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## Wisconsin Supreme Court Overrules Edgerton Case—Expands Possibility for Insurance Coverage From Pre-1986 Policies

The Wisconsin Supreme Court has overruled *City of Edgerton v. General Casualty Co. of Wisconsin*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994). In *Edgerton*, the Supreme Court decided that the issuance of letters by the Environmental Protection Agency (EPA) or the Wisconsin Department of Natural Resources (DNR), which either requested or directed an insured to participate in the environmental cleanup of contaminated property, did not constitute a “suit” sufficient to trigger the insurance company’s duty to defend. The Court also held that cleanup and remediation costs under CERCLA (or Superfund) did not constitute “sums that the insured may become legally obligated to pay as damages” within the indemnification provisions of comprehensive general liability (CGL) insurance policies.

After *Edgerton*, the Court decided *General Casualty Co. v. Hills*, 209 Wis. 2d 167, 561 N.W.2d 718 (1997). In *Hills*, the insured, a service station owner, sought liability insurance coverage for a claim brought against him by a waste oil recycler seeking recovery of environmental response costs associated with a contaminated recycling site. The EPA had placed

the recycling site on the National Priorities List and the United States had brought suit against the recycler and other defendants, but not against the service station owner. No government agency had ever notified the insured service station owner of potential liability under CERCLA or requested that he develop a remediation plan or incur remediation and response costs. The Supreme Court held that, so long as there was no request or directive by the government, the insured was covered under the CGL policy for compensatory, monetary relief sought by the third party for losses incurred due to the insured’s alleged past contamination of the property.

In *Johnson Controls, Inc. v. Employers Insurance of Wausau*, 2003 WI 108, Case No. 01-1193, decided July 11, 2003, the Supreme Court recognized that the basic differences between the *Edgerton* facts and the *Hills* facts were that: (1) *Edgerton* owned the contaminated property, *Hills* did not; (2) *Edgerton* cleaned up the damaged property, *Hills* was asked to contribute to government cleanup costs; (3) *Edgerton* was contacted directly by the government, *Hills*

## Wisconsin Supreme Court Overrules Edgerton Case

Continued from front page

was not; (4) Hills was brought into a formal lawsuit, Edgerton was not. The principal distinction (setting aside the ownership issue) was that in *Edgerton* there was contact between the government and the insured before the insured was sued by a third party; and in *Hills* there was no such contact. This distinction, the Court noted, was arbitrary since insurance coverage for CERCLA response cost liability would turn on the fortuity of whether the insured had ever been contacted in some manner by the government regarding the remediation of a site for which the insured was a potentially responsible party. Governmental contract would mean loss of coverage.

This arbitrary distinction, along with a host of other problems, convinced the Supreme Court to reevaluate and overrule *Edgerton*. In *Johnson Controls*, the Supreme Court explicitly overruled *Edgerton* and held that an insured's costs of restoring and remediating damaged property, whether the costs are based on remediation efforts by a third party (including the government) or are incurred directly by the insured, are covered damages under applicable CGL policies, provided that other policy exclusions do not apply. The Court also concluded that receipt of a potentially responsible party (PRP) letter from the EPA or an equivalent state agency, in the CERCLA context, marks the beginning of adversarial administrative legal proceedings that seek to impose liability upon an insured.

The full importance of *Johnson Controls* will be determined as future cases are decided. A few things should be noted, however, in determining how the case may apply to other situations.

- The decision applies to insurance policies which do not contain an absolute pollution exclusion. An absolute pollution exclusion—as exists in most post-1986 policies—would still exclude insurance coverage.
- The decision does not address whether the insurance company has other viable defenses to coverage.
- The decision does not address the situation where the insured owns contaminated property—which may or may not be contaminating the groundwater or neighboring property.
- The decision should cover all types of environmental contamination, not just CERCLA cases.

If your municipality has an environmental contamination issue which may date back prior to 1986 (i.e., contamination may have existed prior to 1986), you should consider putting your insurance company on notice of the situation. This may be especially important if you have been contacted by EPA, DNR, or a third-party about such contamination.

—Larrie Kobza

## Direct Legislation Powers Strengthened

The Wisconsin Supreme Court has upheld the validity of a citizen petition presented to the Village of Mount Horeb (Dane County), calling for referendum approval of any construction project in which the Village government will expend \$1 million or more. *Mount Horeb Comm. Alert v. Village Board of Mt. Horeb*, 2003 WI 100, decided July 8, 2003. The referendum question on the ballot must state the purpose, location and cost of the project, and ask electors whether the Village should undertake the project.

The immediate issue was a new library.

