

WISCONSIN'S ACTIVIST COURT

CHARLES J. SYKES

On August 9, 2005, businessmen and attorneys across the country opened their copies of the *Wall Street Journal* to read that Wisconsin was bidding to become the country's "favorite trial lawyer destination."

In an editorial headlined "Alabama North," the *Journal* remarked that the "the previously sensible state of Wisconsin, led by its Supreme Court," had been a potential hot-bed of anti-business litigation.

"In a pair of rulings last month" the paper reported, "the court tossed out the state's cap on non-economic damages in medical malpractice cases, and it blessed a theory of lead paint litigation that will soon have every trial lawyer in America descending on the state and posing as a cheesehead."

Or at least trial lawyers looking for fat malpractice awards without caps, lawyers who want to sue manufacturers for products they made years ago, and criminal lawyers who will be able to toss out evidence allowed in most of the rest of the country.

In just a matter of days, with a flurry of 4-3 rulings, Wisconsin's Supreme Court had transformed the state's legal climate. As a result of its decisions on business issues, warns



Wisconsin Manufacturers & Commerce, the court has "put Wisconsin on course to having one of the worst legal climates in the country."

Thus, in a single morning, nearly twenty years of work to burnish the image of the state's business climate was undone.

Within days business groups in the state say they were preparing to launch a \$2 million campaign to fight the court rulings.

Explained Jim Pugh, the spokesman for Wisconsin Manufacturers & Commerce:

Every CEO and top executive in America is now reading that Wisconsin is a dangerous place to operate a business because you're getting sued out of business. That's why it's such a big deal.

An Activist Court

As alarming as the two decisions were, they reflected an even more startling shift in the balance of power on the state's highest court, with far-reaching ramifications for the political and legal climate in the state.

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In less than twelve months, a court with a reliable 5-2 conservative/majority had flipped to a court with a liberal majority. The new four-vote activist majority began with Governor Doyle's appointment of Louis Butler to replace conservative Diane Sykes, who was elevated to the Seventh Circuit of Appeals.

But it was the transformation of one-time conservative Justice Pat Crooks into what one pundit calls the "David Souter of Wisconsin" that gave Chief Justice Shirley Abrahamson the activist court that had for so long eluded her. Over a period of a few days this summer, the majority of justices Shirley Abrahamson, Ann Walsh Bradley, Butler, and Crooks not only threw out the caps on malpractice awards and ruled against the paint companies, but also limited the ability of police to use on-site victim eye-witness identifications of suspects in so-called show-ups and to use physical evidence. Both cases abandoned long held precedents and ignored past court rulings on similar issues.

For Wisconsin courtwatchers, the decisions gave immediate and tangible meaning to concerns about judges "legislating from the bench."

The activism of the new majority extends beyond the specific issues decided, suggesting a far more expansive agenda by the new court, including:

1. Changing the court's standard for reviewing legislation to something called "rational basis with teeth," which essentially allows the justices to second-guess laws they don't like, and which one justice says turns the court into a "super-legislature."
2. A marked willingness to ignore decisions by the U.S. Supreme Court and settled decisions of the court itself.
3. The endorsement of the principle of "new federalism," which confers greater rights on criminal defendants in Wisconsin than granted by the U.S. Supreme Court.
4. A penchant for basing decisions on questionable social science research in lieu of settled law.

5. The embrace of novel and unprecedented theories for lawsuits against business that have been rejected by other states. In its lead paint ruling, the court adopted the so-called "risk contribution" theory under which producers of components of a manufactured product can be held collectively liable, even if the plaintiffs can't prove which company's product caused their injuries.

A Super-Legislature

In 1995, the Wisconsin Legislature created a \$350,000 cap—\$445,775 adjusted for inflation—on non-economic damages in medical malpractice claims. Along with the Patients' Compensation Fund, the liability reform was successful in holding down malpractice costs, and as a result Wisconsin did not experience the out-migration of doctors that plagued other states.

The 4-3 court majority tossed out the caps on the grounds that the caps were "patently arbitrary" and ruled that the legislation had "no rational relationship to a legitimate government interest."

The *Wall Street Journal* commented: "[I]f discouraging frivolous legal claims to make health care more affordable and available for regular citizens isn't "legitimate government interest," we'd like to know what is." The paper noted that even as Wisconsin's high court was rejecting malpractice caps, Illinois Governor Rod Blagojevich was prepared to sign into law a \$500,000 cap on such damages "precisely to stop the flight of doctors out of that state—and into places such as Wisconsin."

For court watchers, however, the underlying logic of the court's decision was even more troubling than the potential blow to the medical and business communities.

