



# *Insurance, Claims and Liability Law*

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**WISCONSIN  
EDITION**

*Brownson & Linnihan, PLLP's  
annual summary of Wisconsin law  
in a format tailored to insurance  
and corporate risk managers and  
claims handlers – **Updated for  
2016***

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## Statutes of Limitations

Statutes of limitations establish the time period during which a plaintiff, insured or claimant must file an action to preserve his claim. The limitations period typically runs from the date of an accident or injury, or from the date of discovery of the existence of a potential claim. In Wisconsin, the following actions must be brought within certain specified time periods:

### 3 Years

- Intentional Torts:
  - Assault, Battery
  - False Imprisonment
  - Libel, Slander
  - Invasion of Privacy
  - False Imprisonment

(Wis. Stat. § 893.57)

- Medical Malpractice  
(Wis. Stat. § 893.55(1m)(a))
- Personal Injury  
(Wis. Stat. § 893.54(1))
- Wrongful Death  
(Wis. Stat. § 893.54(2))

### 6 Years

- Action on Contract  
(Wis. Stat. § 893.43)
- Fraud  
(Wis. Stat. § 893.93(1)(b))
- Legal Malpractice  
(Wis. Stat. § 893.53,  
[Acharya v. Carroll](#))
- Property Damage  
(Wis. Stat. § 893.52)
- Wrongful Taking,  
Conversion or Detention of  
Personal Property  
(Wis. Stat. § 893.51)

*Product Liability: If a strict liability claim is brought as to a product that allegedly damaged or injured a plaintiff or claimant, and the subject product was manufactured 15 or more years prior to accrual of such a claim, a defendant is not liable for damages unless the product's [manufacturer](#) specifically represents that that the item at issue can last for at least 15 years. See, Wis. Stat. § 895.047(5).*

## Insurance Law

### **Resident Licensing**

To secure a Wisconsin resident license for the major lines of insurance, an individual must complete a pre-licensing course at an approved facility, pass an exam for each line and submit an application. To obtain a license for limited lines of insurance, applicants must pass the pertinent exams.

### **Business Entity**

Corporate and partnership licensing is available to certain corporations and partnerships in Wisconsin, but is not mandatory and does not authorize businesses to act as an agent or to conduct business with individual insurers. A firm can secure an insurance intermediary firm license by application. This requires that the firm designate a licensed producer to ensure the firm complies with state law.

### **Nonresident Producer**

Nonresident insurance producers may submit an online or paper application and pay applicable fees to obtain a nonresident license in Wisconsin.

### **Claims Handling**

In Wisconsin, insurance companies must adhere to certain fair and equitable practices while conducting business: *acknowledging communications promptly upon receipt, conducting investigations into and affirming or denying claims within a reasonable amount of time, and attempting to effectuate a fair settlement once liability has become reasonably clear.*

Insurers also owe insureds a general duty to settle claims, encompassed in all insurance contracts, and must exercise *reasonable diligence* in investigating and developing facts to support a good-faith decision to settle or contest a claim; inform insureds that liability may exceed policy limits in any case where that is likely; and timely inform insureds of all settlement offers and regarding the progress of settlement negotiations.

### **Continuing Ed**

A licensed resident insurance agent in Wisconsin must complete twenty-four credit hours of continuing education courses over a two-year period, three of which must be in ethics. One credit hour equals 50 minutes of classroom instruction, and credits cannot be carried over into new reporting periods. Insurance agents who fail to complete and report their continuing education credits will have their license revoked.

## Automobile Liability

### Mandatory Insurance Coverage

Wisconsin requires automobile owners to carry Bodily Injury and Property Damage Liability Insurance, and Uninsured Motorist Coverage.

For policies issued or renewed on or after 11/1/2011, vehicle owners must maintain, at minimum, the following [coverage](#):

- \$25,000 for the injury or death of one person
- \$50,000 for the injury or death of more than one person
- \$10,000 for property damage
- \$25,000 in uninsured motorist coverage for the bodily injury of one person
- \$50,000 in uninsured motorist coverage for the bodily injury of two or more persons

Underinsured motorist coverage is not mandatory in Wisconsin, but, if purchased, minimum limits of \$50,000 per person and \$100,000 per accident apply. Underinsured coverage is required for policies issued or renewed prior to November 1, 2011 at minimum limits of \$100,000 per person/\$300,000 per accident.

