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**DATE:** June 7, 2018

**TO:** Chairman Theodore Lipscomb, Sr.  
Milwaukee County Board of Supervisors

Supervisor Anthony Staskunas  
Milwaukee County Board of Supervisors  
Chairman, Judiciary, Safety, and General Services Committee

Supervisor Willie Johnson  
Milwaukee County Board of Supervisors

George Christenson  
Milwaukee County Clerk

Interested Parties

**FROM:** Office of Corporation Counsel

**SUBJECT:** Settlement Authority for Claims against Milwaukee County;  
Disallowance of Claims against Milwaukee County

### I. INTRODUCTION

This opinion addresses County Board authority for settlement and disallowance of claims against Milwaukee County<sup>1</sup>. In reviewing these matters, the OCC analyzed state statutes, Milwaukee County Ordinances, the county's insurance policy with the Aegis Corporation / Wisconsin County Mutual Insurance Corporation (WCMIC), and WCMIC Advisory Claims Committee protocol and procedures. The OCC also consulted with other WCMIC-insured counties regarding their related practices. Based on this assessment, the OCC recommends that the County Board review WCMIC settlements as informational items only and establish a threshold amount for that review. Additionally, the OCC recommends that the County Board issue notices of disallowance where the county is served with a notice of claim.

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<sup>1</sup> The OCC recently issued an opinion to the County Clerk recommending that it cease disallowance of MTS claims over which Milwaukee County lacks authority. See attached May 25, 2018 opinion letter.

## II. SETTLEMENT AUTHORITY

### A. Scope

As to settlement authority, this opinion applies **only** to WCMIC insured claims – that is, claims where Milwaukee County is in a defensive posture and attorneys’ fees are implicated. It therefore does *not* apply to lawsuits initiated *by* Milwaukee County, which require County Board approval. *See* Wis. Stat. § 59.52(12)(a) (discussed further below) and MCGO 1.11(c)(4)2(b).<sup>2</sup> Nor does this opinion apply to lawsuits against the Milwaukee County Behavioral Health Division (BHD), which are not insured by WCMIC. While Act 203 created the Milwaukee County Mental Health Board and removed County Board jurisdiction over mental health matters, it did not alter the County Board’s obligations to pay judgments entered against a public official or government employee because of acts committed within the scope of employment. *See* Wis. Stats. § 895.46. Any judgments against BHD or its staff, who remain Milwaukee County employees despite the change in governance, are general obligations of the county and require County Board approval.

### B. Statutory / Ordinance Provisions

Wis. Stat. § 59.52(12)(a) provides in relevant part that the County Board *may*: “Examine and settle all accounts of the county and all claims, demands or causes of action *against* the county and issue county orders therefor. . . .” For settlements of \$10,000 or less, the Board *may* delegate that power to a standing committee. *Id.* The Board may also adopt a resolution by majority vote to delegate such power to the chairperson of a standing committee. *Id.*

Historically, the County Board has approved all settlements against Milwaukee County, delegating settlement authority for amounts of \$10,000 and less to the Judiciary, Safety and General Services Committee (Judiciary Committee) per MCGO 1.11(c)(4)2(a). The County Board further delegated settlement authority to the OCC for amounts of \$500 or less (which the OCC must annually report to the Board per MCGO 1.11(c)(4)2(d)). The Judiciary Committee also receives the OCC’s regular litigation report. The County Board’s Committee on Finance and Audit hears “financial matters of concern to the county” per MCGO 1.11(c)(2)9, and therefore also receives the OCC’s litigation report, but does not approve settlements.

### C. WCMIC Policy Language

By its annual approval of the WCMIC policy, the County Board delegates to WCMIC the authority to resolve claims covered under the WCMIC policy brought against the County. WCMIC highlighted the below-quoted policy language as the basis for WCMIC’s understanding that it has ultimate settlement authority over these claims, inclusive of setting attorney hourly rates both for corporation counsel and outside counsel representation in these matters, as well as the determination of trial, discovery, and settlement strategies.

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<sup>2</sup>MCGO 1.11(c)(4)2(b): *Actions initiated by the county.* The committee, subject to full board approval, shall approve the initiation of all suits or claims *by* the county against other persons or entities where the amount claimed exceeds ten thousand dollars (\$10,000.00) or where the rights sought to be declared have a potential fiscal effect on the county in excess of ten thousand dollars (\$10,000.00) . . .



## SECTION II - DEFENSE AND SETTLEMENT

We have the right and duty to defend any suit against the insured seeking monetary damages and/or plaintiff's attorney's fees on account of bodily injury, personal injury, property damage or errors and omissions or any combination thereof to which this insurance applies,

-And-

## SECTION VII - CONDITIONS

- A. Your duties in the Event of an Occurrence, Offense, Claim or Suit...
3. You and any involved insureds must:
- a. Immediately send us copies of any demands, notices, summaries or legal papers received in connection with the claim or suit;
  - b. Authorize us to obtain records and other information;
  - c. Cooperate with us in the investigation, settlement or defense of the claim or suit, and
  - d. Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury, damage or loss to which this insurance may apply.

