



State of Wisconsin
2017 - 2018 LEGISLATURE

LRBs0323/1
MLJ/TJD/KRP:all

**ASSEMBLY SUBSTITUTE AMENDMENT 2,
TO ASSEMBLY BILL 773**

February 19, 2018 - Offered by Representative BORN.

1 **AN ACT** *to renumber* 802.06 (1), 804.01 (2) (e) 1., 893.93 (1) (a) and 893.93 (1) (b);
2 *to renumber and amend* 804.09 (2) (a); *to amend* 218.0125 (7), 218.0126,
3 628.46 (1), 801.01 (2), 804.01 (1), 804.01 (2) (a), 804.01 (2) (e) 2., 804.01 (2) (e)
4 3., 804.01 (3) (a) 2., 804.01 (4), 804.09 (2) (b) 1., 804.12 (1) (a), 893.53, 893.89 (1)
5 and 893.89 (3) (b); *to repeal and recreate* 803.08 (11); and *to create* 177.30
6 (6) and (7), 802.06 (1) (b), 804.01 (2) (am), 804.01 (2) (bg), 804.01 (2) (e) 1g.,
7 804.01 (8), 804.045, 804.08 (1) (am), 804.09 (2) (a) 3., 893.93 (1) (cm) and 893.93
8 (1m) (intro.) of the statutes; **relating to:** discovery of information in court
9 proceedings; procedural requirements relating to class actions; the statute of
10 limitations for certain civil actions; agreements by the secretary of revenue to

- 1 allow third-party audits and estimates based on statistical sampling related
2 to unclaimed property; and interest rates for overdue insurance claims.
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Analysis by the Legislative Reference Bureau

DISCOVERY PROCEDURES

This substitute amendment makes certain changes to discovery procedure in court proceedings. Under the substitute amendment, the court must limit the frequency or extent of discovery if it determines that the discovery sought is cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive or that the burden or expense of the proposed discovery outweighs its likely benefit or is not proportional to the claims and defenses at issue. In addition, the substitute amendment limits the type of electronic information that can be discovered such that a court may not require a party to keep or provide the following types of electronic information: data that cannot be retrieved without substantial additional programming or without transforming it into another form before search and retrieval can be achieved; backup data that are substantially duplicative of data that are more accessible elsewhere; legacy data remaining from obsolete systems that are unintelligible on successor systems; and any other data that are not available to the producing party in the ordinary course of business and that the party identifies as not reasonably accessible because of undue burden or cost.

The substitute amendment also creates a mandatory disclosure requirement that requires a party, without awaiting a discovery request, to disclose any agreement under which any person, other than an attorney who is permitted to charge a contingent fee for representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action.

CLASS ACTIONS

In December 2017, the supreme court issued an order that creates detailed procedures relating to class actions where previously Wisconsin had few procedural requirements relating to class actions. The procedures implemented in the order closely track the federal procedures for filing and maintaining a class action. This substitute amendment amends certain aspects of appellate procedure for a class action.

STATUTE OF LIMITATIONS

Under current law, the statute of limitations for an action for injury to character is six years. Under the substitute amendment, the statute of limitations is shortened to three years.

Under current law, the statute of limitations for an action for injury resulting from improvements to real property is ten years. Under the substitute amendment, the statute of limitations is shortened to seven years.

Under current law, the statute of limitations for an action upon a liability created by statute when a different limitation is not prescribed by law and for an

action for relief on the ground of fraud is six years. Under the substitute amendment, the statute of limitations is shortened to three years.

THIRD-PARTY TAX AUDITS

This substitute amendment prohibits the secretary of revenue from entering into an agreement to allow a person to engage in an audit on a contingent fee basis of another person's documents or records in order to administer the unclaimed property law or to purchase information arising from the audit, except for information received from the federal government. However, if the person whose documents or records are audited is not domiciled in this state, the secretary may enter into such a contingent fee agreement if the amount of the contingent fee does not exceed 12 percent of the total amount of unclaimed property that is disclosed by the audit.

