



WISCONSIN LEGISLATIVE COUNCIL

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RE: Expedited Appellate Procedures Under 2017 Wisconsin Act 58

DATE: September 19, 2017

This memorandum responds to your request for a summary of certain provisions of 2017 Wisconsin Act 58 ("the Act") and a legal analysis regarding the constitutionality of those provisions.

Briefly, the Act authorizes the Wisconsin Economic Development Corporation (WEDC) to create an electronics and information technology manufacturing zone ("EITM zone"), in which businesses may be certified to claim certain tax credits and exemptions and in which special financing and permitting standards apply. The Act also provides for grants to local governments, a moral obligation pledge, and bonding authorization for specified highway construction.

Provisions of the Act relevant to your request create an expedited appellate procedure for appeals of certain judicial orders relating to government decisions concerning an EITM zone. For reasons discussed below, it appears that certain aspects of that appellate procedure could be subject to challenge, although it is not clear whether a court would invalidate those provisions.

EXPEDITED APPELLATE PROCEDURE UNDER THE ACT

The Act creates a right to an appeal and an expedited appellate procedure for certain judicial decisions relating to an EITM zone. Specifically, the right to appeal and expedited procedure apply to appeals from a judgement or order of a trial court relating to a decision by a state or local official, board, commission, condemnor, authority, or other department concerning an EITM zone.

Right to Appeal

Under **current law**, generally retained by the Act, a **final** judgment or order of the circuit court may be appealed as a matter of right to the Court of Appeals, unless otherwise expressly provided by law. [s. 808.03 (1), Stats.] The Court of Appeals **may** grant an appeal of an order or judgment that is not final; specific procedures apply to petitions for such appeals. [s. 809.50, Stats.]

The Act provides that appeals of any trial court judgements and orders (not only final judgments and orders) relating to government decisions concerning an EITM zone may be taken to the Court of Appeals¹ as a matter of right.

Expedited Timelines

Current law provides differing time limits, generally ranging from 20 to 120 days after the date of entry of the judgment or order appealed from, depending on the type of order, for initiating appeals. [s. 808.04, Stats.] After an appeal is initiated, timelines for certain steps in the process, such as the submission of various filings and requesting copies of the transcript, are typically governed by court rules or orders, or they are unspecified. However, special, expedited timelines are set forth in the statutes for certain decisions relating to parental rights or consent to abortion procedures. [See ss. 809.105 and 809.107, Stats.]

Under **the Act**, a party may initiate an appeal of an order or judgment relating to a government decision concerning an EITM zone under an expedited process, which is similar to the process for certain parental rights and consent to abortion procedures cases under current law. The expedited process under the Act is initiated by filing a notice of appeal with the clerk of the relevant trial court and paying a fee. Within three days after the notice is filed, the clerk of the circuit court must transmit the notice, fee, and the circuit court record to the Court of Appeals. The clerk of the Court of Appeals must then file the appeal upon receipt.

Within five days after filing the notice of appeal, the party appealing the decision must take the following actions:

- Request a copy of the transcript of the trial proceedings for each of the parties to the appeal and make arrangements to pay for those copies.
- File a statement on transcript with the clerk of the Court of Appeals, and serve a copy of that statement on the other parties to the appeal.

The court reporter must serve copies of the transcript on the parties within five days of the appellant's request for a copy of the transcript.

¹ Although the Act does not specify that appeals would be taken to the Court of Appeals, it appears from the context and other provisions of the Act that most appeals would be made to the Court of Appeals.

Subsequent proceedings in the appeal are governed by general appellate procedures, except that the following expedited procedures apply:

- Within 15 days after the filing of the record on appeal, the appellant must file a brief.
- Within 10 days after the service of the appellant's brief, the respondent must file a brief.
- Within 10 days after the service of the respondent's brief, the appellant must file a reply brief or a statement that a reply brief will not be filed.

