff and if we hear that opposing counsel has been rude, aggressive, or demeaning to our support team, you can rest assured that our inclination to extend courtesies, kindness, or favors to the offending attorney will be severely curtailed.

Likewise, the hiring and training of staff should include an emphasis on collegiality not only with other attorneys but also with opposing counsel's staff. Staff often have discretion in calendaring for an attorney. A well-regarded staff member will often get the benefit of the doubt from other staff in the legal community. This can result in ease of calendaring, a priority for responsive discovery and even travel considerations when scheduling depositions, mediations, or hearings.

While we each must, for the most part, abide by the wishes and direction of our clients, it is highly unlikely that anyone has actually had a client say to them, "I forbid you from cooperating with counsel, and I insist you shout whenever necessary, and be as obstructionist as possible." We certainly understand that not every missed deadline can be forgiven, but honestly most can without significantly prejudicing your client. The case can still be zealously defended without throwing away your shot. Few missed deadlines are worth insisting upon strict adherence. If the case can proceed with an altered deadline, most courts will permit a modification of the scheduling order. We also understand that sometimes strategy requires certain defenses or claims be kept close to the vest, but like so many things, there is also often an opportunity for professional courtesy and balance. We are not suggesting that anyone disadvantage their client in the interest of "being nice." But building trust and establishing relationships with opposing counsel of mutual respect and cooperation will often far outweigh any "risk" that may attach to such behavior.

Despite our best efforts, there are always going to be folks on the other side of the "v." who just seem determined to make life miserable, for themselves and everyone involved in a given matter. If your practice involves defending claims, it will pose a challenge but you need to do whatever you can to fairly evaluate the case on its merits and try *not* to allow your feelings about opposing counsel impact your professional judgment and evaluation in terms of a case value. The converse is also true: if you and opposing counsel have worked cooperatively and there is an ease in exchange of information and a rapport amongst yourselves, you must also not *overvalue* a case because of this relationship. Your duty to your client is to fairly evaluate the claims presented, the presentation of the injured party or claimant, and the available defenses. However, we continue to insist that building collegiality will still benefit you and your client by reducing cost and creating efficiencies.

Specific to reducing cost and creating efficiencies is the possibility to directly negotiate claims when opposing counsel is someone who you trust, respect, and work well with. We all fall into the trap of simply scheduling mediations, and going through the motions because the court inevitably orders ADR. But when you and opposing counsel can communicate effectively and exchange information in a direct and trustworthy manner, it is often possible (with a client's consent) to directly negotiate certain claims. In the right case, this can save considerable time and expense while still achieving a favorable

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outcome for the client. Even in cases that are destined for formal mediation, a preliminary phone call to opposing counsel discussing settlement parameters can help opposing counsel temper client expectations before the mediation. This not only makes opposing counsel's job easier, but it also increases the likelihood of settlement. Make a note that often the world is wide enough for both plaintiff's and defense counsel to exist and do their jobs effectively without the constant need for acrimony and superfluous efforts.

Finally, we would caution our more colorful and outspoken colleagues to avoid reducing their feelings about opposing counsel, litigants, or judicial officers to writing. While we do not think everyone needs to spend as much time as Angelica did analyzing the placement of a comma in a letter, it is worth considering what you choose to put on paper and what might be left better unsaid. We will all face situations where our buttons are pushed, or we have strong feelings about a particular attorney or party in any given case. But before sharing those feelings on paper, consider reading out loud what you intend to write and consider how it might sound if it was read in court, in front of a judge. Every document we create throughout the course of litigation has the potential to become an exhibit attached to a motion to compel at some point down the road. And there can be times when our inability to temper our quill can result in disciplinary conduct or even licensure suspension.[5] No attorney wants to be the subject of a summary of "Attorney Discipline" article in Wisconsin Lawyer.

There is never one right way to do anything in life, yet we would strongly suggest that we all consider how beneficial collegiality is to our goals as lawyers. Apart from being required of us pursuant to the rules of professional conduct and the oath we all swore when joining the Bar, there is a benefit to working cooperatively with opposing counsel on the cases we find ourselves involved in. History has its eyes on all of us, and we are confident that the most meaningful legacy to create is one of civility, professionalism, and respect.

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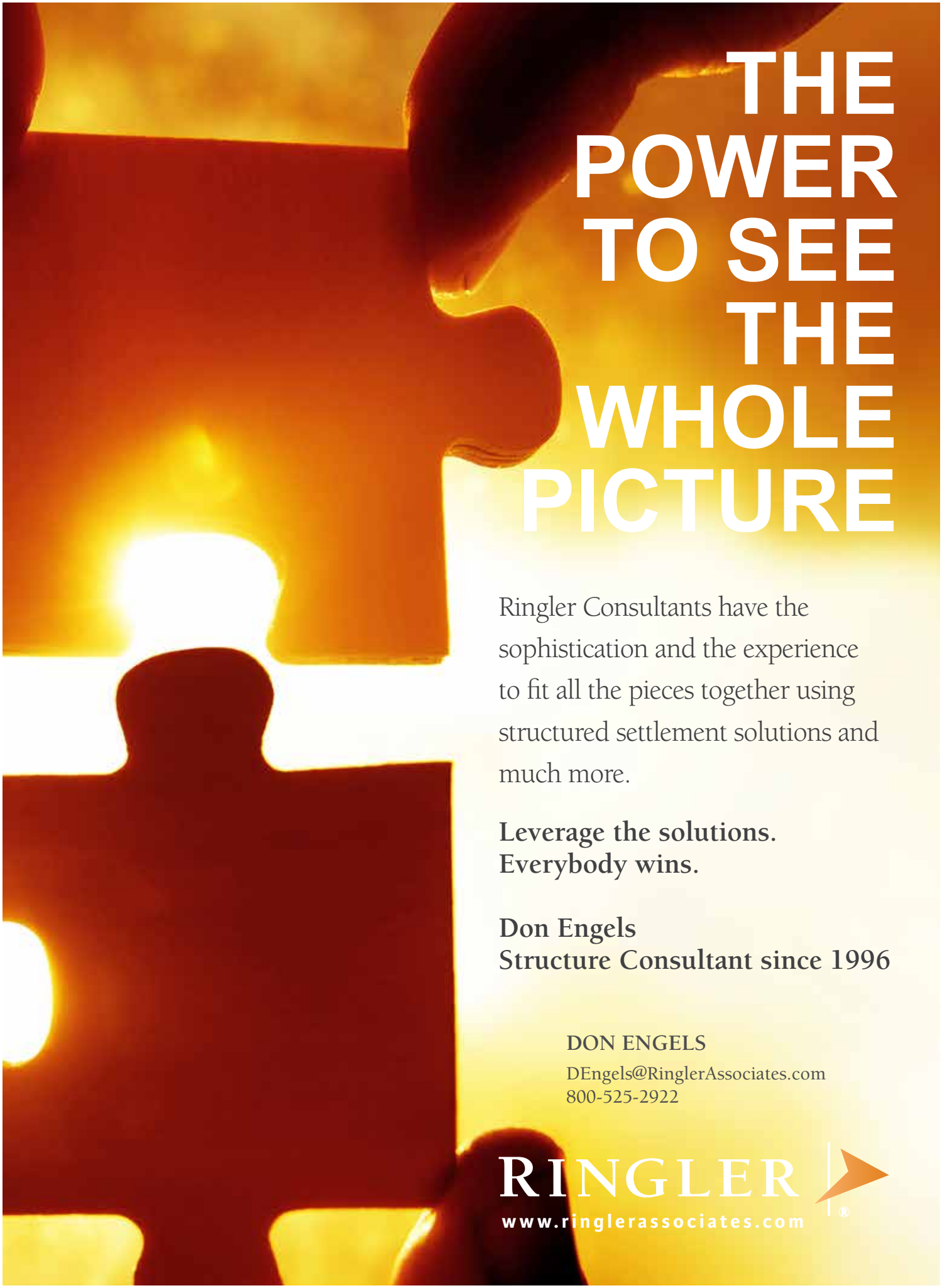
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Wisconsin Supreme Court Overrules *Pharmacal* and Rejects "Other Property" Requirement for Initial Grant of CGL Coverage

by: Joseph M. Mirabella, Simpson & Deardorff, S.C., Doug Raines, Husch Blackwell LLP, and Henry E. Koltz, Crivello, Nichols & Hall S.C.

In *5 Walworth LLC v. Engerman Contracting*,[1] the Wisconsin Supreme Court recently decided that for the purposes of determining whether an initial grant of coverage exists under a commercial general liability policy, the definition of "property damage" does not require "other property" damage—*i.e.*, that there be damage to the work or product of someone other than the insured.

Wisconsin law has long held that faulty workmanship or a defective product alone is not enough to constitute an "occurrence" under the policy,[2] but there had been some degree of uncertainty as to whether there could be "property damage" if there was an accident that resulted in the need for only repair or replacement of the work or product of the insured.

