



Legislative Oversight of DOJ Settlements

Prepared by: Anna Henning, David Moore, and Melissa Schmidt, Senior Staff Attorneys

2017 Wisconsin Act 369 established legislative oversight of Wisconsin Department of Justice (DOJ) decisions to settle certain civil actions. Those legislative oversight requirements survived a broad constitutional challenge in a 2017 Wisconsin Supreme Court decision, *SEIU v. Vos*. A more specific challenge was recently filed.

LEGISLATIVE OVERSIGHT REQUIREMENTS

Led by the Wisconsin Attorney General, DOJ represents the state in civil litigation. Before 2017 Wisconsin Act 369 was enacted, Wisconsin law generally authorized DOJ to settle cases without direct legislative approval.¹

Current law, as affected by Act 369, requires DOJ to obtain approval from the Legislature before taking either of the following actions:

- Discontinuing or compromising a civil action prosecuted by DOJ.
- Compromising or settling a civil action in which DOJ is defending a state agency or a state agency's officer, employee, or agent, and the action is for injunctive relief or involves a proposed consent decree.

If the Assembly, Senate, or full Legislature is involved in the action as a third-party intervener, that body must approve the compromise or settlement.² Otherwise, DOJ must submit a proposed plan to settle, compromise, or discontinue an action to the Joint Committee on Finance (JCF).

JCF may approve DOJ's proposal through a 14-day passive review process in civil actions defended by DOJ, but must provide affirmative approval in actions prosecuted by DOJ. DOJ may not submit a proposed plan to JCF if the plan concedes the unconstitutionality or other invalidity of a statute, facially or as applied, or concedes that a statute violates or is preempted by federal law, without approval of the Joint Committee on Legislative Organization (JCLO). [ss. 165.08(1) and 165.25(6)(a) 1., Stats.]

In practice, there are some types of actions for which DOJ initially requested JCF approval but subsequently resolved without legislative approval. Those actions include: certain subrogation claims that can be resolved among parties other than DOJ; a bankruptcy matter that DOJ determined was not a civil action for purposes of the Act 369 requirements; and certain disputes not yet in litigation.

SEIU v. Vos

In *SEIU v. Vos*, 2020 WI 67, labor organizations and individual tax payers brought a facial challenge³ against several Act 369 provisions, including the legislative oversight requirements described above.⁴ The plaintiffs argued that the requirements violate the [separation of powers doctrine](#) by transferring a core executive branch function to the Legislature. The Legislature argued that the attorney general's powers are statutorily granted by the Legislature, and are not exclusive executive branch powers.

While the Court concluded that settling cases is an executive branch function, it determined that the attorney general's power to litigate on behalf of the state is not "within the exclusive zone of executive authority" in all circumstances. Although the Court noted that "representing the State in litigation is predominantly an executive function," it concluded that "it is within those borderlands of shared powers, most notably in cases that implicate an institutional interest of the legislature." [2020 WI 67 at ¶ 63.]

Thus, the Court held that the legislative oversight requirements are not facially unconstitutional, because they do not violate the separation of powers doctrine in all cases. Instead, the Court noted the Legislature’s “institutional interest” in certain types of litigation, including the following two types of litigation:

- Representation of the state or state officials, at the request of the Legislature, including in which a legislative official, employee, or body is represented by the attorney general or in which a legislative body is the principal authorizing the attorney general’s representation in the first place.
- Cases involving requests for the state to pay money to another party, in at least some cases, where the expenditure of state funds is sufficient to justify the Legislature’s authority to approve certain settlements.

[*Id.* at ¶¶ 10, 64-71.]

The Court emphasized, however, that its holding does not preclude a future as-applied challenge to the legislative oversight requirements. The court “stress[ed] that [its] decision is limited” and “express[ed] no opinion on whether individual applications or categories of applications may violate the separation of powers” [*Id.* at ¶ 73.]

PETITION BEFORE THE WISCONSIN SUPREME COURT

On November 23, 2020, the Attorney General, together with the Governor and Secretary of the Department of Administration, filed an as-applied challenge to the Act 369 legislative oversight requirements. Specifically, the [petition](#), which requests original jurisdiction and injunctive relief in the Wisconsin Supreme Court, argues that these requirements violate the separation of powers doctrine as applied to the following two types of civil actions:

- Civil enforcement actions brought under statutes that the attorney general is charged with enforcing, such as environmental or consumer protection laws.
- Civil actions prosecuted by DOJ on behalf of executive-branch agencies that relate to the administration of the statutory programs they execute, such as common law tort and breach of contract actions.

The petition argues that, unlike the examples of civil cases the *SEIU* decision highlighted as involving an institutional legislative branch interest, these two types of civil cases represent a “quintessential executive function in which the legislative branch has no legitimate institutional interest.”

The Legislature’s brief to the Court is expected in mid-December.

¹ Specifically, prior law authorized DOJ to compromise or discontinue any civil action that it prosecuted on its own initiative or, with the Governor’s approval, at the request of any individual. In civil actions defended by DOJ, prior law allowed the attorney general to compromise and settle actions as the attorney general determined to be in the best interest of the state.

² Act 369 authorized the Assembly, Senate, and Legislature to intervene in any state or federal court action in which a party to the action challenges the validity of a statute as part of a claim or a firmative defense. [s. 803.09(2m), Stats.]

³ The Court characterized this type of challenge as a “tall task” and framed the analysis as follows: “Under our well-established law, a facial challenge succeeds only when every single application of a challenged provision is unconstitutional.” [2020 WI 67 at ¶ 4.]

⁴ For a summary of the issues in the case, see [Legislative Council, Issue Brief, *SEIU v. Vos* \(July 2020\)](#).