

Economic Indicators Report

**Third Quarter 2012:
Stevens Point Area**

**Randy Cray, Ph.D., Chief Economist
Scott Wallace, Ph.D., Research Associate**

Special Report:

A Change in Atmosphere: Developments in State and
Federal Business Law

By Caz McChrystal

Assistant Professor, Business Law, University of Wisconsin-Stevens Point

TABLE OF CONTENTS

National and Regional Outlook	2-3
Table 1: National Economic Statistic.....	3
Central Wisconsin	3-5
Table 2: Unemployment Rate in Central Wisconsin.....	3
Table 3: Employment in Central Wisconsin.....	3
Table 4: Wisconsin Employment Change by Sector.....	3
Table 5: County Sales Tax Distribution.....	4
Table 6: Business Confidence in Central Wisconsin.....	4
Figures 1-7.....	4-5
Stevens Point-Plover Area	5-7
Table 8: Retailer Confidence in Stevens Point - Plover Area.....	5
Table 9: Help Wanted Advertising in Portage County.....	5
Table 10: Unemployment Claims in Portage County.....	6
Table 11: Public Assistance by Program Type.....	6
Table 12: Unemployment Claims in Portage County.....	6
Table 13 Residential Construction in Stevens Point - Plover Area.....	6
Table 14: Nonresidential Construction in Stevens Point - Plover Area.....	6
Figures 8-11.....	6-7
Housing Market Information	7-8
Table 15: National Median Home Prices.....	7
Table 16: National Existing Home Sales.....	7
Table 17: National Inventory.....	7
Table 18: National Affordability Index.....	7
Table 19: Local Area Median Price.....	8
Table 20: Local Units Sold.....	8
Table 21: Local Median Price.....	8
Table 22: Local Number of Home Sales.....	8
Recent Entrepreneurship Rates by Age and Industry	8-10
Special Report	11-23

A Change in Atmosphere: Developments in State and Federal Business Law
By: Caz McChrystal, Assistant Professor Business Law
University of Wisconsin-Stevens Point

Special Recognition:

Brittany Melby, Research Assistant, CWERB
 Jeffrey Dallman, Research Assistant, CWERB



Association for University

Business and Economic Research

CWERB - School of Business and Economics
 University of Wisconsin-Stevens Point
 Stevens Point, WI 54481
 715-346-3774 or 715-346-2537

www.uwsp.edu/business/CWERB or follow us on Twitter @UWSPcwerb

NATIONAL AND STATE ECONOMIC CONDITIONS

During this political season many things were said about the economy that were misleading or untrue. In this quarter's report, I will examine the performance of the U.S. economy over the past number of years. It seems that everyone has an opinion on the matter, but what does the data really say about the situation? There are an untold number of variables that one could examine for insight into the economy. However, I will limit myself to the ones that I feel are best understood by the public.

The Bureau of Economic Analysis data shows that for thirteen consecutive quarters (or thirty-nine months in a row), the Gross Domestic Product of the nation expanded. Let's be clear, the GDP had only two good quarters during this entire period when growth approached 4 percent. In third quarter 2012 GDP was estimated to have grown by 2.0 percent. But we should not forget that in first quarter 2009, the economy was in free fall and contracting at an alarming 5.3% rate. If the economy continued to fall at this rate for twelve months, about \$700 billion worth of output and income would have been wiped out.

One of the most important factors driving the revival of the economy has been consumer spending. This is important because consumer spending accounts for 70 percent of all economic activity. For the past eleven quarters in a row (or past thirty-three months), household spending has been increasing. In third quarter 2012 household spending grew at a 2 percent rate. Although this is a modest increase, the data indicates that households are once again playing a major role in the economy. Furthermore, the University of Michigan's Consumer Sentiment Index is at its highest level since September 2007. In October 2012 the index was at 82.6, up from the September 2012 number of 78.3, a gain of 5.5 percent.

According to the Bureau of Labor Statistics, employment in the country has expanded for twenty-four consecutive months. However, the number of jobs added each month to the economy has been tepid at best. For example, in September only 114,000 jobs were added to the nation's payrolls. Moreover, it should be pointed out that the country is still 260,000 jobs below where it was four years ago. A closer examination of the data shows that the bulk of the job loss came in the year 2009. During the first four months of 2009, the nation was losing an average of 700,000 jobs a month! This of course is a direct result of the Great Recession. So by in large, we have been

improving over the last three years, but at the time of this report, not enough to wipe out the huge losses that occurred in in the Great Recession.

Relatedly, the unemployment rate sky rocketed during 2009 to about 10 percent nationally. It has been trending lower ever since and stands at about 7.8 percent in September. The Bureau of Labor Statistics data shows that the unemployment rate remains at the same level as it did at the beginning of 2009. So the economy appears to be recovering on this front.

Improvement in the housing market is also evident in the data on housing prices and foreclosure activity. According to the National Association of Home Builders the national medium home price has risen from \$175,000 in 2009 to \$185,000 in second quarter 2012, a modest gain of 5.4 percent. But this has not been a smooth ride. In late 2011 the price actually bottomed out at \$160,000. At the same time, RealtyTrac data indicates that foreclosure activity reached a peak in fall of 2010 when about 100,000 homes were being foreclosed per month. In September 2012, the number of foreclosures had fallen to about 53,000 per month and is actually lower than the 67,000 home foreclosures that took place in January 2009.

Over the past four years, the Federal Reserve has come under intense criticism for its expansive monetary policy called quantitative easing. The attempt by the Fed to stimulate the economy by keeping interest rates at a record low level is exemplified by the ten-year U.S. Treasury bond rate of 1.8 percent. The concern has been that this prolonged effort to stimulate the economy through easy monetary policy will lead to inflation and threaten the economy. The record shows that over the last year inflation has remained subdued. In September, the annualized inflation rate was 2.0 percent. However, for a number of months the inflation rate was rising by more than three percent. With so much money now in circulation, it behooves the Federal Reserve to keep a close eye on the situation. If the economy gathers additional momentum the inflation hawks may yet be proved right in their concerns.

Also it is clear that the nation's industrial output has been on the mend. Since mid-2009, the index has been on a steady climb. In mid-2009, the index stood at around 85 and by September 2012 reached 98. This means the nation's industrial output has increased by nearly 16 percent.

The forecast is that the economy should continue to expand at a modest, but steady rate into 2013. However, there are things that could easily derail the expansion and worse yet cause another recession. How Washington addresses the budget impasse is a huge matter. As it now stands, if nothing is done automatic tax hikes and spending cuts will reduce GDP by 3 to 5 percent and cause a recession. Looking to the future, in order to lower the federal government budget deficit, Washington is going to have to make some very tough decisions on spending and taxation. These decisions will have a substantial impact on everyone in this country. Who wins and who loses is going to be an ongoing point of contention that will not go away anytime soon.

On the international scene, the recession gripping Europe is far from over. If the Eurozone should collapse, expect an even larger drag on our economy. Most people in this country do not realize that Europe is a very important trading partner of the U.S. and their recession has been a contributing factor to our modest rate of economic growth. Lastly the nuclear situation developing in the Middle East could lead to another war. If this happens, there will be untold ramifications for the world's oil dependent economy.

TABLE 1 NATIONAL ECONOMIC STATISTICS	2011 Third	2012 Third	Percent Change
Nominal Gross Domestic Product (Billions)	\$15,163.2	\$15,775.7	+4.0
Real Gross Domestic Product (Billions of 2000 \$)	\$13,306.9	\$13,616.2	+2.3
Industrial Production (2002 = 100)	94.2	97.0	+3.0
Three Month U.S. Treasury Bill Rate	0.02%	0.09%	N.A.
Consumer Price Index (1982-84 = 100)	226.9	231.4	+2.0

CENTRAL WISCONSIN

The unemployment rate in each reporting area is displayed in Table 2. In September 2012 Portage, Marathon and Wood counties all experienced reductions in their unemployment rates. The respective September rates were 5.6, 6.4 and 6.0

TABLE 2 UNEMPLOYMENT RATE CENTRAL WISCONSIN	Unemployment Rate September 2011	Unemployment Rate September 2012	Percent Change
Portage County	6.0%	5.6%	-7.1
City of Stevens Point	7.6%	7.2%	-5.3
Marathon County	7.0%	6.4%	-9.3
Wood County	6.9%	6.0%	-13.1
Central Wisconsin	6.7%	6.0%	-10.4
Wisconsin	7.0%	6.2%	-11.3
United States	8.8%	7.6%	-13.7

percent. The labor force weighted unemployment rate for Central Wisconsin was lower, moving from 6.7 percent to 6.0 percent. Meanwhile Wisconsin's unemployment rate fell from 7.0 to 6.2 percent and the United States unemployment rate also fell from 8.8 percent to 7.6 percent. Thus, the unemployment rates are declining throughout all reporting areas.

Employment figures in Table 3 are based on the government's survey of households. Portage County employment rose by 1.2 percent over the past twelve months and Wood County 2.2 percent. Similarly, the news for Marathon County payrolls showed improvement. Marathon County increased by 1.1 percent over the year. Central Wisconsin as a whole experienced an employment increase of about 2,200 positions. Employment in the three counties rose from 144.4 to 146.4 thousand or by 1.4 percent. The survey of households also shows the state of Wisconsin payrolls rising by 0.7 percent or by about 21,000 positions over the period and the nation gained 2.0 percent or just under 3,000,000 jobs over the same period.