Less than ten years ago, in *Wisconsin Pharmacal Co., LLC v. Nebraska Cultures of California, Inc.*,[3] the Wisconsin Supreme Court decided that the definition of "property damage" implicitly meant damage to property other than the work or product of the insured, and it adopted the "integrated system" test, which is derived from the economic loss doctrine, to aid in that analysis.[4] The integrated system test asks whether the damaged property is part of an integrated whole, such that any damage by one component to another constitutes damage only to the product itself, rather than to "other property."[5] If the only damage was to components of an integrated system, then there was no "property damage" and therefore no initial grant of coverage.

In *Pharmacal*, the product at issue was a probiotic pill with a defective ingredient, and the court held that "combining a defective ingredient with other ingredients and incorporating them into supplement tablets, formed an integrated system."[6] And because damage by one component of that integrated system to another component could not constitute damage to "other property," there was no initial grant of coverage under the policy issued to the defective ingredient supplier and others.[7]

In *5 Walworth*, the court was asked to apply those rules to a high-end residential pool complex, which allegedly cracked and leaked and had to be replaced along with the surrounding contiguous deck, plumbing, electrical, and a retaining wall.[8] The insurers for the general contractor who built the pool structure and a subcontractor that supplied concrete for the pool bowls argued that the entire pool structure was an integrated system such that damage to any of its components must be treated as damage to the work or product of the insureds. Consequently, the insurers argued that there was no initial grant of coverage because any damage caused by the leaking pool to the surrounding components of the pool complex did not constitute "property damage."

The Wisconsin Supreme Court rejected the insurers' arguments. In doing so, the court reversed course and abandoned the rule that "property damage" requires damage to other property, and overruled

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Pharmacal insofar as it adopted the integrated system test to analyze whether an initial grant of coverage exists. The court decided that its "analysis in *Pharmacal* went wayward in two respects,"[9] with those being that it strayed too far from the language of the insurance policy, which does not explicitly require damage to other property, and that it should not have borrowed from the economic loss doctrine and adopted the integrated system test to evaluate the initial grant of coverage.

5 Walworth characterized its holding as maintaining fidelity to the well-settled three-step coverage analysis spelled out in other cases that predated *Pharmacal*.[10] Under that three-step coverage analysis, courts must "first examine if the policy makes an initial grant of coverage, then analyze if any exclusions preclude coverage, and finally, review if any exceptions to a particular exclusion reinstate coverage."[11] By inserting an "other property" requirement into the initial grant of coverage step, *Pharmacal* had conflated the first and second steps in the same way that some past decisions had imprecisely discussed them together in finding no coverage for damage to the insured's work or product.[12]

The court explained that *5 Walworth* "illustrates inconsistencies that cannot be reconciled," forcing it to "choose whether to remain consistent with our prior cases, or follow the new course charted by *Pharmacal*."[13] And while the court was "reluctant to reject the holding of a case so recently decided," it concluded that it "must bring consistency and clarity to this area of law" that was "muddled by *Pharmacal*'s missteps."[14]

With the "other property" requirement eliminated from the initial grant of coverage analysis, *5 Walworth* held that there were factual issues that precluded a no-coverage declaration in favor of the insurers.[15] The pool had allegedly cracked and leaked, destabilizing the surrounding soil, which could be an "occurrence" even if the only things damaged were other parts of the pool complex.[16] From there, coverage for damage to the insured's own work or product could still be limited by the policy's exclusions, but, again, there were issues of fact that precluded summary judgment on those issues.[17] Accordingly, the matter was remanded for additional discovery and litigation on coverage and the merits.

From a historical perspective, this decision constituted a rather remarkable reversal for a court that only seven years earlier had broadly adopted the integrated system test to evaluate insurance coverage and that had expansively interpreted the economic loss doctrine. This article will examine the court's stated reasoning for its reversal of course and then analyze the extent to which the integrated system test may continue to be utilized in evaluating insurance coverage.

Adoption of "Other Property" Requirement for Initial Grant of Coverage was the Result of Imprecise Discussion in Past Cases

Generally speaking, CGL policies provide an initial grant of coverage for "property damage" caused by an "occurrence." The term "occurrence" is typically defined to mean an "accident," and the term accident has been interpreted to mean "an event or condition occurring by chance or one that arises from unknown causes and is unforeseen and unintended."[18] The term "property damage" is typically defined in pertinent part to mean "physical injury to tangible property, including all resulting loss of use of that property."

CGL policies also typically contain a number of so-called business risk exclusions, and included among those exclusions are a set of provisions designed to eliminate coverage for damage to the work or product of the insured. The sum of these parts is a CGL policy that generally provides coverage for accidents that cause damage to property other than the work or product of the insured but does not cover the repair or replacement of the insured's own defective work or product.

Because CGL policies generally do not cover the repair or replacement of the insured's own work or product, it is generally understood that there is

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no coverage where the *only* claim is for repair or replacement of the insured's work or product. But the precise analytical path to that conclusion had arguably been left unclear by Wisconsin appellate decisions that predated *Pharmacal*. Specifically, the question in that situation was whether the policy does not provide an initial grant of coverage in the first place or if that initial grant of coverage is extended and then eliminated by the application of the business risk exclusions.

Wisconsin appellate courts have repeatedly emphasized that faulty workmanship or product that merely required replacement, without more, does not constitute an "occurrence."[19] The lessons of those cases are that "while faulty workmanship is not an 'occurrence,' faulty workmanship may cause an 'occurrence.'[20] Stated otherwise, 'faulty workmanship may cause an unintended event … and that event—the "occurrence"—may result in harm to other property.'"[21]

That reference to "other property" damage at the very least implied that such damage is necessary to distinguish "property damage" caused by an "occurrence," for which there is an initial grant of coverage, from simply a claim for faulty workmanship or product that had to be repaired or replaced, for which there is no initial grant of coverage. And indeed, that is exactly what *Pharmacal* explicitly decided. "The insured risk (*i.e.*, physical injury to tangible property) applies to physical injury to tangible property other than, but which is caused by, a defect in the product or work the insured supplied."[22]

Accordingly, *Phamacal* held that "an integrated system analysis is necessary when evaluating coverage under a CGL policy," because courts "must decide whether the product is to be treated as a unified whole or whether a defective component can be separated out such that the claimed damage constitutes damage to property other than the defective component itself."[23] In situations where the only thing alleged to be damaged is a structure in which the insured's product is a component, the integrated system analysis is dispositive of whether there can be "property damage" caused by an "occurrence" or merely defective work or product that results in no more than the need to repair or replace that product.[24]

In *5 Walworth*, the court rejected that interpretation it had so recently endorsed and decided instead that *Pharmacal* had relied on a misapprehension of the underlying precedent. The passages from *Wisconsin Label* and *Vogel* upon which *Pharmacal* had relied "were not in the initial grant of coverage discussions; they were general comments on the purpose of a CGL policy."[25] And while it remains true "that the risk insured in a CGL policy includes damage to property other than to the product or completed work itself … this is true because of the business risk exclusions, not the initial coverage determination."[26]

Despite Obvious Analytical Similarities, the Court Overruled *Pharmacal's* Adoption of the Integrated System Test to Analyze Insurance Coverage

Pharmacal borrowed from the economic loss doctrine when it adopted the integrated system test. "The economic loss doctrine is a judicially created doctrine under which a purchaser of a product cannot recover from a manufacturer on a tort theory for damages that are solely economic."[27] The economic loss doctrine exists to serve three primary functions: "(1) to maintain the fundamental distinction between tort law and contract law; (2) to protect commercial parties' freedom to allocate economic risk by contract; and (3) to encourage the party best situated to assess the risk of economic loss, the commercial purchaser, to assume, allocate, or insure against that risk."[28]

Tort law exists "to protect people from misfortunes which are unexpected and overwhelming," and, accordingly, imposes liability on manufacturers for injury or damage caused by defective products.[29] Contract law and remedies, by contrast, hold the parties to the benefit of their bargain, which may include the obligation to repair or replace a product that does not perform as intended.[30] So when a product fails in its intended use and injures only itself, thereby causing only economic damages

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to the purchaser, "the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong."[31]

In keeping with those principles, the economic loss doctrine distinguishes between "economic losses" and damage to "other property."[32] "Economic losses" are those damages "arising because the product does not perform as expected, including damage to the product itself or monetary losses caused by the product."[33] "Other property" damages are "claims based on personal injury or damage to property other than the product, or economic loss claims that are alleged in combination with noneconomic losses."[34]

"Distinguishing between economic loss and physical harm to property other than the product itself is often a difficult task."[35] Accordingly, Wisconsin adopted the integrated system test to assist in that line-drawing exercise in the context of the economic loss doctrine. *Wausau Tile* endorsed the Restatement explanation of the integrated system rule:

> A product that nondangerously fails to function due to a product defect has clearly caused harm only to itself. A product that fails to function and causes harm to surrounding property has clearly caused harm to other property. However, when a component part of a machine or a system destroys the rest of the machine or system, the characterization process becomes more difficult. When the product or system is deemed to be an integrated whole, courts treat such damage as harm to the product itself.[36]

The underlying reasoning is pragmatic and intuitive. "Since all but the very simplest of machines have component parts, a holding that a component of a machine was 'other property' would require a finding of 'property damage' in virtually every case where a product damages itself."[37]

The integrated system test has been repeatedly and expansively endorsed by Wisconsin courts applying the economic loss doctrine over the last few decades. Among the cases where the court did so were ones involves such products as a tail rotor drive system in a helicopter,[38] windows in a new construction home,[39] an entire new construction home,[40] a comprehensive renovation of a commercial building,[41] and adhesive in aftermarket vehicle lights.[42] These cases broadly stand for the proposition that an integrated system is not simply components of a whole that are literally, technically indivisible, but rather "integral parts of a greater whole [that] did not serve an independent purpose."[43]

Given that CGL policies also are intended to and generally[44] do provide a grant of coverage for the insured's tort liability arising from unforeseen accidents causing physical damage to others, but not for the insured's contractual liability to repair or replace its own defective work or product that did not live up to expectations, *Pharmacal* borrowed from economic loss doctrine jurisprudence, in particular the integrated system test, to aid in the insurance coverage analysis.

