Consumer Law

Credit Card Defaults – Notice of Right to Cure Default – Preemption

***Bank of America N.A. v. Riffard*, 2025 WI App 17 (Feb. 18, 2025) (ordered published March 26, 2025)**

HOLDING: Federal banking law did not preempt a state-law requirement that creditors provide a notice of right to cure default.

SUMMARY: A debtor defaulted on two bank credit cards. The creditor filed a small-claims action, receiving judgments in its favor. The Wisconsin Court of Appeals reversed in an opinion authored by Chief Judge White, which held that federal law did not preempt state law on the issue before it. Although the creditor complied with the requirements of the National Bank Act (NBA), it had not complied with the Wisconsin Consumer Act (WCA), which requires a notice of a right to cure a default. The court rejected the creditor's contention that the federal NBA preempted the state's WCA. Federal case law construing the NBA establishes that "national banks' contracts" are governed by the state law (¶ 26).

Turning to preemption, the first question was whether there was any "irreconcilable conflict" or "impossibility" that foreclosed applying both laws. "We conclude that the WCA and the NBA preemption and savings clause provisions laws do not impose directly conflicting duties on a national bank" (¶ 30).

Next, the court considered whether state law "significantly interfered" with the national law (¶ 31). In this instance, the WCA only "incidentally" affected a national bank's powers (¶ 33). On this issue, the court disagreed with a contrary opinion by a federal district court. "The WCA notice requirement only arises when the national bank wants to pursue a defaulted debt in state court. The WCA confines itself to the traditional state control over the collection of debt and consumer protection" (¶ 37).

Contracts

Leases – Breach of Contract – Statute of Frauds – Equitable Remedies – Contract Reformation

***MPI Wright LLC v. Goodin Co.*, 2025 WI App 18 (filed Feb. 6, 2025) (ordered published March 26, 2025)**

HOLDING: A lease was invalid under Wis. Stat. section 704.03(1) because it did not satisfy the "amount of rent" requirement.

SUMMARY: MPI Wright LLC and Goodin Co. executed a lease in which Goodin agreed to lease a commercial property from MPI Wright for a term of five years and two months. MPI Wright sued Goodin for breach of contract because Goodin did not take possession of the property or make any rent payments. The circuit court granted summary judgment in favor of Goodin on the ground that the lease failed to comply with the statute of frauds. *See* Wis. Stat. § 704.03(1).

The court of appeals affirmed and remanded the case for further proceedings in an opinion authored by Judge Taylor. First, the lease failed to satisfy Wis. Stat. section 704.03(1) because it did not set forth the "amount of rent." The parties sparred over how the rental "amount" might be described in the lease. "[A] lease that sets forth the 'amount of rent' based on a square footage but fails to set forth the square footage does not, on its face, satisfy the 'amount of rent' requirement" (¶ 29). In short, equations can be used to establish the required rent if the equation's terms could be found by a "disinterested third party" – a standard unmet here (¶ 31). The court also concluded, however, that the lease contained a "reasonably definite description of the property" as required by Wis. Stat. section 704.03(1) and identified the "material terms" as required by Wis. Stat. section 706.02(1) (¶¶ 18, 46-47).

Equitable remedies under Wis. Stat. section 706.04 were not available to enforce the deficient lease "concerning the additional requirements that go beyond the requirements of Wis. Stat. § 706.02(1), including to remedy the absence of the 'amount of rent'" (¶ 49). MPI Wright had, however, adequately preserved its "common law contract reformation claim" in both the circuit court and before the court of appeals. "If the circuit court determines on remand that MPI did not forfeit its common law contract reformation claim, the court should proceed to address the issue of whether the Lease can be reformed under the doctrine of common law contract reformation as a matter of law, and, if so, whether common law contract reformation should be applied under the circumstances present here. It is appropriate for the circuit court to consider these questions in the first instance" (¶ 59).

Criminal Law

Controlled Substances – Methamphetamine – L-meth

***State v. Johnson*, 2025 WI App 20 (filed Feb. 13, 2025) (ordered published March 26, 2025)**

HOLDING: Statutes that prohibit the operation of a motor vehicle with a detectable amount of a restricted controlled substance, specifically methamphetamine, do not distinguish between the D-meth and L-meth isomers of methamphetamine.