TABLE 3 EMPLOYMENT CENTRAL WISCONSIN	Total Employment September 2011 (Thousands)	Total Employment September 2012 (Thousands)	Percent Change
Portage County	39.7	40.2	+1.2
City of Stevens Point	13.9	14.8	+6.5
Marathon County	67.2	67.9	+1.1
Wood County	37.5	38.4	+2.2
Central Wisconsin	144.4	146.4	+1.4
Wisconsin	2,849.6	2,870.8	+0.7
United States	140,502	143,333	+2.0

* Percent change figures reflect data before rounding

Table 4 gives the latest employer based payrolls numbers for Wisconsin. Economists believe the

TABLE 4: WISCONSIN EMPLOYMENT CHANGE BY SECTOR	Employment September 2011 (Thousands)	Employment September 2012 (Thousands)	Percent Change
Total Nonfarm	2777.4	2750.8	-1.0
Total Private	2376.1	2348.9	-1.1
Natural Resources and Mining	3.3	3.2	-3.0
Construction	95.6	92.3	-3.5
Manufacturing	452.1	453.7	+0.4
Trade, Transportation, and Utilities	512.5	509.0	-0.7
Information	47.3	48.1	+1.7
Financial Activities	153.4	154.6	+0.8
Professional and Business Services	272.2	280.1	+6.6
Educational and Health Services	428.9	417.6	-2.6
Leisure and Hospitality	266.1	246.1	-7.5
Other Services, exc. Public	144.7	134.2	-7.3
Government	401.3	401.9	+0.1

nonfarm employment numbers based on employer provided data, give a more accurate assessment of the labor market conditions than household data. From September 2011 to September 2012 Wisconsin's total nonfarm employment contracted from 2.777 million to 2.750 million or by a 1.0 percent. This represents a loss of approximately 27,000 thousand jobs during the past year. The sectors of the economy to experience job growth were the manufacturing, information, professional & business services, and financial activities. However, the employment results for all the rest of the industrial sectors were very disappointing. Thus, rate of job generation continues to be very weak in the state as measured by this data set.

In Table 5, Portage County sales tax distributions rose from \$1.29 million to \$1.31 million, an increase of 2.1 percent. Marathon experienced an increase in sales tax distributions from the state. Marathon rose from \$2.51 million to \$2.60 million or by 3.3 percent. Similarly Wood County collections also expanded from \$1.23 million to \$1.27 million or by about 3.2 percent over the course of the past year. The data suggests there was some improvement in retail activity in Central Wisconsin.

TABLE 5 COUNTY SALES TAX DISTRIBUTION	2011	2012	Percent Change
	Third (Thousands)	Third (Thousands)	
Portage County	\$1,285.9	\$1,312.5	+2.1
Marathon County	\$2,514.6	\$2,598.2	+3.3
Wood County	\$1,234.4	\$1,274.3	+3.2

* Percent change figures reflect data before rounding

The CWERB's survey of area business executives is reported in Table 6. This group believes that recent events at the national level have led to a worsening in national economic condition. In addition they believe the local business climate has stayed about the same over the past year. When they were asked to forecast

TABLE 6 BUSINESS CONFIDENCE	Index Value	
	June 2012	September 2012
Recent Change in National Economic Conditions	46	45
Recent Change in Local Economic Conditions	46	48
Expected Change in National Economic Conditions	54	53
Expected Change in Local Economic Conditions	55	53
Expected Change in Industry Conditions	57	48

100 = Substantially Better 50 = Same 0 = Substantially Worse

the future economic conditions at the national level they felt there would be a slight improvement by late 2012. Also, they expressed some optimism for the local economy. However, when it came to their particular industry they believe matters would not change all that much by year end. Table 6 also shows that the level of optimism expressed for the economy was generally higher in June 2012 than in September 2012.

Figures 1 thru 7 give a historic overview of how the economy in Wisconsin has performed during the 2007-2012 time period. For example Figure 5 shows the dramatic decline in Wisconsin manufacturing and the rebound taking place since 2010. In 2007 about 508,000 were employed in manufacturing and at the end of 2010 the number of jobs bottomed out at approximately 425,000; thus the recession caused 83,000 jobs to be lost in this one sector alone. Since that time the rebound in activity has added about 20,000 positions to the manufacturing sector. Figure 7

Figure 1: Employment Level: Wisconsin

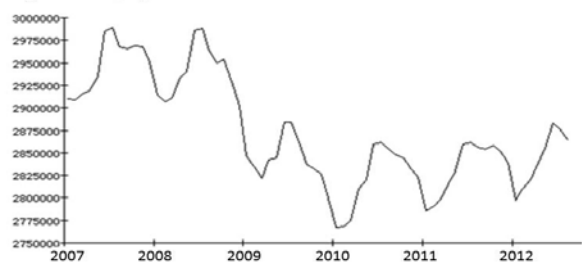


Figure 2: Unemployment Level: Wisconsin

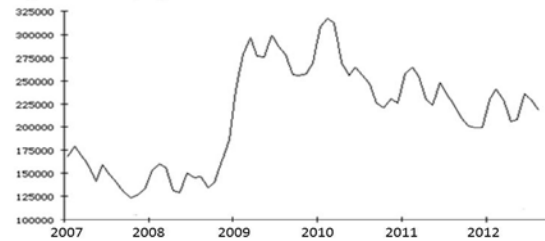


Figure 3: Unemployment Rate: Wisconsin

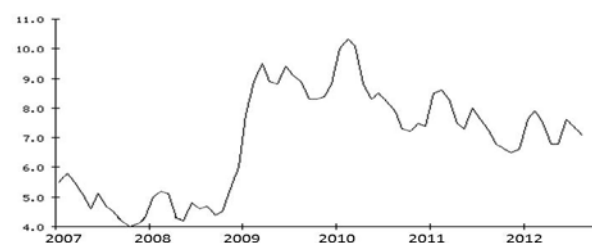


Figure 4: Labor Force: Wisconsin

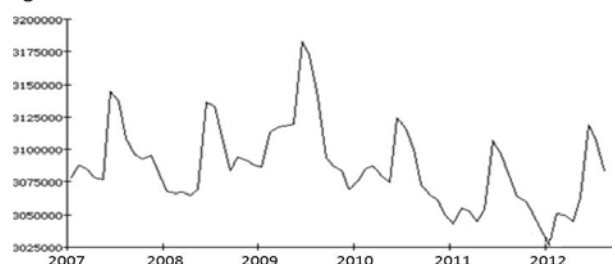


Figure 5: Manufacturing Employment: Wisconsin: Thousands of Persons

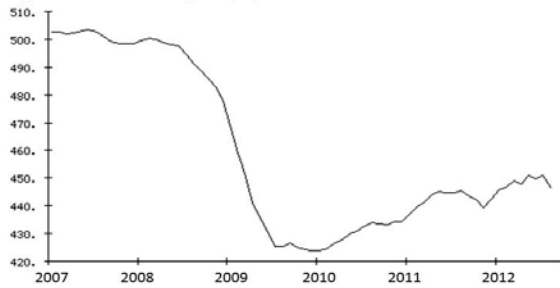


Figure 6: Wisconsin: Education and Health Services: Thousands

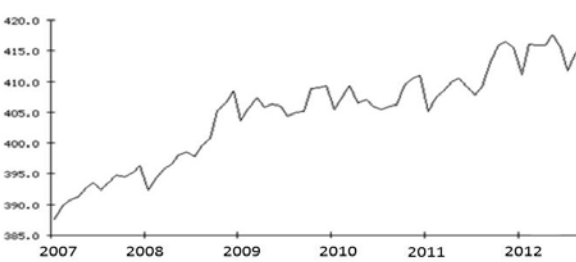


Figure 7: Wisconsin: Leisure and Hospitality: Thousands



shows the steep decline in the number of people employed in leisure & hospitality, from about 262,000 in 2007 to 237,000 in the early 2012. Thus, about 25,000 jobs have been lost over the past three years in this sector.

STEVENS POINT - PLOVER AREA

We usually include Table 7 which gives employer based estimates of industrial sector employment in Portage County. However, please note at the time the report was written these data for March were not available from the Wisconsin Department of Workforce Development. Hopefully these data will be available on a timely basis in the future and will be included in the report.

In Table 8 the CWERB's retailer confidence survey finds that merchants feel that store sales were about the same level as a year ago. In addition, their expectations about store traffic and sales have become less strong than in June 2012. When it comes to expectations about the future it appears that June 2012 assessment of retail activity was marginally higher than in September 2012. Still his group feels that retail activity in the later part of 2012 will be at

higher than in 2011. The overall significance of the survey is that local merchants are saying that there is some signs improvement taking place in the local retail sector.

RETAILER CONFIDENCE STEVENS POINT - PLOVER AREA	Index Value	
	June 2012	September 2012
Total Sales Compared to Previous Year	59	57
Store Traffic Compared to Previous Year	55	55
Expected Sales Three Months From Now	59	55
Expected Store Traffic Three Months From Now	59	55

100 = Substantially Better 50 = Same 0 = Substantially Worse

Table 9 Help Wanted Advertising is a barometer of local labor market conditions and indexes for Stevens Point, Wausau, Marshfield and Wisconsin Rapids are now based on job advertising on the internet. The index for Stevens Point and Marshfield rose by 16.4 percent and by 6.8 percent respectively when compared to this past quarter. Further, Wisconsin Rapids experienced an increase in the amount advertising taking place, at about 0.8 percent. Wausau's help wanted index increased by approximately 2.5 percent. These data suggests that advertising growth has been uneven in the area labor markets. If these data hold true, then perhaps as 2012-2013 unfolds we will see a stronger job market in parts of Central Wisconsin.

HELP WANTED ADVERTISING	Index Value		
	Second Quarter 2012	Third Quarter 2012	Percent Change
Stevens Point	608.22	707.67	16.4%
Wausau	607.00	622.33	2.5%
Marshfield	587.72	627.83	6.8%
Wisconsin Rapids	243.33	245.17	0.8%

Tables 10, 11 and 12 give valuable insight into how local family financial distress fared in Portage County over the past year. The number of total applications for public assistance increased from 6,609 to 6,893 or 4.3 percent. New applications also rose, climbing from 185 to 224 or by 21.1 percent. Table 11 gives detailed information on the types of public assistance for Third Quarter. The numbers seem to suggest that matters may be stabilizing in the area. In addition, Table 12 shows that new unemployment claims contracted from 235 to 216 or by 8.1 percent. Moreover total

unemployment claims dropped from 2,145 to 1,959 or by 8.7 percent.

