



## WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

**2017 Assembly Bill 773**

**Senate  
Amendment 1**

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2017 Assembly Bill 773 (the bill), as passed by the Assembly, makes changes relating to discovery, class action lawsuits, audits on unclaimed property, interest on overdue payments by insurers, and statutes of limitations.

### **ASSEMBLY BILL 773, AS AMENDED BY THE ASSEMBLY**

#### **Audits on Unclaimed Property**

Under current law, the Department of Revenue (DOR) has the authority to examine the records of any person to determine whether the person has complied with the unclaimed property law. If an examination of a person's records results in the disclosure of property reportable and deliverable, DOR may assess certain costs and penalties.

The bill prohibits DOR from entering into a contract or other agreement to allow a person to engage in an audit on a contingent fee basis of another person's documents or records as part of an effort to administer the unclaimed property law or purchase information or documents arising from the audit. An exception exists for circumstances in which the person whose documents or records are audited is not domiciled in this state. In those cases, DOR may enter into a contract or agreement on a contingent fee basis if the amount of the contingent fee does not exceed 12% of the total amount of the property reportable and deliverable that is disclosed by the audit.

Also, the bill provides that DOR may not enter into a contract as part of an effort to administer the unclaimed property law that allows a person that is engaging in an audit of another person's documents or records to use statistical sampling to estimate the other person's liability unless the other person consents to the use of an estimate.

### **Interest Rate on Overdue Insurance Payments**

Under current law, unless otherwise provided by law, an insurer must pay insurance claims within 30 days after the insurer is furnished written notice of the fact of a covered loss and loss amount. However, any payment is not deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment. Overdue payments must bear simple interest at the rate of 12% per year.

The bill changes the interest rate applicable to overdue payments to 7.5% per year.

### **Class Actions**

The bill requires a court to provide a written decision allowing maintenance of a class action and further requires appellate courts to hear timely appeals on orders granting or denying class action certifications. This provision takes effect on July 1, 2018.

### **Discovery**

#### **Scope of Discovery**

The bill creates a general scope provision governing discovery, which aligns closely with the federal rules of civil procedure. Specifically, parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

The bill further requires the court, upon the motion of any party, to limit the frequency or extent of discovery if the court determines that one of the following applies:

- The discovery sought is cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.
- The burden or expense of the proposed discovery outweighs its likely benefit or is not proportional to the claims and defenses at issue considering the needs of the case, the amount in controversy, the parties' resources, the complexity and importance of the issue at stake in the action, and the importance of discovery in resolving the issues.

The bill also allows the court, when ruling on a motion for a protective order, to order that discovery may be had only on specified terms and conditions, including an allocation of expenses.

#### **Mandatory Disclosures**

The bill requires a party to provide the other parties any agreement in which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action.

Unless otherwise stipulated or ordered by the court, this disclosure is required without awaiting a discovery request.

### **Automatic Stay of Discovery**

The bill provides that upon the filing of a motion to dismiss, a motion for judgment on the pleadings, or a motion for more definite statement, all discovery and other proceedings must be stayed for a period of 180 days after the filing of the motion or until the court's ruling on the motion, whichever is sooner, unless the court finds good cause upon the motion of any party that particularized discovery is necessary.

### **Production of Certain Categories of Electronically Stored Information**

The bill provides that, absent a showing by the moving party of substantial need and good cause, subject to an assessment of whether the burden of the proposed discovery outweighs its likely benefit, a party is not required to provide discovery of any of the following categories of electronically stored information (ESI):

- 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.
- 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. In response to a motion to compel discovery or for a protective order, the party from whom discovery is sought is required to show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may generally order discovery from such sources only if the requesting party shows good cause.

### **Preservation of Certain Categories of Electronically Stored Information**

Under the bill, absent a court order demonstrating that the requesting party has a substantial need for discovery of the ESI requested, a party is not required to preserve the following categories of ESI:

- 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.
- Any other data that are not available to the producing party in the ordinary course of business.

### **Limitations on Discovery Methods**

The bill creates the following limitations on the specified methods of discovery, unless otherwise stipulated or ordered by the court:

- Twenty-five interrogatories, including all subparts.
- Ten depositions, none of which may exceed seven hours in duration.
- Requests for production of documents for a reasonable time period of not more than five years prior to the accrual of the cause of action, except this limitation does not apply to requests for patient health care records, vocational records, educational records, or any other similar records.

### **Initial Applicability**

The provisions related to discovery first apply to actions that are filed on July 1, 2018.

## **Statutes of Limitations**

### **Limitation on an Action for Injury to Character or Other Rights**

Under current law, an action to recover damages for an injury to the character or rights of another, not arising on contract, must be commenced within six years after the cause of action accrues, except where a different period is expressly prescribed, or the action is barred. The bill reduces the period from six to three years.

### **Limitation on an Action for Fraud**

Under current law, an action for relief on the ground of fraud must be commenced within six years after the cause of action accrues or the action is barred. The bill reduces the period from six to three years, but retains the six-year period for certain claims concerning warranty reimbursements or promotional allowances under laws governing motor vehicle dealers, if there is evidence of fraud.

### **Limitation When No Other Limitation Provided**

Under current law, when a different limitation is not prescribed by law, an action upon a liability created by statute must be commenced within six years after the cause of action accrues or the action is barred. The bill reduce the period from six to three years.

## **Statute of Repose**

Under current law, subject to certain exceptions, after the end of the “exposure period” no cause of action may accrue and no action may be commenced against the owner or occupier of property or against any person involved in the improvement to real property to recover damages for any injuries arising out of certain types of acts. Current law defines the “exposure period” as the 10 years immediately following the date of substantial completion of the improvement to real property.

However, current law also provides that if, as a result of a deficiency or defect in an improvement to real property, a person sustains damages during the period beginning on the first day of the eighth year and ending on the last day of the 10th year after the substantial completion of the improvement to real property, the time for commencing the action for the damages is extended for three years after the date on which the damages occurred.

The bill defines the exposure period as the seven years immediately following the date of substantial completion of the improvement to real property, and allows for a three-year extension if a person sustains damages during the period beginning on the first day of the fifth year and ending on the last day of the seventh year after the substantial completion of the improvement to real property.

## **SENATE AMENDMENT 1**

Senate Amendment 1 removes the provision that does not require a party to preserve certain categories of ESI, absent a court order demonstrating that the requesting party has a substantial need for discovery of the ESI requested.

## **BILL HISTORY**

### **Assembly Action**

Representative Born offered Assembly Substitute Amendment 2 on February 19, 2018. On February 20, 2018, the Assembly Committee on Judiciary recommended adoption of the substitute amendment on a vote of Ayes, 6; Noes, 3; and passage of Assembly Bill 773, as amended, on a vote of Ayes, 6; Noes, 3.

On February 22, 2018, the Assembly adopted Assembly Substitute Amendment 2 on voice votes and passed Assembly Bill 773, as amended, on voice votes.

### **Senate Action**

Senator Wanggaard offered Senate Amendment 1 on March 12, 2018. On March 14, 2018, the Senate Committee on Judiciary and Public Safety recommended adoption of Senate Amendment 1 on a vote of Ayes, 4; Noes, 1; and concurrence of Assembly Bill 773, as amended, on a vote of Ayes, 3; Noes, 2.

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