SUMMARY: In the wake of a traffic accident in which one person was killed and another injured, Johnson was charged with two counts of violating statutes prohibiting the operation of a motor vehicle with a detectable amount of restricted controlled substance, namely, methamphetamine, in the blood.

Johnson moved to dismiss the two counts on the ground that the state could not prove that he had a detectable amount of a restricted controlled substance in his blood. Johnson's argument was based on the fact that methamphetamine has two isomers, dextromethamphetamine ("D-meth") and levomethamphetamine ("L-meth," also known as "levmetamfetamine"). Johnson contended that only D-meth, and not L-meth, is a restricted controlled substance for purposes of the statutes prohibiting operating a motor vehicle with a detectable amount of a restricted controlled substance in the blood. For this reason,

BLINKA

HAMMER

In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize select published opinions of the Wisconsin Court of Appeals. Full-text decisions are available online at www.wisbar.org/wislawmag.

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Prof. Daniel D. Blinka, U.W. 1978, is a professor of law at Marquette University Law School, Milwaukee.

daniel.blinka@marquette.edu

Prof. Thomas J. Hammer, Marquette 1975, is an emeritus professor of law and the former director of clinical education at Marquette University Law School, Milwaukee.

thomas.hammer@marquette.edu

Johnson argued that the two counts of operating with a detectable amount of a restricted controlled substance must be dismissed because the analysis of his blood did not show that the methamphetamine in his blood was D-meth.

Testimony at a pretrial hearing established that L-meth and D-meth produce vastly different effects on the body, with D-meth causing significantly greater physiological effects than the same amount of L-meth. Testimony also established that the Wisconsin State Laboratory of Hygiene, which analyzed the defendant's blood, does not have the specialized equipment needed to perform the analysis to distinguish between L-meth and D-meth in the blood (*see* ¶ 10).

The circuit court ultimately concluded in a pretrial order that L-meth is not a restricted controlled substance and that the state would therefore have to prove at trial that the defendant had a detectable amount of D-meth in his blood at the relevant time. The state petitioned the court of appeals for leave to appeal this order, which the appellate court granted. In an opinion authored by Judge Kloppenburg, the court of appeals reversed in part the circuit court's order.

The issue on appeal was whether one of the isomers of methamphetamine, L-meth, is a restricted controlled substance, in which case the state here is not required to prove that Johnson had a detectable amount of the other isomer of methamphetamine, D-meth, in his blood but merely needs to prove that there was a detectable amount of methamphetamine in Johnson's blood (¶ 13).

The appellate court concluded that "under a plain language interpretation of the relevant definitional statutes, methamphetamine is a restricted controlled substance for purposes of the statutes prohibiting operating a motor vehicle with a detectable amount of a restricted controlled substance in the blood. We also conclude that the relevant statutes [in both the criminal code and motor vehicle code] do not exclude L-meth from that definition or otherwise distinguish between the isomers of methamphetamine, L-meth and D-meth. We further conclude that, as a result, the State need not prove that the methamphetamine detected in Johnson's blood was D-meth. In other words, proving that Johnson operated a vehicle while there was a detectable amount of methamphetamine in his blood suffices to prove that Johnson violated statutes prohibiting operating with a detectable amount of a restricted controlled substance in the blood" (¶ 3).

This result obtains even though certain over-the-counter inhalers contain a defined amount of L-meth (*see* ¶¶ 29-34).

Lastly, the appellate court rejected the defendant's arguments that the relevant statutes, as interpreted by the court, are facially unconstitutional as a matter of due process and equal protection (*see* ¶¶ 39-53).

