

WMC is launching a war to conquer the judicial branch

By Roger Bybee & Ruth Simpson

Wisconsin is rapidly becoming the latest front in the war against judicial independence, as Wisconsin Manufacturers and Commerce's (WMC) has unleashed a massive effort to radically transform state courts and provide them with a decidedly pro-corporate tilt.

After a period of steady preparation for combat over the judicial branch, WMC, the state's most powerful lobbying group, opened up its full-fledged campaign immediately after three recent Supreme Court decisions that did not take the position WMC and its allies advocated. WMC enjoys enormous influence over both the executive and legislative branches.¹ In the first six months of 2005, it was the state's biggest-spending lobbying force, spending \$535,408.² Following closely behind were the Wisconsin Hospital Association (\$460,172) and the Wisconsin Insurance Alliance (\$400,597).

As the state's leading voice for corporate interests, WMC has virtually unlimited resources to devote to the pursuit of its agenda. In 1995, its chief lobbyist James Buchen openly proclaimed, "We're going to spend as much as we can" to gain tax cuts skewed toward corporations and the wealthy and impose budget cuts on social spending. Further, WMC operates in a legislative context where corporations are the sole "superpower" in Wisconsin politics, with business outpacing labor by a 19-1 margin.

But no longer content with a dominant role over just two branches, WMC has swiveled its gunsights to the judicial branch as well. Based both on the WMC's actions thus far and similar campaigns in other states,

WMC's apparent motives include: to permanently constrain the judiciary's role in our democracy, to expand its effective dominance over the judicial branch by electing pro-corporate justices, ensuring that the legislative and executive branches remain loyal to corporate interests, and dominating public debate with the highly-contrived issue of "liability reform."

WMC's Submarine Campaign Begins

Like a submarine, WMC has been lurking in the waters determined for some time to inject "liability reform" as a central issue in Wisconsin politics and to begin systematically its vast influence in Supreme Court elections. For example, WMC's annual "Day at the Capitol" event held earlier this year spotlighted liability issues with major speeches from Steven Hantler, DaimlerChrysler's chief counsel, and Tiger Joyce of the American Tort Reform Association. Each spoke on the national trends for tort "reform" and why Wisconsin should join the bandwagon.

Later, in June, WMC distributed to state media an "economic report card" on Wisconsin Supreme Court justices distributed by little known organizations — Judicial Evaluation Institute (JEI) and Sequoyah Information Systems (SIS). The report card was viewed by some observers as the opening salvo of an effort

Who are Judicial Evaluation Institute and Sequoyah Information Systems?

Judicial Evaluation Institute is located in Washington D.C. and the Sequoyah Information Systems is out of Edmond, Oklahoma. The groups appear to be "operated by a group of lobbyists, lawyers and business people, most with close ties to the conservative wing of the Republican Party and Koch Industries, a large, privately held corporation with [interests in oil and gas, chemicals and agriculture.] The leaders of Koch Industries, David and Charles Koch, have established a solid track record, primarily through grant-making by several Koch family foundations, of generous effective financial support for conservative public policy initiatives. One of the Koch' primary area of interest has [promoting the election of state judges sympathetic to business interests.]" "Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections," Environmental Policy Project, Georgetown University Law Center, 2000. <http://www.law.georgetown.edu/gelpi/sjlect/>

to mobilize around a pro-corporate candidate for the Spring 2006 Supreme Court election to replace Justice Patrick Crooks, whose retirement was anticipated by WMC. Had Justice Crooks decided to retire, it would

have created a rare electoral contest over an open Supreme Court seat.

