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

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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.

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Since the beginning of 2011, Wisconsin has seen sweeping changes in the laws governing civil litigation, particularly in torts\(^1\) 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 methods 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.  

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.  

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.  

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.  

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 Section

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.  

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.  

2011 Wisconsin Act 92 (hereinafter “Act 92”) limits the award of reasonable attorneys’ fees in fee-shifting cases.  

That amount is capped by the new law at three times the amount of the plaintiff’s compensatory damages.

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.
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. Concepcion19 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

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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.
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. Secondarily, 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, \textit{Walmart Stores, Inc. v. Dukes}).

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, \textit{save upon such grounds as exist at law or in equity for the revocation of any contract}.” 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, \textit{provided} that the contractual defense is generally applicable to all contracts and does not specifically disfavor arbitration agreements. A common law defense of unconscionability was at issue in \textit{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 Concepcions 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 Concepcions 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.”

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. The Supreme Court, reversing the decision of the Ninth Circuit, held that a blanket rule classifying all arbitration agreements preventing

\begin{footnotes}
\footnote{131 S. Ct. 2541 (2011). \textit{See infra} at XXX.}
\footnote{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.}
\footnote{9 U.S.C. §2 (emphasis added).}
\footnote{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.}
\footnote{\textit{AT&T Mobility LLC v. Concepcion} at 2-3.}
\footnote{\textit{Id.} at 3-4}
\end{footnotes}
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. 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. 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. Numerosity requires simply that enough people fall within the plaintiff class to make a joinder of claims 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. 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). 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. 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.

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. 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.

33 Id. at 19.
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.
37 Id. at 8.
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. 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.'"

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. 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. 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”) 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.
Care Act Cases dealt with real disputes of constitutional law, particularly Congress’s power to regulate business and the strictures of federalism. 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.

Turning to the individual mandate, the Government argued that Congress had the authority to enact the provision under the Commerce Clause. 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. 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.” That authority extends to the power to regulate activities that, in the aggregate, have a substantial effect on interstate commerce. 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.” 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

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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.\textsuperscript{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.”\textsuperscript{54} The Court noted that if the Government’s logic were applied to \textit{Wickard v. Filburn},\textsuperscript{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 be regulating supply, but by regulating demand in the form of an individual mandate to purchase wheat.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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[,]”\textsuperscript{60} is in line with Commerce Clause jurisprudence coming from the Court since

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  \item[\textsuperscript{53}] \textit{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.” \textit{Id.} (internal citations omitted).
  \item[\textsuperscript{54}] See \textit{id.} at 21.
  \item[\textsuperscript{55}] See infra note XXX.
  \item[\textsuperscript{56}] \textit{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 \textit{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.
  \item[\textsuperscript{57}] \textit{Id.} at 23.
  \item[\textsuperscript{58}] \textit{Id.} at 26 (internal quotations and citation omitted).
  \item[\textsuperscript{59}] \textit{Id.} at 27.
  \item[\textsuperscript{60}] \textit{Id.} at 41-42.
\end{itemize}
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 are putative “tax” actually being a veiled penalty: 65 imposition “an exceedingly heavy burden,” including a scienter requirement, 66 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.

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.  

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. 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.

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. When simple pressure turns into compulsion, “legislation runs contrary to our system of federalism.” 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.

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

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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. 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. 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. 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.

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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.
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
- Centegy 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.