Municipal Law

Zoning – Mobile Tower Siting and Construction – Denial of Conditional Use Permit

***State ex rel. U.S. Cellular Operating Co. v. Town of Fond du Lac*, 2025 WI App 21 (filed Feb. 12, 2025) (ordered published March 26, 2025)**

HOLDING: United States Cellular Operating Co. (US Cellular) is entitled to approval of its application for a conditional use permit (CUP) for the construction of a mobile tower because the town of Fond du Lac failed to notify US Cellular in writing of the town's decision to deny the permit and the reasons for the denial within the statutory 90-day deadline.

SUMMARY: Pursuant to Wis. Stat. section 66.0404(2)(b) and the town of Fond du Lac's mobile-tower-siting ordinances, US Cellular sought a CUP from the town to construct a new mobile tower. The town notified US Cellular that its application was considered complete as of April 20, 2023, which triggered the statute's 90-deadline within which the town had to review the application, make a decision, notify the applicant of the decision *in writing*, and identify the substantial evidence relied upon if the application were to be disapproved (*see* ¶ 24). *See* Wis. Stat. § 66.0404(2)(d).

The town board denied US Cellular's application at a meeting on June 28, 2023; however, it did not provide US Cellular with a written decision identifying the substantial evidence it relied on in disapproving the application within the 90-day time limit, which expired on July 19, 2023.

US Cellular sought declaratory judgment that its application was deemed granted by operation of law because the town failed to complete its obligations within the statutory deadline. The circuit court denied US Cellular's request, opining that the statute only requires substantial compliance and that the town had met that standard. Among other reasons, the circuit judge noted that US Cellular was aware of the town's decision because it was present for all the hearings on the CUP application. In an opinion authored by Judge Grogan, the court of appeals reversed.

The appellate court concluded that the statute requires actual compliance; substantial compliance is not sufficient (*see* ¶¶ 30-37). It further held that the town did not actually comply with the statute. The town board's decision at the June 28 meeting was rendered *orally* and at no point before the July 19, 2023, deadline did the town formally notify US Cellular of that decision *in writing* (*see* ¶ 39). The statute is clear in its requirement of a *written* decision. "A notification by any other means – verbally at a meeting or during a phone call or other type of conversation – will not satisfy the plain meaning of the statute" (¶ 26).

And, having failed to provide written notification, the town necessarily failed to identify the substantial evidence it relied on in voting to deny US Cellular's application (*see* ¶ 39). It did not matter that US Cellular was aware of the town's decision within the 90-day deadline; US Cellular's knowledge does not establish that the town complied with the statute's written-notification requirement (*see* ¶ 42).

Under Wis. Stat. section 66.0404(2)(d), US Cellular was entitled to consider its application approved due to the town's failure to comply with the 90-day deadline. This can only mean that US Cellular was therefore entitled to proceed with the activity for which it sought approval in its application (*see* ¶ 46). Put another way, US Cellular "is entitled to approval of its CUP application by operation of law based on § 66.0404(2)(d)'s plain language" (¶ 50).

Open Meetings Law

Videoconference Meeting – Email Communications During Meeting

***State ex rel. Wied v. Wheeler*, 2025 WI App 16 (filed Feb. 5, 2025) (ordered published March 26, 2025)**

HOLDINGS: 1) The circuit court erroneously disqualified the original relator in this open meetings law action. 2) Portions of a school board meeting conducted on Zoom to fill a board vacancy violated the open meetings law because preferential votes to narrow the field of candidates were taken by email in a manner that kept the public in the dark as to each board member's preferences.

SUMMARY: During the COVID-19 pandemic, the Elmbrook School District board of education (board) held a meeting by videoconference to fill a vacancy on the board. Wied and Hassan were two of four candidates under consideration to fill the vacancy. Hassan was ultimately selected. Wied filed this complaint against Wheeler (the board's president) and Lambert (the board's vice president), alleging that they violated the Wisconsin Open Meetings Law by using secret email voting during the selection process during the meeting.

Wheeler and Lambert filed a motion to disqualify Wied as the relator in this action, which the circuit court granted. The parties thereafter stipulated to the substitution of Bubke as relator. Ultimately, the circuit court denied Bubke's motion for summary judgment, granted summary judgment to Wheeler and Lambert, and dismissed the case. In an opinion authored by Judge Gundrum, the court of appeals reversed.