WMC positioning seems to take its cue from JEI and SIS, which have issued reports in other states like Ohio, Mississippi and elsewhere. Business groups, led by the U.S. Chamber of Commerce, doubled contributions to judicial races from \$8.4 million in 2002 to \$15.8 million nationwide in 2004. U.S. Chamber-backed campaigns in a dozen states for 15 state Supreme Court candidates claimed a near clean sweep in 2004, Justice at Stake reported.³

The JEI and SIS report rated the Wisconsin Justices on six broad areas of law: employment, insurance, medical malpractice, product liability, workers' compensation and "other liability lawsuits." The report states, "the higher the score, the more the judge's opinions have had the effect of restraining liability." Only 5 of the current justices were rated because both Justices Roggensack and Butler had been on the court for too short a period of time for evaluation. Predictably it gave "positive" ratings to decisions that "slow the expansion of liability" and negative ratings to decisions, that "tends to expand liability." There is no evaluation given for statutory construction or constitutional interpretation. WMC characterized the results as Justices Abrahamson and Bradley "flunking" the business liability test and Justices Crooks, Prosser and Wilcox passing it.⁴

WATL and the AFL-CIO were quick to criticize the report. David Newby, President of the Wisconsin AFL-CIO said, "It hardly seems that this is a useful report unless you are opposed to holding corporations liable for producing products that lead to the injury, disease or even death of consumers." David Skoglund, WATL President, questioned the methodology of the study and the motives of WMC, "The allegiance here is to corporate interest groups as opposed to a justice's allegiance to statutes and law. It's interference with the impartiality and independence of the Supreme Court, and that's troublesome."⁵

However, none of this compares to the firestorm WMC unleashed in July after the Supreme Court issued its opinions in *Ferdon v. The Wisconsin Patients Compensation Fund*, et

al., 2005 WI 125, finding the pain-and-suffering cap in medical-malpractice cases violated the constitutional rights of the most severely injured patients to be treated equally under the law and *Thomas v. Mallet*, 2005 WI 129, allowing a jury trial to move ahead against the lead-paint industry based on a "risk contribution" theory of liability.

The New War

WMC immediately blasted the Supreme Court's "judicial activism" as "dangerous to jobs" and for creating a "litigation crisis."⁶ Within days, WMC launched a "Job Defense Fund" seeking contributions of up to \$50,000 from members. Next WMC assembled a "summit meeting" that produced a "Civil Justice Coalition" of corporate and health-provider groups to lobby for reversal of the Supreme Court decisions and, to outline legislation to overturn the Court decisions as well as, most ominously, a constitutional amendment to severely constrict the Supreme Court's ability to judge the constitutionality of the Legislature's actions.⁷

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In a move startlingly antithetical to its proclaimed role of promoting the creation of more investment and jobs in Wisconsin, WMC has aggressively propagated the notion that investing in Wisconsin is highly perilous for corporate decisionmakers. WMC appears to have helped plant an editorial in the *Wall Street Journal*, and they have developed print ads claiming that trial lawyers are ready to come into the state and take away people's jobs.⁸

WMC has apparently been delighted with the results of its own efforts to nationally sabotage Wisconsin's image as a business-friendly state, with WMC official Jim Pugh boasting, "Every CEO and top executive is now reading that Wisconsin is a dangerous place to operate a business because you're getting sued out of business."⁹

Also echoing WMC's war-cry from the extreme Right has been FreedomWorks, the national organization headed by former Congressman Dick Armey, pledging to spend \$2 million to insert the "liability reform" issue into the 2006 elections with candidate pledges, along with denouncing Justice Patrick Crooks for letting down conservatives with his support on the medical-malpractice issue and allowing "frivolous lawsuits" to flower.¹⁰

Meanwhile, Speaker John Gard, WMC's ally in the Legislature, set up a Task Force on Medical Malpractice Reform with the explicit aim of devising a bill for reinstatement of the pain and suffering cap. Notably, victims of medical negligence and consumer advocates were entirely excluded from Gard's selection of "public" representatives, who all turned out to be medical providers or attorneys specializing in representing health providers in malpractice cases.¹¹

Also heavily involved with WMC are the Wisconsin Hospital Association¹² and Wisconsin Medical Society, who have issued numerous "doom and gloom" declarations to the media and sponsored a highly-slanted poll.¹³ The Hospital Association and Medical Society have concentrated on arguing that repeal of the cap has already begun to make recruiting doctors for rural areas more difficult¹⁴ and that malpractice insurance is a huge cost factor for emergency room doctors.¹⁵