Certification to the Wisconsin Supreme Court

Under **current law**, the Supreme Court of Wisconsin may take jurisdiction of an appeal or any other proceeding pending in the Court of Appeals by any of the following methods:

- Granting direct review upon a petition to bypass filed by a party.
- Granting direct review upon certification from the Court of Appeals prior to the Court of Appeals hearing and deciding the matter.
- On its own motion, deciding to review the matter directly.

[s. 808.05, Stats.]

Generally, the Court of Appeals' decision to certify an appeal to the Wisconsin Supreme Court is discretionary. The Supreme Court may refuse to take jurisdiction of an appeal certified to it by the Court of Appeals. [s. 809.61, Stats.]

The Act requires the Court of Appeals to certify an appeal to the Wisconsin Supreme Court within three days of the Court of Appeals' receipt of the respondent's reply brief or statement that a reply brief will not be filed. The Act also requires the Wisconsin Supreme Court to give **preference** to such certifications in cases relating to a government decision concerning an EITM zone. If the Supreme Court refuses to take jurisdiction of the appeal, the Act provides that the appeal continues through the typical appellate process.

Stay Pending Appeal

Generally, under **current law**, filing an appeal does not automatically stay the execution or enforcement of a judgment or order appealed from except as otherwise provided in law. During the pendency of an appeal, a circuit court or an appellate court may do any of the following:

- Stay execution or enforcement of a judgment or order.
- Suspend, modify, restore, or grant an injunction.
- Make any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered.

[s. 808.07 (1) and (2), Stats.]

The Act provides that any judgment or order of a circuit court relating to an EITM zone is automatically stayed upon the filing of an appeal. However, any party to the proceeding may apply to the relevant appellate court to request that the stay be modified or vacated.

LEGAL BACKGROUND

Separation of Powers Doctrine

The Wisconsin Constitution provides that the legislative power is vested in a Senate and Assembly. [art. IV, s. 1.] The judicial power is vested in a unified court system consisting of one supreme court, a court of appeals, a circuit court, such trial courts of general uniform statewide jurisdiction as the Legislature may create by law, and a municipal court if authorized by the Legislature. [art. VII, s. 2.] Under the Wisconsin Constitution, the Supreme Court shall have superintending and administrative authority over all courts. [art. VII, s. 3 (1).]

The Wisconsin Supreme Court has held that the state's three branches of government exercise both core powers and shared powers. When exercising shared powers, one branch of government may not unduly burden or substantially interfere with another branch. An attempt by one branch to exercise the core power of another branch is impermissible, unless the branch having the core authority accedes to the intrusion as a matter of courtesy. In *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 531 N.W.2d 32 (1995), the court stated:

The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is implicit in the division of governmental powers among the judicial, legislative and executive branches. "The Wisconsin constitution creates three separate coordinate branches of government, no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution and no branch to exercise the power committed by the constitution to another."

Each branch has a core zone of exclusive authority into which the other branches may not intrude....

The separation of powers doctrine was never intended to be strict and absolute. Rather, the doctrine envisions a system of separate branches sharing many powers while jealously guarding certain others, a system of "separateness but interdependence, autonomy but reciprocity." ...The undue burden or substantial interference must be proven beyond a reasonable doubt....

[*Id.*, 531 N.W.2d at 36-40; footnotes and citations omitted.]

The Wisconsin Supreme Court has developed a multi-part test to determine whether legislation unconstitutionally intrudes upon judicial power. First, the court determines if the subject matter of the statute is within the powers constitutionally granted to the Legislature.

Next, the court determines if the subject matter of the statute falls within powers constitutionally granted to the Judiciary. If the subject matter of the statute is within the Judiciary's constitutionally granted powers, but not within powers also constitutionally granted to the Legislature or executive branch, the subject matter is considered within the Judiciary's core zone of exclusive power. Legislative or executive action regarding a core power of the Judiciary is an unconstitutional violation of the separation of powers doctrine.