The appellate court first considered whether the circuit court erred in disqualifying Wied as the relator in this action. The circuit court had disqualified her on the apparent basis that Wied had a personal interest in this matter because she had filed a notice of claim against the school district seeking compensation for the salary she would have received had she been appointed to the board.

The court of appeals concluded that removal of Wied as relator was erroneous. Wis. Stat. section 19.97 provides that "any person" who makes a verified complaint may bring an open meetings law action if the district attorney fails to act. "A relator need not be disinterested in order to pursue an open meetings law challenge" (¶ 17). Said the court, "we see no reason to believe the legislature intended to restrict relators to only persons who do not have a personal interest related to a meeting" (¶ 15).

The appellate court next addressed whether an open meetings law violation occurred during the videoconference meeting. Wis. Stat. section 19.83(1) provides that "[a]t any meeting of a governmental body, all discussion shall be held … only in open session…." Wis. Stat. section 19.88(1) states that "[u]nless otherwise specifically provided by statute, no secret ballot may be utilized to determine any election or other decision of a governmental body except the election of the officers of such body in any meeting."

In this case, the board president sought to narrow the field of four candidates by having board members email him their preferences during the meeting. He then announced vote totals but did not identify how each board member had voted. Ultimately, after erroneously announcing that four board members favored Hassan and two favored Wied (only three board members preferred Hassan), a vote was taken and Hassan was elected to fill the open seat.

In the view of the appellate court, the procedure used to solicit candidate preferences from the board violated the open meetings law. The email communications, which kept from the public each board member's preferences, amounted to a "discussion" that was not "held … *in* open session" (¶ 23; *see* Wis. Stat. § 19.83(1)). (Emphasis added.) Wheeler could have instead read aloud each member's emails, invited board members to voice their preferences orally for all to hear, or had board members write their preferences on a sheet of paper and simultaneously

hold them up for all to see (*see* ¶ 24).

Wheeler and Lambert asserted that they are personally accountable for violating the open meetings law only if they *knowingly* attended a meeting in violation of that law or otherwise *knowingly* committed a violation by any other act or omission. The court of appeals disagreed.

Wis. Stat. section 19.96 provides: "Any member of a governmental body who *knowingly attends* a meeting of such body held in violation of this subchapter, or *who*, in his or her official capacity, *otherwise violates* this subchapter by some act or omission shall forfeit without reimbursement not less than $25 nor more than $300 for each such violation." (Emphasis added.) The word "knowingly" only applies to a member of a governmental body who attends a meeting of such body held in violation of the open meetings law. The term "knowingly" does not apply to a member who "otherwise violates [the law] by some act or omission" (¶ 25).

Wheeler violated the law by facilitating the email communications as described above; Lambert violated it by communicating her preferences in a manner that kept her votes hidden from the public (*see* ¶ 27). Because of their violations, both must forfeit without reimbursement not less than $25 nor more than $300. *See* Wis. Stat. § 19.96.

The court of appeals remanded the matter to the circuit court "to determine the appropriate amount of forfeiture to be paid by Wheeler and Lambert … and to award 'actual and necessary costs of prosecution, including reasonable attorney fees,' *see* Wis. Stat. § 19.97(4), unless Wheeler and Lambert can 'show[] … special circumstances which would render an award unjust'" (¶ 38) (citation omitted).

Public Meetings – Closed Sessions

***State ex rel. Oitzinger v. City of Marinette*, 2025 WI App 19 (filed Feb. 18, 2025) (ordered published March 26, 2025)**

HOLDING: The public meetings under scrutiny in this case were both conducted in violation of the Wisconsin Open Meetings Law.

SUMMARY: The Wisconsin Open Meetings Law directs that "[e]very meeting of a governmental body shall be preceded by public notice as provided in [Wis Stat. §] 19.84, and shall be held in open session." Wis. Stat. § 19.83(1). However, the law contains multiple exemptions. The exemption at issue in this case is in Wis. Stat. section 19.85(1)(e), which provides that "[a] closed session may be held for … the following purpose[]": "Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, *whenever competitive or bargaining reasons require a closed session.*" (Emphasis added.) The court of appeals dubbed this "the bargaining exemption."

