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Feature Article

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North of the Cheese Curtain: Practice Tips for Illinois Lawyers Practicing *Pro Hac Vice* in Wisconsin

Although the Illinois-Wisconsin state line is invisible to the eye, it is often obvious when you have crossed over from Illinois into Wisconsin. The Bears and Cubs flags change to the Packers and Brewers almost immediately. The Wisconsin State Patrol cars patiently wait behind Kenosha County overpasses, looking to pinch inattentive drivers bearing Land of Lincoln license plates. Even the Mars Cheese Castle serves as a sentinel.

As a lawyer practicing with dual legal citizenship in both Illinois and Wisconsin, I have come to learn that there are also less obvious changes once you are north of the border. Illinois defense attorneys who pick up the occasional Wisconsin assignment should be aware of several differences in procedural and substantive law when practicing north of the "Cheese Curtain" that have implications for client advisement, claim assessment, and litigation conduct. While this article could not possibly address all the differences between the two jurisdictions, hopefully, it can illuminate differences of import.

Fortune Favors the Quick-Footed

Many jurisdictions in recent years have attempted to speed the litigation process, and Wisconsin is no different. Accordingly, Illinois-based defense attorneys practicing in Wisconsin should be prepared to jump on their cases even faster than they do in Illinois. While Illinois Supreme Court Rule 181 affords a defendant 30 days to appear and file a responsive pleading (assuming service is not waived), Wisconsin abbreviates this timeline to just 20 days. *See* Wis. Stat. §802.06, *et seq*.

Additionally, Wisconsin has a rapidly ticking clock regarding dispositive motion practice. Unless the court sets a different date in its scheduling order, a motion for summary judgment in Wisconsin must be brought within eight months of the complaint's filing. *See* Wis. Stat. § 802.08, *et seq*. Any party wishing to file a motion for summary judgment outside that time frame will need to seek leave of court.

The motion practice dance steps themselves are also more abbreviated in Wisconsin. The ubiquitous court dates for "presentment" of motions common in Illinois are nonexistent in Wisconsin. Parties instead typically receive a hearing date from the court upon the motion's filing. Additionally, reply briefs are often dispensed with altogether. Some forums, like Milwaukee County, expressly prohibit reply briefs for all non-dispositive motions without leave of court. *See* Milwaukee Cnty. Local Rule 3.11(C) ("No reply briefs shall be considered without the permission of the court."). Other jurisdictions, like Walworth County (Lake Geneva area), while not expressly barring reply briefs, make them practically impossible, as response briefs are not required to be on file until only a few days before the hearing, leaving little time for a reply.

All Politics, and Motion Practice, Is Local

Even the basics of Wisconsin motion practice standards vary from county to county, meaning Illinois attorneys practicing north of the border are well-served by consulting the local court rules before doing anything, and make assumptions at their own peril. For example, Milwaukee County has a ten-page limit for non-dispositive motions. However, Brown County (Green Bay) restricts the same motions to a laconic seven pages. *Compare* Milwaukee Cnty. Local Rule 3.11(E) *with* Brown Cnty. Local Rule 402.

Elsewhere, as mentioned *supra*, Walworth County (Lake Geneva area) requires any motion response brief to be submitted to the court five business days *before* the court-scheduled hearing. But, right next door in Racine County, response briefs are due 20 days *after* the motion was filed, and failure to respond by the deadline constitutes a waiver. *Compare* Walworth Cnty. Local Rule (Civil) 2.A *with* Racine Cnty. Local Rule III.C.3. Failure to appreciate these distinctions can have profound consequences. Fortunately, the State Bar of Wisconsin has a handy reference to the local rules from each county. *See* State Bar of Wisconsin, *Wisconsin Circuit Court Rules*, https://www.wisbar.org/Directories/CourtRules/Pages/Circuit-Court-Rules.aspx (last visited July 11, 2022).

Beware of a "Direct" Attack

In Illinois, even mentioning that a defendant has insurance coverage can be the subject of contentious battles given the prejudicial effect it will have on the jury. In contrast, Wisconsin is a direct-action state, where the defendant's insurance carrier(s) can be named as a masthead defendant alongside their insured co-defendant. Often, placeholder defendants (*e.g.*, "ABC Insurance Company") will be named until the carrier's identity can be ascertained.

"Construct" Your Own Defense

For defense lawyers practicing in the construction domain, be prepared to unlearn what you have learned and start from scratch. As might be expected, Chicago's history as a center for architectural advances has led to a robust library of construction law precedents for Illinois courts to consider. However, Wisconsin's construction law jurisprudence is considerably less developed. Defenses that Illinois construction lawyers have utilized for decades may be unavailable in Wisconsin.

