Brownson & Ballou, PLLP’s annual summary of Wisconsin law designed in a format useful to insurance and corporate risk managers and claims handlers updated for 2014.
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Statutes of limitations establish the time period during which a plaintiff, insured, or claimant must file a cause of action in order to preserve his or her claim. The limitations period typically runs from the date of the accident or injury, or from the day the individual discovered the existence of a potential claim. In Wisconsin, the following types of actions must be brought within two, three, or six years:

### 2 Years
- Intentional Torts:
  - Assault and Battery
  - False Imprisonment
  - Libel
  - Slander

*See Wis. Stat. § 893.57*

### 3 Years
- Medical Malpractice
  - *See Wis. Stat. § 893.55(1m)(a)*
- Personal Injury
  - *See Wis. Stat. § 893.54(1)*
- Products Liability
  - *See Wis. Stat. § 893.54(1)*
- Wrongful Death
  - *See Wis. Stat. § 893.54(2)*

### 6 Years
- Actions in Contract (written or oral)
  - *See Wis. Stat. § 893.43*
- Fraud
  - *See Wis. Stat. § 893.93(1)(b)*
- Legal Malpractice
  - *See Wis. Stat. § 893.53*
- Property Damage
  - *See Wis. Stat. § 893.52*
- Trespass
  - *See Wis. Stat. § 893.52*
INSURANCE LAW

Licensing

Resident Licensing
In order to obtain a resident license for the major lines of insurance in the State of Wisconsin, an individual must complete the necessary pre-licensing course at an approved educational facility and must then pass an examination for each line prior to submitting an application. Individuals wishing to obtain a license for limited lines of insurance must pass the relevant examinations. To access information regarding resident licensing, please refer to: http://oci.wi.gov/agentlic/licensing.htm.

Business Entity
Although not mandatory, corporate and partnership licensing through the Office of the Commissioner is available to certain types of corporations and partnerships in Wisconsin. Such licenses, however, do not authorize the businesses to act as an agent or to conduct business with individual insurers. For more information on the types of corporations and partnerships that may be licensed, please visit http://oci.wi.gov/agentlic/corplic.htm.

Nonresident Insurance Producer
Nonresidents may submit either online or paper applications for nonresident licenses. The application is available online and describes the process and relevant fees. Please refer to http://oci.wi.gov/agentlic/licensing.htm for additional information concerning licensing procedures.

Claims Handling

Wisconsin law requires insurance companies to adhere to a number of fair and equitable practices while conducting business including but not limited to, acknowledging communications promptly upon receipt, conducting investigations into and affirming or denying claims within a reasonable amount of time, and attempting to effectuate a fair settlement once liability has become reasonably clear.

Insurers also owe insureds a general duty to settle claims. This duty is implied in contracts of insurance and encompasses the following obligations:

- Insurers must exercise reasonable diligence in investigating and developing facts to support their good-faith decision to settle or contest a claim,
- Insurers must inform insureds that liability may exceed policy limits in all cases where that is likely, and
- Insurers must timely inform insureds of all settlement offers and of the progress of settlement negotiations.

Continuing Education

A licensed resident insurance agent must complete twenty-four credit hours of continuing education courses over a two-year period, three of which must be in ethics. One credit hour equals 50 minutes of classroom instruction. Credits cannot be carried over across reporting periods.

Insurance agents who fail to complete and report their continuing education credits will suffer revocation of their license.
**AUTOMOBILE LIABILITY**

**Mandatory Insurance Coverage**

The State of Wisconsin requires the owner of an automobile to carry **Liability Insurance for Bodily Injury; Liability Insurance for Property Damage**, and **Uninsured Motorist Coverage**

For policies issued or renewed on or after November 1, 2011, individuals must maintain, at a minimum:

- $25,000 for the injury or death of one person
- $50,000 for the injury or death of more than one person
- $10,000 for property damage
- $25,000 in uninsured motorist coverage for the bodily injury of one person
- $50,000 in uninsured motorist coverage for the bodily injury of two or more persons

Underinsured motorist coverage is no longer mandatory in the State of Wisconsin. However, if insureds request such coverage, minimum limits of $50,000 per person and $100,000 per accident apply. Underinsured coverage remains mandatory for policies that were newly issued or renewed prior to November 1, 2011 at minimum limits of $100,000 per person and $300,000 per accident.