In his dissent, Justice David Prosser, a former speaker of the State Assembly, accused the court's new majority of arrogating to itself the status of a "super-legislature." Noting that our form of government "provides for one legislature, not two," Prosser wrote, "This court is

not meant to function as a 'super-legislature,' constantly second-guessing the policy choices made by the legislature and governor."

Prosser accused the majority of using several "unacceptable tactics" to invalidate the legislature's action.

First, he wrote, the majority relied on the Wisconsin Constitution, not the United States Constitution, to reject state legislation. "This tactic," wrote Prosser, "assures that the court's decision will receive minimal scrutiny from legal scholars and no review by the United States Supreme Court."

"When the court insulates its decisions from review by the United States Supreme Court and response by other branches of state government," wrote Prosser, "it is effectively destroying the checks and balances in our constitutional system."

Prosser also noted that the majority had invented a new standard for reviewing the constitutionality of legislation. "It moves from a 'rational basis' test, long established in our law, to an intermediate scrutiny test which it euphemistically labels 'rational basis with teeth.'" The new standard gives the court much broader latitude in substituting its judgment for that of elected representatives.

Perhaps most troubling, the majority had relied on non-Wisconsin studies and articles to second-guess decisions made by Wisconsin's legislature. Prosser's critique was biting. "The use of these studies is selective, not comprehensive, so that non-Wisconsin studies that would support our legislation are played down, overlooked, or disregarded."

Finally, Prosser accused the majority of systematically minimizing the importance of

facts that support the constitutionality of the legislation.

For instance, the majority ignores the fact that certain types of malpractice insurance premiums have actually decreased in Wisconsin, while similar premiums have climbed in other states.

A Dangerous Precedent

The day after invalidating the malpractice caps, the court ruled that a Milwaukee boy with lead poisoning could proceed with a lawsuit against the paint industry even without evidence that a specific company was responsible for his injury. In doing so, the court majority also adopted an unprecedented and

radical theory that will allow businesses to be sued for things they may not actually have made.

As the *Wall Street Journal* pointed out:

This decision is the first of its kind in the country and establishes a dangerous precedent. It dispenses with the traditional legal standard for torts—which is to establish actual connections between wrongdoing and injury—and replaces it with a chain of speculation and conjecture, making it all but impossible for a company to exculpate itself. In short, the decision gives defendants every incentive to settle rather than risk a trial, rigging the system in favor of the trial lawyers. There's every reason to believe those same lawyers will try to export this same unfair theory to other states.

Business groups also expressed alarm.

"This precedent starts moving Wisconsin's liability law down a dangerous new path for Wisconsin manufacturers," said John Metcalf, who directs Wisconsin Manufacturers & Commerce's legal activities. "Wisconsin is a leading manufacturing state in the nation, with

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thousands of jobs depending on manufacturing. Our business climate will be hurt by this dramatic expansion of liability law."

In an analysis of the decision, the law firm of Quarles & Brady warned that the ruling "will have drastic, perhaps staggering, consequences for Wisconsin industry and commerce in all manner of products and bulk materials."

The business lawyers warned:

Because Wisconsin is the only state in the nation to eliminate the traditional requirement to prove who made the allegedly offending product, it is difficult to conceive of a case in which the Wisconsin Supreme Court would decline to apply this theory in the future.

Again, the dissenting justices were scathing in their criticism of the majority's jurisprudence. "Simply put," wrote Justice John Wilcox, "the majority opinion amounts to little more than this court dictating social policy to achieve a desired result."

As a result of the court's action, warned Justice Prosser, Wisconsin "will be the mecca for lead paint suits."

When the court issues its decision in this case, every person under the age of 20 who claims a lead paint injury in Wisconsin will have a cause of action in our courts.

Every person in the United States who has a lead paint injury that could have come from a Wisconsin-based company and can survive the limitations periods in his own state may have a cause of action.

The majority's ruling, he wrote had created a remedy for lead paint poisoning

so sweeping and draconian that it will be nearly impossible for paint companies to defend themselves or, frankly, for plaintiffs to lose. . . . The majority opinion raises the very real possibility that innocent defendants will be held liable for wrongs they did not commit. . . . The consequences of the majority opinion may be staggering for Wisconsin industry and commerce.

The New Federalism

Although the two decisions on malpractice caps and "collective liability" drew the most

attention and the strongest reactions, two other decisions, in criminal cases, also signaled the court's leftward shift.

In one case (*State v. Dubose*), the court sharply limited the use of so-called "show-up" identifications, in which crime victims make eye-witness identifications of criminal suspects; in the other (*State v. Knapp*), it ruled that physical evidence seized after the failure to give a suspect his Miranda warnings should also be excluded from admission.

In making the two decisions, the 4-3 majority announced that the state's Supreme Court will no longer regard the Wisconsin and federal constitutions as coextensive. Instead, the majority adopted the notion of "new federalism," which claims to read rights into the state constitution that do not exist under the Bill of Rights.