Please note that this has been the case throughout the entirety of the twenty-year relationship between WCMIC and the County. Former Deputy Corporation Counsel Mark Grady often explained the Board's "approvals" of settlements as largely ceremonial, wherein Supervisors could communicate their respective views regarding settlements. Our office is simply reducing to writing oral advice that has been provided throughout recent years by the OCC on this issue.

Also, the OCC understands that commercial general insurance providers would similarly not permit the County to control settlement, trial or discovery strategy, or the selection of counsel, once the deductible limit was reached for any particular claim.

Moreover, the County has enjoyed – and continues to enjoy – a very cooperative relationship with WCMIC Claims Manager Brian Knee. Regardless of the formalities of the insurance contract, Mr. Knee and the OCC, on a near daily basis, confer regarding trial strategies, discovery and settlement strategies, as well as the assignment of counsel. In fact, just recently, Mr. Knee acceded to a request that additional outside counsel be added to represent the County in a matter in response to a direct request from the OCC.

The OCC is only aware of two cases where the cooperative relationship between WCMIC and the County has come under stress, but that pressure arose due to a dispute regarding whether WCMIC would provide coverage on those two claims, which then, in turn, implicated "control of the case"

issues. These will be litigated and hopefully resolved by the courts, so that there is greater clarity when coverage may be in question.

As a practical matter, if Milwaukee County wanted to pursue a course of action that differed from WCMIC's judgment as to how to proceed on a claim, and no coordinated, agreed-upon approach could be identified, the County could pursue such action *outside* of insurance coverage (for example, the County could elect to pay the settlement itself and/or to pay the bills for outside counsel of the County's choosing out of the County's litigation reserve). This alternative approach is not prohibited under the WCMIC policy.

Based upon the foregoing, it is the advice of the OCC that the Board may elect to simply receive informational reports related to settlements approved by WCMIC and that the Board may receive the precise proposed WCMIC settlement amounts in closed session only. Of course, settlement agreements, once finalized, are subject to Wisconsin open records law. Importantly, the OCC is not aware of any other county insured by WCMIC where the County Board approves settlements.

#### **D. WCMIC Claims Committees**

WCMIC approves or rejects recommended settlements from Brian Knee, its litigation case manager (in consultation with counsel) through multiple committees that include Milwaukee County representatives. The WCMIC Advisory Claims Committee consists of 14 members, 2 of whom are Board Supervisor Willie Johnson and DAS Deputy Director Amy Pechacek. The remaining 12 members are representatives of other WCMIC-insured counties. The Claims Advisory Committee meets monthly and approves (or rejects) proposed settlements exceeding \$5,000 for non-property claims and \$15,000 for property claims. In addition, the Advisory Claims Committee reviews and approves every bill for ongoing claims once cumulative expenditures top \$50,000. The Committee then makes recommendations to the 6-member Claims Committee, which provides another layer of oversight for settlement approvals. Supervisor Johnson is also a member of the Claims Committee. The Claims Committee in turn makes recommendations to the WCMIC Board of Directors, which has final authority. Supervisor Johnson is the newly-elected President of the WCMIC Board. *See* attached 2018 WCMIC Committee roster.

#### **E. Communications with WCMIC-Insured Counties**

Milwaukee County is the largest county with the highest volume of claims that WCMIC insures, but it is subject to the same essential statutory and WCMIC policy obligations regarding claim resolution. Both Jackson and Oneida Counties for example are insured by WCMIC, and though smaller in population and claims, nonetheless also grapple with difficult, expensive lawsuits. Both counties have representatives on the WCMIC Advisory Claims Committee. Neither of their county boards approve settlements for WCMIC-insured claims, but they do route them through their respective committees for closed session, oral reports from corporation counsel, including updates on the impact to the deductible. For those counties, when the bodies return to open session, there is no vote on the settlement, nor disclosure of the settlement amount.

#### **F. Conclusion as to Settlement Authority**

The County Board (and its Judiciary Committee) may legally modify the practice of approving WCMIC settlements and require informational reports, inclusive of establishing a threshold

amount for the issuance of such reports, and the manner of that reporting. It is the opinion of the OCC that such a change in protocol complies with state statute and is not inconsistent with WCMIC policy terms, a contract which the County Board annually approves. Such a change would also model procedures implemented by other WCMIC-insured counties. The County Board through its Judiciary and Finance Committees remains notified of ongoing litigation concerns through the OCC's regular litigation report.

### **III. DISALLOWANCES FOR CLAIMS AGAINST MILWAUKEE COUNTY**

#### **A. Purpose**

State statute permits a county board to disallow claims against it. That practice serves a protective function for counties in that it reduces the time period for filing lawsuits when certain criteria are met. It is a practice that until just recently, the County Board followed for MTS claims alone. Should the County Board commence the issuance of notices of disallowance for claims against Milwaukee County, it would be following a practice adopted by other Wisconsin counties, including Florence, Marinette, Waupaca, and Winnebago Counties.

