MISCELLANEOUS

I. TRADE REGULATION

Since Wisconsin Statute section 100.18(1), relating to fraudulent advertising, was enacted by the legislature in 1913,[1] the only interpretation given to the statute has been a 1925 Opinion of the Attorney General.[2] The position was taken then that the statute applied only to printed representations. However, in 1945, section 100.18(1) was amended to include the media of magazines, radio, and television. The statute was also broadened to include other methods "similar or dissimilar" to those specified. In addition to advertisements, the statute was expanded to include "announcements, statements, or representations of any kind [made] to the public."[3]

In *State v. Automatic Merchandisers of America, Inc.*,[4] the issue was whether Wisconsin Statute section 100.18(1)[5] applied to oral representations made in private conversations to prospective purchasers of a seller's product. The State of Wisconsin sought an injunction to restrain the defendants from oper-

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1. Wis. Laws 1913, ch. 510.

2. Under former WIS. STAT. § 343.413 (1925), which was the forerunner of WIS. STAT. § 100.18(1) 1971, prohibiting advertising of a certain type in a newspaper or other publication, or in the form of a notice, poster, pamphlet, or letter, a verbal misrepresentation was not a violation of that section. 14 OP. ATT'Y GEN. 367 (1925). The statute was based upon a model advertising law drafted by Printers Ink Magazine, and subsequently adopted in most states. Because of the source of such laws, they are today commonly known as "Printer's Ink Statutes." Jeffries, *Protection For Consumers Against Unfair and Deceptive Business*, 57 MARQ. L. REV. 559, 561 n. 12 (1974).

3. WIS. LAWS 1945, ch. 399.

4. 64 Wis. 2d 659, 221 N.W.2d 683 (1974).

5. WIS. STAT. § 100.18(1) (1971) basically provides as follows:

> No person [or] corporation . . . with intent to sell . . . any real estate, merchandise, securities, employment, service, or anything offered by such person [or] corporation . . . directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published . . . in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease . . . which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is *untrue, deceptive* or *misleading*. (Emphasis added).

ating their business in violation of section 100.18(1), and to recover the pecuniary losses suffered by persons in Wisconsin because of the alleged improper conduct of the defendants.

The complaint alleged that the defendants were engaged in a marketing scheme to sell mechanical vending machines and distributorships to Wisconsin residents at prices substantially in excess of the actual value. The marketing scheme involved the placing of advertisements in the classified section of newspapers. Persons responding to these advertisements were contacted at their homes by the defendants and presented various promotional materials and oral representations. The complaint alleged that some of these promotional materials and oral representations were untrue, deceptive, or misleading.[6] The defendants demurred to the complaint on the ground that section 100.18(1) did not apply to private face-to-face conversations as were involved in the defendants' dealings with the prospective purchasers.

The Wisconsin Supreme Court, in upholding the injunction, concluded that section 100.18(1) was intended by the legislature to apply even to oral representations such as occurred in this case. Noting that the 1945 amendment was intended to reflect changes in marketing methods, the court felt that the legislature intended "to protect the residents of Wisconsin from *any* untrue, deceptive or misleading representations made to promote the sale of the product."[7] (Emphasis added).

The court also rejected the defendants' assertion that the statute applied only to "dissemination to the public," and so did not relate to statements made privately to prospective purchasers. Relying on *Cawker v. Meyer*,[8] the court reasoned that the individual action of one person can constitute "the public" for purposes of the statute, but admitted the difficulty of defining the word "public." The court indicated that in order to exclude oneself from the definition of public, the controlling factor is whether there is some particular relationship between the parties which would exclude those parties from the general

6. 64 Wis. 2d at 660, 221 N.W.2d at 684. The words "untrue, deceptive or misleading" in WIS. STAT. § 100.18(1) were attacked as being so imprecise as to be unconstitutionally vague in Carpets by the Carload, Inc. v. Warren, 368 F. Supp. 1075 (E.D. Wis. 1973). Judge Gordon refused to convene a three-judge panel on the ground that the plaintiff's claims were "constitutionally insubstantial."

7. 64 Wis. 2d at 663, 221 N.W.2d at 686.