The Wisconsin Supreme Court upheld the petition as meeting the tests established in earlier cases. Specifically, the Court found that the petition called for enactment of new legislation that was within the powers of the municipality, that had a permanent and general character, and that did not interfere with statutory procedures for initiating capital projects. The binding referendum merely adds a step.

The referendum process stalled out when the litigation began because the Village Board refused to submit the petition to a referendum. The case will return to the circuit court for a mandamus order forcing the question to the ballot.

Justice Crooks filed a strong dissent, joined in by Justices Bablitch and Wilcox, noting that some bond issue-funded public projects already have referenda requirements. Those projects will have to survive two referenda in Mount Horeb, if the referendum vote approves the initiative.

The dissenting justices say the decision provides a blueprint for citizens who "wish to disrupt the wheels of government solely for the purpose of disruption."

—Richard A. Lehmann

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## Wisconsin Supreme Court Upholds \$1.2 Million Stray Voltage Judgment

On June 25, 2003, the Wisconsin Supreme Court upheld a \$1.2 million judgment against Wisconsin Electric Power Company (WEPCO) for a stray voltage claim by dairy farmers near New London. *Hoffman v. Wisconsin Electric Power Company*, 2003 WI 64 (Docket No. 00-2703, June 25, 2003).

The Hoffmans operated a dairy farm and had noticed declining dairy production and other health problems with their herd. They used the efforts of a veterinarian and nutritionist, and also installed various facilities to reduce or eliminate any stray voltage on the farm. They continued to have difficulties. In 1995, they asked WEPCO to measure for stray voltage on the farm. WEPCO found that any stray voltage was below the "level of concern" of one milliamperes as had been established by the Public Service Commission of Wisconsin (PSC).

The Hoffmans then sued WEPCO. The jury found in the Hoffmans' favor, and established damages of \$1.2 million. The circuit court judge also ordered WEPCO to put in an ungrounded system to eliminate future stray voltage.

The Supreme Court found that WEPCO could be liable despite the fact that traditional stray voltage was below the level established by the PSC. The court held that parties may maintain common law actions for negligence even if the defendant met a standard of safety established by legislation or state agency action. In addition, the court stated, the Hoffmans had presented an alternative theory based upon non-traditional (ground current) stray voltage, which supported the verdict.

The Supreme Court reversed the circuit court's ordering of an ungrounded system, indicating there was insufficient evidence to show that it met safety issues in its operation. That issue was sent back to the circuit court. Two justices would have sent the issue to the Public Service Commission of Wisconsin.

The *Hoffman* decision makes it much more likely that farmers will bring stray voltage claims against utilities, since such claims may succeed even if the utility has met PSC standards. Utilities also must now consider methods of measuring and dealing with non-traditional, or ground current stray voltage.

A copy of the decision can be found at [www.wicourts.gov/sc/opinions/pdf/00-2703.pdf](http://www.wicourts.gov/sc/opinions/pdf/00-2703.pdf).

— Michael P. May

## DNR Orders New Mercury Rules

At its June 24-25 meeting, the Natural Resources Board ordered a revised version of the mercury emission regulations drafted by the Department of Natural Resources ("DNR"). These regulations will effect the four largest power utility companies in Wisconsin: We Energies of Milwaukee, Alliant Energy of Madison, Wisconsin Public Service of Green Bay and Dairyland Power Cooperative of La Crosse.

The mercury reduction proposal has been in the works for the past two years. While public health officials are encouraging residents to eat more fish, the DNR has broadened its fish consumption advisory to include all the more than 15,000 lakes in Wisconsin because of alarming mercury levels.

Mercury is a byproduct of burning coal at power plants. When released into the air, it eventually settles on land and water. Bacteria in water converts mercury to an even more toxic form, methyl mercury, which accumulates in fish. When people consume these toxic fish, the consequences range from damages on the nervous system to kidney damage.

The proposal adopted by the DNR Board is different from the agency's original proposal. Under the original proposal, baseline emissions would be determined both for major utilities and other entities, and include historical fuel mercury content and use information. The revised proposal requires only the major utilities to set baseline emissions, while minimizing the need for historical data. The original proposal put caps on emission beginning in the 4th year after promulgation on each major utility, as well as and other significant commercial and industrial sources. The revised rules place caps effective in 2008 for major utilities only; industrial mercury emissions would not be subject to the cap. The original rule also called for three reductions over 15 years, 30% in five years, 50% in ten years and 90% in fifteen years. The revised rule calls for a two step reduction, with 40% required by 2010 and 80% by 2015. Other changes in the revised rules include electric reliability, emission offsets, trading, compliance flexibility and periodic evaluation methods.