The substitute amendment also prohibits the secretary from entering into an agreement as part of an effort to administer the unclaimed property law that allows a person engaging in an audit of another person's documents or records to use statistical sampling to estimate the liability of that person unless that person consents to the use of an estimate.

TIMELY PAYMENT OF CLAIMS

This substitute amendment changes the interest rate that an insurer must pay for overdue insurance claims from 12 percent to 7.5 percent. Current law requires an insurer to promptly pay every insurance claim and, generally, a claim is considered overdue if the claim is not paid within 30 days after the insurer has written notice of the fact and amount of a covered loss.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

- 1 **SECTION 1.** 177.30 (6) and (7) of the statutes are created to read:
- 2 177.30 **(6)** (a) Except as provided in pars. (b) and (c), the administrator may not
- 3 enter into a contract or other agreement to allow any person to engage in an audit
- 4 on a contingent fee basis of another person's documents or records as part of an effort
- 5 to administer this chapter or to purchase information or documents arising from the
- 6 audit.
- 7 (b) If a person whose documents or records are audited is not domiciled in this
- 8 state, the administrator may enter into a contract or agreement described under par.
- 9 (a) related to the person if the amount of the contingent fee under the contract or

1 agreement does not exceed 12 percent of the total amount of property reportable and
2 deliverable under this chapter that is disclosed by the audit.

3 (c) This subsection does not apply to information received from the federal
4 government.

5 (7) The administrator may not enter into a contract or other agreement as part
6 of an effort to administer this chapter that allows a person that is engaging in an
7 audit of another person's documents or records to use statistical sampling to estimate
8 the other person's liability unless the other person consents to the use of an estimate.

9 **SECTION 2.** 218.0125 (7) of the statutes is amended to read:

10 218.0125 (7) A claim made by a franchised motor vehicle dealer for
11 compensation under this section shall be either approved or disapproved within 30
12 days after the claim is submitted to the manufacturer, importer or distributor in the
13 manner and on the forms the manufacturer, importer or distributor reasonably
14 prescribes. An approved claim shall be paid within 30 days after its approval. If a
15 claim is not specifically disapproved in writing or by electronic transmission within
16 30 days after the date on which the manufacturer, importer or distributor receives
17 it, the claim shall be considered to be approved and payment shall follow within 30
18 days. A manufacturer, importer or distributor retains the right to audit claims for
19 a period of one year after the date on which the claim is paid and to charge back any
20 amounts paid on claims that are false or unsubstantiated. If there is evidence of
21 fraud, this subsection does not limit the right of the manufacturer to audit for longer
22 periods and charge back for any fraudulent claim, subject to the limitations period
23 under s. 893.93 (1) (b) (cm).

24 **SECTION 3.** 218.0126 of the statutes is amended to read:

1 **218.0126 Promotional allowances.** A claim made by a franchised motor
2 vehicle dealer for promotional allowances or other incentive payments shall be either
3 approved or disapproved within 30 days after the claim is submitted to the
4 manufacturer, importer or distributor in the manner and on the forms the
5 manufacturer, importer or distributor reasonably prescribes. An approved claim
6 shall be paid within 30 days after its approval. If a claim is not specifically
7 disapproved in writing or by electronic transmission within 30 days after the date
8 on which the manufacturer, importer or distributor receives it, the claim shall be
9 considered to be approved and payment shall follow within 30 days after approval.
10 A manufacturer, importer or distributor retains the right to audit a claim for a period
11 of 2 years after the date on which the claim is paid and to charge back any amounts
12 paid on claims that are false or unsubstantiated. If there is evidence of fraud, this
13 section does not limit the right of the manufacturer to audit for longer periods and
14 charge back for any fraudulent claim, subject to the limitations period under s.
15 893.93 (1) ~~(b)~~ (cm).