Medical payments coverage is available in Wisconsin, but not mandatory; insurers must offer the coverage to their insureds.

### Automobile Coverages

***Bodily Injury Liability*** protects insureds against claims by others injured in an accident

***Property Damage Liability*** pays for property damage sustained by others as a result of a motor vehicle accident involving an insured

***Uninsured Motorist*** applies to bodily injuries sustained by insureds and their family members and/or passengers as a result of being hit by an uninsured motor vehicle while occupying the vehicle, or as a pedestrian

***Underinsured Motorist*** increases an insured's bodily injury protection and applies in cases where an at-fault driver's liability insurance limits are lower than an insured's underinsured benefits

***Medical Payments*** insurance is not mandatory, but pays for medical costs not covered by health insurance and/or funeral expenses of an insured and passengers and applies where an insured is struck by a vehicle while walking or riding in another automobile

## DRAM SHOP

Generally, there is no liability for serving, selling, or procuring alcohol in Wisconsin, but this [immunity](#) does not apply if a person procuring, selling, dispensing or giving away alcoholic beverages causes consumption of alcohol by force, or by falsely representing that the beverage does not contain alcohol. The immunity also does not apply if the person providing alcohol knew or should have known that the recipient was younger than the legal drinking age and if the alcohol consumption by the underage person substantially contributed to the injuries sustained by a third-party.

State law provides a complete defense to all civil liability in these cases if:

- (1) The underage person falsely represented that he was of legal drinking age;*
- (2) The underage person supported that false representation with documentation that he had attained the legal drinking age;*
- (3) Alcoholic beverages were supplied based on a good faith reliance on that misrepresentation; and*
- (4) A reasonable person would have believed, based on the underage person's appearance, that he was of age to drink alcohol*

The Wisconsin dram shop statute does not cover claims on behalf of an intoxicated person, or by the estate or personal representative of an intoxicated person, nor does it cover claims by adult passengers in a vehicle driven by an intoxicated person, or by a passenger's estate or personal representative.

## Premises Liability

### Duty

In Wisconsin, a landowner's liability for injuries sustained on the landowner's property depends upon the fault of the parties involved. The fact that a person is injured in an accident while on the property of another does not automatically entitle the injured party to damages from the landowner. Instead, any comparative negligence on the part of the injured party must be examined. Wis. Stat. § 895.045 provides that the negligence of a plaintiff must be compared separately to the negligence of each causally negligent person. The liability of each person whose negligence is measured at less than 51% is limited to the percentage of the total negligence attributed to that person, while any person whose negligence is found to be more than 51% is jointly and severally liable for the total damages allowed. *See*, Wis. Stat § 895.045(1). Notably, if two or more persons act in a common scheme or plan that results in a third party's injury, those parties are jointly and severally liable for the damage allowed. *See*, Wis. Stat. § 895.045(2).

The duty a landowner owes to those on her property differs depending on the legal status of a person injured on the premises. If an injured individual is a trespasser, a private landowner only has the duty to refrain from causing intentional and willful injury. The duty owed to those performing a service on the property (invitees) is that of ordinary care. A landowner may be liable to social guests (licensees) if injury is caused by a trap on the property or by the landowner's active negligence. A higher standard is imposed on business owners via Wisconsin's Safe Place Statute, which requires that employers do everything "reasonably necessary to protect the life, health, safety or welfare" of employees and frequenters. *See*, Wis. Stat. §§ 101.01 and 101.11.

### Defenses

**Snow and Ice:** The responsibility of keeping sidewalks free of snow and ice is that of the municipalities and not of homeowners. Civil liability on the part of a municipality due to snow and ice on public sidewalks is established based on whether the municipality was unreasonable in allowing the condition to continue based upon the location of the snow or ice build-up, climate conditions at the time, accumulation amounts, practicality of removal, traffic and intended use of the sidewalk. *See* Wis. Stat. § 893.83.

**Lack of Knowledge:** A landowner/occupier has a duty to warn of dangerous conditions where he has superior knowledge of dangers posed by a particular condition. A landowner who creates a dangerous condition is deemed to have knowledge of the danger.