As pertinent to this case, the parties agreed that the relevant portion of this exemption is "conducting other specified public business." Two public meetings of the Marinette Common Council were under scrutiny here. The circuit court concluded that the council's Oct. 6, 2020, meeting did not violate the open meetings law but that its Oct. 7, 2020, meeting did violate the law. In an opinion authored by Judge Stark, the court of appeals concluded that both meetings were conducted in violation of the law.

A substantial part of the opinion addressed the components of the bargaining exemption. The court relied extensively on *State ex rel. Citizens for Responsible Development v. City of Milton*, 2007 WI App 114, 300 Wis. 2d 649, 731 N.W.2d 640. "The implication of the bargaining exemption is that the closed session must be necessary to protect the public's competitive or bargaining interests" (¶ 34).

The plain language of the statutory text "provides that a closed session may be held to conduct other specified public business at any or every time that negotiating the terms of a contract or transaction is involved, including competing for more favorable terms, such that those circumstances leave no other option than to close the meeting" (¶ 33). The language of the bargaining exemption (notably use of the word "require") "does not support having a closed session where the competitive or bargaining reasons are speculative or merely helpful, rational, appropriate, or justified based on the government body's preference" (¶ 34).

As for the process to be used at public meetings when a closed session is involved, the appellate court concluded that all meetings, and discussions at all meetings, must begin in open session. The *Milton* decision "contemplates and supports the idea that the governmental body must begin its discussions in an open session, place the initial discussion of the subject matter on the record, and clarify why a specific topic within that discussion requires a closed session prior to voting to go into closed session" (¶ 38).

"[T]he plain language of the statute requires that the decision to enter into closed session be made with actual knowledge of the circumstances and the interests requiring secrecy" (¶ 51).

The meetings at issue in this case arose after the city of Marinette discovered PFAS (per- and polyfluoroalkyl substances) in its water supply. It was undisputed that Tyco Fire Products was responsible for introducing the PFAS into Marinette's groundwater. The Oct. 6 public meeting notice provided by the mayor included the following item: "Negotiations and review of an agreement with … Tyco regarding bio-solid equipment."

Although this meeting began in open session, it does not appear that the discussion of Tyco's agreement to pay for equipment to reduce Marinette's costs to dispose of contaminated wastewater biosolids (the "donation agreement") began or was even introduced in open session. No discussion of the reasons for going into closed session occurred before the council immediately voted to convene in closed session. In fact, members of the council had never seen a draft of the agreement that had been struck by the city's counsel with Tyco prior to the meeting and had no idea about the terms of that contract before the closed session. Thus, the council had no basis to conclude that a closed session was necessary under the "bargaining exemption" to the open meetings law prior to entering the closed session.

Moreover, there was no need to keep the agreement secret from Tyco to protect Marinette's bargaining position. Marinette's attorney had already negotiated this contract with Tyco. Thus, "Marinette was not in a position where it had 'no other option' but to hold its entire discussion of the donation agreement in closed session" (¶ 59). "The *possibility* that the Council would discuss a counteroffer or a negotiation strategy did not permit it to conduct the entire discussion of the donation agreement in closed session" (¶ 61). "If the Council learned about the donation agreement, decided it was unhappy with it, and wanted to discuss further negotiations, it could have voted to convene in closed session to protect its competitive or bargaining interests" (¶ 62).

That never happened. The council reconvened in open session and voted to approve the agreement without any further discussion of it. In sum, "the discussion of the donation agreement at the October 6 meeting was not required

to be held entirely in closed session for competitive or bargaining reasons. Thus, Marinette violated the Open Meetings Law" (¶ 63).

The court reached the same conclusion regarding the Oct. 7, 2020, meeting. The public notice of the meeting indicated that the council would conduct a "discussion with legal counsel regarding the status of the [water] supply alternative analysis" (¶ 16). When the meeting began, the council immediately convened in closed session without any discussion on the record. In the closed session a consultant's report, which had not been previously shared with the council, was discussed. The report dealt with various alternatives Marinette might pursue with regard to PFAS contamination of well water in the neighboring town of Peshtigo. Following the closed session, the council adjourned the meeting without taking any further action.