The effects of the proposed restrictions are as yet unclear. Utilities contend that the proposal will drive up energy costs to the consumer and achieve only a minimal environmental gain since a good portion of the mercury contamination comes from outside of Wisconsin. Environmental groups contend that the revised plan places numerous buffers for the utility companies and does not go far enough to help the water supply.

— Richard A. Heinemann

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# Federal Court Upholds Ordinances Banning “Unreasonable” Noise

Two City of Waukesha ordinances regulate noise generated by bars and similar establishments. Like many municipalities, the City uses a reasonableness standard to describe the level of noise that the City allows. In *Sharkey’s, Inc. v. City of Waukesha*, Case No. 02-C-618, decided May 22, 2003, the United States District Court for the Eastern District of Wisconsin upheld the use of that standard against constitutional attack.

The City issued citations to Sharkey’s, Inc., a local bar, for violating sections 9:11(21) and 12:05(1) of Waukesha’s municipal code. Section 9:11(21) provides that “unreasonably loud noise or other conduct which tends to cause a disturbance or unreasonably interferes with the quiet enjoyment of the surrounding neighborhood is prohibited on or about the licensed premises.” Section 12:05(1) prohibits “[n]oise of any kind tending to unreasonably disturb the peace and quiet of persons in the vicinity thereof.” In response to the citations, Sharkey’s commenced a federal court action seeking a declaration that the ordinances are unconstitutional on their face under both the Due Process Clause and the First Amendment.

## Due Process

Sharkey’s argued that the ordinances violated due process because they were unconstitutionally vague. It asserted that the phrases “unreasonably loud noise” and “noise tending to unreasonably disturb” others were not sufficiently precise to allow Sharkey’s to understand what level of noise was prohibited. The District Court rejected this argument.

It found that the word “unreasonably” creates “a relatively objective test.” The court contrasted the Waukesha ordinances to an ordinance that had been struck down in another case. In that case, the ordinance prohibited noise that “annoys [or] disturbs” others, but the ordinance did not specify that the noise must be “unreasonable.” The court found the ordinance unconstitutionally vague because it allowed prosecutions to turn “solely upon the malice or animosity of a cantankerous neighbor or boiling point of a particular person.” By contrast, the reasonableness standard incorporated into Waukesha’s ordinances helps guard against arbitrary enforcement.

Moreover, the Court observed that the Waukesha ordinances include additional language that help place the standard in context. Section 9.11(21) requires that the unreasonably loud noise also “tend[] to cause a disturbance or unreasonably interfer[e] with the surrounding neighborhood.” Similarly, section 12.05(1) requires that the noise tend “to unreasonably disturb the peace and quiet of persons in the vicinity.” The court found that this language helped convey to the public the nature of the conduct that the ordinances proscribe.

In upholding the Waukesha ordinances against the vagueness challenge, the District Court relied in part on an opinion of the Wisconsin Supreme Court. The federal

court found *City of Madison v. Bauman*, 162 Wis. 2d 660 (1991), persuasive. As the Wisconsin Supreme Court noted, the reasonable-person standard is “one that has been relied upon in all branches of the law for generations.” *Bauman*, 162 Wis. 2d at 677. The District Court in *Sharkey’s* concluded that this standard made the City of Waukesha’s ordinances sufficiently objective to save them from a vagueness challenge.

## First Amendment

Sharkey’s argued that the ordinances violated the First Amendment because they were not narrowly tailored. Sharkey’s argued that the Waukesha ordinances could have been drawn more narrowly by incorporating decibel limitations as measured from certain distances.

However, the Court found that while a decibel standard might make the ordinance more *precise*, it would not necessarily make the ordinance more *narrowly tailored*. The City’s reasonableness standard, the Court found, retains the flexibility that Sharkey’s proposed decibel standard lacks.

## Conclusion

It is helpful to have an opinion from a Wisconsin federal court upholding a noise ordinance that incorporates a “reasonableness” standard. The Wisconsin Supreme Court’s decision in *City of Madison v. Bauman* made the state courts an unfriendly forum for challenges to such ordinances. The *Sharkey’s* decision indicates that litigants are likely to find the federal courts equally unfriendly.

— Richard A. Lehmann & Matthew D. Weber

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## Attorney Client Privilege Exception To The Public Records Law Explained By Court of Appeals

The Town of St. Germain Board of Appeals rejected a request for a zoning variance. The applicant then filed an open records demand for the file on the variance.

The Town refused to release three records. The first was a letter from the variance board chair to the town attorney. The second was a memo from the attorney to the board that discussed the board chair’s letter to the attorney. The third was the attorney’s draft of findings of fact and conclusions of law, again incorporating content that can be traced to the chairman’s letter to the attorney.

