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ABC WI 50TH ANNIVERSARY

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FROM OUR PRESIDENT

Why ABC of WI is Endorsing Rebecca Kleefisch for Governor

"GET INTO POLITICS OR GET OUT OF BUSINESS." IT'S A PHRASE COMMON AT ABC OF WISCONSIN EVENTS. Part of our mission is to engage members to advance our public policy agenda. So, it's good to see GOP gubernatorial candidate Tim Michels' company is active in advancing the goals of organizations with which they are affiliated. But it seems too often I have seen the Michels' company name on the "wrong" side of ABC's priorities.

By way of example, the Michels Corporation had a representative on the board of the Construction Business Group (CBG), a self-proclaimed wage monitor that frequently sends ABC members ominous letters about how they will be "watching them" on public works projects. Perhaps you got one of these letters. Odder yet is Michels Corporation being listed as a member of the now defunct Wisconsin Construction Coalition, a group specifically formed to oppose passage of Right-to-Work and preventing the repeal of prevailing wage laws (two of ABC's top legislative priorities). Maybe the Michels Corporation goals are different than Tim Michels' views as a candidate for Governor, but I like a sure thing.

One thing that I am sure of is Rebecca Kleefisch did a great job as ABC of Wisconsin Jobs Ambassador, preaching not only the importance of getting more people into the skilled trades but also the gospel of free enterprise in construction. She was exposed to ABC members of all sizes who were impressed with her grasp of the issues that are important to ABC members. It could be argued that after that two-year job interview, Rebecca has proven her ability, her commitment to our industry and her love for ABC and our priorities. That is why ABC of Wisconsin endorsed her and that is why ABC members are spending their time and hard-earned money to get her elected as the next governor of Wisconsin.

> "IT COULD BE ARGUED THAT AFTER THAT TWO-YEAR JOB INTERVIEW, REBECCA HAS PROVEN HER ABILITY, HER COMMITMENT TO OUR INDUSTRY AND HER LOVE FOR ABC AND OUR PRIORITIES."

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  Wrightstown, August 11
- **NETWORKING SOCIAL**
  Menomonie, August 18
- **MILFORD HILLS SPORITING CLAY SHOOT**
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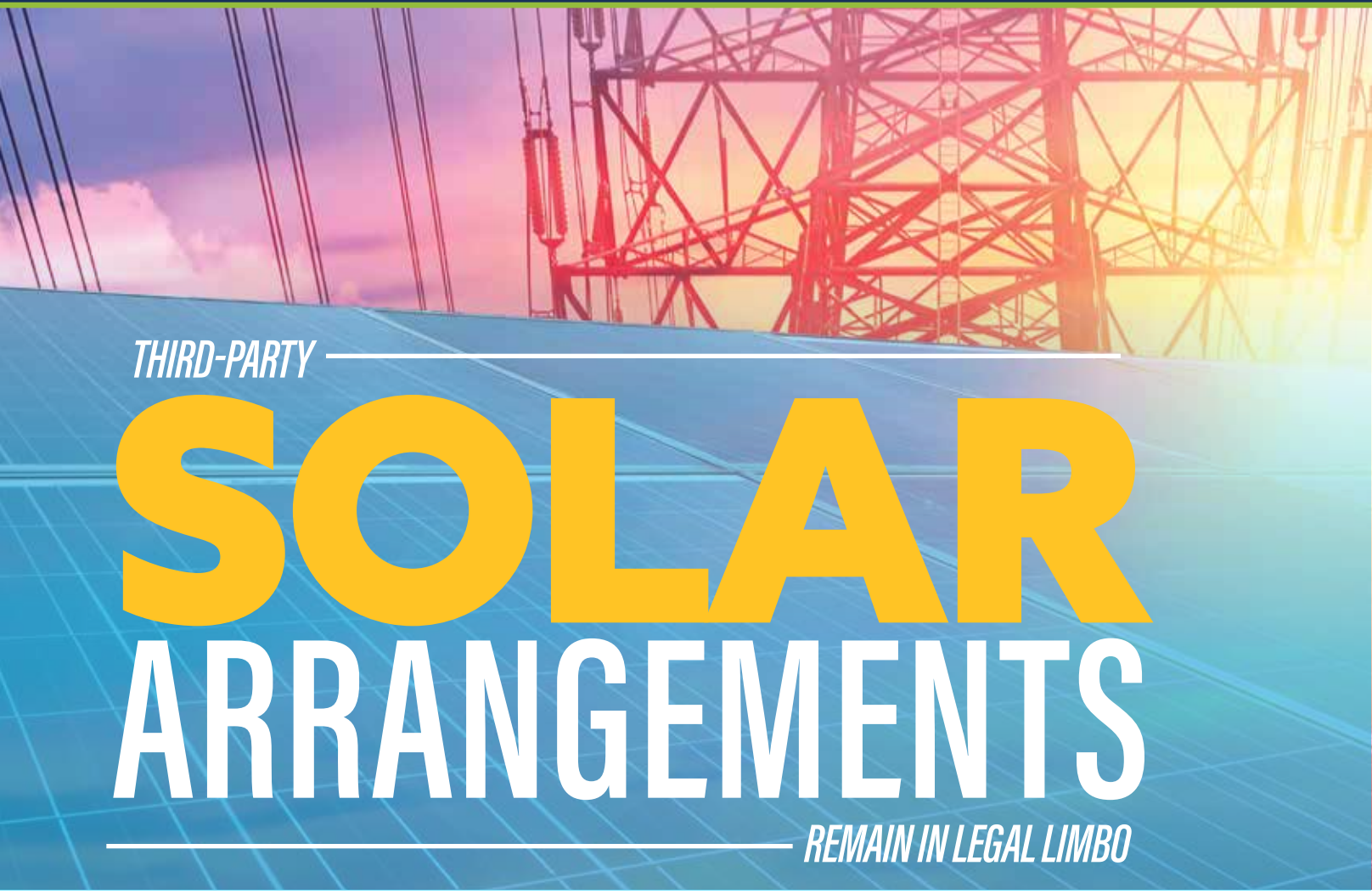


THIRD-PARTY SOLAR ARRANGEMENTS REMAIN IN LEGAL LIMBO

By Jeff M. Brown – State Bar of Wisconsin Legal Writer

The gas station isn't the only place consumers are feeling inflation's bite – they're feeling it when they open their electric bills, too.

According to the U.S. Energy Information Association, retail electricity prices climbed faster in 2021 than in any year since 2008. The average per-kilowatt price in 2021 was $0.1372, up 4.3% from 2020 and the highest ever recorded by the association.

Homeowners can cut costs by using solar energy, which allows them to avoid paying their utility's variable per-kilowatt hour charge for some of their energy.

But installation costs put rooftop solar panels beyond the reach of many homeowners. That's why companies offer financing for solar panel installation in 30 states.

Wisconsin isn't among those states.

Legal Stalemate

According to 2019 survey conducted by the North Carolina Clean Energy Technology Center, Wisconsin is one of 15 states yet to clarify the legal status of solar financing arrangements.

Under a solar financing agreement, commonly called a power purchasing agreement (PPA), a company installs solar panels on a homeowner's roof and then applies to the local utility to connect the panels to the utility's grid.