TABLE 10 PUBLIC ASSISTANCE CLAIMS PORTAGE COUNTY	2011 Third (Monthly Avg.)	2012 Third (Monthly Avg.)	Percent Change
New Applications	185	224	+21.1
Total Caseload	6,609	6,893	+4.3

TABLE 11 PORTAGE COUNTY PUBLIC ASSISTANCE BY PROGRAM TYPE	Third Quarter 2011	Third Quarter 2012	Percent Change
Medical Assistance (All Programs)	11,333	11,158	-1.54%
Food Share (Food Stamps)	7,095	7,269	2.45%
W2 (Paid Cases Only)	21	17	-19.05%
Wisconsin Shares Child Care	401	378	-5.74%

TABLE 12 UNEMPLOYMENT CLAIMS PORTAGE COUNTY	2011 Third (Weekly Avg.)	2012 Third (Weekly Avg.)	Percent Change
New Claims	235	216	-8.1
Total Claims	2145	1959	-8.7

Table 13 presents the residential construction numbers for the Stevens Point-Plover area. In our yearly comparison the number of permits issued in Third Quarter was 15 and they had an estimated value of \$3.7 million. The number of housing units also totaled 15. When comparing Third Quarter 2012 to that of 2011 residential alteration activity contracted from 259 to 230 permits. Further, the value of this type of activity went down from \$2.2 to \$1.9 million. Overall the 2012 construction data results are somewhat off the pace of a year ago.

TABLE 13 RESIDENTIAL CONSTRUCTION STEVENS POINT - PLOVER AREA	2011 Third	2012 Third	Percent Change
Residential Permits Issued	12	15	+25.0
Estimated Value of New Homes	\$3,757.0 (thousands)	\$3,655.0 (thousands)	-2.7
Number of Housing Units	35	15	-57.1
Residential Alteration Permits Issued	259	230	-11.2
Estimated Value of Alterations	\$2,193.6 (thousands)	\$1,887.9 (thousands)	-13.9

The nonresidential construction figures in Table 14 were as follows for Third Quarter 2012. The number of permits issued was 9 and the estimated value was \$8.9 million. This is a large estimated value of new structures figure and bodes well for the area economy. The number of business alteration permits was 51 in 2011 compared to 83 in 2012. The estimated value of alteration activity was \$2.0 million in 2011 compared to the 2012 figure of \$3.1 million. In sum the pace nonresidential construction activity remains brisk in the area. Further, indications are that there are a number of large constructions projects in the pipeline for the greater Stevens Point Area.

TABLE 14 NONRESIDENTIAL CONSTRUCTION STEVENS POINT - PLOVER AREA	2011 Third	2012 Third
Number of Permits Issued	7	9
Estimated Value of New Structures	\$3,522.0 (thousands)	\$8,940.8 (thousands)
Number of Business Alteration Permits	51	83
Estimated Value of Business Alterations	\$2,028.4 (thousands)	\$3,146.6 (thousands)

* Includes Stevens Point, Village of Plover, and the Towns of Hul, Stockton, Sharon, and Plover.

Figures 8 thru 11 on the next page tell an economic history lesson as to how the employment level, the unemployment level, the unemployment rate, and the labor force have trended over the past five years in Portage County. Please note the data for the charts runs from January 2007 to August 2012 and our earlier tables have data for September 2012. The figures clearly show the influence of the great recession on the area local economy and the figures supplement the report's short-term data by placing it into a longer-term context. Also this allows short-term events to be judged more properly.

Figure 8: Employment Level: Portage



Figure 9: Unemployment Level: Portage

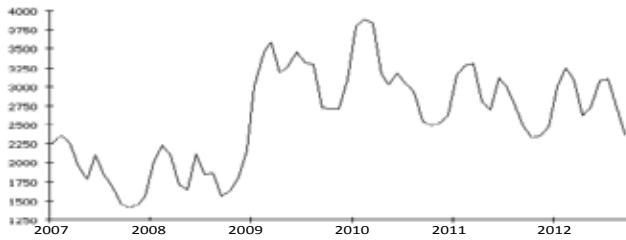


Figure 10: Unemployment Rate: Portage

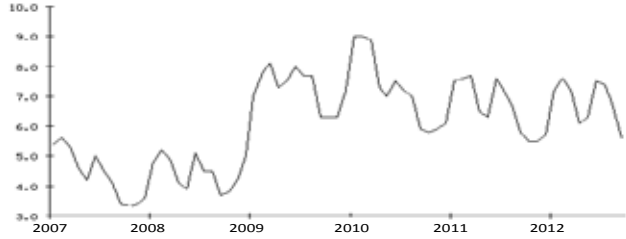
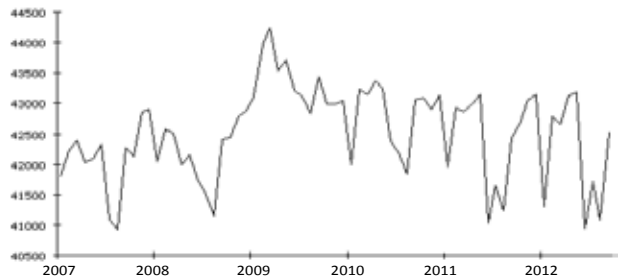


Figure 11: Civilian Labor Force: Portage



HOUSING MARKET INFORMATION

The following seven tables contain information on the national, regional, and local housing market. Housing activity is an incredibly important aspect of the economy. We believe the reader will gain valuable insight into housing markets conditions and greater insight into the local economy in this section of the report.

Table 15 gives national median home price for the U.S. and major regions in the U.S. Housing prices in the Midwest are the lowest in the country. The median home price in our part of the country has risen from \$135,400 in 2011 to an estimated \$145,200 in September 2012. In general housing prices are rising in the U.S. This is a good sign for the economy.

TABLE 15 NATIONAL MEDIAN HOME PRICES	THIRD QUARTER 2012				
	U.S.	NORTHEAST	MIDWEST	SOUTH	WEST
2007	\$219,000	\$279,100	\$165,100	\$179,300	\$335,000
2008	198,100	266,400	154,100	169,200	271,500
2009	172,500	240,500	144,100	153,000	211,100
2010	173,000	243,500	141,699	150,100	215,100
2011	166,100	237,500	135,400	144,200	201,300
September 2012 r	183,900	238,700	145,200	163,600	246,300

Table 16 National and the Midwest existing home sales data shows a substantial increase in sales activity over the past year. In the Midwest 910,000 homes were sold in 2011. The preliminary estimate for 2012 is that 1,100,000 homes will be sold in 2012 in the Midwest, an increase of 21 percent!

TABLE 16 NATIONAL EXISTING HOME SALES	THIRD QUARTER 2012				
	U.S.	NORTHEAST	MIDWEST	SOUTH	WEST
2007	9,852,000	1,006,000	1,327,000	2,235,000	1,084,000
2008	4,913,000	849,000	1,129,000	1,865,000	1,070,000
2009	5,156,000	866,000	1,163,000	1,914,000	1,211,000
2010	4,908,000	617,000	1,076,000	1,861,000	1,154,000
2011	4,250,000	540,000	910,000	1,580,000	1,130,000
September 2012 r *Annualized Basis	4,750,000	590,000	1,100,000	1,930,000	1,130,000

The national inventory of homes is given in Table 17. As of September 2012 the inventory backlog is estimated to be 5.9 months. In 2008 the national supply of homes was 10.4 months. Thus a great deal of improvement is now taking place in the housing market.

TABLE 17 NATIONAL INVENTORY	THIRD QUARTER 2012	
	INVENTORY	MONTH SUPPLY
2007	3,974,000	8.9
2008	3,700,000	10.4
2009	3,283,000	8.8
2010	3,560,000	9.4
2011	2,320,000	8.2
September 2012 r	2,320,000	5.9

Table 18 presents the national affordability index. Low interest rates and falling home prices have greatly improved the affordability of homes. The preliminary estimate for 2012 of 185.0 means that a household earning the median income has 185 percent of the income necessary to qualify for a conventional loan covering 80 percent of a medium-priced existing single-family home. The higher the index, the more affordable housing is becoming for the typical family.

TABLE 18 NATIONAL AFFORDABILITY INDEX	THIRD QUARTER 2012						
	MEDIAN PRICED EXISTING SINGLE FAMILY HOME	MORTGAGE RATE	MONTHLY PAYMENT P & I OF INCOME	AS A % OF INCOME	MEDIAN FAMILY INCOME	QUALIFYING INCOME	COMPOSITE
2008r	196,500	6.15	958	18.1	63,395	45,994	137.8
2009r	172,100	5.14	751	14.6	61,845	36,048	171.6
2010r	173,200	4.89	735	14.3	61,583	35,280	174.6
2011r	166,200	4.67	687	13.6	60,831	32,975	184.5
August 2012 p	188,700	3.70	695	13.5	61,717	33,380	185.0

P&I = Principal and interest
Composite = measures affordability. For example for the year 2011, the index of 184.5 means a family earning the median family income has 184.5 percent of the income necessary to qualify for a conventional loan covering 80 percent of a median-priced existing single-family home.

Table 19 displays data on state and local area median prices. For the most part the state of Wisconsin and local area prices have been more stable than the U.S. as a whole. In Central Wisconsin the lowest median home price is in Wood County at \$95,000. Portage County has the highest medium price of \$134,000 and Marathon falls somewhere between other the two counties, with a medium house price of \$115,550. The medium price of a house in Wisconsin is \$134,000. In addition the medium housing prices in our area and state are now increasing after a number of years of decline.

TABLE 19 LOCAL AREA MEDIAN PRICE	WISCONSIN	MARATHON	PORTAGE	WOOD
2009	\$142,500	\$126,800	\$132,000	\$94,500
2010	140,000	123,000	132,750	97,000
2011	132,000	114,000	134,000	90,000
2012	134,000	115,550	134,000	95,000

Table 20 gives the number of local housing units sold. The counties of the region have all experienced increases in the number of units sold. However, home sales on a yearly basis have continue to contract in Wisconsin.

TABLE 20 LOCAL UNITS SOLD	WISCONSIN	MARATHON	PORTAGE	WOOD
2009	55,132	300	151	203
2010	51,639	455	184	249
2011	51,790	299	132	172
2012	50,546	317	175	187

Tables 21 and 22 present the changes that have taken place in the local median prices and units sold, and compare just Third Quarter 2011 to Third Quarter 2012. Here we see a little or no improvement taking place in prices or sales.