The Court of Appeals held that all three of these documents were properly withheld since they contained or made reference to what the client (the Board chair) told the attorney, and therefore were shielded from release under the attorney-client privilege exception to the open records law. *GPS, Inc. v. Town of St. Germain*, Appeal No. 02-3293, decided June 24, 2003.

This opinion will not be published.

— Richard A. Lehmann

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# Rearrangement of Highway Access Compensable If Done As Part of A Land Condemnation and If Substituted Access Is Unreasonable

The Wisconsin Supreme Court recently held that the Wisconsin Department of Transportation must compensate a property owner if a partial taking results in the condemnation of the driveway by which the owner had accessed a state highway and if the Department fails to provide reasonable alternative means of access. See *National Auto Truckstops, Inc. v. State of Wisconsin*, 2003 WI 95, decided July 8, 2003. The Department had argued that no compensation was due, since property owners are not guaranteed access to the highway by a particular means. Nevertheless, the Department is likely pleased with the outcome of *National Auto*, insofar as three of the seven Justices would have gone further than the majority, requiring compensation to be paid in almost all cases when a portion of a state highway is taken, regardless of whether the substituted access is reasonable.

The Department condemned 0.27 acres of a truck stop property's frontage on a state highway. Two direct access driveways to the state highway were shut off. As a substitute, the Department provided access via a frontage road that connected to an intersecting road to the north.

The value of the condemned property was litigated and the jury awarded \$275,000. The owner wanted \$1,000,000. Most of the difference in these figures is attributable to the alleged reduction in value to the remaining truck stop property because access was to be less direct. However, the trial court refused to admit evidence of how access affected value, because property owners do not have a property right in a particular arrangement of access to the public road network.

The appeals court agreed. The Wisconsin Supreme Court reversed. Four Justices held that the property owner was entitled to compensation if the access that the Department provided was unreasonable. The Justices observed that sec. 32.09(6)(b), Wis. Stats., requires a deprivation or restriction of an existing right of access to be compensated if the property is partially acquired by the government, unless that access is removed by regulation. Here the highway agency had not declared the highway to be a controlled access road, nor had it rescinded the two driveway permits. The direct access was removed when the frontage was condemned.

Nevertheless, the majority observed that earlier cases had interpreted the statute to require compensation for the cutoff of access only if the resulting indirect access arrangement is unreasonable. Therefore, the property owner can take the question of reasonableness to a jury, followed by valuation, if the jury finds the new access arrangement to be unreasonable. The majority opinion gives no indication of what criteria will govern the standard of reasonableness.

Chief Justice Abrahamson joined in the conclusion, but not in the reasoning of the majority decision.

A separate opinion filed by Justice Sykes and joined by Justices Wilcox and Prosser held that change in access arrangements coupled with partial takings of fee title to the property are always compensable. The reasonableness of the access arrangement that the highway agency substitutes

for the former direct access has a bearing on how much compensation must be paid, but not on whether any compensation is due.

While the minority opinion describes the property right in highway access in stronger terms than the majority, the opinion relies on the statute for its conclusions, not the Constitution. Neither opinion suggests that compensation is required when direct access is cut off by declaring a road to have controlled access status or reducing direct access in the administration of driveway permits.

— Richard A. Lehmann

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## Supreme Court To Consider Municipalities' Right To Provide Telco Service

On June 23, 2003, the U.S. Supreme Court granted certiorari in the *Missouri Municipal League* cases, taking up the issue of whether states may prohibit municipalities from offering telecommunications services or whether such state action is preempted under that part of the Telecommunications Act of 1996, which provides that "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of **any entity** to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added).

The issue before the Court will be whether the term "any entity" as used in the Telecommunications Act of 1996, 47 U.S.C. § 253(a), includes political subdivisions of states. On appeal is a U.S. Court of Appeals for the 8th Circuit, which vacated an FCC decision denying a request that it preempt a Missouri statute that prohibits municipalities from offering telecommunications services. The 8th Circuit held that the term "any entity" does indeed include municipalities. The 8th Circuit's decision conflicts with *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir 1999). In *City of Abilene*, the Court of Appeals for the DC Circuit upheld the FCC's so-called "Texas Preemption Order," in which the FCC declined to preempt a Texas statute that is very similar to the Missouri statute.

The Missouri Statute which the Supreme Court will review provides that, subject to certain enumerated exceptions, "No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section."

In concluding that the Missouri statute was not preempted under § 253(a), the FCC stated that the term "any entity" "was not intended to include political subdivisions of the state, but rather appears to prohibit restrictions on market entry that apply to independent entities subject to state regulation."

— Anita T. Gallucci

# MUNICIPAL LAW NEWSLETTER

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