**Recreational Use:** Wisconsin's recreational immunity statute provides that landowners have no legal obligation to keep property safe for recreation, no duty to inspect, and no duty to warn about unsafe natural or artificial conditions. Exceptions to the immunity statute include that landowners are not protected from a malicious failure to warn. Likewise, those who use land for organized sports or receive more than \$2,000 in compensation for the use of their property are not protected. *See*, Wis. Stat. §895.52.

**Open and Obvious Doctrine:** A landowner owes a more limited duty to warn when a dangerous condition is known or obvious. An injured plaintiff's negligence in confronting an open and obvious danger must be compared with any negligence on the part of the defendant landowner.

## Products Liability

### **Claims Generally**

In 2011, Wisconsin enacted the Omnibus Tort Reform Act which limits the scope of products liability actions within the state. There are three types of products liability actions: (all in strict liability): (1) manufacturing defects, design defects and failure to warn.

Under each theory, Wisconsin law requires that a plaintiff show a reasonable design alternative that existed at the time of manufacture.

Further, plaintiffs must prove that a manufacturer's failure to implement an alternative design rendered a product not reasonably safe.

### **Defenses**

Wisconsin law contains five basic defenses to products liability claims:

1. That a plaintiff was under the influence of any controlled substance at the time of the injury,
2. That a product complied with relevant federal or state laws at the time of the sale,
3. That a plaintiff misused, altered, or modified a product,
4. That damage was caused by inherent characteristics of a product that would have been obvious to a consumer, and
5. That a distributor or seller obtained a product in a sealed container and had no reasonable opportunity to inspect or test the product

### **Statute of Repose**

The 2011 Omnibus Tort Reform Act created a statute of repose on products liability claims brought in the state of Wisconsin. The Act bars all products liability claims that involve products manufactured more than fifteen years before the injury. However, the Act does contain two exceptions. First, the fifteen year rule does not apply to damages caused by a latent disease. Second, the fifteen year rule does not apply when the manufacturer promised that the product would last longer than fifteen years.

### **Subsequent Remedial Measures**

Plaintiffs may not offer evidence that a company took subsequent steps to make a product safer. This kind of evidence is only admissible to show that a reasonable design alternative did exist at the time the product was sold.

## Professional Liability

### *Professional Malpractice*

Wisconsin courts hold that professional malpractice claims can be brought in both tort law and contract law since a professional's duty to exercise a certain level of care may be created by a contract in some instances. Such claims are generally subject to a **six-year** statute of limitations.

The Wisconsin Statutes do not identify particular professionals subject to malpractice claims, but courts have held that dentists and engineers qualify as professionals.

### *Medical Malpractice*

Once a medical malpractice claim accrues, a plaintiff must commence an action within **three years** from the date of the [injury](#) or **one year** from the date the injury was, or should have been, discovered. If a health care provider concealed from a patient an act or omission that caused injury, an action must be commenced within **one year** from the date the patient discovered or should have discovered the concealment.

Generally, a plaintiff must offer expert testimony to prove a defendant physician failed to exercise the degree of skill and care required by law. Expert testimony is not required where an ordinary person, using common knowledge, would find that the injury could only have occurred due to a lack of professional care.

### *Legal Malpractice*

In Wisconsin, the statute of limitations applicable to legal malpractice claims is **six years**, although a **three-year** limitations period applies to claims for breach of fiduciary duty against an attorney.

To prove a legal malpractice claim against a lawyer in this State, a plaintiff-client must demonstrate:

- (1) The existence of an attorney-client relationship,
- (2) An act or omission by the attorney constituting negligence,
- (3) The fact and extent of the injury alleged, and
- (4) That the client would have been successful in the prosecution of the underlying action but for the attorney's negligence

## Employment Law

### Discrimination

Wisconsin's Fair Employment Law prohibits an employer from engaging in discriminatory practices on account of any of the following characteristics of employees:

- Age
- Race
- Creed
- Color
- Disability
- Marital status
- Sex
- National origin
- Ancestry
- Sexual orientation
- Arrest or conviction record
- Military service
- Use or nonuse of lawful products off the employer's premises in non-working hours
- Declining to attend a meeting or participate in any communications about religious or political matters

See Wis. Stat. §§111.31-111.395.

An employer's failure to make reasonable accommodations for an otherwise qualified individual with physical or mental disabilities, or due to religion, qualifies as a discriminatory practice unless the accommodation would pose an undue hardship upon the employer's business.