However, *5 Walworth* held that doing so strayed too far from the policy language.[45] "*Pharmacal* painted with a broad brush and seemed to incorporate the integrated systems analysis into all determinations of whether 'property damage' has occurred under the terms of a CGL policy."[46] But that "runs headlong into the fundamental principle running through our insurance cases that policy interpretation should focus on the language of the insurance policy," and do so "without resort to tort principles such as the economic loss doctrine, and by implication, the integrated systems analysis used to assess its application."[47]

5 Walworth acknowledged that the insurers were simply asking the court to "enforce what [the court] said in *Pharmacal*—that the integrated systems test is 'necessary when evaluating coverage under a CGL policy.'"[48] But because the court decided that doing so—at least at the initial grant of coverage


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stage—would be "importing language that does not exist into a policy," the supreme court decided that *Pharmacal* must be overruled to that extent.[49]

Integrated System Test Applicable to Business Risk Exclusions?

Pharmacal recognized that "a CGL policy's sole purpose is to cover the risk that the insured's goods, products, or work will cause bodily injury or damage to property other than the product or the completed work of the insured," so it was necessary to determine whether damage to the tablet via the incorporation of the defective ingredient constituted physical injury to tangible property other than the insured's product.[50] Consequently, *Pharmacal* stated that "to answer the question of what constitutes other property that has suffered physical injury, we analyze whether a supplement tablet is an integrated system because if it is, damage to the system has been defined as damage to the product itself, not damage to other property."[51] Although *5 Walworth* was clear that the integrated system test was improperly applied at the first step of the coverage analysis to determine whether there was "property damage," it conspicuously left open the possibility that such "an 'other property' analysis … **may be relevant to the policy's business exclusions (stage two)**."[52]

That makes sense intuitively, because the issue of where the insured's work or product ends and "other property" begins must still be reckoned with in order to apply the business risk exclusions. In other words, it remains true that "since all but the very simplest of machines have component parts," a holding that damage by one component of it that was the insured's work or product to another component of it that was not the insured's work or product would lead to a finding of covered property damage that falls outside the scope of the business risk exclusions "in virtually every case where a product damages itself."[53]

Importantly, the scope of the business risk exclusions—specifically, but not necessarily limited to, the "your work" exclusion—has been interpreted to apply to the insured's work or product *and* damages directly related to the repair and replacement of the allegedly defective product.[54] *Jacob* involved defective masonry that caused water infiltration into a home, and the court of appeals held that the scope of the "your work" exclusion[55] extended to damages for costs associated with investigating the cause of the damage, assessing the extent of the needed repairs, and repairing or replacing the defective work," because those things were "directly related to the repair and replacement of the defective work."[56]

Jacob contrasted those excluded damages with other categories of damages "such as relocation costs, temporary repairs, loss of use and enjoyment of the residence, and repair of the interior of the residence are not directly the consequence of repairing or replacing [the insured]'s defective work," but instead were "collateral damage to the [plaintiff's] 'other property' (the interior of the residence) and the costs associated with addressing and correcting that situation." There was coverage for those damages.[57]

This interpretation of the "your work" exclusion is analogous to the application of the integrated system test. Each recognizes that it is infeasible to look myopically at solely the work or product of the insured when applying the business risk exclusions, and that in order to serve the purpose of a CGL policy, the scope of the coverage must necessarily exclude unavoidable costs incurred to repair or replace the insured's uncovered work or product.

The integrated system test would accomplish that by eliminating coverage for other components of an integrated system that are damaged because the insured's work or product was defective. "A product that fails to function and causes harm to surrounding property has clearly caused harm to other property. However, when a component part of a machine or a system destroys the rest of the machine or system [that] is deemed to be an integrated whole, courts treat such damage as harm to the product itself."[58]

Jacob was decided twenty-five years ago and while its interpretation was later endorsed by the Wisconsin Supreme Court,[59] no subsequent

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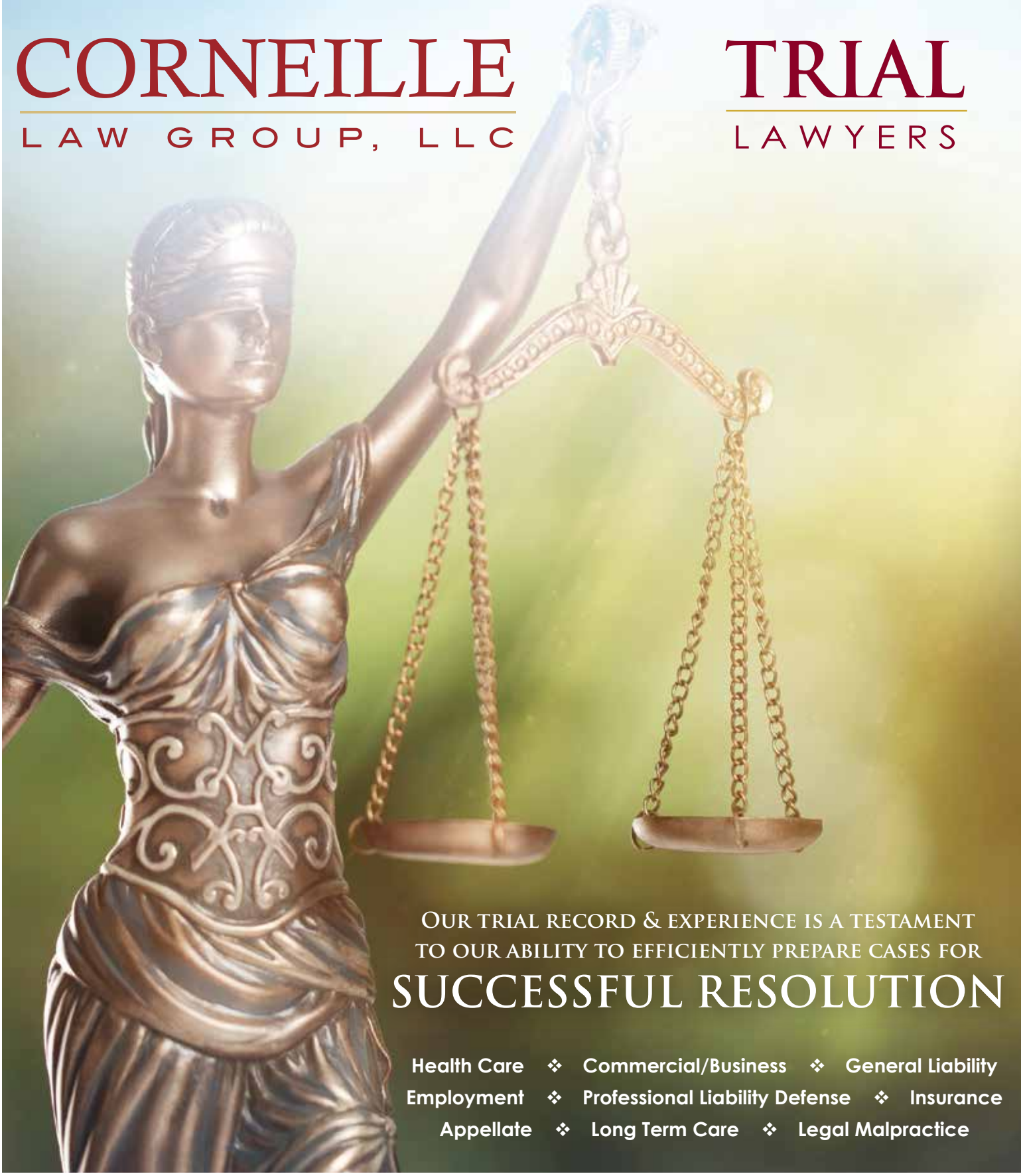

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Wisconsin case has endeavored to more precisely define the boundaries of the "your work" (or "your product") exclusion.[60] Perhaps the supreme court's dicta in *5 Walworth* is an invitation to do just that.

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43 *Id.* ¶¶43-46.