The appellate court concluded that the conduct of this meeting also violated the open meetings law. The council failed to hold any discussions on the record prior to voting to go into closed session. It had no basis upon which to determine that the information its attorney and the consultant planned to provide would involve competitive or bargaining interests such that a closed session was necessary to protect those interests (*see* ¶ 66). There was no competitive or bargaining reason to enter into closed session.

It was undisputed that there were no negotiations between Marinette and Peshtigo, and it was also undisputed that, at that time, Peshtigo had not even requested that Marinette provide water to some of its residents (*see* ¶ 67). Speculation about the possibility of the need for future negotiations did not provide a basis to close the meeting within the bargaining exception (*see* ¶ 69).

"If … the Council determined that it wanted to discuss under what conditions it would offer water to Peshtigo, the Council could have then moved to go into closed session. It would have been appropriate to use closed sessions to protect those competitive or bargaining interests by developing its negotiation strategy – including acceptable terms, limits, or contingencies – secretly" (¶ 71). In short, the Oct. 7 meeting was simply an information-gathering session, and the public deserved to know the consultant's conclusions that the city of Marinette had paid to obtain (*see* ¶ 70).

Torts

Medical Malpractice – Proper Parties – COVID-19 – Immunity – Constitutionality

***Wren v. Columbia St. Mary's Hosp. Milwaukee Inc.*, 2025 WI App 22 (filed Feb. 11, 2025) (ordered published March 26, 2025)**

HOLDINGS: 1) The plaintiff was not required to name various state officials (for example, the attorney general) as parties; it was sufficient to serve them with the necessary papers. 2) The sweeping immunity provided by the COVID-19 legislation was unconstitutional.

SUMMARY: This appeal arises out of a complaint against a hospital alleging medical malpractice, wrongful death, and negligent infliction of emotional distress related to the care the plaintiff received during pregnancy and the death of her newborn child. The child died in May 2020, during the COVID-19 pandemic. The circuit court dismissed the complaint because it had not named certain governmental officials as parties as purportedly required by an emergency decree.

The court of appeals reversed in an opinion authored by Judge Colòn. The circuit judge had ruled that because the attorney general, the speaker of the assembly, the president of the senate, and the senate majority leader had not been named as parties, the court lacked subject-matter jurisdiction under a statute requiring that "all persons shall be made parties who have or claim any interest which would be affected" (¶ 9).

The court of appeals rejected this conclusion because "nothing in the plain language of the statute indicates that any of these individuals must be named as a party to satisfy the requirements of the statute" (¶ 15). "[T]he plain language of § 806.04(11) similarly requires that the speaker of the assembly, the president of the senate, and the senate majority leader only need to be served with a copy of the proceedings and do not need to be named as parties to satisfy the requirements of § 806.04(11)" (¶ 17). "While the language of Wis. Stat. § 806.04(11) is clear, we nonetheless recognize that reading the language of § 806.04(11) in its full context and considering the surrounding language and related statutes further supports a plain language interpretation that § 806.04(11) only requires service and does not require naming the attorney general, speaker of the assembly, president of the senate, and senate majority leader as parties" (¶ 18).

The court also held that the sweeping immunity from liability contained in the COVID-19 emergency act was unconstitutional. As relevant here, the legislature passed Wis. Stat. section 895.4801 on April 15, 2020, as part of a larger bill responding to the COVID-19 pandemic, and established immunity for health-care providers for certain acts and omissions beginning on March 12, 2020, and lasting for 60 days following the end of the state of emergency.

However, the appellate court concluded that there is no "pandemic exception" to one's fundamental liberties (¶ 37). "[T]he breadth of the immunity provided by Wis. Stat. § 895.4801 is not narrowly tailored to the compelling state interest that prompted the statute when it denies the right to a jury trial for claims involving medical care that was provided for a reason other than the treatment of COVID-19" (*id.*). **WL**