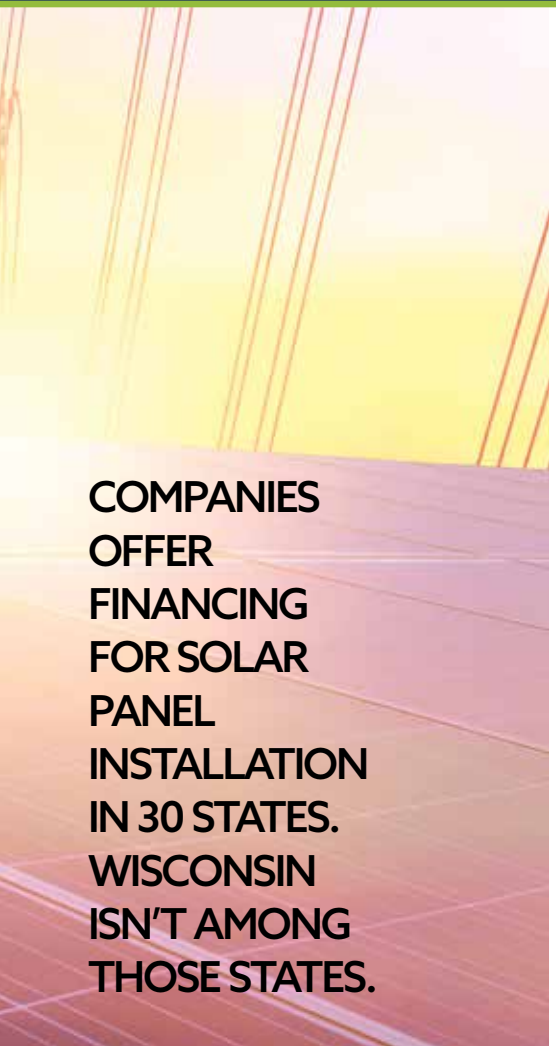
The company owns the panels and sells the homeowner the energy generated by the panels at an agreed-upon amount – either a fixed monthly amount or the amount of the energy the homeowner uses each month. The typical PPA has a term of between 20 and 25 years.

The status of solar financing arrangements remains unclear in Wisconsin because of a legal stalemate between Eagle Point Solar, an Iowa company, and Wisconsin Electric Power Company (also known as WeEnergies), one of Wisconsin's 12 public investor-owned utilities.

Sticking Point

In 2019, the city of Milwaukee hired Eagle Point to install 1.1 megawatts of solar panels on the roofs of seven municipal buildings. The city estimated that the solar panels would save it $28,000 a year in energy costs.

Under the terms of the $1.9 million deal between the city and Eagle Point, ownership of the solar panels would be split 80/20 between the company and the city, with the city retaining the op-



tion to purchase the company's ownership interest over time. Eagle Point would receive the 30% solar installation federal tax credit, which would reduce the city's cost.

But when Eagle Point applied to WeEnergies to connect the panels to the WeEnergies grid in July 2019, the utility declined. WeEnergies noted that by selling power generated by the panels to the city, Eagle Point was acting as a public utility in WeEnergies' exclusive territory, which is prohibited under state law.

'Regulatory Compact'

Like many states, Wisconsin established a "regulatory compact" with public utilities by enacting legislation in the early 20th century.

Under the compact, the state grants a public utility the exclusive right to provide power to customers in a given geographical area. In exchange, the utility agrees to provide service to any customer in the area who applies for it and to charge rates set by the state's three-member Public Service Commission (PSC).

"You don't have competition, on the theory that these are such capital-intensive and facility-intensive enterprises that you don't want multiple entities trying to serve the same area," said Brad Jackson, a partner at Quarles & Brady LLP who represents WeEnergies.

Utility or Not?

Whether Eagle Point is acting as a utility by installing and owning the solar panels on the roofs of the municipal buildings in Milwaukee depends on how one interprets Wis. Stat. section 196.01(5)(a).

That section defines a "public utility" as an entity that "may own, operate, manage or control … all or any part of a plant or equipment, within the state, for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly to or for the public."

After WeEnergies denied Eagle Point's application to connect the Milwaukee solar panels, the company appealed the denial to the PSC.

Eagle Point also asked the PSC to rule that its agreement with the city did not make it a public utility under section 196.01(5)(a). The company argued that it was not acting as a public utility because it was providing power only to the city of Milwaukee, not the public.

The PSC agreed to review WeEnergies' denial of the connection application but declined to determine whether Eagle Point's agreement with the city made it a public utility.

In May 2019, Eagle Point sued WeEnergies and the PSC in Dane County Circuit Court and asked the court to declare that its agreement with the city didn't make it a public utility.

The court dismissed the lawsuit in November 2019, ruling that Eagle Point had failed to exhaust its administrative remedies – a ruling upheld by the Wisconsin Court of Appeals in July 2021.

In January 2022, the PSC deadlocked on a 1-1 vote on the question of whether WeEnergies' denial was lawful.

Commissioner Ellen Nowak, appointed by then-Republican Governor Scott Walker, agreed with WeEnergies that under the agreement with the city of Milwaukee, Eagle Point would be operating as a public utility.

Commissioner Rebecca Valcq, appointed by the current governor, Democrat Gov. Tony Evers, said that WeEnergies had no basis for denying Eagle Point's connection request.

The other Evers appointee, Commissioner Tyler Huebner, recused himself, citing the PSC's recusal policy and his involvement with the case prior to his appointment to the PSC.

A Recurring Question

Eagle Point Solar is not the first company to ask the PSC to determine that a PPA didn't make it a public utility. Sunrun, a California company, asked the PSC to do the same thing in 2018.

In February 2019, the PSC voted 2-1 not to take up Sunrun's request, with the two members appointed by Gov. Walker in the majority and the member appointed by Gov. Evers in the minority.

One of the Walker-appointed commissioners, Michael Huebsch, said the laws regulating public utilities were not "keeping up." Huebsch, a former legislator, said it was up to the legislature to change those laws.

Bills that would have authorized PPAs in Wisconsin were introduced in both of the last two legislative sessions; none received a hearing.

Third-party Solar in Other States

Several states have legalized PPAs by enacting legislation. In Florida, for instance, statutes explicitly state that both PPAs and solar panel leases are legal.

In other states, state supreme court decisions have legalized PPAs.

In 2014, the Iowa Supreme Court ruled that Eagle Point's PPA with the city of Dubuque did not render it a public utility. The court based its holding on a multi-factor analysis: the agreement was an individually negotiated, arms-length transaction; Eagle Point would provide a customized service to a single customer; providing on-site solar energy is not an indispensable service that demanded public regulation; there was no evidence that Eagle Point was a monopoly.

The court acknowledged that the spread of PPAs could reduce the demand for electricity provided by public utilities.

But there was nothing in the record that

quantified that threat or assessed the likelihood of its occurring, the court noted. Additionally, nothing in the record suggested that public utilities had been harmed by PPAs in states where solar providers were not considered public utilities.

The court also pointed out that Eagle Point sought only to reduce demand for electricity supplied by a public utility, not replace the utility.

Case Law in Wisconsin

The single, directly on-point Wisconsin Supreme Court case interpreting the statute governing what constitutes a public utility is more than 100 years old.

In *Cawker v. Meyer*, 147 Wis. 320, 133 N.W. 157 (1911), the supreme court considered whether a company that built a plant to provide power to tenants of a building it owned was operating as a public utility.

The plant provided more power than the company's tenants needed, so the company sold the excess power to three adjoining neighbors.

The supreme court held that the company was not acting as a public utility. The court concluded that in enacting the statute defining a public utility, the legislature sought to regulate the provision of power to the public – "whoever might want the same" – rather than to a few tenants or neighbors.

The applicability of Cawker to the dispute between Eagle Point and WeEnergies is complicated by both the case's vintage and the narrowness of its ruling.

"While we find it quite easy to ascertain the true spirit and intent of the law, yet we deem it inexpedient and unsafe to attempt to define in more specific terms than the statute what does and what does not constitute a public utility," wrote Justice Aad Vinje for the supreme court in Cawker.

"Each case will depend upon its own peculiar facts and circumstances, and must be tested by the statute in the light of such facts and circumstances."

In a later case, *Ford Hydro-Electric Co. v. Town of Aurora*, 206 Wis. 489, 240 N.W. 418 (1932), the supreme court approved the Cawker analysis but held that the term "public" can mean only a single person or customer.

Effect of Legalizing PPAs

Among those circumstances is the effect that widespread adoption of PPAs across Wisconsin would have on the state's public utilities.

In setting the rate that a public utility may charge, Jackson said the PSC calculates the utility's fixed costs – including the cost of maintaining the power grid and related equipment, like the meters mounted to houses – in addition to the utility's variable costs and a reasonable rate of return on the utility's capital investment (minus depreciation).

Jackson said that if customers buy less power from a public utility because they're being served by a third party, it would upset the balance of cost allocation inherent in the rate allocation because the customers wouldn't be paying the full fixed cost required to serve them.