Medical payments coverage is also available in the State of Wisconsin and insurance companies must offer the coverage to insureds but it is not mandatory.

For additional information concerning Wisconsin automobile insurance coverage, please visit [http://oci.wi.gov/consumer/auto-home.htm](http://oci.wi.gov/consumer/auto-home.htm).

**Types of Automobile Coverage**

**Bodily Injury Liability Insurance Coverage:** this coverage protects insureds against claims of others injured in car accidents.

**Property Damage Liability Insurance Coverage:** this coverage pays for property damage sustained by others as a result of a motor vehicle accident involving an insured.

**Uninsured Motorist Insurance Coverage:** uninsured coverage applies to bodily injuries sustained by insureds, their family members and/or their passengers as a result of being hit (either while in a vehicle or walking) by an uninsured motor vehicle.

**Underinsured Motorist Insurance Coverage:** underinsured coverage, not mandatory as of 2011, increases an insured’s bodily injury protection and applies in cases where the at-fault driver’s liability insurance limits are lower than insured’s underinsured benefits.

**Medical Payments Insurance Coverage:** Medical payments insurance, which is not a mandatory type of coverage, pays for the medical and/or funeral expenses of an insured and his or her passengers. The coverage also applies where an insured is struck by a vehicle while walking or while riding in another automobile. Medical payments typically cover only those expenses not covered by health insurance.
DRAM SHOP

Generally, there is no liability for serving, selling, or procuring alcohol in Wisconsin. However, this immunity does not apply if the person procuring, selling, dispensing or giving away alcoholic beverages causes their consumption by force or by false representation that the beverage contains no alcohol. See Wis. Stat. § 125.035.

Wisconsin law also provides a complete defense to all civil liability if all of the following occur:

(1) The underage person falsely represents that he or she has reached the legal drinking age.

(2) The underage person supports the false representation with documentation that he or she has attained the legal drinking age.

(3) The alcoholic beverages are supplied in good faith reliance on the underage person’s representation that he or she has reached the legal drinking age; and

(4) The underage person’s appearance is such that an ordinary person would believe that he or she has attained the legal drinking age.

See Wis. Stat. § 125.035.

The dram shop statute does not cover claims on behalf of the intoxicated person, the estate of the intoxicated person, or the personal representatives of the intoxicated person, nor does it cover claims by adult passengers in an automobile driven by an intoxicated person, the estate of the passengers, or the personal representatives of such passengers.
PREMISES LIABILITY

Duty

In Wisconsin, a landowner’s liability for injuries sustained on the landowner’s property depends upon the fault of the parties involved. The fact that a person is injured in an accident while on the property of another does not automatically entitle the injured party to damages from the landowner. Instead, any comparative negligence on the part of the injured party must be examined. Wis. Stat. § 895.045 provides that the negligence of the plaintiff shall be compared separately to the negligence of each person found to be causally negligent. The liability of each person whose negligence is measured at less than 51% is limited to the percentage of the total negligence attributed to that person. Conversely, a person found to be causally negligent whose percentage of negligence is greater than 51% shall be jointly and severally liable for the total damages allowed. See Wis. Stat § 895.045(1).

Notably, if 2 or more persons act in accordance with a common scheme or plan that results in a third party’s injury, those parties are jointly and severally liable for the damage allowed. See Wis. Stat. § 895.045(2).

The duty a landowner owes with respect to those on the property differs depending on the legal status of the person who allegedly suffers injury while on the premises. If the injured individual is a trespasser, a private landowner only has the duty to refrain from causing intentional and willful injury. The duty owed to those performing some sort of service on the property (invitees) is that of ordinary care. A landowner may be liable to social guests (licensees) if the injury is caused by a trap on the property or if the injury is caused by the landowner’s active negligence.

A higher standard is imposed on business owners via Wisconsin’s Safe Place Statute. This law requires that employers do everything “reasonably necessary to protect the life, health, safety or welfare” of its employees and frequenters. See Wis. Stat. §§ 101.01 and 101.11.
PREMISES LIABILITY

Defenses

Snow and Ice: Wisconsin law has long held that the responsibility of keeping sidewalks free of snow and ice is that of the municipalities and not of the homeowners. Civil liability on the part of the municipality due to snow and ice on public sidewalks is established based on whether the municipality was unreasonable in allowing the condition to continue. Reasonableness factors include the location of the snow or ice build-up, climate conditions at the time, accumulation amounts and practicality of removal, traffic, and intended use of the sidewalk. Specifically, a municipality cannot be liable for snow accumulation unless it has existed for 3 weeks. See Wis. Stat. § 893.83.