44 Wisconsin has rejected an absolute "tort/contract line of demarcation for purposes of determining whether a loss is covered by the CGL's initial grant of coverage," because the focus must be "on the incident or injury that gives rise to the claim, not the plaintiff's theory of liability," lest coverage turn on the whims or creativity of the pleader. *Acuity*, 339 Wis. 2d 217, ¶ 30; *Talley v. Mustafa*, 2018 WI 47, ¶ 20, 381 Wis. 2d 393, 911 N.W.2d 55.

45 *5 Walworth*, 408 Wis. 2d 39, ¶¶ 25-29.

46 *Id.* ¶ 25.

47 *Id.* ¶ 26.

48 *Id.* ¶ 30.

49 *Id*. ¶ 31.

50 *Pharmacal*, 367 Wis. 2d 221, ¶ 26.

51 *Id.* ¶ 27 (citing *Wausau Tile*, 226 Wis. 2d at 249).

52 *5 Walworth*, 408 Wis. 2d 39, ¶ 23 (emphasis added).

53 *Wausau Tile,* 226 Wis. 2d at 250.

54 *See Jacob v. Russo Builders*, 224 Wis. 2d 436, 592 N.W.2d 271 (Ct. App. 1999).

55 The court interpreted a "your work" exclusion in *Jacob* but much of the analysis seems intuitively to apply with equal force to a "your product" exclusion.

56 *Jacob*, 224 Wis. 2d at 450-51.

57 *Jacob* also held that "still other categories of the Jacobs' damages fall into a gray area," such as "the expert fees relating to the investigation of the cause and extent of the damage and the refinancing costs," for which the appellate record was insufficient to categorize as covered or uncovered. *Id.* at 451.

58 *Wausau Tile,* 226 Wis. 2d at 249-50 (quoting Restatement (Third) of Torts § 21 cmt. E (1997)).

59 *Vogel*, 236 Wis. 2d 504, ¶ 21 (abrogated on other grounds by *Ins. Co. of N. Am. v. Cease Elec. Inc*., 2004 WI 139, 276 Wis. 2d 361, 688 N.W.2d 462).

60 *See, e.g*., *Wosinski v. Advance Cast Stone Co*., 2017 WI App 51, ¶ 149, 377 Wis. 2d 596, 901 N.W.2d 797.

Sure, I Can Help You with That: Petitioning a Wisconsin Probate Court to Decide Who Controls the Final Disposition of a Decedent's Remains

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

We all get asked from time to time if we can help a friend or family member with a legal matter outside of insurance defense work. Usually, we refer the person to an expert in that field, whether it be criminal law, family law, bankruptcy law, etc. Occasionally, however, we get asked to help with something that is out of our comfort zone, but still within our skill set.

For example, I was recently asked by a distant relative if I could help him settle a dispute with his ex-wife regarding the final disposition of their deceased son's remains. The son died unexpectedly without a will and without a surviving spouse or any children. My relative wanted to cremate his son's body, as that was his son's express wishes. His ex-wife wanted a burial. She hired an attorney who was pressuring him to give in and the funeral home was refusing to do anything until a consensus was reached. My initial reaction: I have no idea what to do. But after some research, I found out I could actually help.

I. Where Do I Start?

The first question my relative asked was, "What kind if attorney do I need?" I was not quite sure, so I did what most people would do – I Googled it. I searched, "Wisconsin law + death + decision + burial + cremation." One of the top results was Wis. Stat. § 154.30, which is titled, "Control of final disposition of certain human remains." I was on the right track.

According to Wis. Stat. § 154.30, when a person dies without a written instrument designating a person to control the final disposition of their remains, subsection (2) creates a hierarchy of priority of individuals (similar to the wrongful death statute, Wis. Stat. § 895.04) who may control the location, manner, and conditions of a decedent's final disposition. The first level of priority is the surviving spouse of the decedent.[1] If the decedent was unmarried, the next level of priority is the surviving child(ren) of the decedent.[2] If the decedent was survived by more than one child, the majority of the surviving children has control of the final disposition.[3] If the decedent died without a spouse or children, the next level of priority is the surviving parents of the decedent.[4]

I was starting to get somewhere. I now knew that, because the decedent died without a will and without a surviving spouse or children, his parents had the right to control the final disposition of his remains. Seems straightforward, but what happens when the parents cannot agree?

Pursuant to Wis. Stat. § 154.30(c)1., if the individuals on the same level of priority are unable to agree on the location, manner, and/or conditions of a decedent's final disposition, they may petition the probate court for the county in which the decedent resided at the time of his or her death to designate an individual "as most fit and appropriate to control the final disposition." In reaching a decision, Wis. Stat. § 154.30(3)(c)2. lists five non-exhaustive

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factors that the probate court may consider:

1. The reasonableness and practicality of the proposed final disposition;
2. The degree of the personal relationship between the decedent and each of the individuals claiming the right of final disposition, including whether the decedent was estranged from any of the individuals;
3. The desires of the individual or individuals who are ready, able, and willing to pay the cost of the final disposition;
4. The express written desires of the decedent; and
5. The degree to which any proposed final disposition would permit maximum participation by family members, friends, and others who wish to pay final respects to the decedent.

Now I knew what had to happen – my relative needed to file a petition with the probate court asking that he be designated the person most fit and appropriate to control the final disposition of his son's remains. His son resided in West Allis at the time of his death, so the petition needed to be filed in Milwaukee County Probate Court. I searched the probate forms on the Wisconsin Court System website for an example petition, but there were none.[5] I called a probate attorney I know and she did not have any examples either.

In speaking with my relative, I also learned that his son and ex-wife were estranged at the time of his death. Under Wis. Stat. § 154.30(3)(b)4., an individual who is otherwise authorized to control disposition under the order of priority specified in the statute, but who was estranged from the decedent at the time of their death, loses their right to control the decision. Thus, I knew there was another avenue for my relative to obtain the relief he sought: petition the probate court for a determination that his son and ex-wife were estranged at the time of his death, such that the ex-wife does not have the right to control the disposition of their son's remains under Wis. Stat. § 154.30(3)(b)4. If the court ruled they were estranged, my relative would have the sole right of control under Wis. Stat. § 154.30(2)(a)4.

It was at this point that I felt qualified to assist my relative. I could draft and file the petition and attend an evidentiary hearing if necessary. My next question, though, was whether I could ethically represent my relative.

II. Can I Ethically Do This?

I had never represented a relative before. I was not sure if there were any rules prohibiting or regulating representation of family members. So, I looked at the Rules.

Nothing in the Supreme Court Rules (SCR) outright prohibits representing friends or family members in legal proceedings or assisting them with legal matters. I identified one Rule in particular, however, that could be relevant.

Rule 20:1.7 prohibits representation that involves a concurrent conflict of interest, which can exist if (1) one client would be directly adverse to another; or (2) if there was a significant risk that the representation of one or more clients would be materially limited by the lawyer's responsibilities to another client, a former client or third person or by a personal interest of the lawyer. The rule goes on to note, among other provisions, that a lawyer may represent a client even if a conflict in these circumstances exists if the lawyer believes they can provide competent and diligent representation to each client and each client gives informed consent to waive the conflict.

On its face, Rule 20:1.7 may not seem all that relevant. But it is the last part of the Rule ("a lawyer shall not represent a client if … there is a significant risk that the representation ... will be materially limited by a third person or by a personal interest of the lawyer.") that could become an issue when representing a relative. The ABA comments to SCR 20:1.7 provide illustrations. For example, Comment

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[1] states that, "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client." Comment [8] notes that even with no direct adverseness, a conflict of interest exists if there is a significant risk that a "lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." Similarly, Comment [10] states that a "lawyer's own interests should not be permitted to have an adverse effect on representation of a client."

Generally speaking, it is possible that representing a relative could be materially limited by a third person (such as another relative) or by the lawyer's personal interests. ABA Comments [26] and [27] to Rule 20:1.7 address such nonlitigation factors:

> **Nonlitigation Conflicts**
>
> [26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. … Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. …
>
> [27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

Luckily, in my situation, the relative was far enough removed that none of these factors were of concern in my case.

III. Filing the Petition

I told my relative that I could help him *pro bono*. I explained we needed to file a petition and obtain an order from the probate court in Milwaukee. I searched the WSCCA Class Code List and found a code we could use to electronically file the petition: 50100 - Probate-Unclassified.[6] When we went to file the petition, however, I found out that my client's ex-wife opened an estate for their son the same day. So, our filing got rejected and we needed to file the petition within the estate action.

I explained to my client that I do not practice estate law and cannot assist him with the estate matter generally. My representation would be limited to obtaining an order granting him authority to control the disposition of the decedent's remains. So that everyone would understand my role, I drafted and filed a Notice of Limited Appearance pursuant to Wis. Stat. § 802.045, which states, in relevant part:

> **Limited scope representation permitted — process.**
>
> (1) AUTHORIZED. An attorney's role in an action may be limited to one or more individual proceedings or issues in an action if specifically so stated in a notice of limited appearance filed and served upon the parties prior to or simultaneous with the proceeding. Providing limited scope representation of a person under this

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section does not constitute a general appearance by the attorney for purposes of s. 801.14.