THE SINGLE, DIRECTLY ON-POINT WISCONSIN SUPREME COURT CASE INTERPRETING THE STATUTE GOVERNING WHAT CONSTITUTES A PUBLIC UTILITY IS MORE THAN 100 YEARS OLD.

"The rates are set such that the utility is recovering a fair amount of its fixed cost through the variable per-kilowatt rate," Jackson said.

"So, to the extent the customer is either self-serving or buying power from somebody else, the utility is not recovering part of its fixed costs and that's a problem until it gets its rates fixed, and then that becomes a problem for the utility's remaining customers, who have to make up the difference."

The non-refundable federal tax credit for solar installations, which is now 26%, makes it more affordable for customers to pay up-front for installing solar panels.

But that's not an option for non-profits and municipalities or individual taxpayers without enough income to offset the credit against, said John Clancy, a shareholder at Godfrey & Kahn S.C. who focuses on utility law.

"There's a list of folks for whom financing is more important because they can't get the tax credit," Clancy said.

Renewable energy advocates argue that allowing utilities to decline connections to PPA-financed solar panels is putting a lid on the solar energy industry in Wisconsin, which according to the Environmental Law and Policy Center ranks 41st among states in solar generating capacity.

Future of Solar in Wisconsin?

How is the PPA issue likely to be resolved in Wisconsin?

Legislative action appears unlikely, given that bills to legalize PPAs died without getting a hearing in the last two session.

Jackson said the PPA issue is one that cuts across party lines, making it hard to predict the shape and substance of any bill that might pass.

"Even if the legislature did something, I'm not sure what the outcome would be," Jackson said. "I'm really not."

Jackson thinks it's more likely that the Wisconsin Supreme Court will answer the question, by ruling on an appeal from a PSC decision.

The Midwest Renewable Energy Association has handed the PSC a chance to make such a decision.

On May 26, the association filed a petition with the PSC asking the commission to declare that third-party financed distributed energy resources are not public utilities as defined by section 196.01(5)(a).

Jeff M. Brown is a legal writer for the State Bar of Wisconsin, Madison. He can be reached by email or by phone at (608) 250-6126. This article was originally published in Inside Track™, published by the State Bar of Wisconsin.

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SUPPLY CHAIN DELAY CLAIMS

A DAY LATE AND $1,000 SHORT

By Saul C. Glazer – Axley Attorneys

COVID-19 has created many challenges for owners and contractors. Initially, the biggest fear was that a COVID-19 outbreak might shut down a construction site.[1] Next, material prices skyrocketed. Currently, one of the largest concerns is the unreliable supply chain. This article discusses supply chain delay claims and steps owners, contractors, and material suppliers can do to help mitigate the effects of supply chain troubles.

Ounce of Prevention

Steel deliveries have been a major supply chain issue. However, the supply chain has impacted numerous items including windows, cabinets, and appliances. Many home builders have been requiring new home buyers to order dishwashers before any ground has been broken on new home sites because of the long delays in the supply chain. To the extent possible, owners should work with their designers, engineers, and contractors to identify items that may be subject to supply chain problems as early as possible and order difficult to obtain materials early. Steel subcontractors should also order steel as early as possible, and consider ordering steel with multiple orders, when it is not possible to order all the steel at once because not all shop drawings have been approved. Early orders may also alleviate some risk in material price escalation costs.

Liquidated Damages

Both section 15.1.7 of the AIA A201 section 6.6 of ConsensusDocs 200 waive consequential damages against contractors. If these provisions are not struck or modified, contractors generally are not liable for consequential damages to owners for late completion if supply chain issues delay a project. Owners, however, typically protect themselves by imposing liquidated damages for delays which extend the substantial completion date. In Wisconsin, liquidated damages are generally permis-

sible so long as they are not a penalty, and a reasonable approximation of the type of losses that might occur because of late completion.[2] It is important for owners to go through the exercise of documenting the basis for the amount of liquidated damages prior to entering into a construction contract, so there is a documented justification for the amount if a contractor subsequently argues that the amount is unreasonable or a penalty.

Contractors should consider requiring a limit on the amount of consequential damages to avoid a catastrophic loss in the event of late completion. Most construction contracts allow contractors to extend the substantial completion date for excusable delays if they properly follow the contract procedures to extend the contract time. Contractors and subcontractors should always carefully review claims and notice procedures before entering into a contract, and make sure they are reasonable and to understand how to comply with any agreed upon procedures.

Force Majeure

Contractors may find protection from delay clauses through a force majeure clause. Both section 8.3.1 of the AIA A201-2017 and section 6.3.1 of ConsensusDocs 200 contain force majeure clauses. The standard language for the AIA does not reference epidemics or pandemics but does allow for a contract extension for "other causes beyond the Contractor's control." The AIA standard language does not expressly allow for or exclude an equitable adjustment for the contract sum because of a force majeure. The standard language in the Consensus documents allows for an equitable extension of the contract time and price for contractors if the delay is beyond the control of the contractor and due to an epidemic. Some argue that if at the time of when a contract is made there is an existing force majeure, then the parties assume the risk of the existing force majeure. To avoid any dispute, contractors should modify the force majeure clause to specifically include COVID-19 as a force majeure, and expressly indicate that out of the control of the contractor includes when a subcontractor or material supplier has supply chain or labor issues. In addition, contractors should seriously consider demanding language similar to that of Consensus Doc 200.1, Amendment 1 Potentially Time and Price-Impacted Materials. This amendment addresses the problem of supply chain issues, and allows for price and time increases due to those supply chain items expressly identified at the time the contract is made.[3]

SUBCONTRACTORS SHOULD BE FULLY AWARE OF WHAT OBLIGATIONS THEY ARE UNDERTAKING AS PART OF THEIR SUBCONTRACTS.

Subcontractor Concerns

Contractors should make sure that their subcontracts contain properly drafted flow down provisions, which allow contractors to impose any uncompensated loss or inexcusable delay on the appropriate subcontractor or material supplier. Contractors need to be careful to make sure that subcontracts exclude, where possible, any subcontractor or material supplier proposals that contain limitations on liability for delays or contain other clauses that may impose liability on the contractor that cannot be passed through to the owner. Where such limitations are industry standard, contractors should attempt to shift risk of delays back to owners.

Subcontractors should be fully aware of what obligations they are undertaking as part of their subcontracts. Many subcontracts contain no damages for delay clauses which are enforceable in Wisconsin.[4] Supply chain issues may cause longer durations for subcontractors even with respect to materials that are the responsibility of another subcontractor. A no damage for delay clause will likely bar the innocent subcontractor from receiving additional compensation.

Subcontractors may be required to accelerate work or re-sequence work. Whether such costs are recoverable to the subcontractor will depend on the language of the subcontract. Subcontractors should carefully review indemnity clauses as they may impose liability on subcontractors for delay claims from the contractor or other subcontractors. Subcontractors generally do not have the ability to recover directly from another subcontractor for delays.[5]

Conclusion

Unfortunately, COVID-19 has dragged on much longer than anyone has anticipated. Thankfully, the construction industry has remained strong economically. However, supply chain issues have imposed substantial costs on owners, contractors, subcontractors, and material suppliers. There are no easy answers in terms of how to allocate the risks of supply chain issues. Parties should invest additional time in pre-contract to identify as many of the potential supply chain items as possible, and decide how to handle these problems and who will bear the cost and time if there are untimely deliveries of necessary materials.

Saul Glaser is a construction attorney with Axley Attorneys. He can be reached at 608-260-2473.

