



Legislative Oversight of DOJ Settlements

Prepared by: Anna Henning and David Moore, Principal Attorneys

2017 Wisconsin Act 369 created statutory provisions requiring legislative oversight of Wisconsin Department of Justice (DOJ) decisions to settle certain civil actions. In 2020, the Wisconsin Supreme Court's decision in *Service Employees International Union, Local 1 (SEIU) v. Vos* upheld those requirements against a broad constitutional challenge that sought to invalidate the requirements in all instances. More recently, in *Kaul v. Legislature*, the Wisconsin Supreme Court held that the requirements are unconstitutional as applied to two specific categories of cases.

STATUTORY REQUIREMENTS FOR LEGISLATIVE OVERSIGHT

DOJ generally 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 Statutes created by 2017 Wisconsin Act 369, and now limited by the *Kaul v. Legislature* decision, generally require 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 the agency's officer, employee, or agent) and the action is for injunctive relief or involves a proposed consent decree.²

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.³ Otherwise, the statutes require DOJ to submit a proposed plan to settle, compromise, or discontinue an action to the Joint Committee on Finance (JCF) before settling, compromising, or discontinuing the action.⁴

SEIU v. Vos

In *SEIU v. Vos*, 2020 WI 67, labor organizations and individual taxpayers brought a facial challenge⁵ against several Act 369 provisions, including the settlement approval requirements described above.⁶ 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, ¶ 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 there may be certain types of state litigation in which the Legislature has an "institutional interest." [*Id.* ¶¶ 10, 64-71.] The Court emphasized, however, that its holding did not preclude a future "as-applied" challenge to the legislative oversight requirements. [*Id.* ¶ 73.]

KAUL V. LEGISLATURE

Shortly after the Wisconsin Supreme Court issued its decision in *SEIU v. Vos*, the Attorney General, together with the Governor and Secretary of the Department of Administration (collectively, "the Attorney General"), challenged the application of the settlement approval requirements, summarized above, as applied to the following two types of civil actions:

- Civil enforcement actions prosecuted by DOJ under statutes that DOJ is charged with enforcing, such as environmental, financial regulation, and consumer protection laws.
- “Agency-directed actions,” i.e., civil actions prosecuted by DOJ at the request of the head of an executive branch agency.

In its [June 17, 2025 decision](#), the Wisconsin Supreme Court held that legislative settlement approval requirements are unconstitutional as applied to these two categories of DOJ actions. [2025 WI 23.] Justice Hagedorn, who also authored the Court’s opinion in *SEIU v. Vos*, authored the opinion on behalf of a unanimous Court.

The Court’s decision was rooted in the separation of powers doctrine. The Court held that the two categories of DOJ actions at issue in the case are actions in which the Legislature “has not identified a constitutional role for itself,” and which therefore fall within the executive branch’s core powers. The Court observed that “[t]he quintessential core power belonging to the executive branch is the power to ‘take care that the laws be faithfully executed.’” And, as a constitutional officer and member of the executive branch, the Attorney General’s “constitutional role is to faithfully execute the law by prosecuting those actions the Legislature instructs him to by law.” The Court further observed that the Legislature has statutorily conferred the responsibility of prosecuting both categories of cases, described above, and that when the Legislature gives the Attorney General authority to pursue these claims “it necessarily confers discretion on how to pursue the claims to completion, through settlement or otherwise.” [2025 WI 23, ¶¶ 3, 17, 19, and 23-24.]

Having established that the executive branch has constitutional authority to settle these types of cases, the Court noted that “the key question...is whether the Legislature also possesses this constitutional authority in at least some suits within these two categories.” [2025 WI 23, ¶ 25.] The Court explained that, under its decision in *SEIU v. Vos*, the Legislature exercises a shared power over a civil action only if it has “an institutional interest rooted in the Constitution.” Rejecting the Legislature’s arguments that its interests in state revenue and policymaking constitute the requisite “institutional interests” needed to place settlement of the two categories of cases identified by the Attorney General “within the borderlands of shared powers,” the Court concluded that “there is no constitutional justification for requiring [JCF] sign-off on settlement agreements within these categories of cases.” [*Id.*, at ¶ 48.]

The decision will greatly reduce the number of actions for which DOJ must seek JCF settlement approval in practice.⁷ However, because the Court reiterated that *SEIU v. Vos* remains “good law,” legislative settlement approval requirements remain enforceable with respect to actions that fall outside the bounds of the two specific categories affected by the Court’s decision. The following examples, articulated in *SEIU v. Vos*, are categories of cases in which the Legislature may retain such an “institutional interest”: (1) a case in which DOJ represents a legislative official, employee, or body; and (2) a case in which a legislative body is the principal authorizing DOJ’s representation.

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 ss. 165.08(1) and 165.25(6)(a) 1., Stats.

³ The Assembly, Senate, or Legislature may 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 affirmative defense. [s. 803.09(2m), Stats.]

⁴ JCF may approve DOJ’s proposal through a 14-day passive review process in civil actions defended by DOJ, but must provide a 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. [ss. 165.08(1) and 165.25(6)(a) 1., Stats.]

⁵ 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, ¶ 4.]

⁶ For a summary of the issues in the case, see [Legislative Council, SEIU v. Vos, Issue Brief \(July 2020\)](#).

⁷ Approval of settlements related to certain opioid litigation under s. 165.08, Stats., is required under s. 165.12, Stats., to effectuate the terms of the settlements and to distribute the funds to the state and local governments. The Court’s decision in *Kaul v. Legislature* does not directly affect that statute.