(2) Notice of limited appearance. The notice of limited appearance shall contain the following information:
   (a) The name and the party designation of the client.
   (b) The specific proceedings or issues within the scope of the limited representation.
   (c) A statement that the attorney will file a notice of termination upon completion of services.
   (d) A statement that the attorney providing limited scope representation shall be served with all documents while providing limited scope representation.
   (e) Contact information for the client including current address and phone number.

After I filed my Notice of Limited Appearance and a Petition Regarding Control of the Final Disposition of the Decedent's Remains, the court held a status conference. During the status conference, opposing counsel objected to our Petition and asked for deadlines to submit briefs and affidavits. I was concerned about credibility issues and asked the court to schedule an evidentiary hearing instead, along with deadlines for the parties to submit witness lists and exhibits. The probate court agreed with me and scheduled the matter for an in-person evidentiary hearing and ordered the parties to file witness and exhibits at least two weeks before the hearing.

I spent several weeks gathering evidence from my client and others that we could use at the hearing to prove that the decedent and his mother were estranged at the time of his death, and that my client was the person most fit and appropriate to control the final disposition of his son's remains. We lined up five witnesses who were going to testify at the hearing and filed 29 exhibits by the deadline.

We were not surprised when the other side did not file any exhibits or a witness list. We felt confident in our position and were prepared to support it with plenty of evidence. In the end, the other side surrendered and agreed to cremation. In fairness, we offered to share the cremated remains with her, which she accepted.

IV. Closing Thoughts

Once we reached a resolution, we notified the probate court and memorialized the agreement in a stipulation and order, which the court signed. We faxed the signed order to the funeral home and the decedent's body was cremated the next day.

Now that my representation had ended, I needed to file and serve a Notice of Termination of Limited Appearance with the court pursuant to Wis. Stat. § 802.045(4), which I did. Upon filing and service, my representation was automatically terminated without further order of the court.[7]

In the end, I felt proud being able to assist a family member during a very difficult and stressful time in his life, and delighted to learn that our skill set as insurance defense attorneys allowed me to comfortably venture into an unfamiliar area of law.

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References

1 Wis. Stat. § 154.30(2)(a)2.

2 Wis. Stat. § 154.30(2)(a)3.

3 *Id*. "[F]ewer than the majority of the surviving children may control the final disposition if that minority has used reasonable efforts to notify all other surviving children and is not aware of opposition by the majority to the minority's intended final disposition."

4 Wis. Stat. § 154.30(2)(a)4.

5 https://www.wicourts.gov/forms1/circuit/formcategory.jsp?Category=26 (last visited Feb. 18, 2024).

6 https://wscca.wicourts.gov/wcisClsCodeList.do?form=caseSearch.xsl (last visited Feb. 18, 2024).

7 See Wis. Stat. § 802.045(4) ("TERMINATION OF LIMITED APPEARANCE. At the conclusion of the representation for which a notice of limited appearance has been filed, the attorney's role terminates without further order of the court upon the attorney filing with the court, and serving upon the parties, a notice of the termination of limited appearance.").

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It Happens to the Best of Us: Avoiding and Mitigating Defaults

by: Erik J. Pless and Alicia M. Stern, One Law Group S.C., and Kristen S. Scheuerman, Weiss Law Office, S.C.

At some point in every defense attorney's career there will inevitably be a moment of panic when the realization hits that an answer to a complaint has not been filed in a timely fashion. This moment of panic may be self-inflicted, or it could be the result of a client error. Regardless of the cause for panic, the attorney must, when faced with this inevitable circumstance, efficiently develop a strategy for mitigating the default and implement that strategy as promptly as possible to avoid the worst consequences.

In civil cases, the defendant must file an answer within forty-five days if an insurer is named as a defendant or if the action is based in tort.[1] In other civil cases that do not involve tort claims or an insurance company defendant, the answer is due within twenty days.[2]

When faced with the realization that a timely answer has not been filed, as indicated at the outset, the most important thing to do is develop a plan, and then implement that plan accordingly.

I. Developing and Implementing a Plan

Step 1: Analyze the situation. The first step in developing a strategy for mitigating a default is to accurately assess the situation. Start by asking the following questions:

- Was this answer due within forty-five days or twenty days?
- When was the defendant or defendants served? Based on the dates of service, calculate when the answer was due and then determine how many days a default situation has been ongoing. Keep in mind that under Wisconsin law, "the day of the act … from which the designated period of time begins to run shall not be included," but "[t]he last day of the period so computed shall be included."[3] Use a reliable calendar calculator that takes in to account things like leap year to ensure you determine the precise deadline.
- Check CCAP and determine whether a motion for default has been filed and, if so, when that motion was filed.
  - If a Motion for Default Judgment has been filed, is there a hearing scheduled? Who is the Judge assigned to the case?
  - If a Motion for Default Judgment was filed, has the court already granted default judgment, and if so, when?
  - Determine whether there are any other parties in the case that are aligned in interest and further determine whether those parties have already filed an answer.

Step 2: Ascertain what happened and why. After the defendant was served, where did the pleading go and who was notified of the litigation? Start to document this information so you can begin to formulate an explanation as to how the answer failed

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to be filed in a timely manner. When investigating the initial response to service, consider trying to determine whether there was a deviation from the otherwise standard course of practice when new complaints are received. Keep in mind that this is not an exercise in assessing blame. Rather, this is an analysis of what happened and why so that you can formulate an explanation that could explain to a court how "excusable neglect" was the cause for the untimely filing. Understanding the cause of the failure could also potentially prevent any such issues in the future.

Step 3: Ascertain whether there has been any prejudice to the plaintiff or plaintiff's attorney. Obviously, the shorter the time between a missed answer deadline and the answer's ultimate filing, the less likely there will be any prejudice and the less likely a default judgment would actually be entered. However, if you find yourself in a situation where there is a more significant period of time between when the answer should have been filed and when you are discovering the error, consider whether other deadlines passed related to the litigation (such as a scheduling conference or possible disclosure deadlines). You will also want to quickly assess whether any substantive discovery has been conducted in the case since the missed deadline.

Step 4: Formulate a remediation plan. At the risk of misusing a legal term of art, if you have missed a deadline to file an answer, time is of the essence. Consider how quickly can responsive pleadings be filed? Is opposing counsel an attorney with whom you have worked in the past and are comfortable asking for an extension? Regardless of the level of comfort with the plaintiff's attorney, immediate remedial steps need to be taken to mitigate any prejudice and avoid a default judgment being entered. This is important because the legal standard for seeking an enlargement of time is different than the legal standard for vacating a default judgment.

So, the deadline for filing an answer has passed. First, responsive pleadings should immediately be drafted and filed. A notice of appearance, answer, and a motion to enlarge the time within which to answer should be filed the same day a missed deadline is discovered or as soon as reasonably possible thereafter.

Second, call the plaintiff's attorney and ask for an extension. If your extension is granted, no harm has been done (aside from the anxiety and stress you undoubtedly endured). If an extension is granted, confirm the extension with the plaintiff lawyer in writing and immediately notify (and relieve) your client. If counsel does not agree to an extension, send an email to opposing counsel confirming that an extension was requested and the request was denied. Following a rejected extension request, defense counsel should immediately begin formulating a strategy to establish excusable neglect on the part of the insurer, insured, attorney, or law firm involved.

As suggested earlier, it is very important to ask your insurance company client what the normal standard procedure is concerning new litigation and why, in this case, the standard procedure did not result in a timely transmission to defense counsel for answering (assuming a delay in transmission was a part of the cause for missing the deadline). Hopefully, there will be an unusual circumstance that will rise to the level of excusable neglect. To successfully argue that excusable neglect was the cause for the missed deadline, counsel will need to have a thorough understanding of the law as it relates to defining that term. Generally, any unusual or "out of the norm" situation could be the basis for excusable neglect. It is almost certain that your busy schedule or the amount of work on your desk distracting you from a deadline will *not* be considered excusable neglect. In reviewing the existing body of law as it relates to the concept of "excusable neglect," it is clear that there needs to be some reason for the missed deadline beyond a busy and demanding practice that a court can cite as a reason to grant a motion to enlarge time.

After you have discussed with your client their standard procedures for handling new lawsuits, an affidavit should be drafted for signature by someone at the insurance company or the defendant's business explaining the standard procedures and further explaining why or how those procedures failed in this particular instance.

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II. What is Excusable Neglect?

Our courts have considered the following instances of neglect to be excusable: health conditions that interfere with timely work, children's issues, unusual parental responsibilities, a family emergency or a work emergency (such as glitches and unforeseen issues arising out of the implementation of file management software). "Clerical error" can also potentially be the basis for a finding of excusable neglect but proceed with caution if this is the grounds for your delay. Setting the law aside for just a minute, blaming support staff for missed deadlines is generally a poor excuse for an attorney's failure to uphold his or her own professional responsibilities. And yet we are all human and all equally fallible, so mistakes are made. Whether a clerical error or support staff misstep rises to the level of excusable neglect is a matter of discretion for the court.