If the subject matter of the statute is within the powers constitutionally granted to the Judiciary and the Legislature, the statute is within an area of shared powers. If the statute involves a shared power, the statute is constitutional unless it is shown to unduly burden or substantially interfere with the judicial branch. [*State v. Horn*, 226 Wis. 2d 637 (1999).]

The Supreme Court has made clear that judicial power is not limited to deciding outcomes of cases. In one separation of powers analysis, it stated:

It is well established that this court has express, inherent, implied and incidental judicial power. Judicial power extends beyond the power to adjudicate a particular controversy and encompasses the power to regulate matters related to adjudication.

[*State v. Holmes*, 106 Wis. 2d 31, 44 (1982).]

Authority Over Court Jurisdiction and Procedure

The Supreme Court of Wisconsin has described the power of the Legislature to regulate the courts as follows:

In Wisconsin jurisdiction and power of the court is conferred not by act of the legislature but by the constitution itself. While the legislature may regulate in the public interest the exercise of the judicial power, it cannot, under the guise of regulation, withdraw that power or so limit and circumscribe it as to defeat the constitutional purpose.

[*John F. Jelke Co. v. Beck*, 208 Wis. 650, 660 (1932).]

The Wisconsin Constitution distinguishes between the Supreme Court and the Court of Appeals with respect to the Legislature's role. Whereas the Court of Appeals "shall have such appellate jurisdiction ... as the Legislature may provide by law ...," the Supreme Court "has appellate jurisdiction over all the courts," "may review judgments and orders of the Court of Appeals," and "may accept cases on certification by the Court of Appeals." [art. VII, s. 3.]

Current law requires the Supreme Court to, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the proceedings and promoting speedy determination of litigation. The power of the Supreme Court in these matters extends to its ability to affect the work product of the Legislature; that is, the rules of the Supreme Court may modify or suspend existing statutes. [See s. 751.12 (2), Stats.]

However, the statutes reflect the shared power and interests of the judicial and legislative branches in these matters. The authority of the Supreme Court to affect the statutes does not “abridge the right of the Legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure.” [s. 751.12 (4), Stats.]

ANALYSIS

All legislative actions are presumed to be constitutional. This presumption is overcome only if unconstitutionality is proven beyond a reasonable doubt. [*Wisconsin Retired Teacher's Ass'n v. Employee Trust Funds Bd.*, 207 Wis. 2d 1 (1997); *Employers Health Ins. Co. v. Tesmer*, 161 Wis. 2d 733 (Ct. App. 1991).] However, as described above, if a statute is found to be under the exclusive power of the judiciary or to be a power that is shared but that unduly burdens or substantially interferes with the judicial branch, the court may rule the statute to be unconstitutional and overturn it. If a statute is found to be a shared power but is not found to unduly burden or substantially interfere with the judicial branch, the statute is not unconstitutional, but the judiciary may nonetheless overturn the legislative action through future amendments to statutes or its own rules.

Three provisions of the Act appear to be plausibly subject to challenge on separation of powers grounds: (1) the provision requiring the Court of Appeals to certify certain orders and judgments to the Supreme Court; (2) the provision requiring the Supreme Court to give preference to such certifications; and (3) the provision that automatically stays certain circuit court judgments and orders.

Because those provisions affect court practice and procedure, it may be difficult to persuade a court that they fall squarely within the Legislature's core powers. However, whether those provisions affect an exclusive judicial power or a power shared by the Legislature and the judiciary is less clear.