8. 147 Wis. 320, 133 N.W. 157 (1911).

populace for the purpose of the statute.[9] *Cawker* explained that the scope of "the public" is such that it is not restricted to any particular class of the community. Whether the parties fall within any particular class will depend on the circumstances of each case. As pointed out in a law review article on consumer protection,[10] the word "public" has been construed under comparable statutes to mean that any person who invites the trade of the general populace in a given area, or who is engaged in his principal business is dealing with the "public." Thus, it appears section 100.18(1) does not extend to misrepresentations in connection with a casual or incidental sale of merchandise unrelated to the business of the seller. In this case, the prospective purchasers had responded to the defendants' notices in newspapers. Inasmuch as no special relationship existed between these people and the defendants which would distinguish them as prospective purchasers from "the public" which the legislature intended to protect, the statute was applicable.

II. ATTORNEY COMPENSATION

Recognizing that the prevailing average rate now charged by attorneys in this state is $45 per hour, the Wisconsin Supreme Court, in *State v. Sidney*,[11] raised the rate of compensation for indigency defense in criminal cases from $20 per hour to $30 per hour.[12]

The appellant in *Sidney* was an attorney appointed in Milwaukee county to represent an indigent in probation revocation proceedings. Subsequent to providing legal services, the attorney presented the county court with a petition for payment of fees totalling $1,577.94. The petition contained an itemized list of noncourt hours, court appearances, and expenses, accompanied by a detailed description of the type of service performed as to each item. The trial court cut the bill to $310. The supreme court remanded the case on the grounds that the trial court did not give full consideration to a determination of the hours worked and did not base the fee on the proper rate of compensation.[13]

9. 64 Wis. 2d at 664, 221 N.W.2d at 686.

10. Jeffries, *Protection For Consumers Against Unfair and Deceptive Business*, 57 MARQ. L. REV. 559, 561, n. 14 (1974).

11. 66 Wis. 2d 602, 225 N.W.2d 438 (1975).

12. *Id.* at 609, 610, 225 N.W.2d at 442.

13. *Id.* at 606, 225 N.W.2d at 440.

The supreme court, however, clearly reinforced its rule[14] that the trial judge has the responsibility in indigency cases of determining what services were reasonably necessary, ascertaining the reasonable number of hours required to perform those services, and fixing the rate of compensation.[15] The court also stressed the standard set forth in *State v. DeKeyser*[16] for trial courts and attorneys in discharging this responsibility:

> Claims for legal services should be submitted to the court by petition explaining the nature and extent of the work and an itemized form showing not only the amount of time spent but also the nature of the work and the problems involved in sufficient detail so that it can be properly appraised and a reasonable fee determined for the services. The facts so stated should be considered prima facie evidence, and modifications, allowances, and disallowances of the items made by the court and the reasons therefor should be set forth in writing and an opportunity given to counsel to contest the modifications. Reasonable men may differ over the value of legal services and there is no question of an attorney's integrity involved when a court differs with him as to the necessity or value of services rendered.[17]

The payment of attorneys' fees for counsel appointed to represent an indigent criminal defendant is controlled, in part, by the provisions of Wisconsin Statute section 967.06.[18] Section 967.06(2) directs the court to fix the amount of compensation "which shall be such as is customarily charged by attorneys of this state for comparable service." This language does not require remuneration entirely comparable to what an attorney

14. State v. DeKeyser, 29 Wis. 2d 132, 138 N.W.2d 129 (1965).

15. 66 Wis. 2d at 607, 225 N.W.2d at 441. In Touchett v. E Z Paintr Corp., 14 Wis. 2d 479, 488, 111 N.W.2d 419, 423 (1961), a number of factors were listed which the trial court should consider in making these determinations. The case involved a fee dispute between an attorney and a private client.

16. 29 Wis. 2d 132, 138 N.W.2d 129 (1965).

17. *Id.* at 137, 138 N.W.2d at 131, cited at 66 Wis. 2d 608, 225 N.W.2d 441.

18. WIS. STAT. § 967.06 (1973) provides, in part, as follows:

(1) Counsel appointed to represent indigent defendants shall be compensated for services commencing with the time of their appointment.