### Termination

In this State, employment is presumed to be on an *at-will* basis. In an at-will employment relationship, an employer may terminate an employee with or without cause.

Still, there are certain recognized exceptions to this general rule:

- ✓ Parties can modify the at-will employment presumption by contract. If the employer violates the contract, the employee has a claim for breach of contract.
- ✓ Employers are barred from terminating an employee based on the employee's decision to join a union.
- ✓ Wisconsin courts will not uphold a termination when it is against public policy – for instance, where an employee files a workers compensation claim, or testifies against the employer in court.

## Whistleblower Claims

### Relief

If it is determined that an employer has violated the Wisconsin Employee [Protection](#) statute, the following forms of relief may be ordered:

- Reinstatement of the employee
- Transfer to another available position
- Expungement of adverse material from employee's personnel file
- Attorney's fees to the employee
- Recommendation of disciplinary proceeding against employer including placement of violation information in personnel file, letter of reprimand, suspension, or termination

**Private Employees** may be protected from retaliatory employment actions by employers. In Wisconsin, private employees may report violations of the Fair Employment laws, the Family Medical Leave Act and labor standards laws. Employees also have **30 days** to report potential safety hazards within a workplace, and healthcare employees may not be retaliated against for reporting violations of local, state or federal laws. An employee may report elder abuse for up to **300 days** after the alleged abuse took place. And, Wisconsin protects employees who report toxic chemicals in the workplace within **300 days** of discovery.

**Retaliation Claims** may be established where an employee demonstrates the following:

- (1) That the employee engaged in activity protected by the statute;
- (2) That the employee was subject to adverse employment decisions; and
- (3) That a causal connection exists between the employee's activity and the adverse employment action.

After an employee proves the above elements, an employer may rebut a claim of retaliation by showing a legitimate and nondiscriminatory reason for the employment action. Even despite an employer's ability to demonstrate a legitimate reason behind the adverse employment action, an employee may still prevail in a retaliation case by establishing a retaliatory motivation for the activity *in addition* to the employer's legitimate motivation.

**State Employees** may not be retaliated against for lawfully reporting that a government employer violated a state, local, or federal law; mismanaged or abused its authority; created a substantial waste of public funds; or created a danger of public health and safety under the Wisconsin State Employee Whistleblower Protection Law.

## Asbestos Personal Injury Cases in Wisconsin

*In Wisconsin, many of the state's asbestos-related claims originate in the Milwaukee because of the city's history of paper manufacturing and metal works industries. Asbestos-related claims are also common in Green Bay, Madison and Waukesha.*

The Wisconsin Supreme Court has not addressed the question of how much exposure evidence a plaintiff in an asbestos-related case must produce to raise a material issue of fact as to causation to avoid a summary judgment motion. The Wisconsin Court of Appeals has also refused to apply a bright-line test in asbestos causation cases. Instead, Wisconsin courts decide asbestos causation issues based on the totality of circumstances surrounding an individual plaintiff and his claims.

In brief, Wisconsin courts determine whether or not a particular product had the effect of producing a harm such that a reasonable person would regard the product as the *cause* of the injury. Some Wisconsin courts follow the substantial factor test, under which a product must have been a substantial factor in bringing about a plaintiff's injury. A plaintiff's showing of a mere possibility that the plaintiff was exposed to the asbestos product will likely not amount to enough evidence to survive a summary judgment motion in the courts of this State.

Wisconsin courts have also denied summary judgment where a plaintiff showed he did the kind of work that used asbestos and that his employer bought or likely bought asbestos from a defendant. From this evidence, a reasonable jury could infer that a plaintiff used asbestos in his work.

One Wisconsin court denied summary judgment when a plaintiff showed only that a defendant company used asbestos-containing products simultaneously with the plaintiff's presence at a work site.

## Wrongful Death Actions

In Wisconsin, a wrongful death claim may be brought by the personal representative of a deceased person or by a person to whom any amount recovered should belong.

The essential elements of a wrongful death claim in this State are: (1) the defendant committed a wrongful act; (2) the wrongful act proximately caused the death of the decedent; (3) there are survivors to be compensated for their losses resulting from the decedent's death; (4) if death had not ensued, the defendant would have been liable to the decedent in an action for damages; and (5) a showing of pecuniary injury to the relative(s) involved.