At this point, it remains to be seen if the WMC's campaign will ignite a backlash among its own members. WMC's message is seemingly out of touch with the priorities of its base of manufacturers and merchants, although ardently embraced by the strong contingent of numerous insurance and health-provider CEOs present on WMC's board.¹⁶ Second, WMC absurdly inflates the importance of medical-malpractice issues, which make up just 39 cents of every \$100 spent on healthcare in

Wisconsin¹⁷ and is an area where business publication *Expansion Management* ranks the state as most favorable in the nation.¹⁸

At the same time, *Expansion Management*—targeted at corporate decisionmakers who determine where to locate new facilities and to shut down existing ones—ranked Wisconsin as having the second highest healthcare premiums in the nation. Now, a new GAO study has determined Wisconsin leads the nation in physician costs.¹⁹ This follows an earlier GAO study that found Milwaukee was 5th highest among the nation's metropolitan area in hospital prices.²⁰ Previous studies had indicated that Wisconsin's healthcare costs were a substantial 23.4% above the national average.²¹ Despite the evident urgency of holding down healthcare costs for state business leaders, WMC has devoted extraordinary resources and energies to promoting medical-malpractice costs as an imminent threat to Wisconsin jobs.

With national data indicating that healthcare premiums now average \$10,880 for family coverage,²² it stretches logic to the breaking point to argue that medical-malpractice costs are the most dangerous threat to Wisconsin jobs and healthcare access. WMC's contortions on the health issue and almost comically misguided priorities have been so extreme that they have provoked criticism by some business leaders.²³

Still, WMC and its allies continue to lurch forward, undeterred by the absence of supporting evidence and confident that they can inflate the microscopic medical malpractice cost factor into an intense, gigantic issue that will blot out virtually all other concerns in Wisconsin discourse.

Conclusion

Given the remarkable success enjoyed by corporate and medical-provider interests in state Supreme Court races in other states, those concerned with judicial independence and equal justice have good reason to worry about the future of judicial elections in Wisconsin.

A sober assessment of the WMC's aims must conclude that WMC is thoroughly committed to undermining the judiciary as an independent pillar of democracy and to erect a legal shield of virtual immunity for major corporations and allied groups such as medical providers. If WMC and its allies succeed in this effort, Wisconsin's traditions of judicial independence, equal justice and a progressive vision of democracy will have been crushed, replaced by a new level of corporation domination so absolute and pervasive that it bears little resemblance to authentic democracy.

(Endnotes)