TABLE 21 LOCAL MEDIAN PRICE	THIRD QUARTER 2012		
	MARATHON	PORTAGE	WOOD
Third Quarter 2011	109,000	140,000	91,000
Third Quarter 2012	110,000	138,600	90,000
Percent Change	0.9%	-1.0%	-1.1%

TABLE 22 NUMBER OF HOME SALES	THIRD QUARTER 2012		
	MARATHON	PORTAGE	WOOD
Third Quarter 2011	108	33	64
Third Quarter 2012	79	52	56
Percent Change	-26.9%	57.6%	-12.5%

RECENT ENTREPRENEURSHIP RATES BY AGE AND INDUSTRY

UWSP Small Business Development Center
Vicki Lobermeier,
SBDC Director of Entrepreneurship Activities
Mary Wescott, SBDC Counseling Manager

Business Startup, Planning, Financing

This fall in October, 2012, the SBA and AARP hosted the first nationwide National Encore Entrepreneur Mentor Day. The focus of the event was to assist retired people who want to explore business startup.

Business startups know almost no age boundary and recent studies as reported on startup professionals.com showed that business startup is increasing for baby boomers, those born between 1946 and 1964. The website reports boomers have a high rate of company formation.

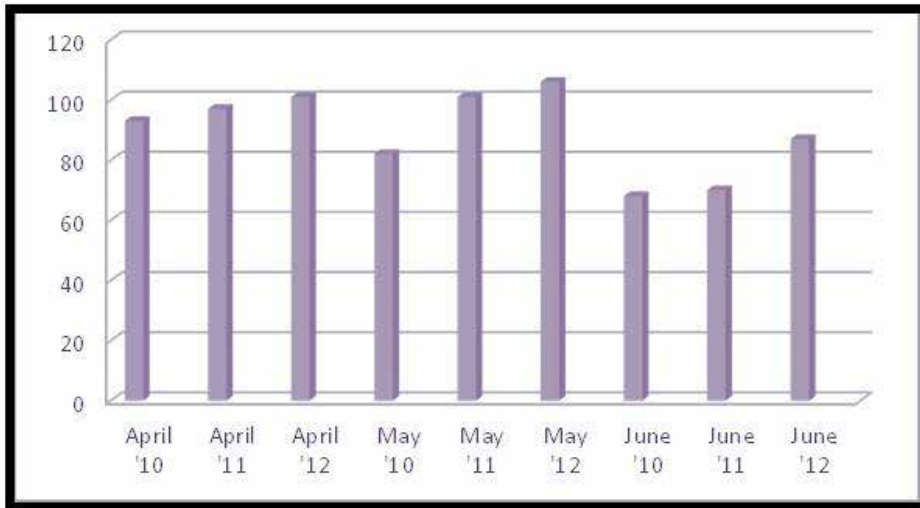
Kauffman Foundation data reports the highest rate of entrepreneurship in America occurs in the 55–64 age groups. For information on starting a business for yourself or an ambitious friend, see www.sba.gov/category/navigation-structure/starting-managing-business/starting-business and contact the UWSP Small Business Development Center at 715 346-4609.

Over 580 entrepreneurs and would-be entrepreneurs have completed the UWSP Small Business Development Center's Entrepreneurial Training, a business planning series. Of that 580, about 54% to date have expanded or maintained their business, or started a new business. It is widely recognized that a business plan is essential for securing a business loan.

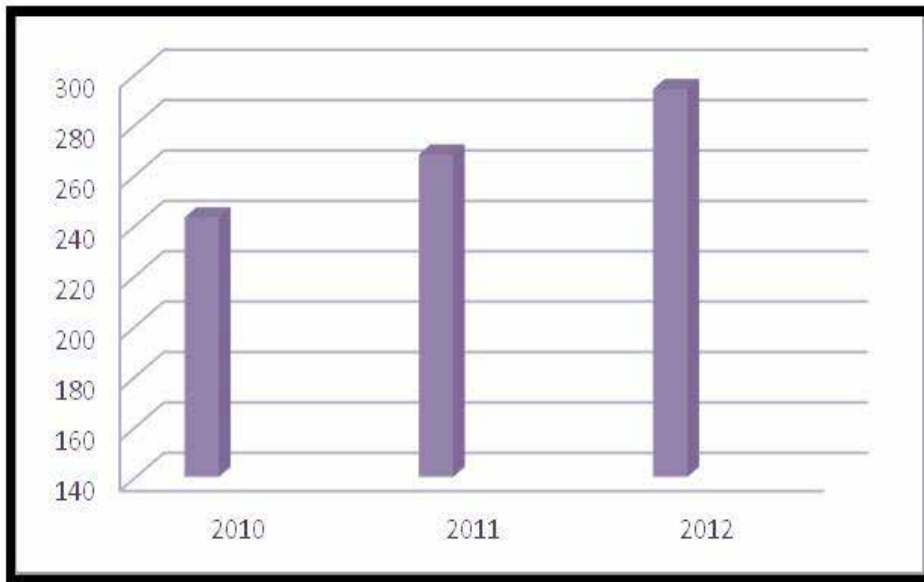
SBA loans for the region are up Q2 2012 over both of the previous years' Q2. Of the \$17,556,800 SBA loan amount, \$10,067,000 were loans made to companies with NAICS 321999, miscellaneous wood manufacturing.

Find the entire Kaufman Index of Entrepreneurial Activity comparing activity from 1996 to 2011 online at www.kauffman.org/uploadedFiles/KIEA_2012_report.pdf