[1] An earlier blog post also generally addressed planning for the impacts of COVID-19 on the construction industry. Construction & Public Contract Law Section Blog: Coronavirus in Construction: Plan Now for After the Outbreak: (wisbar.org).
[2] Wassenaar v. Panos, 111 Wis.2d 518, 525, 529-30, 331 N.W.2d 357 (1983) (liquidated damages clauses are generally enforceable in Wisconsin so long as clause is not a penalty, precise damages are difficult to estimate, and the amount is a reasonable approximation of the anticipated harm).
[3] On the issue of dealing with material price escalation, see also Construction & Public Contract Law Section Blog: Construction Material Price Increases: Options for Contractual Risk Shifting: (wisbar.org).
[4] See *John E. Gregory & Son, Inc. v. A. Guenther & Sons Co.*, 147 Wis.2d 298, 304, 432 N.W.2d 584, 586 (1988)("no damage for delay" clause is generally enforceable, except in such cases of intentional wrongdoing or gross negligence, on the part of the party seeking to be protected).
[5] For a more detailed analysis of why subcontractors generally cannot sue other subcontractors for delays, see Construction & Public Contract Law Section Blog: Court of Appeals: Subcontractors Cannot Sue Each Other for Negligence: (wisbar.org).

PRIVATE WAGE & HOUR INVESTIGATORS WHAT YOU NEED TO KNOW

By Daniel D. Barker, ABC of WI Legal Counsel

As a labor attorney, contractors often ask me how to handle jobsite incursions by private individuals who purport to be "investigating" employee pay issues. Of course, contractors are well-advised to cooperate with investigations by legitimate government officials while working with legal counsel. But when it comes to handling contact from non-governmental "investigators," the issues are more obscure. This article lays out some of the legal and practical considerations that surround these non-governmental investigators. These considerations include: (A) property access rights; (B) employee rights; and (C) legal compliance.

Background

Union-backed groups often employ non-governmental "investigators" who try to catch contractors that break the law by either misclassifying their workers as independent contractors, or violating wage and hour laws. These investigators attempt to enter jobsites to talk with workers about legal compliance. Or they hang around outside of jobsites for the same purposes. If the investigators discover potential legal violations, they may either report the issue to government agencies or refer the employees to private attorneys.

These investigators may even have official-looking business cards and may introduce themselves as "Wage and Hour Investigators." It's no surprise that these 'investigators" often look and act like law enforcement officials because many times they are former police officers or detectives who now work for the private entity. They are so good at looking "official" that contractors and employees can mistake them for real government investigators.

But just because someone calls themself an "investigator" doesn't mean that person is employed by a government entity. And it doesn't mean that they are entitled to be on a project site. This is true even if they happen to have a fancy business card with an official-looking star on it. Nonetheless, these investigators can be very good at talking their way onto a project site. To be effectively prepared to address these matters, contractors need to know a few basic legal principles.

Private Property Rights

As a general rule, owners and general contractors have the right to decide who can enter project sites. Trespassing is illegal. This is important because when it comes to labor law and property access matters, only persons and entities with the legal right to exclude others from a property have the authority to eject or call the police on a trespasser. In most cases, this right is exclusively vested with the owner and the general contractor. It is rare for subcontractors to have these "exclusionary" rights. If it is important for a subcontractor to have these exclusionary rights (such as if they have exclusive control over the project site at certain times), these exclusionary property rights should be clear in any relevant contract documents.

Efforts to eject labor-affiliated outsiders, such as by calling the police, by entities who do not have these exclusionary rights, could be construed as labor law violations. Because of this, subcontractors that want to report the presence of unauthorized individuals to the controlling contractor should ensure that their report is not discriminatory and that they have a demonstrable practice of reporting suspected unauthorized individuals whether or not they are engaged in labor-related activity. In a nutshell, these "investigators"

should be treated like any other visitor on a project site.

The second thing to know is that property access rights are not absolute for general contractors. A general contractor that uses a union subcontractor may need to permit union representatives access to the site to inspect the working conditions of the subcontractor's employees. This obligation arises under "union access" clauses in a subcontractor's labor agreement. The scope and extent of this obligation depends on the language of the subcontractor's access clause. For example, does the access clause require access by only individuals employed by the union or does it allow the agents to be accompanied by outsiders? These are things general contractors will want to know in advance when hiring unionized subcontractors.

Importantly, just because a subcontractor has a union access clause does not mean that union agents have free reign to wander all over a jobsite. Instead, general contractors may enforce legitimate safety and access controls (such as requiring escorts to the specific area where the visited contractors are working).

The takeaway is that controlling access to construction project sites is an important part of good construction management. All controls need to be nondiscriminatory and must be supported by legitimate business reasons. There are, of course, many legitimate reasons for controlling access. General contractors that do not control site access are at increased risk for theft and safety-related issues. Moreover, knowing who is on a jobsite and where they are is an important safety control. Thus, controlling contractors should ensure that their jobsite access and check-in policies are well-established and posted at the site entrance and are enforced with respect to all visitors.

Employee Rights

As you might expect, private employment investigators are resilient and persistent. Even if they are denied access to a jobsite, they will find other ways to connect with workers. Employees who are approached by an investigator may be fearful if they are approached by someone who seems official. They may feel pressured to talk with that person or to reveal their personal information because they mistakenly think they are talking with law enforcement.

JUST BECAUSE SOMEONE CALLS THEMSELF AN "INVESTIGATOR" DOESN'T MEAN THAT PERSON IS EMPLOYED BY A GOVERNMENT ENTITY.

When faced with the prospect of their employees being approached by a private investigator, many employers react illegally. Their first instinct is to order workers not to talk with any investigator. That's illegal. Employees have the right to talk with outsiders about their employment without interference from their employer.

Rather than acting with a heavy hand to prevent conversations, the better approach is to educate employees about their rights and about tactics used by the "investigators." Importantly, while employees have the right to talk with outsiders, they also have the right not to talk with outsiders. It is up to the individual employees to make this decision on their own.

Because it is the employee's decision, merit shop employers might want to consider communicating with employees about this issue before they ever have to face a pushy outsider. For example, employers can educate their employees about the fact that it is not uncommon for outsiders who look and act like law enforcement officers to approach and question them. Employers can remind employees that they have the right to ask for identification before talking to anyone. And if they think someone is trying to mislead them, they might want to think about whether they want to share their personal information, just like they would do with anyone who they think might be trying to mislead them.

An important part of educating employees about their rights is to ensure that the employer presents the information in a balanced, non-threatening manner. Employees should be reminded that the company respects all of their legal rights, which includes talking with these investigators as well as deciding not to talk with them. If an employer wants to inform its employees on these issues, the employer should consult their labor counsel for relevant legal guideposts, so they do not inadvertently violate federal labor law.

Legal Compliance

The best strategy for dealing with concerns about any potential investigator (whether private or governmental) is to maintain legal compliance on all employment-related matters. For example, the non-governmental "investigators" described in this article are primarily looking for two things: (1) companies that misclassify workers as independent contractors; and (2) companies that violate wage and hour laws.

As for the first, merit shop employers should know that individuals who are true independent contractors are the exception to the rule. If you are treating individual construction employees as contractors, you may want to evaluate your practices with a knowledgeable professional. Improperly classifying employees as independent contractors can lead to large legal liabilities.

With respect to wage and hour matters, these matters can be complex, and it is sometimes hard to know all the laws. That said, not knowing the laws can be extremely costly, especially when overtime or Davis Bacon is involved. All too often, companies establish wage and hour policies based on what they think is lawful but without actually analyzing the issues or obtaining advice. They often blindly follow what everyone else is doing. When it comes to pay issues, there is no substitute for learning and understanding how the law works. Competent HR professionals and consultants can help employers design compliant wage, payroll and benefit programs designed to withstand legal scrutiny.

Daniel D. Barker is a Principal with JacksonLewis. He represents employers in all labor and employment matters.

HOW WISCONSIN'S NEW BUSINESS ENTITY LAW AFFECTS LLCS

By Joseph A. Camilli, Daniel S. Welytok and Griffin E. Bliler

On April 15, 2022, Wisconsin enacted a new business entity law (2021 Wisconsin Act 258). Among other changes, the law restates Chapter 183 governing limited liability companies (LLCs) based on the Revised Uniform Limited Liability Company Act (RULLCA) already adopted by many other states. Below is more information about the law's effective date and key changes for Wisconsin LLCs.