16 **SECTION 4.** 628.46 (1) of the statutes is amended to read:

17 **628.46 (1)** Unless otherwise provided by law, an insurer shall promptly pay
18 every insurance claim. A claim shall be overdue if not paid within 30 days after the
19 insurer is furnished written notice of the fact of a covered loss and of the amount of
20 the loss. If such written notice is not furnished to the insurer as to the entire claim,
21 any partial amount supported by written notice is overdue if not paid within 30 days
22 after such written notice is furnished to the insurer. Any part or all of the remainder
23 of the claim that is subsequently supported by written notice is overdue if not paid
24 within 30 days after written notice is furnished to the insurer. Any payment shall
25 not be deemed overdue when the insurer has reasonable proof to establish that the

1 insurer is not responsible for the payment, notwithstanding that written notice has
2 been furnished to the insurer. For the purpose of calculating the extent to which any
3 claim is overdue, payment shall be treated as being made on the date a draft or other
4 valid instrument which is equivalent to payment was placed in the U.S. mail in a
5 properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.
6 All overdue payments shall bear simple interest at the rate of ~~12~~ 7.5 percent per year.

7 **SECTION 5.** 801.01 (2) of the statutes is amended to read:

8 801.01 (2) SCOPE. Chapters 801 to 847 govern procedure and practice in circuit
9 courts of this state in all civil actions and special proceedings whether cognizable as
10 cases at law, in equity or of statutory origin except where different procedure is
11 prescribed by statute or rule. Chapters 801 to 847 shall be construed, administered,
12 and employed by the court and the parties to secure the just, speedy and inexpensive
13 determination of every action and proceeding.

14 **SECTION 6.** 802.06 (1) of the statutes is renumbered 802.06 (1) (a).

15 **SECTION 7.** 802.06 (1) (b) of the statutes is created to read:

16 802.06 (1) (b) Upon the filing of a motion to dismiss under sub. (2) (a) 6., a
17 motion for judgment on the pleadings under sub. (3), or a motion for more definite
18 statement under sub. (5), all discovery and other proceedings shall be stayed for a
19 period of 180 days after the filing of the motion or until the ruling of the court on the
20 motion, whichever is sooner, unless the court finds good cause upon the motion of any
21 party that particularized discovery is necessary.

22 **SECTION 8.** 803.08 (11) of the statutes, as affected by 2017 Supreme Court
23 Order 17-03, is repealed and recreated to read:

24 803.08 (11) INTERLOCUTORY APPEAL OF CLASS CERTIFICATION. (a) When
25 practicable after the commencement of an action brought as a class action, the court

1 shall determine by order whether it is to be so maintained. If the court finds that the
2 action should be maintained as a class action, it shall certify the action accordingly
3 on the basis of a written decision setting forth all reasons why the action may be
4 maintained and describing all evidence in support of the determination. An order
5 under this subsection may be altered, amended, or withdrawn at any time before the
6 decision on the merits. The court may direct appropriate notice to the class.

7 (b) An appellate court shall hear an appeal of an order granting or denying class
8 action certification, or denying a motion to decertify a class action, if a notice of
9 appeal is filed within 14 days after entry of the order. During the pendency of an
10 appeal under this subsection, all discovery and other proceedings shall be stayed,
11 except that the trial court shall retain sufficient jurisdiction over the case to consider
12 and implement a settlement of the action if a settlement is reached between the
13 parties.

14 **SECTION 9.** 804.01 (1) of the statutes is amended to read:

15 804.01 (1) DISCOVERY METHODS. Parties may obtain discovery by one or more
16 of the following methods: depositions upon oral examination or written questions;
17 written interrogatories; production of documents or things or permission to enter
18 upon land or other property, for inspection and other purposes; physical and mental
19 examinations; and requests for admission. Unless the court orders otherwise under
20 sub. (3), and except as provided in ~~s. ss. 804.015, 804.045, 804.08 (1) (am), and 804.09,~~
21 the frequency of use of these methods is not limited.