Lack of Knowledge: A landowner or occupier’s duty to warn others of dangerous conditions on the land is premised on the landowner or occupier having superior knowledge of dangers posed by a particular condition. A landowner or occupier who creates a dangerous condition requires no notice because he or she has knowledge of the acts that created the danger.

Open and Obvious Doctrine: The open and obvious doctrine is a factor to consider in comparative fault analysis. A landowner owes entrants a more limited duty to protect and/or warn when a dangerous condition is known or obvious. However, when landowners can and should anticipate that a dangerous condition will cause an entrant physical harm, the landowners retain a duty of reasonable care despite the open and obvious nature of the condition. Ultimately, a plaintiff’s negligence in confronting an open and obvious danger must be compared with any negligence on the part of the defendant landowner.

Recreational Use: Wisconsin’s recreational immunity statute provides that landowners have no legal obligation to recreational users to keep their property safe for recreation, no duty to inspect, and no duty to warn about unsafe conditions. Importantly, Wisconsin’s statutory immunity statute applies to both natural and artificial conditions. There are some important exceptions to the recreational immunity statute. First, landowners are not protected from a malicious failure to warn. Further, those who use their land for organized sports or who receive more than $2,000 in compensation for the use of their property are not protected. See Wis. Stat. §895.52.
PRODUCTS LIABILITY

Claims Generally
In 2011, Wisconsin enacted the Omnibus Tort Reform Act which limits the scope of products liability actions within the state. There are three types of products liability actions: (all in strict liability): (1) manufacturing defects, design defects, and failure to warn.

Under each theory, Wisconsin law requires that a plaintiff show a reasonable design alternative that existed at the time of manufacture. Further, plaintiffs must prove that the manufacturer’s failure to implement the alternative design rendered the product not reasonably safe.

Defenses
Wisconsin law contains five defenses to products liability claims:

1. That the plaintiff was under the influence of any controlled substance at the time of the injury,
2. That the product complied with relevant federal or state laws at the time of the sale,
3. That the plaintiff misused, altered, or modified the product,
4. That the damage was caused by inherent characteristics of the product that would have been obvious to a consumer, and
5. That the distributor or seller obtained the product in a sealed container and had no reasonable opportunity to inspect or test the product

Statute of Repose
The 2011 Omnibus Tort Reform Act creates a statute of repose on products liability claims brought in the state of Wisconsin. The Act bars all products liability claims that involve products manufactured more than fifteen years before the injury. However, the Act does contain two exceptions. First, the fifteen year rule does not apply to damages caused by a latent disease. Second, the fifteen year rule does not apply when the manufacturer promised that the product would last longer than fifteen years.

Subsequent Remedial Measures
Plaintiffs may not offer evidence that a company took subsequent steps to make a product safer. This type of evidence is only admissible to show that a reasonable design alternative did exist at the time the product was sold.
PROFESSIONAL LIABILITY

Legal Malpractice

In Wisconsin, the statute of limitations period applicable to legal malpractice claims is six years. In contrast, the three-year statute of limitations for breach of fiduciary duty applies to claims against an attorney alleging a breach of the fiduciary duty.

In Wisconsin, in order to state a legal malpractice claim against an attorney, a plaintiff-client must demonstrate:

1. That an attorney-client relationship existed,
2. Acts or omissions constituting the attorney’s alleged negligence,
3. The fact and extent of the injury alleged, and
4. That the client would have been successful in the prosecution of the action but for the attorney’s negligence

Medical Malpractice

Once a claim accrues, a plaintiff must commence a medical malpractice claim within three years from the date of the injury or one year from the date the injury was discovered or should have been discovered. If the health care provider concealed from the patient an act or omission that caused the injury, an action must be commenced within one year from the date the patient discovered or should have discovered the concealment.

Generally, a plaintiff must provide expert testimony to demonstrate that the defendant physician failed to exercise the degree of skill and care required by law. However, expert testimony is not required if an ordinary person could apply common knowledge and determine that the injury could only have occurred due to a lack of professional care.

See Wis. Stat. 893.55(1m)(a).