(2) The judge or court under this section shall fix the amount of compensation for counsel appointed hereunder, which shall be such as is customarily charged by attorneys of this state for comparable service, and shall provide for the repayment of actual disbursements for necessary travel and other expense, automobile travel to be compensated at not over 8 cents a mile. The certificate of the clerk shall be sufficient warrant to the county treasurer to make such payment.

privately retained might receive from a client. According to prior rulings by the court:

> Comparable services we conclude mean not what is customarily charged a private client but such charge discounted by some factor because of the certainty of payment from the public treasury. . . . Again in *State v. Kenney, supra*, [24 Wis. 2d 172, 128 N.W.2d 450, (1964)] we held sec. 256.49 did not require this court to apply the full minimum bar rates to services rendered by court-appointed counsel and in that case we used as a standard approximately two thirds of the minimum bar rates as a going rate for the representation of indigents in Rock county.[19]

In *Sidney*, the court reemphasized its holding that legal services to indigent criminal defendants should be compensated at a rate one-third below the prevailing rate charged for services to nonindigent clients, basing its reasoning on the fact of certainty of payment from the public treasury, and on the further fact that "legal work of this nature is part of the general obligation on the part of all lawyers to see that justice is done in our criminal courts."[20]

III. Court-authorized Transplant Operations

In re Guardianship of Pescinski[21] presented the difficult question of whether a court has the power to order a kidney transplant involving an incompetent individual where no consent has been given by the incompetent or his guardian *ad litem*, nor any benefit to the incompetent has been shown, but where the dire need of the donee for the transplant has been established.[22]

In 1970, Elaine Jeske, the mother of six children, had both her kidneys surgically removed because she was suffering from a fatal kidney disease. Since that time, Mrs. Jeske had been kept alive by a dialysis machine. Late in 1974, Mrs. Jeske's doctors determined that the dialysis machine could no longer keep her alive, and that death was imminent unless she received a transplanted kidney. Mrs. Jeske's parents, both over sixty-five, were ruled out by her doctor as a matter of policy.

19. State v. DeKeyser, 29 Wis. 2d at 138, 138 N.W.2d at 132, cited at 66 Wis. 2d 606, 607, 225 N.W.2d 440, 441.

20. 66 Wis. 2d at 610, 225 N.W.2d at 442.

21. 67 Wis. 2d 4, 226 N.W.2d 180 (1975).

22. *Id.* at 5-6, 226 N.W.2d at 180.

Mrs. Jeske's children, all minors, were similarly excluded. The search narrowed to Elaine's two brothers and her sister.

The sister was excluded as a donor because she had diabetes. One brother was excluded because he suffered from a stomach disorder and did not care to be a donor. The other brother, Richard Pescinski, was legally declared incompetent in 1958 and committed to Winnebago State Hospital. "He [had] been a committed mental patient since that date, classified as a schizophrenic, chronic, catatonic type."[23] His mental capacity was estimated to be age twelve. Tests established that Richard was a suitable kidney donor. A hearing was held to decide whether permission should be granted to perform the operation. The guardian *ad litem* would not consent to the transplant, and the county court held it did not have the power to order the operation. The Wisconsin Supreme Court, in a six to one decision, affirmed the trial court.[24]

The supreme court's decision rested on the categorical rejection of the doctrine of substituted judgment, the absence of the real consent of the incompetent, and the absence of evidence that the transplant would be beneficial to the incompetent.

Historically, the substituted judgment doctrine was used by courts of equity to allow gifts of property belonging to an incompetent.[25] It is an application of the maxim that equity will speak for one who cannot speak for himself.[26] The doctrine of substituted judgment was raised by the appellant, who urged the supreme court to adopt the reasoning of the Kentucky Court of Appeals in *Strunk v. Strunk*.[27] The Kentucky court

23. *Id.*

24. *Id.* at 7, 226 N.W.2d at 181.

25. The doctrine of substituted judgment is recognized in this country as the right to act for the incompetent in all cases. It is broad enough to cover property and all matters touching on the well-being of the ward. Strunk v. Strunk, 445 S.W.2d 145, 148 (Ky. 1969).