Certification of Certain Orders and Judgments

Of the three provisions listed above, the provision requiring the Court of Appeals to certify certain orders and judgments to the Supreme Court is perhaps most likely to be found to be an exercise of power shared between the legislative and judicial branches, rather than a core power of the judicial branch. Although it also has a procedural effect, the requirement to certify cases could be characterized as having the effect of narrowing the Court of Appeals' jurisdiction. As discussed, the Wisconsin Constitution authorizes the Legislature to determine the bounds of

the Court of Appeals' jurisdiction. Thus, the Legislature arguably has a clear role with respect to requiring the Court of Appeals to certify cases to the Supreme Court.²

As described above, an action within the scope of a shared power is generally upheld unless it unduly burdens or substantially interferes with another branch. Arguably, requiring the Court of Appeals to certify a relatively limited subset of cases to the Supreme Court is unlikely to unduly burden or substantially interfere with the judicial branch, but a reviewing court would evaluate that argument.

Automatic Stay of Certain Decisions

The provision providing for an automatic stay of certain decisions could be found to govern an area that is within a shared power of the Legislature and judiciary or a core power of the judicial branch. The granting of a stay could be characterized as having both a substantive and procedural effect. As noted above, the statutes provide that the authority of the Supreme Court to affect the statutes and develop rules of procedure does not "abridge the right of the Legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure." In other words, the governance of court procedure is clearly shared by the two branches. However, a stay can also be characterized as a substantive remedy, which affects parties' rights while an appeal is pending. For that reason, a court could hold that the provision is unconstitutional if it finds that this provision violates the judiciary's independence in the fulfillment of its constitutional responsibilities. Thus, it is possible that a court could hold that the decision whether to grant a stay is a core power of the judiciary.

If the granting of an automatic stay (with the possibility of having a stay vacated) falls in an area of shared powers, then it could be argued that the Act substantially interferes with the judiciary's ability to grant a remedy. Under current law, an appeal of a court order generally does not automatically stay enforcement. However, the strength of that argument may be mitigated because the Act authorizes parties to request an appellate court to vacate or modify the stay.

Preference by the Supreme Court

Similarly, it could be argued that, even if it were found to be within the scope of a shared power, requiring the Supreme Court to give preference to certifications in certain cases would unduly burden the judiciary, and more specifically the Supreme Court. In addition, this might be viewed as a matter over which the Supreme Court has superintending and administrative authority under Wis. Const. art. VII, s. 3 (1).

On the other hand, courts have recognized that the Legislature has a role in assuring the fairness, and appearance of fairness, of the judicial system. For example, in cases relating to trial rights, such as speedy trial for criminal defendants and judge substitution, the court has held

² It could alternatively be argued that the provision interferes with the Supreme Court's constitutional power of "superintending and administrative authority" over all courts. It is difficult to predict how a court might respond to that argument based on existing case law.

that the Legislature shares with the judiciary the authority to guarantee such rights. [See, e.g., *State v. Holmes*, 106 Wis. 2d 31 (1982), upholding a statute requiring substitution of a trial judge.] On this point, the Supreme Court has stated:

While the legislature has no constitutional power to compel the court to act or, if it acts, to act in a particular way in the discharge of the judicial function, it may nevertheless with propriety, and in the exercise of its power and the discharge of its duty, declare itself upon questions relating to the general welfare... The court, as has been exemplified during the entire history of the state will respect such declaration and, as already indicated, adopt them so far as they do not embarrass the court or impair the constitutional functions.

[*Id.* (quoting *Integration of Bar Case*, 244 Wis. 8 (1943)).]

In addition, because the provision merely requires the Supreme Court to “give preference” to certain certifications, rather than requiring the Supreme Court to accept them, it could be argued that the provision preserves the Supreme Court’s discretion and thus does not burden or interfere with the judicial branch.

Conclusion

It is difficult to predict with certainty how a court may rule regarding the Act’s constitutionality. Provisions of the Act that provide for an automatic stay and require the Supreme Court to give preference to certain certifications appear most subject to challenge. However, arguments could be made with respect to both provisions that they are shared powers that should be upheld because they do not unduly burden or substantially interfere with the judicial branch.

If you have any questions, please feel free to contact us directly at the Legislative Council staff offices.

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