Professional Malpractice

Wisconsin courts hold that professional malpractice claims can sound in both tort law and contract law. This is because a professional’s duty to exercise a certain level of care might be created by a contract between the parties.

The applicable statute does not identify particular professionals subject to malpractice claims, but courts have held that dentists and engineers qualify as professionals.

Professional malpractice claims are generally subject to a six-year statute of limitations period.
Discrimination

Wisconsin’s Fair Employment Law prohibits an employer from engaging in discriminatory practices on account of the following characteristics:

- Age
- Race
- Creed
- Color
- Disability
- Marital status
- Sex
- National origin
- Ancestry
- Sexual orientation
- Arrest or conviction record
- Military service
- Use or nonuse of lawful products off the employer’s premises in non-working hours
- Declining to attend a meeting or participate in any communications about religious or political matters

See Wis. Stat. §§111.31-111.395.

The statute also provides that an employer’s failure to make reasonable accommodations for otherwise qualified individuals with physical or mental disabilities, or because of religion, qualifies as a discriminatory practice unless the accommodation would pose an undue hardship to the employer’s business.

Termination

Pursuant to Wisconsin law, employment is presumed to be at-will. In an at-will employment relationship, an employer may terminate an employee with or without cause. In Wisconsin, however, there are recognized exceptions to the general rule of at-will employment. First, parties can modify the at-will employment presumption via contract. If the employer violates the contract, the employee has a claim for breach of contract. Second, Wisconsin law prohibits employers from terminating an employee based on that employee’s decision to join a union. Finally, Wisconsin courts will not uphold a termination when it is against public policy. It was found to be a violation of public policy when an employee’s termination was based on the employee’s filing of a workers compensation claim. A termination was also found to violate public policy when the employee was terminated after testifying against the employer in court.
**WHISTLEBLOWERS**

**Elements of a Claim**

To establish a case for retaliation, an employee must demonstrate the following:

1. That the employee engaged in activity protected by the statute,
2. That the employee was subject to adverse employment decisions, and
3. That a causal connection exists between the employee’s activity and the adverse employment action.

After an employee demonstrates all of the above elements, an employer may rebut a claim of retaliation by demonstrating a legitimate and nondiscriminatory reason for the employment action. Despite an employer’s ability to demonstrate a legitimate reason behind the adverse employment action, an employee may still prevail by showing a retaliatory motivation for the action *in addition* to the employer’s legitimate motivation.

**Relief**

If it is determined that the employer violated the Employee Protection statute, the following forms of relief may be ordered:

- Reinstatement of the employee,
- Transfer to another available position,
- Expungement of adverse material from employee’s personnel file,
- Attorney’s fees, and
- Recommendation of disciplinary proceeding against employer including placement of violation information in personnel file, letter of reprimand, suspension, or termination.

**State Employees:** Pursuant to the Wisconsin Employee Protection statute, a state employee may not be retaliated against for lawfully reporting that a government employer either violated a state, local, or federal law, mismanaged or abused its authority, created a substantial waste of public funds, or created a danger of public health and safety. *See* Wisconsin’s Department of Workforce Development’s [website](#) for more information.

**Private Employees:** In certain circumstances, Wisconsin laws also protect private employees from retaliatory employment actions. First, private employees may report a violation of Wisconsin’s Fair Employment laws. Employees may also report violations of Wisconsin’s Family Medical Leave Act and labor standards laws. Employees have **30 days** to report potential safety hazards within the workplace. Health care employees may not be retaliated against for reporting violations of local, state, or federal laws. Further, an employee may report elder abuse for up to **300 days** after the alleged abuse took place. Finally, Wisconsin protects employees who report toxic chemicals in the
ASBESTOS CLAIMS

In Wisconsin, many of the state’s asbestos-related claims originate in the city of Milwaukee because of the city’s history of paper manufacturing and metal works industries. Asbestos-related claims are also common in cities such as Green Bay, Madison, and Waukesha.

The Wisconsin Supreme Court has not addressed the question of how much exposure evidence a plaintiff in an asbestos-related case must produce to raise a material issue of fact as to causation (in order to avoid a summary judgment motion). However, the Wisconsin Court of Appeals has refused to apply a bright-line test in asbestos causation cases. Instead, Wisconsin courts decide asbestos causation issues based on the totality of circumstances surrounding the individual plaintiffs and their claims. In other words, Wisconsin courts determine whether or not a particular product had the effect of producing a harm such that a reasonable person would regard the product as the cause of the injury. Specifically, some Wisconsin courts follow the substantial factor test. Under the substantial factor test, the product must have been a substantial factor in bringing about the plaintiff’s injury. A plaintiff’s showing of a mere possibility that the plaintiff was exposed to the asbestos product will likely not amount to enough evidence to survive a summary judgment motion in Wisconsin.

