INSTITUTE FOR REFORMING GOVERNMENT

WILL THE SUPREME COURT MAKE WISCONSIN "ALABAMA NORTH" AGAIN?

OVERVIEW

A strong Wisconsin economy depends on a fair, efficient, predictable legal system that prevents a "jackpot justice" approach to civil law. Wisconsin was once known as "Alabama North," a tort hellhole for employers and a haven for trial lawyers looking to make a quick fortune. Under Governor Scott Walker, the State adopted a number of laws that better balanced the civil legal system with common-sense reforms that incorporated many principles of law from the federal courts. This improved tort climate was a key factor driving Wisconsin's rise in the "Best State for Business" rankings throughout the 2010s, rising from the 41st best state for business in 2010 to a top-ten ranking by 2017.[1]

WHAT YOU SHOULD KNOW

- In 2011 Act 2, Governor Walker and the Legislature made huge strides to rebalance Wisconsin's civil legal system to ensure economic recovery. These included punitive damage caps, a clear standard for expert witness testimony, and safeguards against industry-wide legal liability.
- Without these reforms, Wisconsin would have been an Alabama North, where trial lawyers looking to make a quick buck could take businesses to court over frivolous claims.[2]
- Wisconsin's economic well-being depends on the courts more than some employers and business owners realize. Tort climate is often placed alongside tax rates and regulatory burden as the key three factors when considering where to locate a business. Without these reforms, Wisconsin would again be a wild west of frivolous claims and nonsensical lawsuits.

WHAT COULD HAPPEN

Many reforms signed by Gov. Walker are at risk of being overturned by future Supreme Court action. The items detrimental to employers and the economy include:

- Helping trial attorneys get a big payday by eliminating personal injury punitive damage caps.
- Reversing product liability limits, potentially making manufacturers liable for injuries caused by products they did not produce.
- Encouraging frivolous lawsuits by no longer requiring the filing party to pay all fees if a suit is found frivolous.
- No longer requiring expert witnesses in trials to base their testimony on facts and data.
- Eliminating statutes of limitations for medical malpractice claims that incentivize prompt filing of cases and resolution of obvious injuries.

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WHAT'S NEXT

The power of the Wisconsin Supreme Court hangs in the balance, with a progressive and conservative candidate running for an open seat in April.

The Wisconsin Supreme Court is currently considering a case (*Estate of Lorbiecki v. Pabst Brewing Co.*) which could fundamentally alter Wisconsin's punitive damages scheme. The case could also be the first to set a precedent undermining the caps, with the second strike coming in future years.

LEGAL BACKGROUND

Under a previous liberal majority led by Chief Justice Shirley Abrahamson, the Wisconsin Supreme Court ruled in favor of those bringing lawsuits, even to the point of striking down duly enacted laws that limited civil liability. In one particularly egregious case, the Court found that the Legislature lacked a "rational basis" for the statute capping medical malpractice damages (*Ferdon v. Wisconsin Patients Compensation Fund, 2005*). The med-mal caps, along with the state's fund for injured patients, are two pillars of our state's health care policy that protect patients, keep costs low, and prevent a physician shortage. Med-mal caps keep insurance affordable for practitioners and hospitals while ensuring injured persons can recover from their suffering. The Supreme Court's activist decision threatened to spiral health insurance premiums in Wisconsin while also exacerbating a physician shortage, especially in rural areas of our state. The Legislature has since enacted new, higher med-mal caps, but these protections are only one Supreme Court decision away from throwing the medical system back into danger.

During that same Abrahamson era, the Court adopted an extraordinarily aggressive and novel theory of industry-wide negligence that held the entire industry liable when a plaintiff could not determine which particular company had provided the harmful product (*Thomas v. Mallett, 2005*). That means that industry could be liable for harmful products that they did not even produce. That decision cast aside centuries of American and British precedent, which had always connected legal responsibility to the particular damage caused. The decision opened the door such that a future court could use it as a precedent to impose industry-wide liability in other settings where multiple companies are engaged in the same business, like firearms production or manufacturing.

ZOOM IN

The Wisconsin Supreme Court has traditionally deferred to the Legislature to make policy judgments about how to structure Wisconsin's civil legal system. Though the judges must apply and live with the system, it is the Legislature's prerogative to make the policy that undergirds the system: should losers pay for frivolous cases, should there be limits on punitive damages, when do claims go stale? However, at various points the Wisconsin Supreme Court has gone beyond its limited role of applying the law to make big rulings based on the common law or the state constitution that undermines these policy judgments, as we saw in the Abrahamson era.

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Endnotes

1 See Chief Executive, "2017 Best States for Business," found here: Business-Friendliness, Location Fuel Wisconsin's Rise.

2 See Wall Street Journal, Alabama North, Aug. 9, 2005, found here: Alabama North - WSJ.