Wrongful death actions are subject to a **two-year** statute of limitations and begin to accrue upon the death of the decedent, unless the death results from malpractice – in that case, case the two-year period is tolled on the date the malpractice is initially discovered.

### **Recoverable Economic Damages**

In a wrongful death case, a deceased person's next of kin may recover money damages, including:

- *Damages arising from medical expenses and care*
- *Cemetery and funeral expenses*
- *Loss of earnings and earning capacity*
- *Loss of income or support*
- *Cost of substitute domestic services*
- *Loss of employment or business or employment opportunities*
- *Loss of use of property*
- *Cost of repair or replacement*
- *Other monetary losses*

### **Recoverable Noneconomic Damages**

in wrongful death lawsuits include those for:

- *Pain and suffering*
- *Inconvenience*
- *Mental anguish*
- *Emotional distress*
- *Loss of society and companionship*
- *Loss of consortium*
- *Injury to reputation*
- *Humiliation*
- *Other nonmonetary damage*

Wisconsin law caps the amount family members may receive for loss of society and companionship at up to \$350,000 for a deceased adult and up to \$500,000 for a deceased minor. *See*, Wis. Stat. § 895.04.

## Government Immunities

### *Statutory Cap on Liability*

According to the Wisconsin Statutes, tort recovery for damage, injury or death against a government agency or its officers/employees for acts done within an official capacity is limited to \$250,000. *See*, Wis. Stat. § 893.82(6).

Wisconsin law does not allow for the recovery of punitive damages against any government agency, or its officers or employees, for acts done in their official capacity.

### *Discretionary Function Immunity*

Wisconsin maintains the common law rule that, subject to specific exceptions, a state officer or employee is immune from personal liability for injuries resulting from acts performed within the scope of her office.

An important exception to this doctrine of immunity is that a public officer or employee is not shielded from liability for the negligent performance of a purely ministerial duty. A duty is ministerial (and thus not protected) when it is absolute and its performance leaves no room for judgment or discretion.

### *Qualified Immunity*

Qualified immunity aims to safeguard the ability of government officials to exercise discretion and authority while performing their public duties. To employ the qualified immunity defense, a public official must demonstrate **that his actions did not violate a clearly established statutory or constitutional right of which a reasonable person would have been aware.**

If a reasonable official could have believed the conduct at issue was lawful, then qualified immunity will apply and a claim will be dismissed.

Issues concerning the applicability of qualified immunity are generally questions of law to be resolved by the court, but fact finders may on occasion be required to determine the reasonableness of an official's conduct.

## Recoverable Damages

### *Economic and Noneconomic Damages*

Money damages are available to one who suffers a detriment as a result of the unlawful act or omission of another. In Wisconsin personal injury and wrongful death actions, injured plaintiffs may recover economic and noneconomic damages.

Recoverable economic damages include:

- *Costs arising from medical expenses and medical care*
- *Cost of replacement*
- *Loss of earnings and/or loss of earning capacity*
- *Loss of income or support*
- *Burial and cemetery costs*
- *The cost of substitute domestic services*
- *Loss of employment or business or employment opportunities*
- *Other monetary losses*

Noneconomic damages recoverable include:

- *Damages arising from pain, suffering, inconvenience, physical impairment, mental anguish, emotional distress, loss or illness*

**Punitive Damages** are aimed at punishing defendants rather than compensating plaintiffs.

To support an award of punitive damages, a plaintiff must show: (1) evil intent deserving punishment; (2) wanton disregard of a duty; or (3) gross or outrageous conduct.

A punitive damage award is likely excessive if it is more money than necessary to serve its stated purpose, or if it inflicts a financial burden on the defendant that is disproportionate to the wrongdoing.

Wisconsin courts look to six factors to determine whether a punitive award may be excessive:

- 1) *The grievousness of the wrongdoing;*
- 2) *The degree of malicious intent;*
- 3) *Whether the punitive damages awarded bear a rational relationship to the award of compensatory damages;*
- 4) *The potential damage caused by the wrongdoing;*
- 5) *The ratio of the award to civil or criminal penalties that could be imposed for comparable misconduct; and*
- 6) *The wealth of the wrongdoer.*

## Collateral Source Rule

The collateral source rule is well established in Wisconsin and has been the state's law since 1921. According to Wisconsin's collateral source rule, a plaintiff's recovery cannot be reduced by payments or benefits from other sources. In other words, defendants are required to pay a plaintiff or injured party the full amount ordered by the court despite any payments or benefits conferred upon the injured party by an unrelated source.