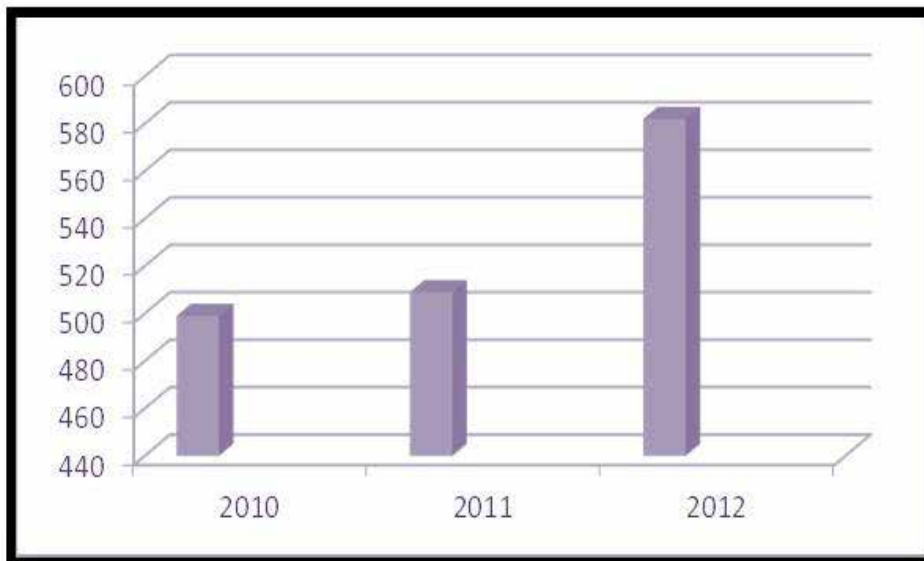
Formal Starts Q2: 2010, 2011, 2012



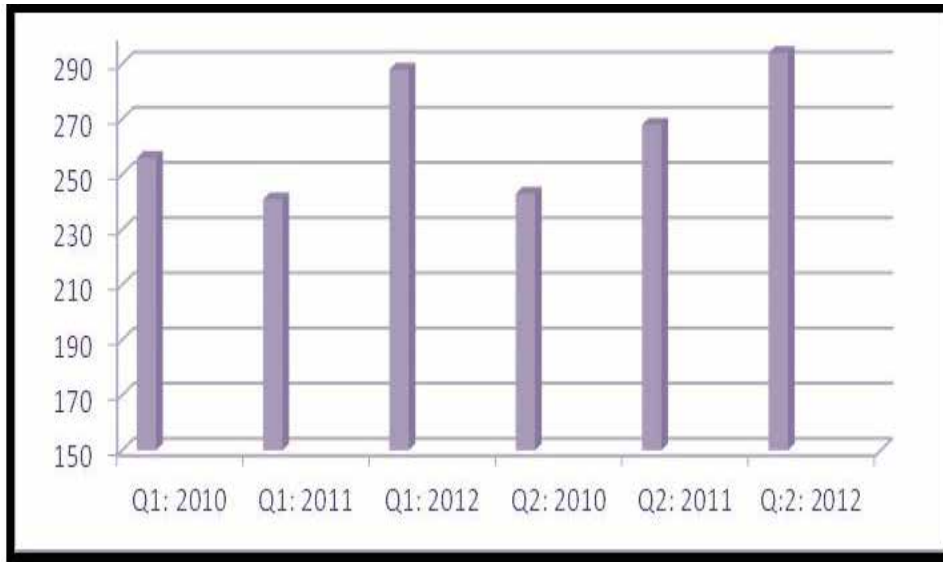
Total Starts Q2: 2010, 2011, 2012



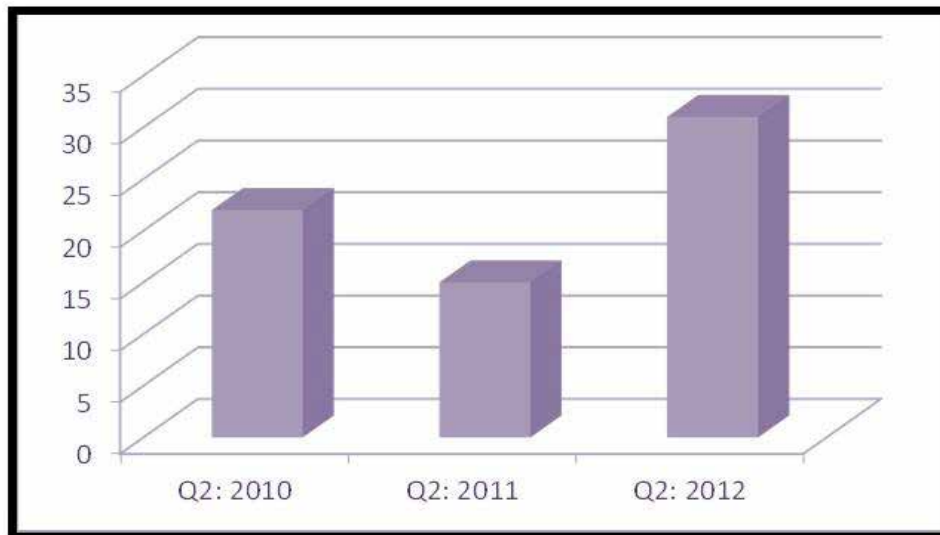
Number of Total Starts Q1 thru Q2



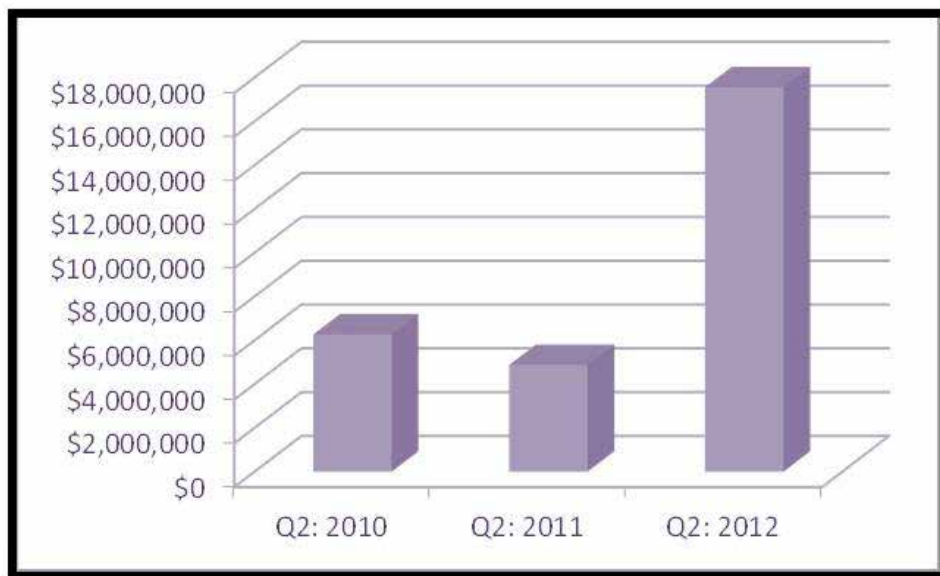
Total Starts Q1 thru Q2: 2010, 2011, & 2012



Total Number of Loans Q2



Q2 SBA Total Loan Amounts



A Change in Atmosphere: Developments in State and Federal Business Law

By Caz McChrystal, Assistant Professor, Business Law
University of Wisconsin-Stevens Point

ABSTRACT

The past two years have seen a substantial shift in the State's policies towards the regulation of business and a continuation of the Supreme Court's judicial conservatism in matters of business law. This report will focus on several key changes to State and Federal law, from Wisconsin's sweeping tort reform to the Supreme Court's evolving interpretation of Congress's authority to regulate business, that affect all businesses and which signal a change in the atmosphere of business regulation.

INTRODUCTION

The past two years have seen a substantial shift in the State's policies towards the regulation of business and a continuation of the Supreme Court's judicial conservatism in matters of business law. These developments have been overwhelmingly positive for business owners and constitute sweeping change from prior State policy and the federal jurisprudence of the last generation. While businesses are subject to significant State and Federal regulation regarding operations, this report will focus on developments in statutory law and the continued conservative streak in the jurisprudence of the United States Supreme Court.

This report, it should be noted, is by no means comprehensive of all the developments in business law over the past two years. The report will, in contrast, aim to describe in detail several developments that exemplify the current trajectory of State law and federal jurisprudence. The report will look at several changes in Wisconsin statutory law dealing with civil litigation (often referred to as "tort reform") and three decisions of the United States Supreme Court dealing with contract law, class action litigation, and Congress's Constitutional authority to regulate business, respectively.

¹ Attorney Caz McChrystal is an Assistant Professor of Business Law at the University of Wisconsin – Stevens Point. He continues to represent clients in the areas of intellectual property & business law, with a particular focus on international licensing, rights management, corporate governance, and litigation. He has published articles on entertainment and technology law in the *Global Business & Economics Review*, *Billboard Magazine*, the *Vanderbilt Journal of Entertainment and Technology Law*, and *Berklee Today* and has argued before State courts in Wisconsin, in the United States District Court for the Eastern District of Wisconsin, and before the Seventh Circuit Court of Appeals.

WISCONSIN STATUTORY LAW

Since the beginning of 2011, Wisconsin has seen sweeping changes in the laws governing civil litigation, particularly in torts¹ against businesses. These changes came incrementally, first with a sweeping bill enacted in January 2011 that affected many areas of civil litigation. This was followed by two more laws enacted during Governor Walker's second special session on job creation towards the end of 2011. Finally, in March of this year, changes were made to employment discrimination suits under Wisconsin's Fair Employment Act.

2011 Wisconsin Act 2

2011 Wisconsin Act 2 (hereinafter "Act 2") instituted sweeping changes to the law in the areas of punitive damages, frivolous lawsuits, expert witness testimony, and product liability. Punitive damages are available to a plaintiff under Wisconsin law in cases where the defendant "acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff."² While this standard of proof has not changed, Act 2 places a highly restrictive cap on punitive damages that allows plaintiffs to receive no more than the greater of \$200,000 or twice the amount of compensatory damages.³ The punitive damages cap significantly decreases businesses' and insurers' exposure in litigation.⁴

In addition, Act 2 allows parties who are the target of a frivolous lawsuit to seek damages from the plaintiff and/or the plaintiff's attorney.⁵ This change in the law decreases the cost of so-called "nuisance lawsuits"⁶ for businesses. Further, Act 2 adopts the *Daubert* standard for expert testimony.⁷ *Daubert* requires that expert testimony be based on sufficient facts or data that was generated through accepted means and is generally accepted by the scientific community. This change makes it more difficult for parties in litigation to present expert testimony that is highly prejudicial but has little probative value.

Finally, Act 2 rewrites Wisconsin's product liability laws. Notable changes in the law include a new standard in cases alleging a design defect. To recover damages in such cases, a Plaintiff must now

¹ Torts refer to any lawsuit in which a plaintiff alleges personal injury or harm or damage to property.

² Wis Stats. §895.043(3).

³ Act 2 §22m. There is one exception to the cap, however. The cap on punitive damages does not apply in cases where a plaintiff seeks punitive damages from a defendant who caused injury as a result of operating a motor vehicle while intoxicated. *Id.*

⁴ Prior to Act 2, Wisconsin had no caps on punitive damages; however, the U.S. Supreme Court had placed some outward limits on punitive damages awards that violated a defendant's rights under the Due Process Clause of the U.S. Constitution. *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

⁵ Act 2 §28.

⁶ Nuisance lawsuits are cases that lack merit but are filed in the hopes of forcing a defendant to settle, such as where the cost of settlement is lower than the expected cost of defending against the suit.

⁷ Act 2 §§33-39. The *Daubert* standard has already been adopted by a majority of states and by the federal courts.

show that a reasonable alternative design existed that would have made the product safer and which could have been adopted by the manufacturer.⁸ In addition, the law prevents sellers and distributors from being sued for products liability except in situations in which the seller or distributor contractually assumed responsibility for aspects of the design, manufacture, or labeling of the product at issue.⁹ This greatly limits plaintiffs' ability to sue sellers and distributors under a strict liability theory, previously the law in Wisconsin. Act 2 also decreases the period of time in which a plaintiff may file a product liability suit under the statute of repose. A product liability must now be filed within 15 years of the date of a product's manufacture.¹⁰ A final change to product liability law adopted in Act 2 is to overrule the 2005 Wisconsin Supreme Court decision *Thomas v. Mallet*, 2005 WI 129.¹¹ That decision imposed market share liability in Wisconsin, a theory of recovery in which a plaintiff, unable to identify the specific manufacturer of the product that injured her, may file suit against all manufacturers of that product and have damages apportioned according to the defendants' respective market shares.

Laws of the Second Special Session

In December 2011, Wisconsin enacted two laws relating to civil litigation and which serve to reduce defendants' exposure in lawsuits. 2011 Wisconsin Act 69 (hereinafter "Act 69") greatly reduces the interest on judgments that a plaintiff may recover against a defendant.¹² Prior to the law's passage, plaintiffs could collect interest on any judgment or settlement at an annual rate of 12 percent. Act 69 reduces that interest rate to the Federal Reserve Prime Rate plus 1 percent.¹³ 2011 Wisconsin Act 92 (hereinafter "Act 92") limits the award of reasonable attorneys' fees in fee-shifting cases.¹⁴ That amount is capped by the new law at three times the amount of the plaintiff's compensatory damages.¹⁵

2011 Wisconsin Act 219

In April 2012, 2011 Wisconsin Act 219 was passed. The law repeals parts of a 2009 bill passed under the Doyle administration that allowed plaintiffs in employment discrimination disputes under Wisconsin's Fair Employment Act to recover compensatory and punitive damages of up to \$300,000. The earlier law brought Wisconsin law into parity with Title VII of the Civil Rights Act of

⁸ Act 2 §31 (codified at Wis Stats. 895.047(1)(a)).

⁹ *Id.* (codified at Wis Stats. 895.047(2)). There are two exceptions to this limitation: situations in which the manufacturer is not subject to personal jurisdiction in the State and when the manufacturer is judgment-proof.

¹⁰ *Id.* (codified at Wis Stats. 895.047(5)).

¹¹ *See* Act 2 § 30.

¹² *See* 2011 Wisconsin Act 69.

¹³ *Id.*

¹⁴ *See* 2011 Wisconsin Act 92. Fee-shifting cases are those in which the winning party can collect the costs of its legal fees from the losing party.