For example, a design professional defendant being sued in Illinois can rest assured that its project contract defines the standard of care, and with it, the extent of any duty owed. *See Ferentchak v. Village of Frankfort*, 105 Ill. 2d 474, 482 (1985) (recognizing that the "degree of skill and care required of [the engineer] in this situation is dependent on his contractual obligation …. 'The scope of that duty, although based upon tort rather than contract, is nevertheless defined by the…contract' between the engineer and the developer"); *Thompson v. Gordon*, 241 Ill. 2d 428, 449 (2011). However, *Ferentchak* and *Thompson* have no precedential equivalent in Wisconsin that holds the project contract similarly sacrosanct.

Instead, Wisconsin plaintiffs can utilize the more amorphous doctrine of "equitable indemnification," which can even be asserted as an independent cause of action. Simply put, equitable indemnification shifts the loss from the one compelled to pay onto the party that, "under equitable principles," should bear the loss. *See Brown v. LaChance,* 165 Wis. 2d 52, 64-65 (Ct. App. 1991). Equitable indemnification's two basic elements are the payment of damages and the

lack of liability. *Id.* Equitable indemnity does *not* require a shared or joint liability for the debt. *Est. of Kriefall v. Sizzler USA Franchise, Inc.*, 2012 WI 70, ¶ 34.

Similarly, equitable indemnification does *not* require that the party seeking indemnification have a contractual relationship with the party from whom equitable indemnification is sought. *Id.* ¶ 34. Quite simply, equitable indemnification is possible when one party is exposed to liability for the wrongful acts of another. *Id.* ¶ 41. A design professional defendant filing a motion to dismiss in Wisconsin on the grounds that the alleged duty is not in the project contract may find the motion summarily denied on equitable indemnification principles. The court will instead apply the standard of ordinary care, and if "under equitable principles" the architect is alleged to have contributed to a scenario where the plaintiff had to pay, a dismissal will not be granted.

However, this does not mean that the project contract is irrelevant to the design professional's defense, as an end-run around equitable indemnification may be able to put the project contract (and its assignment of duties, for purposes of standard of care analysis) back at center stage. Despite Wisconsin's lack of a *Ferentchak* equivalent, the Wisconsin Supreme Court has a history of "examin[ing] business contracts and agreements to help determine what is included within the duty of ordinary care, where the alleged negligence arose out of a business relationship." *Hoida, Inc. v. M&I Midstate Bank*, 2006 WI 69, ¶ 35 (citing *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶¶ 6-9; *Baumeister v. Automated Prod., Inc.*, 2004 WI 148, ¶¶ 21-24). While a Wisconsin court may not give the project contract the full *Ferentchak* treatment, one may cite to Wisconsin law in support of an argument that any discussion of ordinary care should include an examination of what the parties agreed prior to the project was "reasonable under the circumstances." *See Behrendt v. Gulf Underwriters Ins. Co.*, 2009 WI 71, ¶ 18 (citing *Hoida*, 2006 WI 69, ¶ 38 (recognizing that "contractually assumed obligations and agreed upon limitations…shape [ ] [the] duty of ordinary care…because they set out what the parties agreed was reasonable under the circumstances")).

Our firm had recent success making such an argument on behalf of a design professional in Racine County, where upon examination of the project contract, the court found that the design professional did not assume the duties that the plaintiff alleged were breached. The court found no standard of care violation and swiftly entered summary judgment in favor of the design professional.

Conclusion

This discussion provides but a few examples of the differences Illinois practitioners need to be aware of when defending a claim in Wisconsin. As stated at the outset, this article (and perhaps no article) could ever hope to address all the differences between defending claims in both Illinois and Wisconsin. Your local sponsoring attorney should be able to help navigate the specific facts of your case, but gaining familiarity with local practice yourself can only save both you and your client valuable time and resource. Hopefully, the foregoing is helpful in illustrating the types of issues that can easily present themselves.

About the Author

Michael P. Sever is a partner at *Foran Glennon Palandech Ponzi & Rudloff, P.C.*, where he concentrates his practice in commercial litigation, construction litigation, casualty litigation, subrogation, products liability, and professional liability defense. Mr. Sever has represented companies and design professionals in cases involving construction negligence, contract enforcement, trucking accidents, premises liability, and personal injury defense. Mr. Sever also represents the world's largest collector car auction in a variety of matters, including dispute resolution, contract enforcement, litigation,

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