The collateral source rule is meant to act as a deterrent because it renders tortfeasors fully responsible for damages caused by their wrongdoing. The Wisconsin Supreme Court has explained: "The tortfeasor who is legally responsible for causing injury is not relieved of his obligation to the victim simply because the victim had the foresight to arrange, or good fortune to receive, benefits from a collateral source for injuries and expenses." See, [Ellsworth v. Schelbrock](#), 611 N.W.2d 764, 767 (Wis. 2000).

Wisconsin law prohibits juries from hearing evidence of collateral source payments. This means that at trial, a jury may not use evidence of collateral source payments to determine the reasonable value of medical treatment rendered to an injured party in a case.

### ***Uninsured Motorist (UIM) Claims***

In March 2012, the Wisconsin Supreme Court decided the case, *Orlowski v. State Farm Mutual Automobile Ins. Co.*

Prior to [Orlowski](#), Wisconsin law was relatively unclear on the applicability of the collateral source rule to uninsured motorists. In *Orlowski*, however, the State Supreme Court held that an uninsured motorist who brings a UIM claim may seek the full amount of her past medical expenses, *including* any amounts written off by medical providers based on contractual agreements between those medical providers and health insurers. The rationale behind this ruling seems to be that if any party should receive an arguable windfall, Wisconsin law gives that windfall to the injured party.

## Prejudgment Interest

*In Wisconsin, prejudgment interest is designed to encourage settlement between parties to litigation. Prejudgment interest may be sought in cases where a court determines that a damage award began to accrue interest on a date preceding the date of the judgment – even if the interest actually began to accrue months or years after actual entry of judgment.*

Prejudgment interest is awarded where the amount of damages is determinable before judgment occurs. In these cases, damages are determinable before judgment either because the damages are liquidated, or because there is a reasonably certain standard of measurement of damages. It is also possible for parties to agree by contract that any future damages will include prejudgment interest. Additionally, prejudgment interest is available as a matter of law in this State when the amount of final judgment exceeds the prior settlement amount offered by the winning party.

In 2011, Governor Walker signed [Act 69](#) which dramatically reduced Wisconsin's prejudgment and post-judgment interest rates. Wisconsin's prejudgment interest rate is now 1 percent plus the Federal Reserve prime rate on either January 1<sup>st</sup> or July 1<sup>st</sup> of the year in which the judgment is entered.

Specifically, if judgment is entered on or before June 30<sup>th</sup> in a given year, the judgment interest rate is based on the Federal Reserve prime rate on January 1<sup>st</sup> of that year. If judgment is entered on July 1 or later, the interest rate is based on the Federal Reserve prime rate as indicated on July 1<sup>st</sup> of the year.

Since 2009, the Federal Reserve prime rate has remained at 3.25 percent. Thus, the current prejudgment interest rate in Wisconsin is 4.25 percent.

## Personal Injury Actions and Medicare

### **Reporting Requirements**

Medicare functions as a secondary payer, which means it will not pay for medical expenses in situations where primary insurance plans or self-insurance coverage exists.

In 2007, Congress passed legislation requiring primary plans (including employers, workers' compensation insurers, auto and liability insurers, group plans and programs, and third-party administrators) responsible for payment in cases involving Medicare-eligible claimants to put Medicare on notice of a case. Fines of up to \$1,000 per day apply to noncomplying plans.

As of January 1, 2013, plans were required to report any settlements over \$5,000 to Medicare. By January 1, 2011, settlements over \$2,000 had to be reported, and since January 1, 2015, any settlement over \$300 is to be disclosed to Medicare.

*As a practical matter, essentially any personal injury or worker' compensation settlement or any judgment in favor of a Medicare-eligible claimant or plaintiff should be reported to Medicare.*

### **Reimbursing Medicare and Preserving Future Interests**

In addition to the reporting requirements for Medicare, attorneys and parties to personal injury actions involving Medicare-eligible claimants must address Medicare's financial interests.

Upon reaching a settlement or judgment in a personal injury action, Medicare must be reimbursed for past payments it made on behalf of a plaintiff or claimant.