¹⁵ *Id.*

1964. The new law eliminates the availability of compensatory and punitive damages for plaintiffs who file employment discrimination disputes with the Department of Workforce Development (DWD).¹⁶

The new law is beneficial to employers accused of discrimination. It greatly decreases an employer's exposure in employment discrimination suits brought before the DWD.¹⁷ In addition, the law will likely motivate potential plaintiffs to bring employment discrimination claims in federal court, where compensatory and punitive damages are still available, rather than as administrative hearings before the DWD. This benefits employers because federal employment discrimination suits can be, and often are, resolved in the summary judgment phase.¹⁸ In contrast, administrative hearings before the DWD must proceed to the merits if probable cause is found.

These changes in Wisconsin statutory law fall broadly into three categories: eliminating causes of action against businesses conventionally viewed as "plaintiff-friendly," increasing a plaintiff's burden of proof in other forms of litigation, and placing major limits on plaintiffs' possible recoveries in all forms of litigation. The underlying policy behind these changes is clear: to reduce the threat of litigation against businesses and insurers and to reduce the exposure of businesses and insurers faced with meritorious claims by plaintiffs.

SUPREME COURT DECISIONS

Since the early nineteen-nineties, the Supreme Court has seen a shift towards judicial conservatism that has resulted in several pro-business changes in jurisprudence. In the past two years, the Court has decided three cases that can be broadly read as "wins" for businesses.

AT&T Mobility LLC v. Concepcion

The Spring 2011 decision in *AT&T Mobility LLC v. Concepcion*¹⁹ by the U.S. Supreme Court marked a twofold victory for business. Primarily, the decision serves to underscore the enforceable nature of contractual agreements to arbitrate claims,²⁰ particularly in regards to adhesion contracts²¹ between

¹⁶ See 2011 Wisconsin Act 219.

¹⁷ An employer could still be liable for the plaintiff's attorneys' fees and for back pay.

¹⁸ This greatly reduces the burdens of litigation on employers because it puts an end to the case before Discovery is exhausted and prevents the need for a trial.

¹⁹ 131 S. Ct. 1740 (2011) (page numbers in this report refer to the Court's slip opinion, *available at* <http://www.supremecourt.gov/opinions/10pdf/09-893.pdf>).

²⁰ Arbitration is an alternative form of dispute resolution conducted in lieu of litigation in the court system. It is widely viewed as providing for faster resolution (typical disputes in arbitration are resolved in months rather than the years it may take to resolve the same dispute in court) at a lower cost to the parties (lowered costs are typically enjoyed by large corporate defendants who face high costs of discovery and legal fees in court).

²¹ Adhesion contracts are those entered into between a dominant party who drafts the contract in its favor, and a weaker party who is offered the agreement on a take-it-or-leave-it basis.

businesses and consumers. Secondly, the decision serves to limit the application of classwide disposition of claims both through arbitration and in the courts (the latter limitation was carried further by another decision of the U.S. Supreme Court in the summer of 2011, *Wal-Mart Stores, Inc. v. Duke's*²²).²³

The Federal Arbitration Act (FAA) was passed by Congress in 1925 in response to an entrenched hostility towards arbitration agreements in state and federal courts. Section 2 of the Act, the primary substantive provision of law, provides that agreements to arbitrate “shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*”²⁴ The latter part of that provision, known as a saving clause, leaves the door open for state courts to invalidate arbitration agreements based on traditional common law contractual defenses such as fraud, duress, or unconscionability, *provided* that the contractual defense is generally applicable to all contracts and does not specifically disfavor arbitration agreements. A common law defense of unconscionability²⁵ was at issue in *AT&T Mobility LLC v. Concepcion*.

Vincent and Liza Concepcion entered into an adhesion contract with AT&T for mobile phone service that required all disputes be resolved through arbitration. The service plan purchased by the Conceptions provided for free cell phones, and, while they were not charged for the phones, they were charged \$30.22 in sales tax for the phones. The Conceptions filed suit in federal court notwithstanding the arbitration agreement in their contract, and that claim was consolidated with a putative class action alleging false advertising and fraud arising from AT&T’s advertisements characterizing the phones as “free.” AT&T moved to compel arbitration, but the district court denied the motion on the grounds “that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions.”²⁶

The Ninth Circuit Court of Appeals affirmed this decision and further held that the decision was not preempted by the FAA because the court’s unconscionability analysis was merely a refinement of state law that was generally applicable to all contracts.²⁷ The Supreme Court, reversing the decision of the Ninth Circuit, held that a blanket rule classifying all arbitration agreements preventing

²² 131 S. Ct. 2541 (2011). *See infra* at XXX.

²³ Such classwide disposition of claims are generally referred to as class actions. Such cases are brought by a small number of named plaintiffs on behalf of a large group who suffered a common harm (the plaintiff class). The individual monetary damages awarded to the named plaintiffs are multiplied by the number of plaintiffs in the plaintiff class. Class actions are typically litigated in state or federal courts; however, in recent years the American Arbitration Association has begun to develop means to arbitrate disputes on a classwide basis. Class actions are most commonly against large businesses that are alleged to have caused large numbers of plaintiffs to suffer individually small monetary harm. Such claims would not typically be filed on an individual basis, but the aggregation of those claims makes a single cause of action feasible. Such class actions impose heavy costs on defendants both in terms of legal fees and the potential for large aggregated damages awards.

²⁴ 9 U.S.C. §2 (emphasis added).

²⁵ The crux of an unconscionability defense is that the contract is substantively unfair; that the provisions of the contract are either unduly burdensome on one party or unfairly exculpatory for the other.

²⁶ *AT&T Mobility LLC v. Concepcion* at 2-3.

²⁷ *Id.* at 3-4

classwide disposition of disputes arising from adhesion contracts contravened the purposes of the FAA; therefore, a rule declaring such contracts unconscionable, is preempted by the FAA.²⁸

The Court recognized two underlying purposes in the FAA: (1) to “ensure[] that private arbitration agreements are enforced according to their terms; and (2) to “promote the expeditious resolution of claims” by allowing for “efficient, streamlined procedures tailored to the type of dispute.”²⁹ The Court reasoned that to force a defendant such as AT&T, which had relied on the enforceability of its arbitration agreements, to defend itself against a class action in the court system or even in classwide arbitration, would contravene both of these purposes.³⁰

While the ultimate effect of this decision is for history to decide, it does present a demonstrable change in the law. The applicability of the saving clause in section 2 of the FAA has been greatly diminished, at least with regards to unconscionability. If a court runs afoul of the FAA by ruling an arbitration agreement unconscionable on the grounds that the agreement effectively deprives potential plaintiffs of the ability to litigate small dollar claims, then it is hard to imagine a set of facts that would allow a court to delve into the substantive fairness of any arbitration agreement. This, then, leaves fraud and duress as the sole grounds upon which a court may invalidate arbitration agreements. Such a position, though tacit in the opinion of the Court, was stated with greater clarity in Justice Thomas’ concurrence. His honor argued for a rule that would allow courts to hear only procedural attacks on arbitration agreements (those alleging fraud or duress in the *formation* of the contract) rather than substantive attacks (those that argue that the *substance* of the agreement is unfair, or unconscionable).³¹

Aside from the Court’s primary purpose of limiting the grounds upon which arbitration agreements can be deemed invalid, the decision also serves to prevent further class action litigation in areas where business-to-consumer relationships are dominated by arbitration agreements. The Court’s decision confirms that an arbitration agreement explicitly prohibiting classwide disposition of disputes will prevent any trial court from exercising jurisdiction over such a classwide dispute. The Supreme Court’s intent to narrow lower courts’ jurisdiction over class action lawsuits was further established by its Summer 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*.

Wal-Mart Stores, Inc. v. Dukes

Wal-Mart Stores, Inc. v. Dukes involved a putative class action brought against the nation’s largest private employer, Wal-Mart Stores, Inc. The named plaintiffs were three current and former female employees of Wal-Mart Stores, Inc. who, on behalf of a putative plaintiff class of 1.5 million current and former female employees of Wal-Mart, alleged that the retail chain engaged in sexual discrimination in its hiring and promotion policies in violation of Title VII of the Civil Rights Act of

²⁸ See *id.* at 18.

²⁹ *Id.* at 9.

³⁰ *Id.*

³¹ See generally *AT&T Mobility LLC v. Concepcion*, opinion of J. Thomas, concurring.

1964.³² Ultimately, the Supreme Court ruled that the case could not proceed as a class action; rather, female employees who felt that Wal-Mart had discriminated against them would have to file individual lawsuits against the company.³³ This decision has served to limit the courts' ability to grant certification and hear class action lawsuits and has changed the landscape of large-scale employment discrimination litigation.

In order for a lawsuit to proceed as a class action, the plaintiff must obtain class certification by demonstrating that their case satisfies four requirements: Numerosity, Commonality, Typicality, and Adequacy of representation.³⁴ Numerosity requires simply that enough people fall within the plaintiff class to make a joinder of claims³⁵ impracticable. Typicality requires that the level of harm suffered by the named plaintiff(s) is commensurate with the level of harm suffered by the unnamed members of the plaintiff class. Adequacy of representation requires that the named plaintiff(s) are represented by competent and diligent counsel who adequately protect the rights of the plaintiff class. These requirements were satisfied by the named plaintiffs in *Wal-Mart Stores, Inc. v. Dukes*.³⁶ It was on the requirement of Commonality that the Court determined the named plaintiffs fell short.

Commonality requires that all members of the plaintiff class and the named plaintiffs have common questions of law and fact as to the defendant(s).³⁷ In other words, everyone in the plaintiff class must have been mistreated in the same way by the same defendant(s), and that mistreatment must be actionable under the same legal theory for each member of the plaintiff class. In the context of employment discrimination, named plaintiffs would need to offer proof of commonality showing that the employer engaged in a pattern or practice of discrimination.³⁸ As the Court previously held in *General Telephone Co. of Southwest v. Falcon*, there are two manners in which to prove this: (1) the employer used biased testing procedures to evaluate current and prospective employees or (2) with significant proof that the employer operates under a general policy of discrimination.³⁹

The named plaintiffs in this case were unable to prove commonality under either approach. Pay and promotion decisions at Wal-Mart, as with many other large chain establishments with geographically diverse end-point locations, were delegated to the broad discretion of local managers.⁴⁰ As a result, while it is conceivable that biased testing or a general policy of discrimination could be found within individual Wal-Mart outlets controlled by individual local managers, such was not present on a corporate level. Therefore, there could have been no evidence to prove a common pattern or practice of discrimination emanating from Wal-Mart Stores, Inc. at the corporate level.