26. The doctrine of substituted judgment apparently found its first expression in the leading English case, Ex parte Whitehead, 2 Meriv. 99, 35 Eng. Reprint 878 (ch) (1816). It was amplified in In re Earl of Carrysfort, 41 Eng. Reprint 418 (1840), where the principle was applied for the benefit of one who was not next of kin to a "lunatic," but was a servant of the "lunatic" and was obliged to retire from his service by reason of age and infirmity. The Chancellor permitted the allowance of an annuity out of the income of the estate of the "lunatic" earl as a retirement pension to the servant. Although no supporting evidence could be found, the court was satisfied that the Earl of Carrysfort would have approved if he had been capable of acting himself. Annot., 24 A.L.R.3d 863 (1969).

27. 445 S.W.2d 145 (Ky. 1969).

held that a chancery court had sufficient inherent power to authorize the operation by substituting its judgment for that of a person incompetent to arrive at a decision for himself.[28] The Wisconsin Supreme Court refused to adopt the concept of substituted judgment by asserting that absent statutory authority, Wisconsin courts have no equitable power to invade the estate or the body of an incompetent.[29]

While *Strunk* and *Pescinski* were quite similar, there were factual distinctions which were critical in supporting the opposite conclusions of the two courts. The Kentucky court found that, under the circumstances, the operation would be psychologically beneficial to the incompetent. His well-being would have been jeopardized more severely by the loss of his brother than by the removal of a kidney.[30] In the *Pescinski* case, there was no evidence that Elaine's death would be psychologically detrimental to Richard. Nor was there any evidence that Elaine's life was vital to the continuity of Richard's improvement.

In its conclusion, the Wisconsin court held as follows:

> In the absence of real consent on [the incompetent's] part, and in a situation where no benefit to him has been established, we fail to find any authority for the county court, or this this court, to approve this operation.[31]

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28. *Id.* at 148.

29. States which have rejected the doctrine are Texas, Ohio, Tennessee, and now Wisconsin. *In re* Guardianship of Neal, 406 S.W.2d 446 (Tex. Civ. App. 1966), per curiam 407 S.W.2d 771, (Texas refused to apply the doctrine when a gift would have saved the estate $240,000 to $480,000 in estate taxes); *In re* Beilsten, 145 Ohio 397, 62 N.E.2d 205 (1945), (The court refused to allow a ward's funds to be used to support his adult daughter); Lewis v. Moody, 149 Tenn. 687, 261 S.W. 673 (1924), (The court ruled it had no power to deal with surplus income of a ward's estate unless specifically authorized by statute.).

30. 445 S.W.2d at 146-47. This was substantiated by a psychiatrist, in attendance to the incompetent, who testified that in his opinion the death of the brother would have "an extremely traumatic effect upon [the incompetent]." An amicus curiae from the Department of Mental Health of the Commonwealth was also important:

> Jerry Strunk, a mental defective, has emotions and reactions on a scale comparable to that of a normal person. He identifies with his brother, Tom; Tom is his model, his tie with his family. Tom's life is vital to the continuity of Jerry's improvement at Frankfort State Hospital and School.
>
> The necessity of Tom's life to Jerry's treatment and eventual rehabilitation is clearer in view of the fact that Tom is his only living sibling, and at the death of their natural parents, now in their fifties, Jerry will have no concerned intimate communication so necessary to his stability and optimal functioning.

Id.

31. 67 Wis. 2d at 8-9, 226 N.W.2d at 182.

The court gave no indication what it might do in the event real consent was given by an incompetent or if a benefit had been established. The court also failed to indicate what it meant by real consent or what type of benefit would be sufficient.