22 **SECTION 10.** 804.01 (2) (a) of the statutes is amended to read:

23 804.01 (2) (a) *In general.* Parties may obtain discovery regarding any
24 ~~nonprivileged matter, not privileged, which that~~ is relevant to the subject matter
25 ~~involved in the pending action, whether it relates to the~~ any party's claim or defense

1 ~~of the party seeking discovery or to the claim or defense of any other party, including~~
2 ~~the existence, description, nature, custody, condition and location of any books,~~
3 ~~documents, or other tangible things and the identity and location of persons having~~
4 ~~knowledge of any discoverable matter. It is not ground for objection that the~~
5 ~~information sought will be inadmissible at the trial if the information sought appears~~
6 ~~reasonably calculated to lead to the discovery of admissible evidence and~~
7 ~~proportional to the needs of the case, considering the importance of the issues at~~
8 ~~stake in the action, the amount in controversy, the parties' relative access to relevant~~
9 ~~information, the parties' resources, the importance of the discovery in resolving the~~
10 ~~issues, and whether the burden or expense of the proposed discovery outweighs its~~
11 ~~likely benefit. Information within this scope of discovery need not be admissible in~~
12 ~~evidence to be discoverable.~~

13 **SECTION 11.** 804.01 (2) (am) of the statutes is created to read:

14 804.01 (2) (am) *Limitations.* Upon the motion of any party, the court shall limit
15 the frequency or extent of discovery if it determines that one of the following applies:

16 1. The discovery sought is cumulative or duplicative, or can be obtained from
17 some other source that is more convenient, less burdensome, or less expensive.

18 2. The burden or expense of the proposed discovery outweighs its likely benefit
19 or is not proportional to the claims and defenses at issue considering the needs of the
20 case, the amount in controversy, the parties' resources, the complexity and
21 importance of the issues at stake in the action, and the importance of discovery in
22 resolving the issues.

23 **SECTION 12.** 804.01 (2) (bg) of the statutes is created to read:

24 804.01 (2) (bg) *Third party agreements.* Except as otherwise stipulated or
25 ordered by the court, a party shall, without awaiting a discovery request, provide to

1 the other parties any agreement under which any person, other than an attorney
2 permitted to charge a contingent fee representing a party, has a right to receive
3 compensation that is contingent on and sourced from any proceeds of the civil action,
4 by settlement, judgment, or otherwise.

5 **SECTION 13.** 804.01 (2) (e) 1. of the statutes is renumbered 804.01 (2) (e) 1r.

6 **SECTION 14.** 804.01 (2) (e) 1g. of the statutes is created to read:

7 804.01 (2) (e) 1g. A party is not required to provide discovery of any of the
8 following categories of electronically stored information absent a showing by the
9 moving party of substantial need and good cause, subject to a proportionality
10 assessment under par. (am) 2.:

11 a. Data that cannot be retrieved without substantial additional programming
12 or without transforming it into another form before search and retrieval can be
13 achieved.

14 b. Backup data that are substantially duplicative of data that are more
15 accessible elsewhere.

16 c. Legacy data remaining from obsolete systems that are unintelligible on
17 successor systems.

18 d. Any other data that are not available to the producing party in the ordinary
19 course of business and that the party identifies as not reasonably accessible because
20 of undue burden or cost. In response to a motion to compel discovery or for a
21 protective order, the party from whom discovery is sought is required to show that
22 the information is not reasonably accessible because of undue burden or cost. If that
23 showing is made, the court may order discovery from such sources only if the
24 requesting party shows good cause, considering the limitations of par. (am). The
25 court may specify conditions for the discovery.

1 **SECTION 15.** 804.01 (2) (e) 2. of the statutes is amended to read:

2 804.01 (2) (e) 2. If a party fails or refuses to confer as required by subd. 1. 1r.,
3 any party may move the court for relief under s. 804.12 (1).

4 **SECTION 16.** 804.01 (2) (e) 3. of the statutes is amended to read:

5 804.01 (2) (e) 3. If after conferring as required by subd. 1. 1r., any party objects
6 to any proposed request for discovery of electronically stored information or objects
7 to any response under s. 804.08 (3) proposing the production of electronically stored
8 information, the objecting party may move the court for an appropriate order under
9 sub. (3).