³² *Wal-Mart Stores, Inc. v. Dukes*, at 1-3.

³³ *Id.* at 19.

³⁴ Fed. R. Civ. Procedure 23(a).

³⁵ A joinder of claims refers to a case in which, like a class action, multiple plaintiffs sue a common defendant; however, unlike a class action, with a joinder of claims, all plaintiffs are present in court and must prove their respective cases against the defendant.

³⁶ See *Wal-Mart Stores, Inc. v. Dukes* at 8-9.

³⁷ *Id.* at 8.

³⁸ *Wal-Mart Stores, Inc. v. Dukes*, at 11.

³⁹ *Id.* at 12-13 (citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982)).

⁴⁰ *Id.* at 2.

The proof of commonality offered by the named plaintiffs consisted primarily of statistical evidence, which showed that: female employees hold 70 percent of hourly jobs at Wal-Mart retail locations, but only 33 percent of managerial positions; female employees are paid less than male employees in the same positions in every region of the country; and that pay disparity between male and female employees widens over time even between male and female employees hired at the same time for the same position.⁴¹ While such statistical evidence could form the basis of liability on the merits for employment discrimination under a disparate impact theory, the majority of the Court nonetheless found that such evidence was "worlds away from 'significant proof' that Wal-Mart 'operated under a general policy of discrimination.'"⁴²

It seems, then, that the majority of the Court currently does not believe that lower courts should have jurisdiction to hear class action lawsuits alleging employment discrimination against corporations in which hiring and promotion decisions are made by local or regional managers.⁴³ In addition, the Court's decision in *Wal-Mart Stores, Inc. v. Dukes* appears to close the door on large-scale class actions against corporations where the decisions that allegedly led to the underlying dispute were within the broad discretion of local managers. This, in turn, reduces large business' probable exposure in disputes stemming from the decisions of local managers.⁴⁴ Read broadly, *Wal-Mart Stores, Inc. v. Dukes* imposes new and real roadblocks against plaintiffs seeking to have their lawsuits certified as class actions and for plaintiffs seeking to prosecute large-scale employment discrimination suits.

National Federation of Independent Business v. Sebelius

The June 28, 2012 decision in *National Federation of Independent Business v. Sebelius* (hereinafter "*The Affordable Care Act Cases*")⁴⁵ was the most hotly anticipated Supreme Court decision in years. The underlying policy of the Patient Protection and Affordable Care Act (hereinafter "*Affordable Care Act*") is, and likely will continue to be, a hotly contested matter. However, policy aside *The Affordable*

⁴¹ *Id.* at 4 (Justice Ginsburg, dissenting).

⁴² *Id.* at 14 (emphasis added).

⁴³ The only fact pattern under which a corporate parent could face classwide litigation in an employment discrimination dispute would be a situation in which a corporation maintained an explicit policy mandating discrimination. It would be a foolish employer, indeed, who would maintain an explicit corporate policy of employment discrimination.

⁴⁴ This is, of course, based on conjecture. If *Wal-Mart Stores, Inc. v. Dukes* had been certified to proceed as a class action, and the named plaintiffs had prevailed, the damages awarded to the 1.5 million member plaintiff class would have been equal to the sum of the damages awarded to each of the three named plaintiffs multiplied by fifty million. Conversely, with class certification denied by the Court, it is extremely unlikely that each of the 1.5 will pursue an individual claim against Wal-Mart Stores, Inc. However, even if each and every member of the plaintiff class filed suit individually, Wal-Mart's probable exposure would still likely be less than that in a class action. The relative weakness in bargaining power and adequacy of representation of 1.5 million *individual* plaintiffs versus a single plaintiff class of 1.5 million would result in a lower estimated liability for Wal-Mart.

⁴⁵ 567 U.S. ___ (2012) (Page numbers in this report refer to the Court's slip opinion, *available at* <http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf>). The title of the case is abbreviated in plural, because the Supreme Court consolidated several cases on appeal. Its decision applies to three cases heard by the Eleventh, Sixth, and D.C. Circuit Courts of Appeal

Care Act Cases dealt with real disputes of constitutional law, particularly Congress’s power to regulate business and the strictures of federalism.⁴⁶ At issue were two provisions of the law: the individual mandate, requiring all individuals to purchase health insurance with minimum levels of protection, and the Medicaid expansion which conditions funding to the States on providing health care to all citizens whose income falls below a certain threshold.⁴⁷

Turning to the individual mandate, the Government argued that Congress had the authority to enact the provision under the Commerce Clause.⁴⁸ Alternatively, the Government argued that even if the Commerce Clause does not provide authority for the individual mandate, the provision nonetheless falls under Congress’s power to tax.⁴⁹ It was this latter, fallback position that provided the Court the grounds on which to uphold the individual mandate. Nonetheless, because the Commerce Clause is a constitutional grant of authority that has been in flux for the past sixty years, the Court’s consideration of it in *The Affordable Care Act Cases* merits careful attention.

Since the late 1930s, it has become “well established that Congress has broad authority under the [Commerce] Clause.”⁵⁰ That authority extends to the power to regulate activities that, in the aggregate, have a substantial effect on interstate commerce.⁵¹ While this provides the Constitutional framework for the majority of the Federal Government’s regulation of business, it also allows for regulation of individuals’ private lives. While this power has been expansive, the Court noted that Congress had “never attempted to rely on [its powers under the Commerce Clause] to compel individuals not engaged in commerce to purchase an unwanted product.”⁵² Put more succinctly, the Commerce Clause has historically been viewed as a grant of authority to regulate *activity*, rather than *inactivity*.

In enacting the individual mandate, Congress was attempting to do just that: regulate inactivity; on its face, the law compels individuals to purchase health insurance. The core of the Government’s argument in support of the mandate was that all individuals, through fate or circumstance, would someday purchase health care, notwithstanding a prior decision to forego health insurance. The cost of that health care for those uninsured individuals is shifted to the hospitals that treat them; those losses are then passed on to insurers, and ultimately to consumers who purchase health insurance policies. Therefore, inactivity by the individual would, in the aggregate, have a substantial and

⁴⁶ Broadly defined, federalism refers to the interplay between the authority of the Federal and State governments.

⁴⁷ *The Affordable Care Act Cases* at 1-2.

⁴⁸ See *U.S. Const. Art. I, §8, cl. 3*, granting Congress the power “[t]o regulate Commerce . . . among the several States[.]” (emphasis added).

⁴⁹ See *id. Art. I, §8, cl. 1*, granting Congress the “Power To lay and collect Taxes[.]”

⁵⁰ *The Affordable Care Act Cases* at 17.

⁵¹ *Id.* (citing *United States v. Darby*, 312 U.S. 100, 118-119 (1941)). See, e.g., *Wickard v. Filburn*, 317 U.S. 11 (1942) (upholding a fine imposed on a farmer who grew wheat for private consumption on his own farm in excess of a quota imposed by Congress for the purpose of supporting the price of wheat. The Court reasoned that though the individual farmer’s decision to grow wheat in excess of the quota would have no effect on the interstate market for wheat in and of itself, when considered in the aggregate along with similar decisions by other farmers, it would have a substantial effect on the interstate market for wheat).

⁵² *The Affordable Care Act Cases* at 17 (footnote omitted).

deleterious effect on interstate market for health insurance. The individual mandate would prevent such cost-shifting and further reduce insurance premiums by adding more healthy individuals to the risk pool.⁵³

The Court ruled that to allow such regulation of inactivity would be too great an extension of Congress's authority under the Commerce Clause and an impermissible departure "from the notion of a government of limited powers."⁵⁴ The Court noted that if the Government's logic were applied to *Wickard v. Filburn*,⁵⁵ widely viewed as the Supreme Court's most broad interpretation of Congress's Commerce Clause authority, then the Government could support the price of wheat not only by regulating supply, but by regulating demand in the form of an individual mandate to purchase wheat.⁵⁶ To allow this kind of regulation would be "to compel citizens to act as the Government would have them act[;]" the Court reasoned that such was "not the country the Framers of our Constitution envisioned."⁵⁷

Furthermore, the Court dismissed the Government's argument that the individual mandate deserves an exception to a prohibition against extending Commerce Clause authority to regulating inaction "because everyone subject [to the mandate] is in or will be in the health care market, they can be regulated in advance."⁵⁸ The court reasoned that there was simply too narrow a connection and too great a temporal gap between the mandate to purchase a health insurance policy and subsequent commercial activity (entering the health care market by receiving medical treatment) to justify an exception.⁵⁹

The essential holding of the Supreme Court with regard to the Commerce Clause, "that our constitution protects us from federal regulation under the Commerce so long as we abstain from the regulated activity[;]"⁶⁰ is in line with Commerce Clause jurisprudence coming from the Court since

⁵³ *Id.* at 16. The Court concisely and cogently summarized the Government's cost-shifting argument thusly: "Everyone will eventually need health care at a time and to an extent they cannot predict, but if they do not have insurance, they often will not be able to pay for it. Because state and federal laws nonetheless require hospitals to provide a certain degree of care to individuals without regard to their ability to pay, . . . hospitals end up receiving compensation for only a portion of the services they provide. To recoup the losses, hospitals pass on the cost to insurers through higher rates, and insurers, in turn, pass on the cost to policy holders in the form of higher premiums. Congress estimated that the cost of uncompensated care raises family health insurance premiums, on average, by over \$1,000 per year."

Id. (internal citations omitted).

⁵⁴ *See id.* at 21.

⁵⁵ *See infra* note XXX.

⁵⁶ *The Affordable Care Act Cases* at 21. However, if we accept the Government's cost-shifting argument as true, the analogy begins to break down. While every individual will someday, through fate or circumstance and likely without actively making a choice, receive medical treatment (and thus enter the market for health care), the same cannot be said of wheat. One *can* choose to never purchase products containing wheat and there is no plausible way for fate or circumstance to intervene and change that decision without an active choice by the individual.

⁵⁷ *Id.* at 23.

