To: Interested Parties

Form: Robert Fassbender

Re: 2017 Wis. Act 369 Provisions on Legislative Oversight of State Litigation

Date: January 14, 2019

The lame-duck legislation passed and signed into law after the November 2018 elections involved three bills aimed at rebalancing powers of the legislative and executive branches of government.[1] These bills[2], including more sweeping proposals not enacted, caused political and legal friction between the Republican controlled legislature and the incoming Democrat governor Tony Evers and attorney general Josh Kaul.[3]

The debate over the legislation had several themes, but broadly focused on its separation of powers implications. Despite the heated rhetoric, the Act's provisions relating to legislative oversight of state litigation—the topic of this memo—are anticipated in Wisconsin's constitution that provides the legislature clear authority to prescribe by law the powers and duties of the attorney general.[4] Yet, the attorney general, who oversees the Wisconsin Department of Justice (DOJ), is part of the executive branch. So, the overall characterization of Act 369, and its compatriot acts, as shifting power from the executive to the legislative branch is accurate.

This memo discusses how one of the enactments, 2017 Wis. Act 369, limits the power of the attorney general to unilaterally settle litigation affecting the state by providing the legislature with broad authorities to intervene in and approve related settlements.[5] The Act has parallel provisions for the speaker of the assembly and assembly, the senate majority leader and the senate, and the co-chairpersons of the joint committee on legislative organization (JCLO) and the full legislature.

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[1] Reflecting the middle split of Wisconsin's electorate—or some would say, the lopsided partisan divide between its two largest counties (Milwaukee and Dane) and the rest—the Democrats flipped the governor and AG offices, while the Republicans in the Assembly maintained its wide margin 63–35 (one vacant) and the Senate strengthened its hold to 19–14.

[2] 2017 Senate Bill 883, 2017 Senate Bill 884, and 2017 Senate Bill 886 signed into law, respectfully, as 2017 Wis. Act 368, Act 369, and Act 370.

[3] One of the more controversial proposals not enacted would have changed the 2020 presidential primary to improve the election chances of seating conservative Wisconsin Supreme Court Justice Daniel Kelly.

[4] See Wis. Constitution, Article VI, Section 3.

[5] Other provisions in Act 369 relate to election law (identification cards, absentee voting, and military and overseas voters), administrative procedures (rulemaking, guidance documents, and agency publications), and Wisconsin Economic Development Corporation (WEDC). See Wisconsin Legislative Council 2017 Wis. Act 369 Memo.

DISCUSSION

A. Joint Finance Committee Must Now Approve Settlements

In a suit against the state, Act 369 provides legislative oversight of proposed DOJ settlements. Prior Wis. Stat. § 165.25 (6) (a) allowed the AG to "compromise and settle" the case upon a finding by the AG that such a settlement is "in the best interest of the state." This determination as to the best interest of the state was by the AG alone, without any need to seek client consent, be that the governor, agency or legislature. In a vital limit on the AG's settlement authority, revised Wis. Stat. § 165.25 (6) (a)(1) requires a legislative intervenor or its joint finance committee (JFC) to consent.

> The attorney general may compromise and settle the action as the attorney general determines to be in the best interest of the state except that, *if the action is for injunctive relief or there is a proposed consent decree, the attorney general may not compromise or settle the action without the approval of an [legislative] intervenor* under s. 803.09 (2m) or, *if there is no intervenor, without first submitting a proposed plan to the joint committee on finance*. If, within 14 working days after the plan is submitted, the cochairpersons of the committee notify the attorney general that the committee has scheduled a meeting for the purpose of reviewing the proposed plan, *the attorney general may compromise or settle the action only with the approval of the committee*. The attorney general may not submit a proposed plan to the joint committee on finance under this subdivision in which 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 the approval of the joint committee on legislative organization. (emphasis ours)

We found no reference in the statutes relating to the contents of a settlement "plan." But it is clear the terms of the settlement must be submitted and approved by JFC *so long as* within 14 working days after the plan is submitted JFC cochairs notify the AG that the committee has scheduled a meeting for the purpose of reviewing the proposed plan.

Note, therefore, this power to approve settlements has two weaknesses. First, if the legislature or one of its houses is not an intervenor, the authority is not likely to apply to dismissals. Second, if JFC doesn't schedule a hearing, the settlement is likely to be considered passively approved.

Act 369 settlement provisions apply to any settlements proffered by the AG after the effective date of the Act, which was Dec. 16, 2018.

B. The Legislature as Intervenor Provides Additional Protections

As noted, various Act 369 provisions relate to the ability of the legislature to intervene. Each complement each other and are found in Chapter 13 (legislative branch), Chapter 803 (civil procedure – parties), Chapter 806 (civil procedure – judgment), and Chapter 809 (rules of appellate procedure). See Act 369 Excerpts.