Wisconsin law concerning default judgments is found in section 801.15, which provides as follows:

> When an act is required to be done at or within a specified time, the court may order the period enlarged but only on motion for cause shown and upon just terms … If the motion is made after the expiration of the specified time, ***it shall not be granted unless the court finds that the failure to act was the result of excusable neglect***.[4]

Statutory language aside, our courts have held that an enlargement of time to serve and file an answer is not a favor to be granted to a litigant as a matter of grace.[5] A party's neglect, carelessness, or inattentiveness is not "excusable neglect."[6] Further, it is not enough that the failure to timely file an answer be unintentional or inadvertent, since nearly any pattern of conduct resulting in default could be cast as due to mistake or inadvertence or neglect.[7] Further, the purported existence of a meritorious defense has no bearing on whether the neglect was excusable and is insufficient by itself to entitle a defaulting party to relief.[8]

Our courts have considered various "clerical errors" and concluded the same constituted excusable neglect under the following specific fact patterns:

a. The *Casper* Case

Excusable neglect was found when an insurance company (National Union) failed to timely answer an amended complaint. When the amended complaint was received in a division office, counsel determined the amended complaint needed to be handled and answered by counsel out of another department. She followed "specific procedures to administer and coordinate the handling of legal documents" but apparently USPS lost the document and it was never delivered to the other department. In holding that this clerical error constituted excusable neglect, the *Casper* court explained that, "it appears that despite the carefully structured process to assure timely answers to the legal process … and they have a process that attempts to assure timely answer to the legal process … the correspondence was lost."[9]

b. The *Royal Insurance* Case

Royal failed to Answer timely and demonstrated that a clerical error inadvertently caused the Complaint to be attached to its pre-suit file, which was then sent off for duplication. When the file returned, the Complaint was immediately noted and an Answer was filed within 24 hours of the discovery.[10]

Wisconsin law is also fairly clear on what is *not* "excusable neglect." Our courts have expressly held that "[s]ummer vacations and heavy workloads do not provide, in and of themselves, a sufficient excuse for missing statutory deadlines."[11] The press of other business does not amount to an excuse for failing to meet a statutory deadline.[12] Confusion about forwarding papers from one office to another due to reorganization is not excusable neglect.[13] A lawyer who misplaced a client's file while relocating his law office and thus missed a statutory deadline was not forgiven for excusable neglect.[14]

In another matter resulting in a similar holding to *Dugenske*, a substantial, sophisticated bank that

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had a "well-established" procedure for the orderly and timely handling of lawsuits failed to timely file, resulting in default judgment and the bank claimed that the summons and complaint were lost in transit after it changed the address for its legal-processing department.[15] However, the court was not satisfied that this constituted excusable neglect. The court considered that prior to the lawsuit being filed, the bank had been contacted by the Plaintiff's attorney, and that even after service, the Bank was sent letters regarding the lawsuit.[16] The court concluded that there was no reason to believe that the bank's "established procedures" would not have at least alerted them to the fact a suit was imminent or why the "established procedures" could not accommodate a routine address change.[17] The *Mohns* case is one of the reasons we have emphasized having a thorough understanding of your client's standard procedures and to further determine, with precision and specificity, what kind of break down occurred to lead to the missed deadline.

Mohns is not the only example we have of some sort of procedural breakdown not rising to the level of excusable neglect. A similar result was reached by the *Leonard* court when it failed to enlarge the time for filing when a lawsuit was routed to an accounting department and then not answered.[18] In *Leonard*, DuPont Mutual Insurance Company ("DuPont") received the Plaintiffs' lawsuit and then forwarded the Complaint to its adjuster, Wisconsin Adjusting Service ("WAS").[19] A WAS claims manager received the file and sent it to an accounting department for payment of an invoice, with instructions to return the file to the claims adjuster; nothing was said about when the adjuster needed the file back. *Id*. The file was not returned before the Answer was due and a default judgment against DuPont for its failure to timely answer was granted.[20]

In upholding the default judgment and refusing to find "excusable neglect," the court of appeals focused on the fact that DuPont had no established procedure in place to ensure a timely return of legal documents.[21]

> A clerical error may constitute excusable neglect. We agree; but, here, there was no showing of unintentional misplacement. Rather, the Leonard/Conley file was *intentionally* sent to the accounting department without any established procedure to ensure a timely return. This was not a "clerical" error. DuPont and its agent were aware of the complaint and of the need to file a timely answer. WAS offered no explanation of why its accounting department failed to send the file back to the insurance adjuster, and the only reason the adjuster offered for failing to check on the file was that he was busy.[22]

III. Has a Default Already Been Granted?

Wisconsin law concerning excusable neglect prior to default judgment being rendered is very different from Wisconsin law concerning relief from an existing default judgment. Prior to the grant of a judgment, the standard utilized by the circuit court is one of "excusable neglect" as evidenced by the language found within section 801.15. However, the law concerning relief from default is far less forgiving. Under current Wisconsin default jurisprudence, a circuit court may exercise judicial discretion to grant relief from an existing default when – in weighing the correct balance to strike between finality and fairness – the circuit court determines that "extraordinary circumstances" are present.[23] A circuit court weighing this balance in an exercise of its discretion applies a five-factor analytical framework – based on section 806.07(1)(h) but known colloquially as the *Miller* factors – to determine whether to grant relief:

(1) *Character of the litigant's choices*: Whether the judgment was the result of the conscientious, deliberate and well-informed choice of the party seeking relief;
(2) *Effective assistance of counsel*: Whether the party seeking relief received the effective assistance of counsel;

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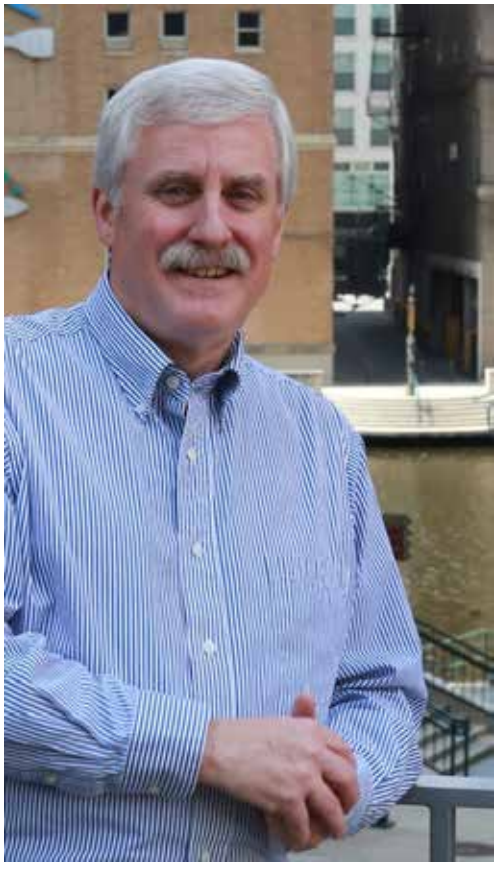

Jim Mathie established Mathie Mediation Services in 2016. Since devoting his entire practice to mediation, hundreds of attorneys have retained his services to mediate their disputes. Jim's four-office downtown Milwaukee suite provides ample space for any mediation. Jim also travels throughout Wisconsin – 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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(3) *Finality and merits considerations*: Whether relief is sought from a judgment in which there was no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments;
(4) *Meritorious defense*: Whether there is a meritorious defense to the claim; and
(5) *Inequity in granting relief*: Whether there are intervening circumstances making it inequitable to grant relief.[24]

The party seeking relief from an existing default bears the burden to prove that the conditions for granting relief exist.[25] Sharp (perhaps some would say unethical) practitioners may attempt to mislead a court into using the *Miller* factors prior to a default judgment being rendered but that is certainly not advisable. When defending a motion for default judgment, practitioners should take particular care to inform the court of the proper standard for reviewing the motion and distinguish the standard for vacating a default judgment from the required to enlarge time prior to a default judgment.

Consider the following scenarios:

> **Scenario #1:** A new client calls in a panic just realizing that a two-month-old complaint has just been "found" on the adjuster or claim attorney's desk. Default judgment has not been granted but a motion for default has already been filed by the plaintiff's attorney. Both the insurer and the insured have been served and the answer is two weeks overdue.

This scenario probably does not rise to the level of "excusable neglect" absent some compelling explanation of why the complaint was "lost" on the desk of a person responsible for ensuring that the complaint gets answered in a timely fashion. Typically, a family emergency would be the only compelling explanation.

> **Scenario #2:** An attorney calls you seeking your help in getting out of a default judgment that was entered against a client of his. She explains that she was on vacation when suit was filed and the client dropped it off at her office. The next day the attorney's sole paralegal broke his leg and required emergency surgery. Later that week, a temporary worker who was filling in and answering phones did not understand the significance of the complaint and simply filed it away in the client's file. Two months later, the client calls irate after being mailed a copy of a default judgment.

This scenario almost certainly rises to the level of excusable neglect. A medical emergency involving the person responsible for proper handling of the complaint rarely would be considered "inexcusable."