⁵⁸ *Id.* at 26 (internal quotations and citation omitted).

⁵⁹ *Id.* at 27.

⁶⁰ *Id.* at 41-42.

the early nineties. As the make-up of the Court became more judicially conservative under the leadership of Chief Justice William Rehnquist, it has reined in Congress's authority under the Commerce Clause.⁶¹

After declaring the individual mandate unconstitutional under the Commerce Clause, the Court then examined whether the individual mandate could be justified under Congress's power to tax. The Constitution gives Congress the broad power to lay and collect taxes; however, penalties levied by Congress are generally recognized to fall outside of this authority.⁶² The mandate requires that individuals without health insurance make an additional payment (referred to in the statute as a "shared responsibility payment") to the IRS when paying taxes.⁶³ To find the mandate constitutional under the taxing power requires that the law be read not as a law compelling individuals to buy insurance policies but as a tax on those who choose not to do so.⁶⁴

The essential inquiry engaged in by the Court was to determine whether the shared responsibility payment constitutes a tax or a penalty. The Court noted that there are three characteristics that point towards a putative "tax" actually being a veiled penalty:⁶⁵ imposition "an exceedingly heavy burden,"⁶⁶ including a scienter requirement,⁶⁷ and tasking enforcement to an agency responsible for punishing violations of the law rather than collecting revenue.⁶⁸ The Court determined that the shared responsibility payment possessed none of these characteristics.

The amount individuals would owe as a shared responsibility payment imposed under the law will typically be far less than the price of purchasing an insurance policy, and, as mandated by the statute, cannot be higher than the cost of purchasing a policy. Secondly, the shared responsibility payment is not conditioned on a scienter requirement (that is, it is irrelevant whether an individual knows they are uninsured or not). Finally, the shared responsibility payment is collected by the IRS at the time income taxes are paid.⁶⁹ Therefore, the Court held the individual mandate to be a constitutional tax under Congress's enumerated taxing power.

Taking the Commerce Clause and taxing power analysis together, it is fair to conclude that Congress still has tremendous authority to regulate businesses and to regulate the personal lives of individuals.

⁶¹ See generally *United States v. Lopez*, 514 U.S. 549 (1995) & *United States v. Morrison*, 529 U.S. 598 (2000); but see cf. *Gonzales v. Raich*, 545 U.S. 1 (2005).

⁶² See generally, U.S. Const. Art. I, §8, cl. 1 & *The Affordable Care Act Cases* at 31-36.

⁶³ *Id.* at 32.

⁶⁴ *Id.* at 31.

⁶⁵ *Id.* at 35 (citing *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922)). In *Drexel Furniture Co.*, the Court held the 1919 Child Labor Tax Law an unconstitutional penalty rather than a tax.

⁶⁶ The "tax" imposed on businesses employing child laborers at issue in *Drexel Furniture Co.* was ten percent of a company's net income. *Id.*

⁶⁷ Scienter means that an act or omission was made knowingly. The law at issue in *Drexel Furniture Co.* only applied to business that knowingly employed child laborers.

⁶⁸ The "tax" at issue in *Drexel Furniture Co.* was enforced by the Department of Labor, an agency that punishes violations of labor laws.

⁶⁹ *Id.* at 35-36.

However, the manner in which Congress may do so has changed. Rather than passing laws that compel individuals or businesses to behave in a certain way, laws must now be drafted in a manner that places increased tax burdens on individuals and businesses that choose not to behave in a way that Congress, as a matter of policy, has deemed beneficial.

The Court's decision also dealt heavily with the strictures of federalism, the split of authority between two sovereigns, the Federal Government and the fifty State governments. This analysis focused on the Medicaid provisions of the Affordable Care Act. The vast majority of all funding for state Medicaid expenditures comes from the federal government. Prior to the Affordable Care Act states only were required to protect the most needy members of society in order to receive federal Medicaid dollars: pregnant women, children, the blind, the elderly, the disabled, unemployed parents making less than 37% of the federal poverty level, and employed parents making less than 67% of the federal poverty level.⁷⁰

The Affordable Care Act requires that by 2016 Medicaid cover everyone under the age of 65 with an income below 133% of the poverty line. In return the federal government is mandated to pay 100% of the costs of covering these individuals through 2016. The amount of federal coverage would then decrease annually until it reached a minimum of 90 percent.⁷¹ If states did not meet these expanded Medicaid requirements, they would not only lose the additional new funding for the expanded Medicaid, but *all* existing Medicaid funding as well.⁷²

The Court began its analysis by noting that Congress may use its broad spending authority to secure State compliance with federal objectives; however, the exercise of this power is in the nature of a contract between the Federal Government and the State. The Federal Government may not condition funds in such a way as to exert undue influence or duress over a State government. That is, the Federal Government cannot use its spending authority to strong-arm a State into adopting federal policies with which State policy-makers disagree.⁷³

When simple pressure turns into compulsion, "legislation runs contrary to our system of federalism."⁷⁴ The problem such compulsion presents is that would allow the Federal Government to achieve unpopular policy objectives without being held directly accountable. When the Federal Government compels State action, it is the State elected officials that bear the brunt of the electorate's animosity. Such a lack of federal accountability, the Court reasoned, is anathema to our system of federalism.⁷⁵

The States argued, and the Court agreed, that to condition *all* Medicaid funding on the States' expansion of Medicaid eligibility, was to compel States to act. Medicaid spending accounts for over

⁷⁰ *Id.* at 45.

⁷¹ *Id.* at 45-46.

⁷² *Id.* at 46.

⁷³ *Id.* at 46-47.

⁷⁴ *Id.* at 47.

⁷⁵ *Id.* at 48.

20 percent of the average State's budget, and the Federal Government can fund as little as 50 percent.⁷⁶ A decision to defy congress and thus not expand Medicaid eligibility, therefore, could result in a State losing 10 percent of its total budget. The Court determined that the impossibility of absorbing such a loss effectively removed any semblance of choice from the States.⁷⁷ Therefore, the Medicaid funding provisions of the Affordable Care Act were deemed an impermissible encroachment on States' sovereign authority to make their own policy.

This determination solidifies this Court's adherence to a strong system of federalism in which States maintain near total control of the police power within their borders. so then, to draw conclusions from *The Affordable Care Act Cases* as a whole, the Court has imposed real limits on Congress's power to regulate businesses and individuals under the Commerce Clause but has confirmed Congress's broad authority to impose taxes.⁷⁸ In addition, the decision decreases the Federal Government's authority relative to States' authority to make policy. The decision, then, is far from liberal. It represents the current make-up of the Court, with a five justice majority that believes in the tenets of strict constructionism.

Taken together, these three cases suggest a continuation in the Court's laissez-faire views of businesses' freedom to contract, its fundamental view that the court system should not serve as the policeman of industry, and its commitment to a strong system of federalism.

CONCLUSION

Over the past two years, Wisconsin has enacted sweeping changes to its civil litigation system. These changes are a clear victory for businesses and greatly reduce the amount of litigation they face and their potential exposure in the face of meritorious litigation. The Supreme Court has continued to render decisions that are overwhelmingly friendly to business and which are supportive of the strong system of federalism that currently favors Wisconsin businesses.

⁷⁶ *Id.* at 51.

⁷⁷ *Id.* at 55.

⁷⁸ The latter could have been a tactical decision by the Court. While the Court has allowed Congress to regulate individual decisions on a granular level through the imposition of taxes, it may have done so under the conventional wisdom that elected representatives facing reelection will not support numerous tax increases.

Notes:

ABOUT THE CENTRAL WISCONSIN ECONOMIC RESEARCH BUREAU

MISSION AND VISION

The mission of the UWSP Central Wisconsin Economic Research Bureau is to foster economic development by bringing timely economic analysis to our region, focusing on Marathon, Portage and Wood counties.

The mission has been accomplished through the publication of Economic Indicator Reports. These reports are compiled and released for each county in Central Wisconsin.

The CWERB aspires to be Wisconsin's premier research center focused on regional economic development.

HISTORY

The CWERB is a nonprofit organization founded in October 1983. Its operating budget comes from the private sector and the UWSP School of Business and Economics. The CWERB also represents an important part of the outreach efforts of the UWSP School of Business and Economics.

SOURCES OF FUNDING

- UWSP School of Business and Economics
- BMO Harris Bank of Stevens Point
- BMO Harris Bank of Marshfield
- BMO Harris Bank of Wausau
- Centergy Inc. of Wausau
- Community Foundation of Greater South Wood County - Wisconsin Rapids

SCHOOL OF BUSINESS & ECONOMICS

- Enrollment of 1,000 students; More than 30% of our students come from Marathon, Portage and Wood counties; approximately 50% of our graduates stay in the three-county area
- The SBE is in the pre-accreditation phase by the Association to Advance Collegiate Schools of Business (AACSB), once completed, SBE will be among the top 18% of all business schools in the world.

CWERB CLIENTELE

- Central Wisconsin business firms are the most crucial component in the economic development of our region. Business firms are keenly aware of the important role that informed decision making plays in any developmental strategy.
- Private sector organizations devoted to economic development in Central Wisconsin, such as area chambers of commerce and their affiliated economic development agencies.
- Public sector organizations devoted to economic development in Central Wisconsin.
- The general public, in order to make informed decisions, take advantage of the unbiased information and analysis about the economy.
- The CWERB employs student research assistants which provides an excellent educational setting while also providing the opportunity for students to earn funds toward education. Faculty, staff and students at UWSP utilize the reports and resources of the CWERB.

CWERB ACTIVITIES

The dissemination of the CWERB research takes place through various hard copy publications, electronic media reports and presentations. For example, the Economic Indicator Reports are presented in Marshfield, Stevens Point, Wausau and Wisconsin Rapids. The audiences consist of business, political and educational leaders.

The Economic Indicator Reports also contain a special report section that is devoted to a current issue in economics. These special reports are usually presented by UWSP faculty.

Substantial newspaper, radio and television coverage of the publications and presentations have been instrumental in focusing attention on the School of Business and Economics. Chief Economist Randy Cray has been interviewed by the local media as well as the Chicago Tribune and CNN Radio on a variety of economic matters.

