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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2005-06
(session year)

Senate
(Assembly, Senate or Joint)

Committee on Judiciary, Corrections and Privacy...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (July 2012)

WISCONSIN FARM BUREAU® MEMO

TO: STATE SENATOR DAVE ZIEN
REPRESENTATIVE SCOTT SUDER

FROM: PAUL ZIMMERMAN
EXECUTIVE DIRECTOR OF GOVERNMENTAL RELATIONS

SUBJECT: NUISANCE SUIT LEGISLATION

DATE: OCTOBER 5, 2005

The Wisconsin Farm Bureau Federation (WFBF) supports your efforts to limit the Attorney General's authority to pursue nuisance suits. This legislation is needed to ensure that Wisconsin businesses that are following all state and federal laws and regulations cannot be sued as a nuisance.

As you are well aware, the Attorney General and out-of-state landowners filed a nuisance suit against a cranberry grower in Sawyer County, even though the cranberry grower has not been cited for any environmental violations by any regulatory agency. The Attorney General's decision to file this nuisance suit against a Wisconsin farmer has greatly alarmed the agricultural community in Wisconsin. Her action is also a threat to Wisconsin's Right to Farm Law that provides nuisance lawsuit protection for farmers who are using normal farming practices.

Farm families across the state are concerned that they too could be sued by the Attorney General for being a nuisance for just for farming their land. This fear has dampened farmers' views on the future of agriculture in Wisconsin.

Your legislation is needed to restore faith in Wisconsin's business community that if they are following the state's rules and regulations, they will not be sued. The Attorney General should not use litigation to circumvent Wisconsin's regulatory process.

Thank you for your leadership on this important issue. WFBF looks forward to working with you on this legislation as it moves through the legislative process. If you have any questions or comments, please contact me at 608-828-5708.

NFIB
The Voice of Small Business

WISCONSIN

Memorandum

To: **Senator David Zien**

FROM: **Bill G. Smith, State Director**

DATE: **October 6, 2005**

RE: **Nuisance Lawsuit Abuse**

Recent studies by NFIB's Research Foundation show small business employers devote considerable time, money, and attention to liability issues affecting their business, which, of course, impacts the overall economy of Wisconsin. In fact, survey studies indicate small business owners (47 percent) are very concerned they will be dragged into a lawsuit where others are responsible and believe they have little or no control over the possibility of being a defendant in a lawsuit.

These same small business owners are equally concerned over an activist attorney general who may target them even when no law or regulation has been violated.

We are grateful for the legislation you are introducing that will address the ability of the attorney general to bring "nuisance lawsuits" against the owners of our state's small businesses.

There is always a level of uncertainty associated with owning and operating a small business. We clearly don't need the additional uncertainty of an activist attorney general being able to file lawsuits when there is no violation of the law or noncompliance with a regulation.

Whether it originates in the public sector with the Office of the Attorney General or with lawyers in the private sector, the cost of lawsuits can have a devastating impact on Wisconsin's small business community.

Again, thank you for introducing this important legislation and your leadership to prevent lawsuit abuse.

National Federation of Independent Business – Wisconsin
10 East Doty Street, Suite 201 ♦ Madison, WI 53703 ♦ 608/255-6083 ♦ Fax 608/255-4909 ♦ www.nfib.com/WI

Dedicated to Preserving and Promoting the American Dream

MEMORANDUM

TO: State Senator Dave Zien

FROM: Jerry Deschane

DATE: September 28, 2005

RE: Legislation to curb nuisance lawsuit abuse

Thank you for taking the lead in addressing this important issue. The Wisconsin Builders Association believes that nuisance lawsuit abuses must be controlled for two reasons: 1) so that businesses operating in or considering Wisconsin know what the rules are, and 2) to preserve regulatory reform gains of the last legislative session.

Wisconsin builders and developers "play by the rules." Our members spend thousands of dollars hiring engineers, environmental consultants, and architects to make sure that the homes built in Wisconsin comply with all of the state's many rules. And that's not easy. As we all know, Wisconsin is a hyper-regulated state. Between local, federal, and state regulations, the Badger state can look like a red tape maze to new businesses. Nonetheless, businesses generally do a very good job of staying within those boundaries.

Allowing an activist Attorney General to sue a citizen or businessperson who hasn't violated the law throws the state's economy into chaos. What *are* the rules? What environmental standard should we design to, if the Attorney General can challenge the outcome, no matter how positive? How can we expect a business to locate jobs here if we cannot assure them that our Attorney General won't sue them tomorrow over a perceived shortcoming that is not covered by any law or regulation?