One might question the necessity of establishing a benefit to an incompetent in a situation where the death of another will result simply because the recipient is unable to show that the transplant would be beneficial to the incompetent, especially when the risk to the incompetent is negligible and the need for the transplant is unquestionable. Yet, a fear that mental institutions will become storehouses of spare parts for those on the outside, the memories of the medical experiments of the Nazis in World War II are legitimate concerns of those who have to make a very difficult decision.[32]

Justice Day, in his dissenting opinion, underscored the weakness in searching for a psychological benefit in order to achieve an equitable result:

> In the case before us, if the incompetent brother should happily recover from his mental illness, he would undoubtedly be happy to learn that the transplant of one of his kidneys to his sister saved her life. This at least would be a normal response and hence the transplant is not without benefit to him.[33]

To avoid this dilemma, Justice Day proposed five requirements which, upon fulfillment, would allow a court to approve an operation.[34] They are as follows:

> 1. A strong showing that the proposed donee faces imminent death without the kidney transplant.
> 2. A showing that reasonable steps have been made to acquire a kidney from other sources.
> 3. A showing that the proposed donor is closely related by blood to the proposed donee.
> 4. A showing that the proposed incompetent-donor is in good health.
> 5. A showing that the operation is one of minimal risk to the donor, and that the donor could function normally on one kidney following such an operation.

On the problem of real consent, Justice Day stated that

32. *Id.* at 10-12, 226 N.W.2d at 183 (Day, J., dissenting). *See,* Note, 9 JOURNAL OF FAMILY LAW 309 (1969).

33. 67 Wis. 2d at 9-10, 226 N.W.2d at 183 (Day, J., dissenting).

34. *Id.* at 10, 226 N.W.2d at 183 (Day, J., dissenting).

"from such a record it is difficult to see how one could ever get a meaningful 'consent' from the incompetent in this case."[35] This requirement will be a problem whenever the potential donor has been found legally incompetent to make decisions regarding his person and property. One might assume from *Pescinski* that if it can be established by sufficient evidence that a transplant would be beneficial to the incompetent-donor and in his best interest, the permission of the guardian will satisfy the "real consent" requirement. This approach would not be based on the doctrine of substituted judgment, but on the rule that the guardian acts "loyally in the best interest of his ward."[36]

IV. Environmental Law and Procedure

Citizen environmental groups will be encouraged by the court's opinion in *Wisconsin's Environment Decade, Inc. v. Public Service Commission of Wisconsin.*[37]

Wisconsin's Environmental Decade, Inc. (hereinafter WED), a nonprofit corporation engaged in public interest activities intended to improve the quality of the human and natural environment, filed a petition under Wisconsin Statute sections 227.15 and 227.16(1) for judicial review of certain decisions by the Public Service Commission of Wisconsin (hereinafter PSC) and certain proposals of the Wisconsin Public Service Corporation to place limitations on the sale of natural gas. Essentially, WED claimed that the PSC's restrictions on the use of natural gas failed to curb present wasteful use of natural gas supplies and would encourage customers to turn to more environmentally-damaging fuel.[38]

35. *Id.* at 12, 226 N.W.2d at 183 (Day, J., dissenting).

36. 67 Wis. 2d at 7, 226 N.W.2d at 181.

37. 69 Wis. 2d 1, 230 N.W.2d 243 (1975).

38. Among the allegations of the petition are the following:

"8. That petitioner and petitioner's members, whose interests petitioner asserts herein, are directly affected and aggrieved by the orders sought to be reviewed herein because;

"a. Said orders harm the environment by prematurely devouring the last, dwindling reserves of natural gas, and by encouraging environmentally destructive practices such as strip mining to artificially and temporarily augment the supply of natural gas via coal gasification.

"b. Said orders unduly discriminate against their responsible use of natural gas in the future by allowing present profligate users of natural gas to prematurely exhaust the finite supply remaining.

"6A. That petitioner, on its own behalf, and on behalf of its members, has

The Dane county circuit court granted PSC's motion to dismiss the petition on the ground that WED was not a proper party to bring the action in that the petition failed to state facts sufficient to meet the requirements of sections 227.15 and 227.16(1).[39] The Wisconsin Supreme Court reversed and remanded to the trial court for a determination of the truth of the facts pertaining to standing alleged in the petition. If any of the bases for standing alleged in the petition was factually established, the court ordered that the trial court should then consider the merits of the appropriate issues in WED's petition.[40]

Sections 227.15 and 227.16(1) govern a motion to dismiss in a proceeding to seek review of an administrative decision, and raise the question whether the petition alleges facts sufficient to show that the petitioner has standing. Both sections require the petitioner to show a direct effect on his legally protected interests. A person aggrieved has been defined as "one having an interest recognized by law in the subject matter which is injuriously affected by the judgment."[41] The Wisconsin rule of standing envisions a two-step analysis. The first step is to ascertain "whether the decision of the agency directly causes injury to the interest of the petitioner."[42] The second step is to

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interests in a healthful environment, an interest threatened by this order which induces lower priority natural gas customers to switch to more environmentally damaging alternative sources of energy."