Wisconsin courts have denied summary judgment when the plaintiff showed that plaintiff did the type of work that used asbestos and that plaintiff’s employer bought or probably bought asbestos from the defendant. From this evidence, a reasonable jury could infer that the plaintiff used asbestos in his work. Another Wisconsin court denied summary judgment when the plaintiff showed only that the defendant company used asbestos-containing products simultaneously with plaintiff’s presence at that work site.
In Wisconsin, a wrongful death claim may be brought by a personal representative of the deceased person or by the person to whom the amount recovered belongs.

The essential elements of a claim for wrongful death in Wisconsin are: (1) the defendant committed a wrongful act; (2) the wrongful act proximately caused the death of the decedent; (3) there are survivors to be compensated for their losses resulting from the decedent’s death; (4) if death had not ensued, the defendant would have been liable to the decedent in an action for damages; and (5) a showing of pecuniary injury to the relative involved.

Wrongful death actions are subject to a two-year statute of limitations period and begin to accrue upon the death of the decedent, unless such death results from malpractice, in which case the two-year period begins to toll on the date of the discovery of the malpractice.

### Recoverable economic damages:
- Damages arising from medical expenses and care
- Cemetery and funeral expenses
- Loss of earnings and earning capacity
- Loss of income or support
- Cost of substitute domestic services
- Loss of employment or business or employment opportunities
- Loss of use of property
- Cost of repair or replacement
- Other monetary losses

### Recoverable noneconomic damages:
- Pain and suffering
- Inconvenience
- Mental anguish
- Emotional distress
- Loss of society and companionship
- Loss of consortium
- Injury to reputation
- Humiliation
- Other nonmonetary damage

Importantly, the Wisconsin legislature caps the amount family members may receive for loss of society and companionship at up to $350,000 for a deceased adult and $500,000 for a deceased minor. See Wis. Stat. § 895.04.
GOVERNMENT IMMUNITIES

Statutory Cap on Liability

According to Wisconsin statutory law, tort recovery for any damage, injury, or death against a government agency or its officers and employees for acts done within their official capacity is limited to $250,000. See Wis. Stat. § 893.82 (6). Further, Wisconsin does not allow for the recovery of punitive damages against any government agency or its officers and employees for acts done in their official capacity.

Discretionary Function Immunity

Wisconsin maintains the general common law rule that, subject to specific exceptions, a state officer or employee is immune from personal liability for injuries resulting from acts performed within the scope of the employee or officer’s office. An important exception to the doctrine of immunity is that a public officer or employee is not shielded from liability for the negligent performance of a purely ministerial duty. A duty is ministerial (and thus not protected) when the duty is absolute and the performance of such a duty leaves no room for judgment or discretion.

Qualified Immunity

Qualified immunity aims to safeguard the ability of government officials to exercise discretion and authority while performing their public duties. In order to utilize the qualified immunity defense, a public official must demonstrate that his or her actions did not violate a clearly established statutory or constitutional right of which a reasonable person would have been aware. If a reasonable official could have believed the conduct at issue was lawful, qualified immunity will apply and the claim will be dismissed. Issues concerning the applicability of qualified immunity are generally questions of law to be resolved by the court, but fact finders may on occasion be required to determine the reasonableness of an official’s conduct.
### Economic & Noneconomic Damages

Monetary damages are available to one who suffers a detriment as a result of an unlawful act or omission of another. In personal injury and wrongful death actions, plaintiffs may recover both economic and noneconomic damages.

 Recoverable economic damages include:
- Costs arising from medical expenses and medical care
- Cost of replacement
- Loss of earnings and earning capacity
- Loss of income or support
- Burial and cemetery costs
- The cost of substitute domestic services
- Loss of employment or business or employment opportunities
- Other monetary losses

Noneconomic damages recoverable by personal injury or wrongful death plaintiffs include:
- Damages arising from pain, suffering, inconvenience, physical impairment, mental anguish, emotional distress, loss or illness
- Loss of society and companionship
- Loss of consortium
- Injury to reputation
- Humiliation

A plaintiff whose contributory fault was greater than the combined fault of other individuals who contributed to the injury, however, will be barred from recovering damages.