10 **SECTION 17.** 804.01 (3) (a) 2. of the statutes is amended to read:

11 804.01 (3) (a) 2. That the discovery may be had only ~~on specified~~ by specifying
12 ~~terms and conditions, including a designation of the time or~~ and place or the
13 allocation of expenses, for the disclosure or discovery;

14 **SECTION 18.** 804.01 (4) of the statutes is amended to read:

15 804.01 (4) SEQUENCE AND TIMING OF DISCOVERY. Unless the parties stipulate or
16 the court upon motion, for the convenience of parties and witnesses and in the
17 interests of justice, orders otherwise, methods of discovery may be used in any
18 sequence and the fact that a party is conducting discovery, whether by deposition or
19 otherwise, shall not operate to delay any other party's discovery.

20 **SECTION 19.** 804.01 (8) of the statutes is created to read:

21 804.01 (8) PRESERVATION OF ELECTRONICALLY STORED INFORMATION. Absent a
22 court order demonstrating that the requesting party has a substantial need for
23 discovery of the electronically stored information requested, a party is not required
24 to preserve the following categories of electronically stored information:

1 (a) Data that cannot be retrieved without substantial additional programming
2 or without transforming it into another form before search and retrieval can be
3 achieved.

4 (b) Backup data that are substantially duplicative of data that are more
5 accessible elsewhere.

6 (c) Legacy data remaining from obsolete systems that are unintelligible on
7 successor systems.

8 (d) Any other data that are not available to the producing party in the ordinary
9 course of business.

10 **SECTION 20.** 804.045 of the statutes is created to read:

11 **804.045 Limits on quantity of depositions.** A party shall be limited, unless
12 otherwise stipulated or ordered by the court in a manner consistent with s. 804.01
13 (2), to a reasonable number of depositions, not to exceed 10 depositions, none of which
14 may exceed 7 hours in duration.

15 **SECTION 21.** 804.08 (1) (am) of the statutes is created to read:

16 804.08 (1) (am) A party shall be limited, unless otherwise stipulated or ordered
17 by the court in a manner consistent with s. 804.01 (2), to a reasonable number of
18 requests, not to exceed 25 interrogatories, including all subparts.

19 **SECTION 22.** 804.09 (2) (a) of the statutes is renumbered 804.09 (2) (a) (intro.)
20 and amended to read:

21 804.09 (2) (a) (intro.) Except as provided in s. 804.015, the request may, without
22 leave of court, be served upon the plaintiff after commencement of the action and
23 upon any other party with or after service of the summons and complaint upon that
24 party, and shall meet all of the following criteria:

1 1. The request shall describe with reasonable particularity each item or
2 category of items to be inspected.

3 2. The request shall specify a reasonable time, place, and manner of making
4 the inspection and performing the related acts.

5 4. The request may specify the form or forms in which electronically stored
6 information is to be produced.

7 **SECTION 23.** 804.09 (2) (a) 3. of the statutes is created to read:

8 804.09 (2) (a) 3. The request shall be limited, unless otherwise stipulated or
9 ordered by the court in a manner consistent with s. 804.01 (2), to a reasonable time
10 period, not to exceed 5 years prior to the accrual of the cause of action. The limitation
11 in this subdivision does not apply to requests for patient health care records, as
12 defined in s. 146.81 (4), vocational records, educational records, or any other similar
13 records.