- ¹ One reflection of WMC's political power has been its ability to radically lower the corporate tax burden and shift it to Wisconsin homeowners. Matt Pommer, "Biz Taxes here close to lowest says UW economist," *The Capital Times*, April 22, 2004. (Wisconsin corporations rank 50th in terms of their share of state and local taxes.)
- ² "State lobbyists break record while preparing for budget," *Wisconsin State Journal*, August 1, 2005.
- ³ Deborah Goldberg, et al., "The New Politics of Judicial Elections 2004: How Special Interests Pressure on Our Courts Has Reached a 'Tipping Point'—and How to Keep Our Courts Fair and Impartial," issued by Justice At Stake. Available at www.jas.org. The report describes the most appalling application of the big money-nasty TV ad formula, which was used in West Virginia to defeat a sitting chief justice with deceptive charges about his vote on a case involving a former child molester.)
- ⁴ Wisconsin Supreme Court Judicial Evaluation 2005, The Economic Judicial Report, Judicial Evaluation Institute and Sequoyah Information Systems, June 2005.
- ⁵ Rich Kirchen, "Liability a supreme concern," *The Business Journal Serving Greater Milwaukee*, June 24, 2005.
- ⁶ WMC news releases available on its website at www.wmc.org.
- ⁷ In an Aug. 2, 2005 document "Wisconsin's Civil Justice System: A State of Crisis," the coalition outlines a variety of routes to curb, "The court's interference with legislature's prerogative to assess and address important policy issues such as medical malpractice costs." The Coalition even discusses using "the power of the purse," in their words, to bring the Court into line.
- ⁸ "Alabama North," *The Wall Street Journal*, August 9, 2005. The print ad, "Hello Trial Lawyers, Good-bye Jobs," can be reviewed at www.wmc.org.
- ⁹ "Business groups target high court, Justice Crooks," Associated Press story, JR Ross, *Wisconsin State Journal*, August 15, 2005.
- ¹⁰ *Id.*
- ¹¹ The task force has 10 members. It is chaired by Representative Curt Gielow (R-Mequon) and includes Republicans Mike Huebsch (R-West Salem), Ann Nischke (R-Waukesha) and Democrats Jason Fields (D-Milwaukee) and Bob Ziegelbauer (D-Manitowoc). The "public" members are: David Striffling, an attorney from Quarles and Bradley and former law clerk to Justice David Prosser; Mary Wolverton, a malpractice defense lawyer with Peterson, Johnson and Murray; Dr. "Bud" Chumley, an obstetrician and President and CEO of Medical Associates Health Centers in Menominee Falls; David Olson, a hospital CEO, board member and founder of NorthReach; and Ralph Topinka, Vice President and General Counsel of Mercy Alliance in Janesville.
- ¹² The Hospital Association website proudly noted September 19 that the group's political action committee had amassed \$156,000 toward its goal of \$175,000.
- ¹³ The poll, with responses conditioned by misleading "information" provided by the poll script, was conducted by Gene Ulm of Public Opinions Strategies, a Republican pollster.
- ¹⁴ Recruitment of doctors to lower-income, lower-density rural areas and impoverished urban communities has been a problem long pre-dating the cap of 1995-2005. In fact, the Hospital Association and Medical Society themselves issued a 2004 report— "Who Will Care for Our Patients"— highlighting the problem's seriousness— while the cap was still in effect. Moreover, Paul Nannisa a top Milwaukee health administrator for Aurora Health Care, asserted that the shortage of primary care doctors is quite severe, "We have a shortage that's far more acute than 10 years ago." *Milwaukee Journal-Sentinel*, Section G, page 1, November 15, 2004.
- ¹⁵ Dr. Susan Turney, CEO of the Wisconsin Medical Society, in a letter to *The Capital Times* on August 31, tried to dismiss the tiny overall impact of medical-malpractice costs by arguing that med-mal insurance consumes as much as 40% of ER doctors' overhead. This claim is extremely specious, as ER doctors— uniquely among providers— have to pay for almost no overhead (office, nursing assistants, schedulers, billing staff, etc.) Moreover, many medical facilities pay for ER doctors' medical malpractice insurance.
- ¹⁶ WMC's board includes executives from Marshfield Clinic, Dean Health Systems, Meriter Health Services, and Thedacare.
- ¹⁷ Information from the Wisconsin Insurance Report 2003, Office of the Commissioner of Insurance and U.S. Census Bureau, Statistical Abstract of the United States, 2004-05.
- ¹⁸ Michael Keating, "Health Care Expenses Are a Key Site Location Factor," *Expansion Management*, Feb. 14, 2005.
- ¹⁹ GAO-05-856 FEHBP Competition and Other Factors Linked to Wide Variations in Health Care Prices. See also, story by Rick Romell, "State leads nation in physician costs," *Milwaukee Journal-Sentinel*, 1A, September 15, 2005.
- ²⁰ GAO, Milwaukee Health Care Spending Compared to Other Metropolitan Areas: Geographic Variation in Spending for Enrollees in the Federal Employees Health Benefits Program, GAO-04-1000R (Washington, D.C.: Aug. 18, 2004).
- ²¹ Joe Manning, "Employers face smaller health insurance increases; Workers should expect to bear higher expenses," *Milwaukee Journal-Sentinel*, Nov. 21, 2004, relying on data from Mercer Human Resource Consulting.
- ²² Study by Kaiser Family Foundation, and the Health Research and Education Trust, reported by Guy Boulton, "Health costs keep rising," *Milwaukee Journal-Sentinel*, 1D, September 15, 2005.
- ²³ Jack Lohman, "WMC's scare tactics are bad for business," *The Capital Times*, Sept. 5, 2005. Lohman is the retired CEO of Milwaukee-based Cardiac Evaluation Centers.