Last session, the legislature cast a bipartisan vote adopting the Jobs Creation Act, (Wisconsin Act 118), one of the most significant regulatory reform bills passed in Wisconsin in recent memory. Unfortunately, that work could be rendered meaningless by one nuisance lawsuit. Is the state's Green Tier law irrelevant, if any charter signed by the DNR can be challenged by the Attorney General?

These concerns are not hypothetical. The Attorney General's decision to sue the Zawistowski Farm in Sawyer County under a novel nuisance theory would make irrelevant the clear standards and processes written into Wisconsin's navigable water law by Act 118. The water law governs thousands of development projects that will be at risk under this new style of government second-guessing.

The democratic process allows the Wisconsin Legislature to pass environmental laws as tough as any in the world, if it chooses. Our industry, and other industries in Wisconsin, will comply with those legally-adopted rules. We cannot, however, comply with rules that do not exist, or that are written down only in the campaign manifesto of an activist state official.

Wisconsin Manufacturers & Commerce

REPRESENTING WISCONSIN BUSINESS

Wisconsin Manufacturers' Association · 1911
Wisconsin Council of Safety · 1923
Wisconsin State Chamber of Commerce · 1929

James S. Haney
President

James A. Buchen
Vice President
Government Relations

James R. Morgan
Vice President
Education and Programs

Michael R. Shoys
Vice President
WMC Service Corp.

TO: Interested Parties

FROM: Scott Manley, Director
Environmental Policy

DATE: October 6, 2005

RE: Fairness in Litigation Act

Wisconsin Manufacturers & Commerce strongly supports Senator Dave Zien and Representative Scott Suder's proposal to place reasonable limits on the authority of the Attorney General to litigate nuisance lawsuits. We believe their bill is an appropriate response to a disturbing trend on the part of Attorney General Peg Lautenschlager to use litigation as a means to rewrite the law.

In addition to being costly to defend, slapping law-abiding businesses with frivolous nuisance lawsuits sends the wrong message for job creation.

The most recent example of the Attorney General's abuse of nuisance lawsuits involves a multi-state case she filed against utilities relating to carbon dioxide (CO_2) emissions. The lawsuit was designed to force five major utilities to reduce CO_2 emissions, including a utility in Wisconsin. Despite the fact that the EPA has stated the Clean Air Act does not allow regulation of CO_2 emissions, and Congress has specifically rejected the idea of regulating CO_2, Lautenschlager joined the nuisance lawsuit hoping that a judge would rewrite the law to her liking.

WMC strongly believes that the Constitution reserves lawmaking authority for the legislative branch of government, and Lautenschlager's disagreement with a law does not give her the right to sue law-abiding business in an effort to change it. Fortunately, the judge presiding over the utility case agreed, and dismissed the Attorney General's lawsuit last month.

In the decision throwing Lautenschlager's case out of court, Judge Loretta Preska stated that the Attorney General's lawsuit sought to impose changes in the law by ***"judicial fiat,"*** and that the policy questions presented in the litigation were more appropriately ***"consigned to the political branches, not the Judiciary."***

In other words, Lautenschlager and the attorneys general were asking the courts to do what no legislative body or executive had ever approved. ***That is a chilling abuse of power and needs to be stopped in Wisconsin in order to protect the regulatory certainty industry needs to operate in our state.***

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www.wmc.org

The proposed bill is consistent with the ruling in this case because it correctly recognizes the Legislature's constitutional role as the lawmaking branch of government.

Setting limits on the authority of the Attorney General to circumvent the Legislature in the lawmaking process is an important backstop in our system of checks and balances in government. We have a legislative process that involves public input for a reason, and Lautenschlager's effort to make laws in a courtroom through nuisance lawsuits denies Wisconsin citizens their right to participate in the lawmaking process.

In addition to being fundamentally unfair, targeting nuisance lawsuits at businesses who are obeying the law sends the wrong message to prospective job providers.

Wisconsin will be less competitive than our neighboring states at attracting and maintaining jobs if employers know that the Attorney General may be looking over their shoulder to sue - even though they are obeying the law. The *Fairness in Litigation Act* addresses this job-killing practice by prohibiting the Attorney General from filing a nuisance lawsuit if the alleged activity is not in violation of a statute, rule, permit, or ordinance.