Wis. Stat. § 803.09 (2m), created by Act 369, provides:

> When a party to an action challenges in state or federal court the *constitutionality* of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or *otherwise challenges the construction or validity* of a statute, as part of a claim or affirmative defense, the assembly, the senate, and the legislature may intervene as set forth under s. 13.365 at any time in the action as a matter of right by serving a motion upon the parties as provided in s. 801.14. (Emphasis ours.)

Thus, the three legal challenges triggering the authority to intervene are challenges to the "*constitutionality*" or "otherwise the *construction* or *validity* of a statute." These types of challenges are typical in most regulatory litigation.

Wis. Stat.§ 13.365 provides that this authority to "intervene at any time" is conferred on the committee on assembly organization for the assembly, the committee on senate organization for the senate, and the Joint Committee on Legislative Organization (JCLO) for the legislature. Each organization can hire outside counsel to represent it as intervenors.

This power to intervene applies to any litigation pending in state or federal court on the Act's effective date, which was Dec. 16, 2018. See Act 369, § 102 (1) (nonstatutory provisions). Also, as noted above, the Act provides that in any action involving injunctive relief or a proposed consent decree, the attorney general may not compromise or settle without the approval of a legislative intervenor.

C. More Lawyers, Less Lawyers: Pick Your Poison

Shakespeare had a point—"the first thing we do is kill all the lawyers." In the case of Act 369, the AG get fewer legal guns and the legislature more.

Act 369, Section 24, eliminates the solicitor general's office at DOJ. Other provisions delete funding for four related positions—the solicitor general and three deputy solicitors general. Under Republican AG Brad Schimel, the office of solicitor general (OSG) became a legal powerhouse headed by Solicitor General Misha Tseytlin, a former clerk to Justice Anthony Kennedy, and Chief Deputy Solicitor General Ryan Walsh, a former clerk to Justice Antonin Scalia. They filed outstanding briefs aligned with GLLF positions. Thus, though Schimel and his OSG attorneys are gone, we have mixed feelings over the elimination of the OSG.

While eliminating the OSG, Act 369 provides the legislature authority to obtain legal counsel other than from DOJ in any action which the legislature the assembly, or the senate is a party or in which their interests are affected. See Wis. Stat. § 13.124, created by Act 369. Hiring outside counsel under these provisions is within the sole discretion of JCLO chairs, the speaker of the assembly, or the senate majority leader. The Act has other provisions allowing for legislative counsel in specific instances, as well as related requirements for service of process.

Thus, the speaker, majority leader, or JCLO chairs can retain their own counsel to assist in evaluating cases prior to a decision to intervene under new Act 369 provisions, or if they wish, to monitor after a decision not to intervene, or for any matter they so choose.

It is important that the legislature retain competent and unbiased counsel on an ongoing and a case-specific basis to protect the rule of law and maintain a representative government. They need their own solicitor general, so to speak, if they wish to rein in the administrative state and its legion of deep-state lawyers. And with respect to 2011 Wis. Act 21, to defend their enactments.

With respect to Act 21, it is noteworthy that the Assembly's request for Schimel's opinion asserts key positions supported by the regulatory community:

1. The *Lake Beulah* court did not address Act 21's explicit authority provision.
2. Wis. Stat. §§ 282.11 and 281.12 are statements of policy and general duties preambles, and as such, "they do not contain the explicit authority required by Act 21."

D. The Challenges to Act 369 and the Extraordinary Session Should Fail

There are several legal challenges to Act 369. The broadest allegation—one that would topple Act 369 in its entirely—was brought by League of Women Voters of Wisconsin, Disability Rights Wisconsin, and Black Leaders Organizing for Communities. They allege that the constitution allows the legislature to meet only in times prescribed by law or in a special session called by the governor. It follows, they argue, that an extraordinary session falls in neither category, and thus, Act 369 and the other extraordinary laws are invalid and unenforceable. See summons and compliant.

The legislative reference bureau notes that the legislature first held an extraordinary session in 1977, which allows for legislative enactments after the expiration of the last scheduled floorperiod. Since then, according to LRB, the legislature called for more than 20 such sessions. If the 2018 extraordinary session laws fail, it would put all the prior enactments on thin legal ice. Such a scenario, except maybe in a Dane County court, is not likely to happen.

In addition, it was reported that state Rep. Jimmy Anderson, D-Fitchburg, would file a complaint with the Dane County DA asking that the extraordinary session votes be voided. Anderson, according reports, will assert his disability prevented him from sitting through the all-night session, and thus, he was unlawfully excluded from voting on those bills.

CONCLUSION

2017 Wis. Act 369 reflects the legislature's exclusive authority to make law, and thus, the Act provides needed legislative oversight over policy-setting litigation. For example, this oversight of proposed DOJ settlements lessens the risk of secret sue-and-settle deals between DOJ and special interest groups to establish otherwise unlawful regulatory schemes. Recognizing they, as elected legislative officials, need their own counsel, as well as establishing their right to intervene and approve settlements will go a long way, if used, to rein in the administrative state.