Effective Date

On January 1, 2023, the new law will govern all existing and future LLCs. An LLC can elect to be governed by the new law earlier by amending its Operating Agreement and filing a Statement of Applicability with the Wisconsin Department of Financial Institutions (DFI). An LLC can also opt-out and remain governed by the old law by amending its Operating Agreement and filing a Statement of Nonapplicability with the DFI before January 1. Even if an LLC does not opt-out, any terms of its Operating Agreement that were valid under the old law will remain valid under the new law.

Articles of Organization

An LLC's management will no longer be governed by its Articles of Organization. Rather, an LLC will be member-managed by default unless its Operating Agreement provides in writing that it is manager-managed.

Operating Agreement

An LLC's Operating Agreement was viewed as optional under the old law but now will appear to immediately exist upon formation. Such immediate existence reflects an Operating Agreement's new forms; it is no longer limited to a written document but can also be verbal, implied, or any combination of the three. The new law also redefines an Operating Agreement's scope by listing several topics that it can govern. Along with this list of topics, the new law includes a series of limitations on an Operating Agreement's terms, with a carveout for actions allowed by an Operating Agreement despite such limitations and a "sub-carveout" for actions allowed by a written Operating Agreement.

Fiduciary Duties

Under the old law, LLC members and managers were able to agree that they could waive fiduciary duties owed to each other including the Duty of Loyalty, the Duty of Care, and the imposed contractual obligations of Good Faith and Fair Dealing required under Wisconsin law. Such permissible waivers reflected the LLC statute drafters' goal of respecting the "entity of contract" nature of LLCs, permitting a highly flexible and entity structure. The new law, on the other hand, now attempts to impede these waivers ostensibly to protect the interests of minority interest holders and avoid potential member and manager disputes. However, it remains to be seen how effective these efforts to restrict waivers will be in practice. The new law explicitly states that written Operating Agreements may prescribe the standards and methods for determining the extent of said duties and the steps necessary to waive or disclaim them. Moreover, given that the new law will honor any provision in an Operating Agreement effective under the old law so long as the provision was enforceable under the old law, it appears that LLCs who have already waived some or all fiduciary duties of members and managers under the old law will not be required to conform to the new law's fiduciary duty provisions.

Please contact any of the authors from von Briesen, s.c. Attorneys at Law or a von Briesen Business and Corporate Law attorney at 414-276-1122 to answer questions you have about Wisconsin's new business entity law.

CHALLENGING LOCAL UNITS OF GOVERNMENT IMPOSING ILLEGAL TAXES

By Eric Searing, Lucas Vebber, & Luke Berg


Luke Berg


Eric Searing


Lucas Vebber

Property tax bills are one of the largest annual expenses for Wisconsin families each year. One way the legislature has sought to keep those bills down and to ensure that housing remains affordable in Wisconsin is through levy limits. The levy limit statute strictly limits how much a local government may increase its property tax burden each year. To exceed its levy limit, a local government must seek approval from its residents via referendum.

In late 2019, the Town of Buchanan, located in northeast Wisconsin, adopted a "transportation utility fee" to generate additional revenue beyond what was allowed by traditional property taxes. The "transportation utility fee" is charged to "all developed properties" and is used to fund "the cost of utility district highways, stormwater management, sidewalks, street lighting, traffic control" and "any other convenience or public improvement."

Representatives from Wisconsin Property Taxpayers, Inc. (WPT) – a nonpartisan, statewide organization that is comprised of commercial, agricultural, and residential property taxpayers – contacted our attorneys at the Wisconsin Institute for Law & Liberty (WILL) to take a closer look at the fee and determine if it was an unlawful tax.

For a number of years now, local units of government, aided by their taxpayer-subsidized lobbying groups, have sought to circumvent the process of going to voters (via referenda) by creating new taxes under the guise of fees and surcharges to property owners and businesses in their communities. Taxpayer advocacy groups like WPT have been vigilant in calling attention to these maneuvers around the state.

In Wisconsin, contrary to what some in government think, municipalities possess no inherent power to tax, and they can only impose taxes that are authorized by the legislature.

Based on our review, we determined that the Town of Buchanan's "transportation utility fee" was in fact an illegal tax. And the Town was using this tax to exceed its levy limit by over 33%, charging property owners an additional $850,000 over its $2.4 million levy limit! Yet the town never conducted a referendum to exceed its levy limit.

In May of 2021, our attorneys filed a notice of claim with the Town of Buchanan, warning the town that its fee was an unlawful tax and violated the levy limit statute, among other things. The town denied the claim in late August and in September we filed a lawsuit in Outagamie County Circuit Court asking the court to declare the Town of Buchanan's "transportation utility fee" illegal and to issue an injunction to prevent Buchanan from levying, enforcing, or collecting the "fee."

On Monday, June 6, 2022, in a major victory for taxpayers, Outagamie County Circuit Court Judge Mark McGinnis struck down the Town of Buchanan's transportation utility fee, holding that it exceeds the town's levy limit imposed by state law. The case will most likely be appealed, but we are confident that we will prevail on behalf of WPT and its members. The case sets an important precedent for all Wisconsinites who may find themselves subjected to similar unlawful taxes.

Eric Searing, Director of External Relations, Lucas Vebber Deputy Counsel and Luke Berg, Deputy Counsel, are with the Wisconsin Institute for Law & Liberty (WILL) and can be reached at 414-727-9455.

STOP LAWSUIT ABUSE IN WISCONSIN

By R.J. Pirlot, Executive Director, Wisconsin Civil Justice Council

The Wisconsin Civil Justice Council's mission is to promote fairness and equity in Wisconsin's court system, with the ultimate goal of making Wisconsin a better place to work and live. ABC of Wisconsin is a founding member of the WCJC and ABC of Wisconsin President John Mielke sits on our board of directors, playing an important role in setting our policy agenda. During the 2021-2022 legislative session, WCJC's top priority was enacting COVID-19 liability protections for Wisconsin employers as the economy reopens. WCJC wanted to protect businesses and their employees from predatory lawsuits alleging a businessowner exposed a person to COVID-19. WCJC and key members, such as ABC of Wisconsin, worked with lawmakers to protect businesses who took reasonable steps to protect against COVID-19 exposures. Despite opposition from trial lawyers who fought enactment of these needed protections, we worked closely with legislative leaders to pass our legislation and successfully convinced Gov. Evers to sign our bill into law. Key input from ABC of Wisconsin ensured that these protections from liability for COVID-related lawsuits apply to contractors, too.

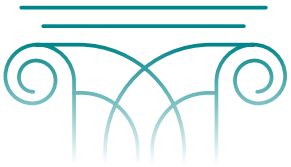
These COVID-19 liability protections, signed into law as 2021 Wisconsin Act 4, provide civil immunity from ordinary negligence claims related to COVID exposure for Wisconsin employers, governments, schools, and other entities as well as their employees, agents, and independent contractors. In short, we raised the threshold for successfully proving a businessowner is at fault if a person alleges he or she got sick due to the businessowner's actions or inactions. This immunity does not apply

if an act or omission involves reckless or wanton conduct or intentional misconduct, a high standard. Act 4 applies retroactively to March 1, 2020, except for actions filed prior to Act 4's effective date of February 27, 2021. In addition, despite attempts by the trial lawyers, these protections do not sunset and, moreover, you will continue to be protected even as the COVID virus mutates because our language applies not just to the original, novel coronavirus but also to any viral strain originating from the SARS–CoV–2 virus. Tiger Joyce, president of the American Tort Reform Association, called Act 4 "some of the strongest protections I've seen enacted in the country."

In addition to getting Act 4 signed into law, WCJC worked hard holding the line on efforts to create new civil causes of action which could be used to harass Wisconsin businesses. For example, this past session Gov. Evers proposed creating new civil causes of action for employment discrimination, unfair honesty or genetic testing, broadband service denial, and unnecessarily summoning a law enforcement officer. Gov. Evers also proposed re-creating opportunities for trial lawyers to bring claims in the name of the state, a law which had been repealed by legislative Republicans under Republican Gov. Walker. WCJC worked with legislators to ensure that none of these concerning policies advanced.