69 Wis. 2d at 7-8, 230 N.W.2d at 246.

39. The reasons for dismissal were stated to be:

". . . that petitioner is not a person aggrieved whose legal rights, duties or privileges are directly affected by the orders of respondent Public Service Commission sought to be reviewed herein within the meaning of section 227.15, Wis. Stats., and that it is not a person aggrieved or directly affected by said orders within the meaning of section 227.16(1), Wis. Stats." 69 Wis. 2d at 7, 8, 230 N.W.2d at 247.

WIS. STAT. § 227.15 (1973) provides in pertinent part as follows:

Judicial review; orders reviewable. Administrative decisions, which directly affect the legal rights, duties or privileges of any person . . . shall be subject to judicial review as provided in this chapter.

WIS. STAT. § 227.16(1) (1973) provides in pertinent part as follows:

Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 and directly affected thereby shall be entitled to judicial review thereof as provided in this chapter.

40. 69 Wis. 2d at 20, 230 N.W.2d at 253.

41. Greenfield v. Joint County School Commissioners, 271 Wis. 442, 447, 73 N.W.2d 580 (1955).

42. 69 Wis. 2d at 10, 230 N.W.2d at 248.

determine "whether the interest asserted is recognized by law."[43] The court concluded that the law of standing in Wisconsin should not be construed narrowly or restrictively, and quoted Professor Kenneth Culp Davis:

> The only problems about standing should be what interests deserve protection against injury, and what should be enough to constitute an injury. Whether interests deserve legal protection depends upon whether they are sufficiently significant and whether good policy calls for protecting them or for denying them protection.[44]

The court distinguished Wisconsin cases in which review had been denied by noting that the statutes relied upon by persons seeking review had not given legal recognition to the interests asserted. Such denial thus rests on substantive statutory interpretation rather than on rules of standing.[45] In this case, the court substantially liberalized the standing requirements, at least in the area of environmental law. The court also indicted its willingness to accept the federal courts' viewpoint that an allegation of injury in fact to aesthetic, conservational, and recreational interests is readily accepted as sufficient to confer standing.[46] Even more significantly, the federal courts have shown a willingness to find that environmental interests are arguably within the zone of interests protected by virtually any statute relating to environmental matters.[47]

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43. *Id.* This approach is similar to the two-pronged standing analysis outlined by the United States Supreme Court in Association of Data Processing Service Organization, Inc. v. Camp, 397 U.S. 150 (1970), and Barlow v. Collins, 397 U.S. 159 (1970) as follows: (1) Does the challenged action cause the petitioner injury in fact, economic or otherwise? And (2) is the interest allegedly injured arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question?

44. 69 Wis. 2d 4, 13, 230 N.W.2d 243, 249 quoting DAVIS, ADMINISTRATIVE LAW TREATISE 722, sec. 22:00-4 (1970 Supp.).

45. *See* Mortensen v. Pyramid Savings and Loan Association, 53 Wis. 2d 81, 191 N.W.2d 730 (1971); Dressler v. WERB, 6 Wis. 2d 243, 94 N.W.2d 609, 95 N.W.2d 788 (1959); Ashwaubenon v. State Highway Commission, 17 Wis. 2d 120, 115 N.W.2d 498 (1962).

46. United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972). There was a minority on the United States Supreme Court in Justices Douglas, Brennan, and Blackmun who would expand the traditional concepts of standing to enable an organization like the Sierra Club, possessing pertinent, bona fide, and well recognized purposes in the area of environment, to litigate environmental issues without alleging that its members are among those aggrieved by agency action. Such a change, as Justice Blackmun said, "need only recognize the interest of one who has a probable, sincere, dedicated, and established status." Sierra Club v. Morton, 405 U.S. 727, 757-8 (1972) (Blackmun, J., dissenting).