"The New Federalism," traces its modern lineage to the 1970s, when liberal jurists began to search for ways to circumvent what they saw as an increasingly conservative U.S. Supreme Court. Although Chief Justice Shirley Abrahamson has been the Wisconsin's court most enthusiastic advocate for the "new federalism," it was the formerly conservative Justice Crooks who waxed the most enthusiastic for the new standard.

In his concurrence in *Knapp*, he wrote:

As early as 1977, United States Supreme Court Justice William J. Brennan, Jr. recognized and encouraged the emerging pattern of state court decisions interpreting their own constitutions, and declining to follow federal precedent they found "unconvincing, even where the state and federal constitutions are similarly or identically phrased."

What stunned the dissenters and many court watchers, however, was the court's decision to ignore the specific decision of the U.S. Supreme Court in the case before it.

This was not the first time the high court had considered the issues in *State v. Knapp*. Mathew Knapp had been convicted of murder after the circuit court denied his motion to suppress the admission of a sweatshirt containing

the victim's blood into evidence. On appeal, the state Supreme Court had reversed his conviction, ruling that the evidence should have been suppressed because Knapp had not been given his Miranda rights.

The U.S. Supreme Court, however, vacated the Wisconsin court's decision, citing its holding that Miranda violations should not extend to the exclusion of physical evidence.

"The United States Supreme Court went to great lengths to instruct the Wisconsin Supreme Court on the requirements of the United States Constitution," noted Waukesha County District Attorney Paul Bucher. "By the way, the Wisconsin Constitution and the United States Constitution are almost identical."

Despite its reversal, however, the State Supreme Court's new majority chose to ignore the high court's ruling, deciding instead that the state constitution contained more extensive rights than those found under the U.S. Constitution. The 4-3 majority used the same logic to invalidate most "showup" identifications, even though the decision conflicting with previous holdings by the court. In a "showup" identification, police ask witnesses of a crime to identify a suspect at or near the scene of a crime.

The ruling brought a biting dissent from Justice Wilcox, who wrote:

The majority thus has no legal basis for its conclusion that Article I, Section 8 of the Wisconsin Constitution requires a radical change in our law governing showups. Simply put, Article I, Section 8 "necessitates" the rule announced by the court only because a majority of justices on this court wills it to be so. . . .

This is the second time this term this court has abandoned our practice of interpreting

similarly worded provisions of the state and federal constitutions in concert.

Wilcox highlighted the dangers of ignoring past precedents. "If a constitution is to mean anything, its principles must not be subject to change based on the prevailing winds of the time. . . ."

In a stinging dissent, Justice Pat Roggensack wrote that the majority's ruling

substitutes a search for the truth, which should form the foundation for every criminal prosecution, with one social science theory that showup identifications are "unnecessarily suggestive."

In so doing, the majority opinion abandons

our previous jurisprudence and the United States Supreme Court's jurisprudence concerning showup identifications, both of which have used the reliability of the identification as the linchpin for determining admissibility.

David Ziemer, writing in the *Wisconsin Law Journal* notes, the

greatest impact of the two decisions is not the particular holdings themselves, but that, in criminal cases, the

Wisconsin Constitution will no longer be interpreted in lock-step with the U.S. Constitution. . . .

Thus, the decisions are a very significant break from past interpretation. The question is whether this break will extend to search and seizure law.

Or perhaps into other areas of jurisprudence, especially now that the court has unhitched itself from federal constitutional law and precedent.

The Future

Prospects for the future are unclear. The court's decisions that were based on the state

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constitution can neither be appealed nor over-ridden solely by legislative action. And there are no indications that the court's balance of power will change any time soon.

Justice Crooks is up for re-election next Spring. But early attempts by business groups and conservatives to recruit an opponent have not been successful, perhaps in recognition of the difficulty of unseating an incumbent justice.

The lack of a competitive challenger to Crooks, shifts the focus to the legislature and the governor.

The legislature is expected to address the liability crisis this fall, with a package of bills addressing the court decisions on malpractice, product liability, and punitive damages.

That, in turn, will force Doyle to choose between the trial lawyer lobby and the state's

business community. Given his close relationship with the trial lawyers, it's likely he's already made the choice.

"This could be the issue," says one insider, "that causes business to finalize its divorce from this governor."

Congressman Mark Green (R-Green Bay), a candidate for governor, has already made it clear that he intends to make the liability crisis an issue in the campaign. A former member of the state legislature, Green was one of the authors of the original malpractice cap.

Conventional wisdom continues to believe the next election will turn on education and taxes, but Green is gearing up a campaign in which lawsuits, liability, the business climate—and appointments to the Supreme Court—could turn out to be the sleeper issues of 2006.