Over the last few decades, WCJC has worked with lawmakers to enact a host of liability reforms, designed to create a more fair tort system in Wisconsin and to protect businesses from predatory lawsuits. Other recent victories include:

- Limiting the ability to use discovery to go on "fishing expeditions" on Wisconsin businesses.
- Halting discovery if a motion to dismiss is pending before the court.
- Updating the state's class action procedures, including creating a right of either party to seek an appeal of class certification before the litigation may proceed.
- Requiring mandatory disclosure if a third-party is financing or underwriting the litigation.
- Limiting the liability of employers who hire ex-offenders who have earned a Wisconsin-issued certificate of qualification for employment.



KEY INPUT FROM ABC OF WISCONSIN ENSURED THAT THESE PROTECTIONS FROM LIABILITY FOR COVID-RELATED LAWSUITS APPLY TO CONTRACTORS, TOO.

- Requiring proof of a "reasonable alternative design" in an alleged defective design of a product, moving Wisconsin away from what was a broad "consumer expectation" test.
- Limiting testimony of experts and evidence to that which is based on sufficient facts or data and is the product of reliable principles and methods.
- Establishing a cap on punitive damages at $200,000 or two times compensatory damages, whichever is greater.
- Holding a party liable for costs and fees for bringing a lawsuit or claim that is done solely for the purpose of harassing or maliciously injuring another party.

Next legislative session, which will begin January 2023, a WCJC priority will be to create reasonable protections to protect Wisconsin consumers from predatory "lawsuit lending" companies. Consumer lawsuit lending is advancing money for a consumer to use for any purpose other than prosecuting the consumer's dispute, with repayment of the money conditioned on and derived from the consumer's proceeds of the dispute, regardless of whether these proceeds result from a judgment, settlement, or other source. In short, it is a form of lending provided to a consumer, such as a plaintiff in a lawsuit, with repayment coming from the plaintiff's recovery, if any.

Consumer lawsuit lending can result in a plaintiff paying very high effective interest rates, leaving a winning plaintiff with little financial recovery at the end of a successful suit. Typically, a plaintiff who takes out such a loan borrows a few thousand dollars but, when the money is repaid, ends up repaying a multiple of what was borrowed. In a study by faculty at the Cardozo School of Law and the University of Texas School of Law, though the average amount provided via lawsuit lending to a consumer in a motor vehicle case was $5,227, the amount due for repayment was $13,515 (with a median amount provided of $2,000, the median amount due was $3,961).

Why does WCJC and other members of the Wisconsin business community care about lawsuit lending? The mere presence of a such a loan can make it harder to settle a case and can thereby needlessly prolong litigation, negatively affecting all parties to the litigation, as the plaintiff knows repayment is contingent on a judgment or settlement.

Our goal is to continue to allow such lending to continue to occur in Wisconsin, while placing modest limits on the practice, such as a cap on interest which may be charged and prohibiting the lender from making any decisions regarding the legal dispute, leaving any decisions regarding the litigation with the consumer and the consumer's attorney.

None of our victories have been easy. Even with a Republican-controlled legislature – as Wisconsin has had since the 2010 elections – we always face stiff opposition from trial lawyers, who have been working hard to make in-roads with key members of the Wisconsin Legislature. Moreover, none of these victories would have been possible without the broad support WCJC receives from organizations such as ABC of Wisconsin, along with individual companies in Wisconsin.

R.J. Pirlot, a member of the Hamilton Consulting Group, in addition to representing ABC of Wisconsin, serves as the Wisconsin Civil Justice Council's executive director. WCJC is a 16-member organization made up of Wisconsin's leading business and professional associations. For more information about the Wisconsin Civil Justice Council, including how to support its work here in Wisconsin, go to https://www.wisciviljusticecouncil.org/ or contact R.J. at 608-258-9506.

Associated Builders and Contractors
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Rep Penterman


Representative Petryk


Representative Rodriguez

NSIN HARD HAT AWARD RECIPIENTS

f ABC of Wisconsin initiatives and merit construction.


Representative Rozar


Representative Schraa


Representative Sortwell


Rep Summerfield


Representative Tranel


Speaker Vos


Representative Wichgers


Representative Wittke


Senator Agard


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Senator Testin

THE STRUCTURE OF FREEDOM

By Dan Kelly,
Wisconsin Supreme Court Justice, 2016-2020

We've been free for so long we take it for granted. It's not that we don't value it — we assuredly do. But we rarely give it much thought, mostly because we don't have to. It's the default status, the way things are supposed to be, the way things will continue to be absent some unthinkable occurrence. Of course, that's not to say we don't notice when we experience an infringement on our freedom. The reaction, however, just reinforces the proposition's truth: we experience the infringement as an unnatural imposition, an alien intrusion on the expected and normal order of things.

But sometimes an infringement arrives as a disruption so great that it calls into question our comfortable assumption that we can safely place our liberties on autopilot. A case in point: the arrival of the COVID-19 pandemic in March of 2021, and the Safer at Home Order that followed a few short weeks later. In that order, Secretary of Human Services (designee) Andrea Palm took for herself the authority to reorder the lives of everyone living in Wisconsin. The more remarkable provisions in the order included the following mandates:

- Everyone must remain at home, subject only to exceptions she authorized;
- All businesses must cease operations, except to the extent she decides they are "essential;"
- All businesses not shut down by the order must comply with her directives on how to conduct their activities;
- No private gatherings except as she might decree;
- No travel, except as she allows;
- Compliance with DHS guidelines as and when they might emerge over time;
- Compliance with social distancing requirements and the department's directives on how to wash one's hands, and how to cough or sneeze.

I have no idea whether the order's requirements were substantively effective in combatting COVID. I do, however, have plenty of thoughts on whether Secretary Palm had the authority to use the massive power of the state to summarily confiscate our fellow Wisconsinites' freedom to make those decisions for themselves. Recent events have led me to revisit those thoughts and, having done so, I'm more convinced than ever that we cannot afford to leave our freedoms on autopilot. We need to remember how they are protected, and how to recognize the warning signs that they might be in peril. I described some of those principles in the concurring opinion I wrote a few years ago in Wisconsin Legislature v. Palm, two of which I'll summarize here.

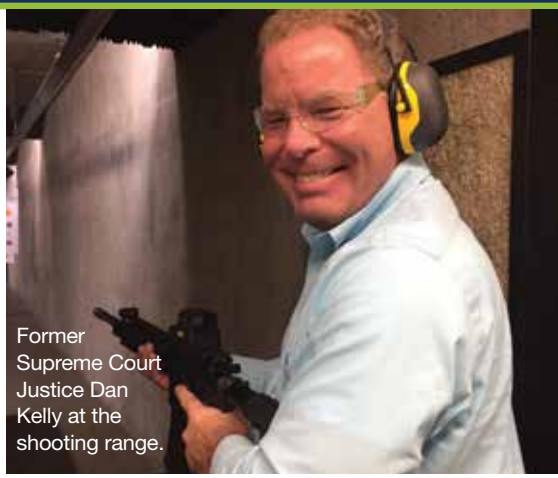
First, we need to regain a healthy reticence and caution over the use of government power. Consulting their vast store of historical knowledge, the framers of the United States Constitution understood that the very act of creating a government carried with it the inherent risk that their creation could, over time, choke out our native freedoms. So, their project was to come up with a structure that would allow for a government powerful enough to protect our rights, but not so powerful that it could eliminate them. James Madison, in his usual trenchant style, described the problem like this:

"If angels were to govern men, neither external nor internal controls on government would be necessary.

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." (Federalist No. 51).

Creating a powerful government is easy. The trick is in obliging the government to control itself. In pursuit of that goal, the framers adopted Montesquieu's innovation: the allocation of the constituent elements of governmental power between separate legislative, executive, and judicial branches. The result was a structure in which power would be pitted against power, ambition against ambition. Success in keeping the powers separated amongst those branches has turned out to be the key factor in securing our liberties.

If the executive branch had honored that separation, there never would have been a Palm case for the court to decide. And that's because Secretary Palm's order wasn't really



Former Supreme Court Justice Dan Kelly at the shooting range.

an order at all. It was legislation, the authority for which lies with the legislature, not an unelected bureaucrat in the executive branch. So, the problem with the order wasn't its ability to control the spread of COVID. It was its hijacking of authority that belonged elsewhere. The proper procedure was for the people of Wisconsin to engage with their legislators to determine the appropriate trade-offs between pandemic precautions and individuated decision-making.