The *Fairness in Litigation Act* also addresses another abuse of our legal system by restricting the Attorney General from "piling-on" by litigating a case that a private party has already filed. Having to fend off legal attacks from two fronts creates needless but expensive layers of liability for Wisconsin job providers. Fairness dictates that the state's highest-ranking law enforcement officer should not leverage the Attorney General's considerable clout to advance the interests of private parties. For this reason, the bill requires the Attorney General to seek approval from the Governor or both houses of the legislature before "piling-on" a private lawsuit.

Finally, the bill recognizes the substantial cost businesses are forced to pay to defend themselves in nuisance cases, and requires that their attorney and expert witness fees be reimbursed if the Attorney General's lawsuit is unsuccessful.

WMC continues to advocate for maintaining a competitive jobs climate through limiting lawsuit abuse in the private sector, and we thank Senator Zien and Representative Suder for their important effort to rein-in lawsuit abuse in the *public sector*. We hope the legislature and Governor Doyle will recognize the importance of this bill to Wisconsin's ability to compete for jobs, and we urge passage of the *Fairness in Litigation Act* into law this session.

"We recognize the importance that this elected position has in being the chief law enforcement officer in this state," says Zien. "But when that law enforcement officer goes after the very people they are elected to protect, it's time to put some checks and balances in place."

Continued Suder: "Our legislation provides that balance, and recognizes the separation of powers that must exist between the branches of government. Legislators are elected to be law makers. The AG is elected to be the law enforcer. Our legislation provides the clarity between the two that is currently lacking."

Zien and Suder said hearings will be held on the legislation yet this fall.

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WISCONSIN LEAGUE OF CONSERVATION VOTERS

October 11, 2005 OCT 12 2005

Senator Dave Zien
Room 15 South
State Capitol
P.O. Box 7882
Madison, WI 53707-7882

RE: Formal Wisconsin Public Records Law Request Concerning LRB 2762/1, the Fairness in Litigation Act, and corresponding predecessor drafts of each, and drafting instructions.

Senator Zien:

The Wisconsin League of Conservation Voters is a 501(c)(4), non-partisan, non-profit conservation organization. We request all records related to LRB 2762/1, the Fairness in Litigation Act, and corresponding predecessor drafts of each, and drafting instructions.

Information should include, but not be limited to, correspondence, phone logs, emails, memoranda or any other documentation related to meetings, telephone calls, or summaries regarding interactions of you or your staff with lobbyists or other registered principles.

This request is submitted pursuant to Wisconsin's Open Records Law, sections 19.31 to 19.39, Wis. Stats. Under this law, any person may request a record from an authority who has custody of the record. See Sec. 19.32(3), Stats. A "record" is "any material on which written, drawn, printed . . . information is recorded or preserved . . . which has been created or is being kept by an authority." Sec. 19.32(2), Wis. Stats. Under this definition, the above documents are clearly "records" that can be requested by any person.

As this request is in writing, we understand that the records or other response to this request must be submitted to us in writing. Please let us know of any applicable copying charges.

Sincerely,

Kerry Schumann
Executive Director
Wisconsin League of Conservation Voters

306 E. Wilson Street #2E, Madison, WI 53703 • Tel. (608) 661-0845 • Fax (608) 260-9799
info@conservationvoters.org • www.conservationvoters.org


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www.doj.state.wi.us

PEG LAUTENSCHLAGER
ATTORNEY GENERAL

NEWS RELEASE

For Immediate Release
October 20, 2005

For More Information Contact:
Kelly Kennedy 608/266-7876

ATTORNEY GENERAL LAUTENSCHLAGER: ZIEN/SUDER BILL DEPRIVES CITIZENS OF "LITIGATION FAIRNESS"

MADISON — Attorney General Peg Lautenschlager today strongly criticized new draft legislation aimed at gutting the rights of the citizens of Wisconsin by stripping away some of the most basic traditional protections the Attorney General is empowered to defend.

Lautenschlager called the bill, sponsored by Senator Dave Zien (R-Eau Claire) and Representative Scott Suder (R-Abbotsford), "an unprecedented attack on the fundamental rights of Wisconsin's consumers, property owners and taxpayers" and "a measure that seeks to undermine the very checks and balances upon which our democracy is founded."

On October 6, 2005, Zien and Suder held a news conference announcing their plans to introduce legislation, ludicrously dubbed the "Fairness in Litigation Act," and laid out their scheme to remove historic legal protections from citizens and undermine traditional Wisconsin law.