### Punitive Damages

Punitive damages are aimed at punishing defendants rather than compensating plaintiffs. One of the following must be present to support an award of punitive damages: (1) evil intent deserving or punishment, (2) wanton disregard of a duty, or (3) gross or outrageous conduct.

A punitive award is likely excessive if it is more money than is necessary to serve the stated purposes of punitive damages, or if the award inflicts a financial burden on the defendant that is disproportionate to the wrongdoing. Specifically, Wisconsin courts look to six factors to determine whether a punitive award is excessive:

- The grievousness of the wrongdoing,
- The degree of malicious intent,
- Whether the award bears a rational relationship to the award of compensatory damages,
- The potential damage caused by the wrongdoing,
- The ratio of the award to civil or criminal penalties that could be imposed for comparable misconduct, and
- The wealth of the wrongdoer.
COLLATERAL SOURCE RULE

In General

According to Wisconsin’s collateral source rule, a plaintiff’s recovery cannot be reduced by payments or benefits from other sources. In other words, defendants are required to pay the injured party the full amount ordered by the court despite any payments or benefits conferred upon the injured party from an unrelated source. The collateral source rule is meant to act as a deterrent because it makes tortfeasors fully responsible for damages caused by their wrongdoing. As the Wisconsin Supreme Court explained, “The tortfeasor who is legally responsible for causing injury is not relieved of his obligation to the victim simply because the victim had the foresight to arrange, or good fortune to receive, benefits from a collateral source for injuries and expenses.” See Ellsworth v. Schelbrock. The collateral source rule is well established in Wisconsin and has been the state’s law since 1921.

Further, Wisconsin law prohibits juries from hearing evidence of collateral source payments. This means that a jury may not use evidence of collateral source payments to determine the reasonable value of medical treatment rendered in the case.

Uninsured Motorist Claims (UIM Claims)

In March of 2012, the Wisconsin Supreme Court decided a case titled Orlowski v. State Farm Mutual Automobile Ins. Co. Prior to Orlowski, Wisconsin law was unclear on the applicability of the collateral source rule to uninsured motorists. However, the Wisconsin Supreme Court clearly held that uninsured motorists making a UIM claim will be able to seek the full amount of past medical expenses, including those amounts written off by medical providers based on contractual agreements between those medical providers and health insurers. Again, if any party should receive an arguable windfall, Wisconsin law gives that windfall to the injured party.
PREJUDGMENT INTEREST

Prejudgment interest is designed to encourage settlement between parties. It occurs when a court determines that a damage award started accruing interest on a date before the judgment is actually entered into. This is called prejudgment interest even if the interest accrues months or years after the entry of judgment. In Wisconsin, prejudgment interest is awarded where the amount of damages is determinable before judgment occurs. Damages are determinable before judgment either because the damages are liquidated or because there is a reasonably certain standard of measurement. It is also possible for parties to agree in their original contract that any future damages will include prejudgment interest. Finally, prejudgment interest is available as a matter of law in Wisconsin when the final judgment amount exceeds a prior settlement amount offered by the winning party.

In 2011, Governor Walker signed Act 69 which dramatically reduced Wisconsin’s prejudgment and post-judgment interest rates. Wisconsin’s prejudgment interest rate is 1 percent plus the Federal Reserve prime rate on either January 1st or July 1st of the year in which the judgment was entered. Specifically, if the judgment was entered on or before June 30th, the judgment interest rate is based on the Federal Reserve prime rate on January 1st of the judgment year. If the judgment was entered on July 1 or later, the interest rate is based on the Federal Reserve prime rate as indicated on July 1st of the judgment year. The current Federal Reserve prime rate is 3.25 percent. Thus, the current prejudgment interest rate in Wisconsin is 4.25 percent. The Federal Reserve prime rate has been at 3.25 percent since 2009.
**PERSONAL INJURY ACTIONS AND MEDICARE**

*Reporting Requirements*

Medicare currently functions as a secondary payer, which means it will not pay for medical expenses in situations where primary insurance plans or self-insurance coverage exists. In 2007, Congress passed legislation requiring primary plans (defined broadly to include employers, workers’ compensation insurers, auto and liability insurers, group plans and programs, and third-party administrators) responsible for payment in cases involving Medicare-eligible claimants to notify Medicare of its existence and liability. Fines of up to $1,000 per day apply to noncomplying plans.