Second, we need to remember the proper role of the court. Some say, in response to decisions they do not like, that the court "failed to read the room," or "was apparently ignorant of the most recent polling on the question," or "didn't fairly represent what the people want." But the court is not one of the political branches, and it is not designed to respond to public passions. Its job is simply to apply the law as it exists — not as someone wishes it to be. Indeed, if it were to succumb to public pressure it would itself violate the constitutional structure. As I wrote in Palm, the court must "be assiduous in patrolling the borders between the branches." Why? Because as Justice Antonin Scalia has said, "[t]he purpose of the separation and equilibration of powers in general was not merely to assure effective government but to preserve individual freedom."

The framers probably would not be surprised to learn that Secretary Palm attempted to exercise legislative power. But they would have been shocked if the Wisconsin Supreme Court had not responded the way we did. And yet it was a close-run thing. The proper constitutional order, and the protection of our freedoms, prevailed by a narrow 4-3 majority opinion.

The separation of powers — it's more important to our liberties than ever.

SEN. JOHNSON HIGHLIGHTS HIS SUPPORT OF TAX CUTS FOR SMALL BUSINESSES

By Sen. Ron Johnson

One of the most ridiculous and distorted attacks against me focuses on my significant involvement and contribution to the 2017 Tax Cuts and Jobs Act. Had it not been for me, our small businesses – which account for approximately 95% of businesses in Wisconsin and throughout America – would not have received any tax relief and would have been put at a significant competitive disadvantage compared to large corporations called C-Corps.

Here's what happened. Because of legitimate concerns over our growing national debt, Republicans decided to limit the deficit static score for tax reform to $1.5 trillion. Unfortunately, that score only covered cutting taxes for businesses organized as C-Corps to the 20% rate President Trump had campaigned on. C-Corps represent the largest businesses in America but only 5% of all business organizations.

Having owned and operated smaller "pass-through" businesses, I was well aware of how much of a competitive disadvantage smaller businesses would be put at if this disparity wasn't corrected. In a pass-through business, the income "passes through" to the owners of the company and is taxed at the individual level at progressive individual tax rates. Pass-through businesses include partnerships, Sub-Chapter S Corporations, and LLCs. Most small Main Street businesses choose this form of tax structure.

Prior to the 2017 Tax Cuts and Jobs Act, the maximum tax differential between C-Corps and pass-through businesses was 7.7%, with pass-throughs paying the higher rate. Without my intervention, that maximum differential would have increased to a whopping 23.8%. Behind the scenes, I tried my best to convince my colleagues to recognize the harm this would cause and fix this problem, but the $1.5 trillion static score and President Trump's campaign promise frustrated my efforts.

Here is the chart I developed and used to show my colleagues and the Trump administration's tax advisors what their tax bill would do to small businesses.

TAX RATES ON BUSINESS INCOME

	C corp	Active PT owner	Passive PT owner	Excluded PT owner
Current law				
Top tax rate	35 %	39.6 %	39.6 %	na
Obamacare NIIT			3.8 %	
SALT adj at 7.5%	(2.6) %	(3.0) %	(3.3) %	
Adjusted top tax rate	32.4 %	36.6 %	40.1 %	
Difference from C corp rate	na	+4.2 pts	+7.7 pts	
Difference as a pct		*+13 %*	*+24 %*	
Senate proposal				
Top tax rate	20 %	38.5 %	38.5 %	38.5 %
Obamacare NIIT			3.8 %	3.8 %
PT deduction at 23%		(8.9) %	(8.9) %	
SALT adjustment	(1.5) %			
Adjusted top tax rate	18.5 %	29.6 %	33.4 %	42.3 %
Difference from C corp rate	na	+11.1 pts	+14.9 pts	+23.8 pts
Difference as a pct		*+60 %*	*+81 %*	*+129 %*
Change from current law	(13.9) pts	(7.0) pts	(6.7) pts	2.2 pts
Difference as a pct	*-42.9 %*	*-19.1 %*	*-16.7 %*	*5.5 %*

Analysis excludes tax effects of active pass-through owner salaries and all dividends.

One day, a reporter caught wind of my concerns and asked if I was going to support the tax bill in its current form. I answered honestly by saying, "No." That was not received well by President Trump's team, my fellow Republicans, or conservative television and talk radio hosts. But I held my ground, and eventually prevailed by reaching a compromise to increase the 20% C-Corp rate to 21% to accommodate lowering the maximum pass-through rate to 29.6%, an 8.6% maximum differential.

The Left now tries to claim that I somehow carved out a special tax deal for two people who have donated to my campaigns and happen to have large pass-through businesses. That is both absurd and false. My actions were not targeted to benefit a few but designed to help the many – the roughly 95% of all Wisconsin and U.S. businesses – and the tens of millions of hard working people they employ.

Had it not been for me, "Main Street" businesses would have been left behind and found it very difficult to compete with the big guys. I'm proud of my efforts and believe that without me, many small businesses would have failed because of the competitive disadvantage, or converted to C-Corp status and thus dramatically reduced the amount of tax revenue tax the federal government would have received. ABC Wisconsin

Former ABC of Wisconsin Labor Attorney Jim Pease speaks to members in the early days of the chapter.

THE PENDULUM SWINGS OVER 50 YEARS- A HISTORICAL PERSPECTIVE FROM A FORMER ABC LABOR ATTORNEY

By Jim Pease

More than 50 years ago, before ABC had a chapter in Wisconsin, construction unions dominated the industry, particularly in the major metropolitan areas. Those unions used exclusive jurisdiction and all-union subcontracting clauses in their labor agreements to exclude nonunion contractors from job sites. They also used picketing and threats to "shut down the job" to discourage contractors and construction users from using nonunion contractors and suppliers. For example, unions picketed to cause unionized ready mixed concrete truck drivers to refuse to cross the picket lines and effectively shut down a job. They also used political pressure from government personnel, including inspectors, who were in league with unions (and often were former union representatives) to encourage use of union contractors and suppliers and hassle nonunion contractors and suppliers. Those unions were winning the battle against nonunion contractors and suppliers who were struggling to survive. Nonunion contractors and suppliers, and those of us who represented them, were the underdogs. They were challenging times.

It wasn't until the 1970's, that things started to change. I remember a Maryland contractor by the name of Mike Kallas, a member of ABC, who was brought to Wisconsin by a group of local contractors and suppliers to speak about his experiences with ABC in the eastern states. He explained how ABC could do the same in Wisconsin; providing help to contractors and suppliers in Wisconsin stand up to the construction unions. His experiences with ABC were an inspiration to his audience. He made people think it was possible for contractors and suppliers to stand up to the construction unions and remain free to operate in a way they considered most effective for their employees and for themselves.

The formation of a local ABC Chapter in Wisconsin in 1972 brought together contractors and suppliers with similar issues and facilitated working together to address the challenges construction unions were imposing on them. Now, when a ready mixed concrete supplier was unable to deliver concrete to a job that was being picketed or threatened with a picket, another supplier would step in and fill the gap by making the delivery.

I recall what a thrill it was to see cranes fired up in the wee hours of the morning to lift concrete onto sites (a Wisconsin River bridge and at a Wausau area site) shut down by pickets. I thoroughly enjoyed watching the pickets jump in their trucks to get to a telephone to call the union office to find out what they should do. These were just a few of the many jobs where ABC contractors and suppliers helped make it possible for nonunion workers to work on jobs.

The ability of nonunion contractors and suppliers to work on jobs side by side with union contractors was a turning point that signaled fundamental changes in the Wisconsin construction market. It was clear that the pendulum was swinging away from union power, which had been used to control jobs in Wisconsin.