Medicare's future interests must also be preserved where claimants may incur future medical expenses. The means by which to protect Medicare as to future medical expenses, however, remains unclear, as there is no federal statute or regulation governing the treatment of future medical expenses paid by Medicare in the context of tort actions.

## Settlement Agreements

*A settlement agreement is a contract between litigants. Settlement agreements are favored by Wisconsin law, but Wisconsin courts make clear that the traditional elements of a contract are still required to form a valid settlement agreement; that is, an offer, acceptance and consideration. Wisconsin statutory law requires that all settlement agreements be made either on the record before the court or in writing to comply with the Statute of Frauds. Any such writing must be signed by the party against whom the settlement agreement is being enforced. Oral settlement agreements are generally not enforceable in Wisconsin.*

### **Pierringer Release**

A *Pierringer* release permits the injured party to free a settling joint tortfeasor from liability while still pursuing claims against any non-settling joint tortfeasor for their percentage of damages. In other words, a *Pierringer* release only releases part of a plaintiff's claim and preserves the remainder of her action against a non-settling joint tortfeasor. A *Pierringer* release also bars subsequent contribution and indemnity actions joint tortfeasors might later assert against settling joint tortfeasors.

Importantly, a *Pierringer* release impacts the rights of those who are not parties to litigation in that such a release bars all claims for indemnity or contribution that a settling joint tortfeasor might later have against a non-settling joint tortfeasor, whether or not the non-settling joint tortfeasor is a party to the pending litigation.

### **Loy Release**

A *Loy* release is used in the context of settlements with an insured. A *Loy* release aims to protect an insured from future liability while securing a general release for an insurer and must include:

- A general release for the insurer;
- A release for the insured up to the primary policy limit;
- A release for the insured for any amounts in excess of all excess coverage that exists; and
- A covenant from the claimant not to sue the insured personally

## General Practice Points

### Filing

Under Sec. 801.16, pleadings and other papers are to be filed with the circuit court clerk, with a copy to the presiding judge, if the judge so requires.

If a user files a document with the courts electronically, the filing system will submit the papers filed to the proper clerk of court, and the clerk of court will review the filing to assess whether it will be accepted. If accepted, the paper will be deemed filed at the time it was originally submitted via the electronic filing system.

Alternately, if rejected by the clerk, the document will not be made a part of the record in a case, and the user will be notified that the item has been rejected and that refileing is required. *See*, Sec. 801.17(4).

**Protective Orders** are available by motion from a party, or a person from whom discovery is sought, for good cause shown if “*justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.*” Sec. 804.01(3)(a). Such an [order](#) may set forth terms including, but not limited to, the following: that the discovery sought not be had; that the discovery be had on specified terms, including as to a certain time or place; that the discovery be had only by a method other than selected by the party requesting discovery; that certain topics be avoided, or that the scope of discovery be limited; that the discovery should be had only with persons designated by the court; that a deposition transcript, once sealed, be opened only by court order; that a trade secret or other confidential information not be disclosed, or be limited; and/or that the parties each file certain documents in sealed envelopes to be opened as the court directs. *Id.*

### Motions

Parties must apply to the Wisconsin Courts for any order by motion, unless such application is made during a hearing or trial. Motions are to be made in writing and must “state with particularity the grounds therefor, and ... set forth the relief or order [sought.](#)” Sec. 802.01(2). If a motion is made by a written notice of hearing of the motion, the requirement that the motion be in writing is met.

### Expert Discovery

Using written interrogatories, a party may require any other party to identify any person the latter anticipates calling as an expert witness at trial. A party may take the deposition of any expert witness identified whose opinions may be offered at trial. *See*, Sec. 804.01(2)(d)(1).

Under Sec. 804.01(2)(d)(2), a party may, through interrogatories or a deposition, “discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon motion

• Additional Resources •



Secretary of State

Office of the Commissioner  
of Insurance

State Medicaid  
Eligibility Handbook



Wisconsin Constitution

Wisconsin Statutes

Wisconsin Rules of Civil  
Procedure





*The partners at Brownson & Linnihan, Robert D. Brownson, Thomas J. Linnihan, Kristi K. Brownson, Patrick M. Biren and Thomas J. Norby are litigators and seasoned defense attorneys practicing in Minnesota, North Dakota, Wisconsin, and throughout the country.*

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