14 **SECTION 24.** 804.09 (2) (b) 1. of the statutes is amended to read:

15 804.09 (2) (b) 1. The party upon whom the request is served shall serve a
16 written response within 30 days after the service of the request, except that a
17 defendant may serve a response within 45 days after service of the summons and
18 complaint upon that defendant. The court may allow a shorter or longer time. The
19 response shall state, with respect to each item or category, that inspection and
20 related activities will be permitted as requested, unless or state with specificity the
21 grounds for objecting to the request is objected to, in which event the reasons for
22 objection shall be stated. If objection is made to part of an item or category, the part
23 shall be specified. The response may state an objection to a requested form for
24 producing electronically stored information. If the responding party objects to a
25 requested form, or if no form was specified in the request, the party shall state the

1 form or forms it intends to use. The responding party may state that it will produce
2 copies of documents or of electronically stored information instead of permitting
3 inspection. The production shall be completed no later than the time for inspection
4 specified in the request or another reasonable time specified in the request or
5 another reasonable time specified in the response.

6 **SECTION 25.** 804.12 (1) (a) of the statutes is amended to read:

7 804.12 (1) (a) *Motion.* If a deponent fails to answer a question propounded or
8 submitted under s. 804.05 or 804.06, or a corporation or other entity fails to make a
9 designation under s. 804.05 (2) (e) or 804.06 (1), or a party fails to answer an
10 interrogatory submitted under s. 804.08, or if a party, in response to a request for
11 inspection submitted under s. 804.09, fails to produce documents or fails to respond
12 that inspection will be permitted as requested or fails to permit inspection as
13 requested, the discovering party may move for an order compelling an answer, or a
14 designation, or an order compelling inspection in accordance with the request. When
15 taking a deposition on oral examination, the proponent of the question may complete
16 or adjourn the examination before he or she applies for an order. If the court denies
17 the motion in whole or in part, it may make such protective order as it would have
18 been empowered to make on a motion made pursuant to s. 804.01 (3).

19 **SECTION 26.** 893.53 of the statutes is amended to read:

20 **893.53 Action for injury to character or other rights.** An action to recover
21 damages for an injury to the character or rights of another, not arising on contract,
22 shall be commenced within ~~6~~ 3 years after the cause of action accrues, except where
23 a different period is expressly prescribed, or be barred.

24 **SECTION 27.** 893.89 (1) of the statutes is amended to read:

1 893.89 (1) In this section, “exposure period” means the ~~10~~ 7 years immediately
2 following the date of substantial completion of the improvement to real property.

3 **SECTION 28.** 893.89 (3) (b) of the statutes is amended to read:

4 893.89 (3) (b) If, as the result of a deficiency or defect in an improvement to real
5 property, a person sustains damages during the period beginning on the first day of
6 the ~~8th~~ 5th year and ending on the last day of the ~~10th~~ 7th year after the substantial
7 completion of the improvement to real property, the time for commencing the action
8 for the damages is extended for 3 years after the date on which the damages occurred.

9 **SECTION 29.** 893.93 (1) (a) of the statutes is renumbered 893.93 (1m) (a).

10 **SECTION 30.** 893.93 (1) (b) of the statutes is renumbered 893.93 (1m) (b).

11 **SECTION 31.** 893.93 (1) (cm) of the statutes is created to read:

12 893.93 (1) (cm) An action under s. 218.0125 (7) or 218.0126.

13 **SECTION 32.** 893.93 (1m) (intro.) of the statutes is created to read:

14 893.93 (1m) (intro.) The following actions shall be commenced within 3 years
15 after the cause of action accrues or be barred:

16 **SECTION 33. Initial applicability.**

17 (1) **THIRD-PARTY AUDITS.** The treatment of section 177.30 (6) of the statutes first
18 applies to a contract or agreement that is entered into, renewed, or modified on the
19 effective date of this subsection.

20 (2) **DISCOVERY PROCEDURES.** The treatment of sections 802.06 (1) (b), 804.01 (1),
21 (2) (am), (bg), and (e) 1g., (3) (a) 2., (4), and (8), 804.045, 804.08 (1) (am), 804.09 (2)
22 (b) 1., and 804.12 (1) (a) of the statutes, the renumbering and amendment of section
23 804.09 (2) (a) of the statutes, and the creation of section 804.09 (2) (a) 3. of the
24 statutes first apply to actions that are filed on July 1, 2018.