> **Scenario #3:** In an (alleged) seven-figure litigation with several dozen pleadings and several parties, an amended complaint is not answered by an attorney actively defending the case. Months go by during which time multiple depositions are taken and all parties proceed as normal –as if the amended complaint were answered in a timely fashion. Several months after the failure to answer, the plaintiff's attorney realizes that no answer was filed and files a motion for default judgment complete with supporting brief and affidavit establishing the defense attorney's professional "impeccable credentials," experience and accomplishments and that of his State Bar of WI Certified Paralegal together with a copy of a published case in which the defense attorney advocated the importance of the timeliness of pleadings as well as an article written by the defense

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attorney concerning case law on the consequences of default. Both the attorney and the paralegal erroneously thought the answer had been timely filed. The only explanation was a highly unusual business emergency involving law firm management that affected both the attorney and paralegal.

This scenario rises to the level of excusable neglect despite the "press of business" situation. No prejudice could be shown by the plaintiff in a failure to answer an amended complaint and the case progressing as normal.

> **Scenario #4:** The complaint has been transmitted with file materials to defense counsel on a timely basis. Defense counsel has weeks to draft the answer. She drafts responsive pleadings. They sit on her desk in rough form waiting to be revised and sent out after review by the insured and adjuster. The insured and adjuster never get back to her with input about the draft answer. New work comes in. A different case suddenly increases in value after a new expert report comes in. An IME deposition goes poorly causing a re-evaluation. An associate attorney has a problem in a case that requires attention. Clients are asking for reports on files. The answer gets buried on her desk under discovery responses that can wait. She discovers that an answer was due ten days after it should have been filed. She and the plaintiff attorney have a historically contentious relationship.

This probably would not rise to the level of excusable neglect as the normal press of work is typically not enough to be considered "excusable."

IV. A Paralegal's Perspective

In working for busy civil litigators with heavy caseloads, managing deadlines for even one attorney can be overwhelming. Between discovery requests and adhering to scheduling order deadlines, some days a paralegal can find themselves spending every minute available just making sure that all the deadlines for the day are accounted for and met.

In an insurance defense or civil litigation defense practice, one of the most important deadlines is answering a complaint. Using a multi-method way of making sure that the complaint gets answered may seem redundant, but it is always better to be safe than sorry. A little extra work on the backend can prevent even more work later. When a new file comes in for representation, the first thing to be conducted is a conflict check to make sure that the firm can accept the case. At the same time, it is important to find out when the potential client(s) was/were served with the complaint. Knowing the date of service allows you to calculate when the answer must be filed.

Once a conflict check is cleared and the answer deadline is determined, in most practices, putting that deadline on the handling attorney's electronic calendar is the first thing that should be done. Keep in mind that each practice needs to create a system that works for the nuances of the attorneys and staff involved. For example, some attorneys do not use a computer so perhaps a deadline needs to be added to a physical desk calendar. If you are using an electronic calendar, adding deadlines and assigning a category color, such as red or another color that stands out, can also be helpful in drawing attention to the deadline as it approaches.

Simply calendaring the deadline, though, is not enough. Ensure you have reminders set in advance of the deadline; if time allows, perhaps include a seven-day calendar reminder and another reminder three days before the deadline, and even a reminder the day before a critical deadline. Using another color-category for these reminders can create another way to draw attention to the fact that a critical deadline is on the horizon (for example, if you see a significant

amount of green reminders, or yellow reminders, your eyes will be trained to look ahead and make note of upcoming deadlines).

If you work with an attorney who prefers to have a paper copy of a printed complaint in their inbox, it can also be helpful to put a colorful sticky note with the answer due date in bold marker on the top of the complaint so that there is a continuous reminder in front of the handling attorney at their desk. While these extra efforts may come at the expense of the trees, having multiple and diverse methods in place for addressing these critical deadlines can be worth the impact on our forests.

It is also worth considering whether a double-layer, or triple-layer of protection could be helpful. Instead of just adding deadlines and reminders to the handling attorney's calendar, these same deadlines and reminders should be added to the lead paralegal and/or legal assistant's calendar as well. It would not be unexpected for the handling attorney to get sidetracked or bogged down in an unexpected project or pressing matter, and if people other than the attorney are monitoring and watching for approaching deadlines, it is less likely that a critical deadline will be missed. The proverbial "two heads are better than one" adage certainly rings true when it comes to managing and adhering to deadlines.

After the answer has been filed with the court, putting a notation such as "DONE" on the electronic calendar due date is another step that some may find helpful when looking ahead at future deadlines.

V. Best Practices

Although most of this has been covered or alluded to, it is worth repeating and summarizing our advice for not only responding to a default situation, but ways to potentially avoid that panic-induced reality all together.

Hire the best people. Of course, this is easier said than done, but having a support team that knows the way you work, anticipates your needs, understands the critical importance of legal deadlines, and effectively manages office procedures and your calendar is so important. However, great support staff are also only as good as the leadership they observe and emulate. Open, effective communication between attorney and support staff is critical. Put your heads together to find ways that work for your practice to create an effective internal docket, including hard deadlines, reminders, and layers of safeguarding that attempt to avoid the possibility of a missed deadline. This could include deadlines on not only the managing attorney's calendar, but also on the lead paralegal's calendar, and perhaps even a legal assistant's calendar.

If a mistake is discovered and a deadline is missed, file your responsive pleadings right away without delay. As soon as pleadings are filed, make a phone call to opposing counsel to try and avoid a headache by securing an extension. Plaintiffs' counsel would also be well-advised to think long and hard about what might be to gain from refusing an extension. The court always has some discretion in granting a request to enlarge time and has further discretion in vacating a default judgment and yet we all know what the law generally allows and what it does not. If the motion to enlarge time is likely to be granted, perhaps there is more benefit to the plaintiff in working collegially to grant an extension rather than oppose it. There is a famous book that says something along the lines of, "Do unto others as you would have them do unto you," and perhaps this is advice worth taking to heart if you find yourself asked to extend grace to someone who made a mistake just in case you may yourself make a mistake at some point during the pendency of a case. Finally, if the answer has been drafted and is ready to be filed, then waiting until the last few days of the forty-five (or twenty) day period yields few, if any, significant benefits. An answer that already has been filed cannot become "lost on a desk" when new and more pressing matters demand the attention of the defense attorney, associate, or paralegal working on the file.

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Erik J. Pless is an attorney at One Law Group S.C. in Green Bay. He received his J.D. degree from the University of Wisconsin in 1993 and a B.A. magna

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Alicia M. Stern is a paralegal at One Law Group S.C. Alicia joined One Law Group, S.C. in 2023. After High School, she graduated from Blue Sky School of Massage with certifications in multiple Neuromuscular Therapies working primarily with physical therapy patients. In December 2007, she made a career change to the legal field and joined a general practice firm in Shawano assisting in everything from Municipal, Family, Criminal, Wills, Power of Attorneys, and Real Estate law. Alicia and her family made a move to the Green Bay area, and she has been working as Attorney Pless's paralegal handling civil defense matters since 2014. Alicia completed the Paralegal Training Program through the University of Wisconsin Oshkosh and is also a State Bar of Wisconsin Certified Paralegal.

Kristen S. Scheuerman joined Weiss Law Office, S.C., in October 2022 after spending more than a decade at a large Fox Valley law firm, where she practiced as a Shareholder. Kristen's practice has always been focused on personal injury and civil litigation, and before joining Weiss Law Office, she also served as a municipal prosecutor. Throughout her career, Kristen's practice has also included appellate work in a variety of practice areas. Kristen earned her bachelor's degree from Lawrence University and her law degree from Marquette University Law School. She is admitted to practice in all Wisconsin state courts and both district courts.

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Legislative Update: 2023-24 Session Concludes with Few Changes to Civil Justice Policy

by: Adam Jordahl, The Hamilton Consulting Group, LLC

On behalf of WDC, the Hamilton Consulting Group monitors developments affecting civil litigation, insurance law, and worker's compensation policy in Wisconsin, including Legislative opportunities and threats impacting Wisconsin's civil litigation environment; Rule petitions to the Wisconsin Supreme Court affecting civil trial and appellate practice; and Case law from precedential opinions issued by the state's supreme and appellate courts.[1] The Hamilton Consulting team is available to serve WDC and its members and can be contacted at jordahl@hamilton-consulting.com.

I. Introduction

At the time of writing in late February, the Wisconsin Legislature was nearing the end of the 2023-24 legislative session. Key political and policy issues that occupied lawmakers this session included redistricting, tax reform, local government funding, workforce development, alcohol regulation, childcare, and abortion. Very few proposals affecting civil litigation, whether positive or negative for civil defense practitioners, were poised to become law this session.

II. Limiting Noneconomic Damages

WDC has registered in support of legislation, Senate Bill 613, that would cap the recovery of noneconomic damages from trucking companies and commercial drivers.[2] Authored by Sen. Cory Tomczyk (R-Mosinee) and Reps. John Spiros (R-Marshfield) and Rick Gundrum (R-Slinger), the aim of the bill is to protect employers from unreasonable "nuclear verdicts" and stabilize insurance costs for the trucking industry.[3]

The legislation sets a per-victim limit (*not* a per-accident or per-incident limit) of $1 million in noneconomic damages that can be recovered from a commercial motor vehicle carrier for injury, death, or other loss caused by an employee of the carrier while acting within the scope of employment.