#### **B. Notice of Disallowance – Statutory Requirements - Claimant**

A claimant is required by statute to file a notice of circumstance and a notice of claim within 120 days after an event. In particular, Wis. Stat. § 893.80(1d)(a) requires that no action may be brought against a political corporation or governmental subdivision or agency thereof nor against its officer, agent or employee for acts done in an official capacity or in the course of agency or employment unless within 120 days after the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the governmental subdivision or agency and on the officer, official, agent or employee. However, a notice of disallowance does not apply to the claimant's notice of circumstances of the claim. Nor do disallowances apply to a claimant's request for a writ for mandamus under Wis. Stat. § 19.37 or federal or administrative actions.

A notice of disallowance does apply to a claimant's notice of claim filed pursuant to Wis. Stat. § 893.80(1d)(b). That provision requires that the claimant file a notice of claim containing his or her address and an itemized statement of the relief sought and present it to the County Clerk. *See* Wis. Stat. §§ 893.80(1d)(a) and 801.11(4)(a)<sup>3</sup>. That event triggers the governmental entity's filing of a formal disallowance as further detailed below. *Id.*

#### **C. Notice of Disallowance –Statutory Requirements – Governmental Entity**

There are statutory requirements for a proper notice of disallowance. It must be sent and served on the claimant (with a copy to any attorney) via registered or certified mail. Wis. Stat. § 893.80(1g). For certified mail, the sender should use the "restricted" delivery option. *See Pool v. City of Sheboygan*, 2007 WI 38, 300 Wis.2d 74, 729 NW2d 415. It must show proof of service as evidenced by either the claimant's signature on the registered or certified mail receipt or by a returned registered letter. *Id.* *See* attached examples of other county disallowance notices.

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<sup>3</sup> Wis. Stat. 801.11(4)(a)1 also provides for service of the claim on the County Board Chairperson. In Milwaukee County, claimants are directed to serve the County Clerk.



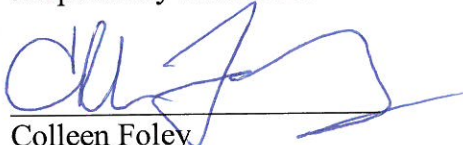
Service of a notice of disallowance by the governmental entity or proof of the attempt thereof, translates into an abbreviated period for a claimant to file a lawsuit. It means that no action or claim may be brought against the governmental entity after 6 months<sup>4</sup> from the date of service or attempted service of the notice of disallowance and the notice of disallowance must contain an explicit statement to that effect. *Id.* See also *Linstrom v. Christianson*, 161 Wis.2d 635, 469 N.W.2d 189 (Ct. App. 1991) (claimant must bring suit within 6 months of service or be time barred). See also *Griffin v. Milwaukee Transport Services, Inc.*, 2001 WI App. 125, 246 Wis.2d 433, 630 N.W.2d 536 (shortened time limits for suit are constitutional).

Failure by the body to disallow a claim within 120 days after the claimant's presentation of the written notice of the claim is still deemed a disallowance. Wis. Stat. § 893.80(1g). But it does not trigger the 6-month deadline, so the claimant may bring the lawsuit anytime within the regularly applicable statute of limitations and not be limited to doing so within 6 months from the date of service of the disallowance. See *Coleman v. City of Milwaukee*, 107 Wis.2d 528, 531, 319 N.W.2d 863 (1982). Once the 120-day period under subsection (1g) has run, a municipality may not revive the 6-month limitation period by giving a late notice of disallowance. See *Blackbourn v. School Dist. of Onalaska*, 174 Wis.2d 496, 497 N.W.2d 460 (Ct. App. 1993).

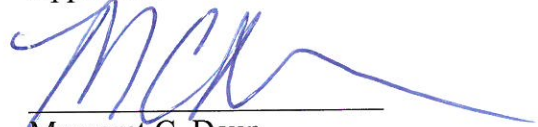
#### D. Conclusion

The OCC recommends that the County Board institute a practice and procedure for disallowance of claims, in conjunction with the County Clerk, to reduce the time for claimants to file lawsuits against Milwaukee County. Indeed, that practice is followed by multiple counties in Wisconsin and is an effective method to reduce liability exposure.

Respectfully submitted:

  
Colleen Foley  
Deputy Corporation Counsel

Approved:

  
Margaret C. Daun  
Corporation Counsel

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<sup>4</sup> Different, longer periods for filing suit after a disallowance of claim apply for property and medical malpractice claims. There is a 1-year limitation after discovery of a negligent act or omission involving property or 1-year from the date on which, in the exercise of reasonable diligence the negligent act or omission should have been discovered. Wis. Stat. § 893.80(1p). The time period for disallowance of medical malpractice claims is either 3 years from the date of the injury or 1 year from the date the injury was discovered or concealed, or in the exercise of reasonable diligence should have been discovered, except it may not be more than 5 years from the date of the act or omission. See Wis. Stat. §§ 893.80(1m) and 893.55(2). Separate limitation periods apply for medical malpractice actions involving children under Wis. Stat. § 839.55.