This change was brought about largely through the use of reserved entrance systems, which required any union picketing to be limited to entrances that were used by employees and suppliers of the picketed employer. If carefully established and maintained, reserved entrances proved to be another way of enabling nonunion contractors and suppliers to work on jobs with unionized contractors and suppliers and help convince construction users that it was feasible to use nonunion contractors and suppliers. One of the limitations on the use of reserved entrances was that they are enforced by the National Labor Relations Board (NLRB), which tends to have a natural tendency to sympathize with unions.

Secondary boycotts occur when the unions put pressure on unionized workers on a project with mixed union and nonunion contractors and suppliers to cause them to stop working. The strategy was to put pressure on employers to influence construction users to remove nonunion contractors and suppliers from the job. This can occur when a union fails to limit its picketing to entrances used by the nonunion employer with whom the union had its primary dispute or when the union tries to circumvent the limitations imposed on it by the law against secondary boycotts by otherwise putting pressure on neutral employers and their employees to stop working to put pressure on general contractors and construction users to terminate the nonunion employers on the job. Once those board agents realized the inappropriateness of those secondary boycotts, it was possible to get the NLRB to go into federal district court and persuade sometimes reluctant federal judges that an injunction against the union's unlawful activity was appropriate. What helped greatly in educating NLRB agents was the construction unions' resort to violence in support of their disputes with nonunion contractors and suppliers. The board agents were quite intolerant of that violence.

NONUNION CONTRACTORS AND SUPPLIERS, AND THOSE OF US WHO REPRESENTED THEM, WERE THE UNDERDOGS.

Once construction users saw that it was feasible to complete a job, notwithstanding threats and harassment by the construction unions, the construction users welcomed the opportunity to take advantage of the competition provided by nonunion contractors and suppliers.

Another development arising from the ability of nonunion contractors to work on mixed jobs was the establishment of what became known as dual shops. These occurred when unionized contractors recognized the feasibility and working on mixed jobs and established nonunion shops in hopes of being able to compete in that market. However, there proved to be significant problems in running a dual shop operation and financial penalties on employers who didn't do so successfully were very substantial, which limited the growth of dual shop operations.

For several decades, unions retaliated by trying to unionize nonunion employers. However, those employers had anticipated that tactic and, by and large, had established compensation and personnel policies that compensated employees what they were worth and treated them fairly. Obviously, this removed any incentives among those employees for wanting to be represented by a union to whom they would have to pay fees and dues and whose rules they would have to follow. So, those unionization efforts were largely unsuccessful.

Gradually, sophisticated unionized subcontractors began to realize that they needed to establish their ability to work on jobs with nonunion contractors and suppliers even if a construction union targeted the job with picketing and threats of a shutdown. That was because construction users who wanted to take advantage of the competition provided by nonunion contractors and suppliers, would not consider those unionized contractors and suppliers who couldn't work on a job with mixed union and nonunion contractors and suppliers unless they signed a contract with a performance clause. The performance clause stated that picketing of a job was not justification for the contractors to fail to perform their work on the job.

Eventually, the volume of cases we had, where nonunion contractors and suppliers had union-related problems working on jobs, even in large metropolitan areas, declined significantly, and union business agents showed some willingness to tolerate some nonunion contractors and suppliers.

More recently, union activity has been relatively tame. However, the impact of the pandemic and a new administration may be swinging the pendulum back in favor of more union power. There also appears to be a shortage of skilled workers who are willing to work. This frees employees to job-shop, skipping from job to job for ever higher wages or better working conditions, leaving nonunion contractors – who aren't willing to pay their employees what they are worth – with a shortage of skilled workers. Obviously, this compromises the ability to complete jobs on time and within budget. It puts significant pressure on nonunion employers to deal with the rapidly escalating employee demands without compromising the ability of the business to operate effectively, and, eventually, profitably.

It is almost as though the clock has turned back 50 years, and employers are facing challenges equally as severe as those faced 50 years ago. We hope it's not, but if it is, ABC will be ready to fight the fight. Wisconsin

ABC Supply Stadium – Corporate Contractors, Inc.

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NEW MEMBERS

For membership information contact Bill Stranberg, Membership Director Associated Builders and Contractors of Wisconsin – 608-244-5883

MAY 2022

• Cedar Lake Sand & Gravel Co.
Pat Strachan
5189 Aurora Rd.
Hartford, WI 53027
Phone: 262-644-5125
Description: Supplier Member
Sponsor: Steve Klessig, Keller, Inc.
Beam Club Members-to-date: 65

• Clearwater Plumbing, Inc.
David Egle
285 Forest Grove Dr. #114
Pewaukee, WI 53072
Phone: 262-370-4420
Description: Contractor Member
Sponsor: Josh Levy, Husch Blackwell LLP
Beam Club Members-to-date: 1

• CR Prints & Photography, LLC
Chad Renly
17 W. Evergreen Ln.
Milton, WI 53563
Phone: 608-359-6484
Description: Associate Member
Sponsor: Amber Anderson, Aerotek, Inc.
Beam Club Members-to-date: 7

• Dunneisen Excavating, L.L.C.
Randy Dunneisen
W8697 Island Rd.
Waterloo, WI 53594
Phone: 920-988-0372
Description: Contractor Member
Sponsor: Jon Koch, Stevens Construction Corp.
Beam Club Members-to-date: 3

• Gillespie Plumbing, LLC
Mike Gillespie
1582 Detroit Harbor Rd.
Washington Island, WI 54246
Phone: 920-847-2222
Description: Contractor Member
Sponsor: Troy Carlson, Ansay & Associates, LLC
Beam Club Members-to-date: 28

• Jossart Brothers, Inc.
Vonda Jossart
1682 Swan Rd.
De Pere, WI 54115
Phone: 920-339-8500
Description: Contractor Member
Sponsor: Flynn McCarley, Ansay & Associates, LLC
Beam Club Members-to-date: 1

• Lampert Lumber
Barry Voigt
804 N. Union St., Mauston, WI 53948
Phone: 608-847-5819
Description: Supplier Member
Sponsor: Brian Wieser, Wieser Brothers General Contractor
Beam Club Members-to-date: 55.5

• MCB Electric, LLC
Marvin Borntreger
651 Windsor Lane, Evansville, WI 53536
Phone: 608-279-2623
Description: Contractor Member
Sponsor: Dave Murphy, PDC-Electrical Contrators
Beam Club Members-to-date: 18

• Service First Plumbing
Jamie Guibord
2823 London Rd. Suite 2
Eau Claire, WI 54701
Phone: 715-834-8884
Description: Contractor Member
Sponsor: Jim Bunkelman, Royal Construction, Inc.
Beam Club Members-to-date: 13

• U.S. Upfitting of Wisconsin
Dan Shelhamer
3515 N. 127th St.
Brookfield, WI 53005
Phone: 262-373-0454
Description: Supplier Member
Sponsor: Tim Mertins, Enterprise Fleet Management
Beam Club Members-to-date: 3

JUNE 2022

• Canfield Buildings, Inc.
William Canfield
S66W27890 River Rd.
Waukesha, WI 53189
Phone: 262-544-9230
Description: Contractor Member
Sponsor: Ken Kamphuis, Reesman's Excavating & Grading, Inc.
Beam Club Members-to-date: 1

• Chicago Masonry Construction
Bill Sanchez
841 N. Addison Ave.
Elmhurst, IL 60126
Phone: 630-834-0910
Description: Contractor Member
Sponsor: Keith Battaglia, Battaglia Industries, Inc.
Beam Club Members-to-date: 1

• Dennis Electric II
Kevin Diemert
1153 Ember Ave
Adams, WI 53910
Phone: 608-254-7657
Description: Contractor Member
Sponsor: Mitch Altmann, Altmann Construction Co.
Beam Club Members-to-date: 1

• Lerdahl | Inspired Workplace Interiors
Kelly Beck
7182 US Hwy 14
Middleton, WI 53562
Phone: 608-824-8202
Description: Supplier Member
Sponsor: Jon Koch, Stevens Construction Corp.
Beam Club Members-to-date: 4

• Northern Group USA
Skyler Mayotte
4829 S. Hately Ave
Cudahy, WI 53110
Phone: 414-640-4630
Description: Contractor Member
Sponsor: Jay Zahn, Hausmann Group
Beam Club Members-to-date: 56

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