Over time, trucking has become progressively safer, yet trucking-related litigation costs and verdicts have risen rapidly, out of sync with the facts on the ground. This raises costs for anyone who buys or sells a product shipped by truck. The large truck fatal crash rate in America fell by 34 percent between 2000 and 2020, and research suggests that 70 percent of fatal crashes involving a truck were the sole fault of passenger vehicle drivers.[4]

Meanwhile, a study of civil verdicts over $1 million, conducted by the American Transportation Research Institute, found a 967 percent increase in the average size of verdicts in the trucking industry between 2010 and 2018. This increase is not due to overall inflation or healthcare cost inflation, which increased at much lower rates of 16 percent and 26 percent, respectively.[5]

SB 613 cleared both houses of the Wisconsin Legislature on February 20, 2024. First, the Senate voted 21-11 to pass the bill, with one Republican joining all Democrats present in opposing the bill.[6] The Assembly concurred in the bill by voice vote later that day.

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Given the partisan nature of the Senate vote, and opposition from the plaintiff's bar, it seems likely that Gov. Tony Evers (D) will veto this reform, despite broad support for the legislation among Wisconsin's business community.[7]

III. De-Icer Certification and Liability Protection

Senate Bill 52, authored by Sen. Andre Jacque (R-De Pere) and Rep. Elijah Behnke (R-Oconto), creates a voluntary training and registration program for commercial applicators of products for snow and ice removal.[8] The program, which would be managed by the Department of Agriculture, Trade, and Consumer Protection, is intended to encourage applicators to use ice and snow removal procedures that also protect water quality, in part by reducing salt use.

For registered applicators and the businesses and individual property owners that hire them, the bill provides protection from civil liability for a hazard related to snow and ice accumulation. This liability exemption would apply provided that the registered applicator used approved treatment methods and did not commit a reckless, wanton, or intentional act or omission.

The Wisconsin Civil Justice Council successfully worked with the bill authors, legislative committees, and other stakeholders to draft strong, sensible liability protection language to incentivize applicators and business owners to take advantage of this program. WDC provided significant input during the drafting process and negotiations.

On January 16, 2024, the Senate voted 17-15 to pass the bill, with only Republicans voting in favor.[9] Five Republicans joined all Democrats present in opposing the bill. The Senate adopted a substitute amendment[10] to update the language of the bill and rejected another amendment[11] that would have watered down the lability language and left property owners and commercial applicators vulnerable to tenuous claims. On February 22, 2024, the Assembly concurred in the bill by voice vote.[12]

The legislation is supported by a mixture of business and environmental groups but opposed by the plaintiff's bar.[13] Given the partisan nature of the votes in the Legislature and the opposition from plaintiff's attorneys, a veto from Gov. Evers appears to be the most likely outcome for this bill.

IV. Regulation of Nonrecourse Civil Litigation Advances

Legislation to create consumer protections for nonrecourse civil litigation advances (colloquially known as "consumer lawsuit lending") was reintroduced this session.[14] It was authored by Sen. Eric Wimberger (R-Green Bay) and Rep. Ron Tusler (R-Harrison).

A nonrecourse civil litigation advance is one way that some financiers invest in lawsuits. It is a form of payment advance provided to a plaintiff in a lawsuit, with repayment conditioned on and derived from the plaintiff's recovery, if any. These transactions are currently unregulated in Wisconsin. The goal of this reform is to protect consumers and control litigation costs by limiting the total finance charge and requiring financiers to clearly disclose the terms of these agreements and provide certain consumer protections in their contracts.[15]

This legislation received public hearings in both houses of the Legislature and a positive committee vote in the Senate. WDC registered in support of this legislation, which was developed by the Wisconsin Civil Justice Council with broad support from the state's business community.[16] Ultimately, the bill was not scheduled for a floor vote in either house by the end of the session.

As expected, a representative of the consumer legal finance industry testified against the bill at the public hearings. He said that the firms he represents oppose a cap on the total finance charge

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but generally support the bill's other regulatory provisions to address "bad actors" in the industry.

V. Other Legislation

In addition to the bills discussed in detail in this article, a variety of bills proposing new private causes of action were introduced this session. Very few of these bills advanced beyond the committee stage in the legislative process, and none of them were expected to become law this year. A notable and concerning trend for civil defense and insurance attorneys and the state's business community is an increasing willingness among legislators of both parties to propose new civil causes of action as a way of advancing policy goals that could otherwise be accomplished by regulatory or other means.

VI. Conclusion

On behalf of WDC, the Hamilton Consulting Group monitors developments affecting civil litigation and insurance law in Wisconsin, including:

- Legislative opportunities and threats impacting Wisconsin's civil litigation environment.
- Rule petitions to the Wisconsin Supreme Court affecting civil trial and appellate practice.
- Case law from precedential opinions issued by the state's supreme and appellate courts.[17]

The Hamilton Consulting team is available to serve WDC and its members. If you have any questions about legislative or policy matters, please contact the author at jordahl@hamilton-consulting.com.

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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 publications, client reports, and member communications. Adam earned a B.A. from Rice University, graduating cum laude with distinction for his senior thesis on internet memes and political messaging.

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News from Around the State: Trials and Verdicts

The WDC regularly publishes notable trial verdict results in its Journal and on its website. If you have recently tried a civil case to verdict in Wisconsin, you are encouraged to submit a brief summary of the case to Journal Editor Vincent Scipior at vscipior@cnsbb.com. Please include the case caption, county and case number, a description of the facts and legal issues for trial, information about any pre-trial settlement offers and demands, and verdict outcome (liability and damages).

AnnaMaria Wallace, et al. v. Milwaukee County Transit System, et al.
Milwaukee County Case No. 22-CV-7043
Trial Dates: February 5-6, 2024

Facts: This case involved a low-speed collision between plaintiff's vehicle and a Milwaukee County Transit System bus. Plaintiff was stopped at a red light when she was rear ended by the bus. The bus was travelling at less than 2 mph when it made minor bumper contact. As a result of the accident, plaintiff was claiming a right shoulder rotator cuff tear, neck pain, low back pain, and headaches. She underwent surgery and was claiming $106,356.42 in past medical expenses and $4,554.59 in lost wages. Permanency was alleged.

Issues for Trial: Prior to trial, the parties stipulated to liability. The only issues for trial were causation and damages.

At Trial: The jury awarded $10,000 in past medical expenses, $50,000 in past pain, suffering and disability, $0 in wage loss, and $10,000 in future pain, suffering and disability. The jury further found, however, that the motor vehicle accident was not a cause of the injuries alleged by plaintiff, resulting in no recovery.

Verdict: $0

For more information, contact Alex H. Koritzinsky at akoritzi@amfam.com.

Sharon Boehler, et al. v. Am. Family Mut. Ins. Co., et al.
Columbia County Case No. 21-CV-117
Trial Dates: December 19-20, 2023

Facts: Plaintiffs (husband and wife) were both claiming neck and back injuries from a 2018 car accident. The wife was claiming over $25,000 in medical expenses. The husband was claiming $496 in chiropractic expenses. The husband was also making a derivative claim for loss of consortium.

Issues for Trial: The parties stipulated to liability prior to trial.

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At Trial: Plaintiffs used their treating chiropractor from Hall Chiropractic as their expert. The defense called Dr. Randal Wojociehoski, DO to defend against the wife's permanency claim. The jury awarded $5,000 in damages to the wife and $3,500 in damages to the husband.

Plaintiff's Final Pre-Trial Demand: $70,000
Defendant's Final Pre-Trial Offer: $30,000
Verdict: $8,500

For more information, contact Matthew J. Van Keulen at mvankeul@amfam.com.

Jordan M. Bales v. State Farm. Mut. Auto. Ins. Co., et al.
Dane County Case No. 22-CV-2094
Trial Dates: November 13-14, 2023

Facts: This was a car accident case tried before the Honorable Everett Mitchell in Dane County. The plaintiff was claiming soft tissue injuries with permanency and future treatment.

Issues for Trial: Prior to trial, the parties stipulated to $54,574.79 in past health care expenses, $2,264.42 in out-of-pocket expenses, and $2,549.25 in wage loss.

At Trial: Plaintiff's attorney asked the jury to award $450,000 to $600,000 in total damages during closing arguments. The jury found plaintiff 25% causally negligent and awarded $55,000 for past pain, suffering, and disability, $19,000 in future medical expenses, and $35,000 in future pain, suffering, and disability, resulting in a total judgment of $126,291.35 (below defendant's final pre-trial offer).

Plaintiff's Final Pre-Trial Demand: $213,000
Defendant's Final Pre-Trial Offer: $154,000
Verdict: $126,291.35

For more information, contact Austin Doan at adoan@boardmanclark.com.

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Calendar of Events

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Spring Conference
The American Club
Kohler, WI

August 8-9, 2024
2024 WDC Annual Conference
Wilderness Hotel and Golf Resort
Wisconsin Dells, WI