Plans are also required to report liability settlements and judgments concerning Medicare-eligible claimants to Medicare entities. As of January 1, 2012, plans were required to report settlements or judgments of over $100,000. Plans were required to report lower settlements to Medicare as of July 1, 2012 ($50,001 to $100,000) and October 1, 2012 ($25,001-$50,000). Beginning January 1, 2013, plans must report settlements over $5,000. Moreover, as of July, 2012, CMS set subsequent reporting levels for January 1, 2014 (settlements over $2,000) and January 1, 2015 (over $300).

*Reimbursing Medicare & Preserving its Future Interests*

In addition to the reporting requirements described above, attorneys and participants involved in personal injury actions concerning Medicare-eligible claimants must also address Medicare’s financial interests. Upon reaching a settlement or judgment in a personal injury action, participants must reimburse Medicare for the past payments it made on behalf of the claimant. Participants must also consider Medicare’s future interests where claimants may incur future medical expenses. The means by which to protect Medicare as to future medical expenses, however, remains unclear. At present, no statute or regulation governs the treatment of future medical expenses and Medicare in the context of tort actions.
SETTLEMENT AGREEMENTS

A settlement agreement is a contract between the litigants. Settlement agreements are favored by Wisconsin law. However, Wisconsin courts make clear that the traditional elements of a contract are still required to form a valid settlement agreement: offer, acceptance, and consideration. Wisconsin statutory law requires that all settlement agreements be made either on the record before the court or in writing in compliance with the Statute of Frauds. In order to comply with the Statute of Frauds, the writing must be signed by the party against whom the settlement agreement is being enforced. Thus, oral agreements to settle are not enforceable in Wisconsin.

**Pierringer Release**

A Pierringer release permits the injured party to free the settling joint tortfeasor from liability while still pursuing claims against any non-settling joint tortfeasors for their percentage of damages. In other words, a Pierringer release only releases part of the claim and preserves the remainder against the non-settling joint tortfeasors. A Pierringer release also bars subsequent contribution and indemnity actions joint tortfeasors might later assert against the settling joint tortfeasor. Importantly, a Pierringer release also impacts the rights of those who are not parties to the litigation in that the release bars all claims for indemnity or contribution that a settling joint tortfeasor might later have against a non-settling joint tortfeasor, whether the non-settling joint tortfeasor is a party to the current litigation or not.

**Loy Release**

A Loy release is used in the context of settlements with an insured. The point of a Loy release is to protect the insured from future liability and to obtain a general release for the insurer. An insurer must gather the four following things

- A general release for the insurer,
- A release for the insured up to the primary policy limit,
- A release for the insured for any amounts in excess of all excess coverage that exists, and
- A covenant from the claimant not to sue the insured personally.
ADDITIONAL RESOURCES

State of Wisconsin
Wisconsin Statutes

Wisconsin Department of Health Services

Wisconsin Rules of Civil Procedure

Wisconsin Secretary of State
Wisconsin Constitution

Wisconsin – Office of the Commissioner of Insurance

Wisconsin Medicaid Eligibility Handbook

Wisconsin Department of Workforce Development

Milwaukee Journal Sentinel
Wisconsin State Journal
Meet Brownson & Ballou

The partners at Brownson & Ballou, PLLP, Robert D. Brownson, Thomas J. Linnihan, Kristi K. Warner, and Patrick M. Biren, are litigators and seasoned defense attorneys practicing in Minnesota, North Dakota, Wisconsin, and nationwide.

Brownson & Ballou attorneys represent corporations, insurance companies, public entities, and individuals in civil litigation matters in state, federal, and appellate courts, and administrative agencies. The firm’s attorneys practice in environmental law, insurance, employment and discrimination, trade secrets and business torts, asbestos and toxic exposure defense, products liability, workers’ compensation defense, construction and surety bond, copyright and trademark, constitutional law, and premises liability claims.

Brownson & Ballou’s mission is to deliver results that exceed our clients’ expectations, to offer the superior quality associated with large firms in combination with the close personal attention typically found only in small firms, and to serve as creative, efficient, and experienced professionals in working with our clients.

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