47. *See* Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir.

In applying the two-prong test, the court found that the petition sufficiently alleged injuries that were a direct result of PSC action.[48]

> This court and the federal courts have taken a similar view of the directness requirement. Injury alleged, which is remote in time or which will only occur as an end result of a sequence of events set in motion by the agency action challenged, can be a sufficiently direct result of the agency's decision to serve as a basis for standing. The question whether the injury alleged will result from agency action in fact is a question to be determined on the merits, not on a motion to dismiss for lack of standing.[49]

In completing the standing analysis, the court found that the interest asserted by WED is a legally recognized interest under various provisions of Wisconsin Statute Chapter 196[50] and the Wisconsin Environmental Protection Act.[51] This legally protected interest was sufficiently alleged[52] by statements that members of WED reside in the area affected, and that the PSC's action will result in environmental harm because of increased use of dirtier fuels and will curtail the interest of WED's members to continue to enjoy adequate and sufficient service through the conservation of natural gas. It is important to note that the court construed chapter 196 as designed to benefit the consuming public, consistent with its holding in *Wisconsin Power and Light Co. v. Public Service Commission*[53] that ". . . the predominant purpose underlying the public utilities law is the protection of the consuming public rather than the competing utilities." Regarding the Wisconsin Environmental Protection Act, the court stated:

1970) (Federal Insecticide, Fungicide, and Rodenticide Act); Citizen's Committee for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970) (Department of Transportation Act, The Hudson River Basin Compact Act).

48. 69 Wis. 2d at 7, 8, 230 N.W.2d at 247.

49. 69 Wis. 2d at 14, 230 N.W.2d at 250.

50. Certain sections of WIS. STAT. ch. 196 (1973) charge every public utility with the responsibility of furnishing adequate and not insufficient service to customers.

51. WIS. LAWS 1971, ch. 274, § 1. WED also attempted to argue that its interest was legally recognized because of the navigable waters public trust doctrine as developed by the court in Daly v. Natural Resources Board, 60 Wis. 2d 208, 208 N.W.2d 839 (1973). But the court was unwilling to adopt a rule that "any allegation of harm to the environment raises, by implication, an allegation of harm to navigable waterways." 69 Wis. 2d at 15, 230 N.W.2d at 250.

52. 69 Wis. 2d at 7, 8, 230 N.W.2d at 247.

53. 45 Wis. 2d 253, 259, 172 N.W.2d 639, 641 (1969).

> [T]he preamble of an act is instructive of legislative intent, and as such it must be considered that the legislature intended to recognize the rights of Wisconsin citizens to be free from the harmful effects of a damaged environment where it can be shown that the person alleging injury resides in the area most likely to be affected by the agency action in question. Such is the situation in the instant case.[54]

The final issue raised was whether WED has standing to represent its members where the allegations of injury relate solely to the members' individual interests. The court resolved the issue by again adopting the federal view that if an organization, devoted to the protection and preservation of the environment, alleges facts sufficient to show that a member of that organization would have standing to bring the action in his own name, the organization itself has standing to sue in its own name.[55]

JOHN S. JUDE

MUNICIPAL LAW AND EMINENT DOMAIN

In the area of eminent domain, the Wisconsin Supreme Court, during its last term, modified its previous position on the issue of inverse condemnation in *Howell Plaza, Inc. v. State Highway Commission*.[1] Respondent Howell Plaza petitioned the trial court to force the State Highway Commission to proceed with the condemnation of Howell Plaza's property, claiming that the land was already "occupied" by the Commission. The supreme court pointed out that in order for such a request to succeed in the initial stages of the inverse condemnation proceeding, there must have been either a statutory occupation,[2] or a taking of the property such that compensation would be required under the terms of the Wisconsin Constitution.

The respondent alleged that the conduct of the Highway Commission in the various stages of plotting and planning the freeway, short of actual possession, was sufficient deprivation

54. 69 Wis. 2d at 18, 230 N.W.2d at 252.
55. *Id.* at 20, 230 N.W.2d at 253.

1. 66 Wis. 2d 720, 226 N.W.2d 185 (1975).
2. WIS. STAT. § 32.10 (1973).