"This bill would cost Wisconsin citizens millions and millions of dollars as taxpayers and consumers. It does nothing more than take away the historic protections afforded our citizens to recover restitution from those who defraud consumers and guts laws that protect property owners and keep Wisconsin's natural resources safe," Lautenschlager said. "This absurd legislative proposal would prevent the Department of Justice from going to court to protect citizens against environmental pollution, overpriced prescription drugs and even Medicaid fraud."

The Zien-Suder proposal guts the powers of the Wisconsin Department of Justice (DOJ) to represent citizen and consumer interests in a court of law. The proposal would strip the Attorney General of the authority to file public nuisance lawsuits, prohibit the Attorney General from joining in multistate lawsuits without the approval of the Governor, and prevent the Attorney

General from intervening in a civil action unless directed to do so by the Governor or both houses of the Legislature. The Attorney General further would be precluded from suing any entity already subject to certain lawsuits.

Background:

Under the Zien-Suder Bill:
Multi-state lawsuits would be frustrated.

This bill would jeopardize the ability of the Department of Justice to join multi-state lawsuits which have recouped tens of millions of dollars for Wisconsin comsumers. The power of united state Attorneys General, democrat and republican alike, often persuades defendants to settle cases out of court and thus saves both time and taxpayer dollars which are consumed in long drawn out lawsuits.

Since the early 1990s, Wisconsin Department of Justice has recovered more than $22 million dollars through multi-state actions aimed at consumer fraud. Wisconsin taxpayers obtained over $9 million in penalties and more than $13 million in restitution to individual Wisconsin consumers since 1991. The Zien-Suder proposal would jeopardize Wisconsin citizens' share of these multi-state awards.

Under the Zien-Suder Bill:
Public nuisance actions to protect property owners would be frustrated.

According to long-established legal doctrine, a public nuisance is a violation of law. A public nuisance is defined as an injurious effect on the safety, health or morals of the public or use of property which works some substantial annoyance, inconvenience, or damage to the public generally, or the public that is exercising a public or common right. The bill would prevent the Attorney General from filing public nuisance lawsuits to obtain the same relief for citizens that the Attorney General obtained in the following cases:

- In the early 1970s, a construction company conducted unregulated pumping of groundwater, causing adjacent property owners' wells to dry up. The pumping caused the foundations of area homes to cave in. Property was rendered valueless. The Attorney General stepped in and sued the company to abate this public nuisance. In that case, the construction company tried to get the court to do what this bill attempts – to declare that the Attorney General has no legal standing to bring a nuisance action on behalf of the community of property owners damaged by the company's actions. The landmark decision by the Wisconsin Supreme Court in 1974 established the "reasonable use" doctrine of groundwater law, agreeing that a public nuisance is presented whenever someone unreasonably causes substantial harm to their neighbors by pumping groundwater without limit.

- The public nuisance law was again used in the 1980s to abate the effects of a huge chicken processing operation that produced 15 tons of manure a day. The accompanying

stench and flies caused neighboring property owners to become physically ill from the pungent, unbearable odor. After giving the corporation numerous opportunities to clean up the operation, the court finally ordered the operation shut down. Odors from such operations remain unregulated today and this bill would render the Attorney General powerless to do anything about them in the future.

Despite the bill's authors' claims to the contrary, not a single nuisance lawsuit brought by the Attorney General has been found to be frivolous.

- It should be noted that neither of the sponsors of this bill is able to cite one case in which a court has found that the Wisconsin Attorney General, Republican or Democrat, has filed a frivolous nuisance lawsuit.

- The legislators' claim that "organizations representing farmers, businesses, cranberry growers, realtors, developers, utilities, and others showed the lawmakers case after case where the current AG has overstepped her bounds and abused her power as an elected official" is an outright falsehood. Since the 1970s, Attorneys General have filed less than ten nuisance actions. None have been found to be frivolous.

Under the Zien-Suder Bill:
Medicaid fraud enforcement would be jeopardized.

In 1980, the U.S. Congress created Medicaid Fraud Control Units (MFCUs) in the offices of Attorneys General in each of the 50 states. Wisconsin's MFCU has been a national leader in this effort, recovering more than $11 million for Wisconsin taxpayers since 1994. These actions are often geared to protect our most frail and vulnerable citizens—older adults, the developmentally disabled, and those who require long-term specialized medical care. In some situations, the inability of the MFCU to act would result in continued suffering by or loss of life of patients in various residential care facilities. In one such case last year, the negligence in care delivery to patients at a nursing home in Chippewa Falls resulted in a $2.1 million settlement. Other cases involved the short-filling of prescriptions for indigent customers by Wal-Mart, resulting in a $20,421 recovery, the illegal marketing of feeding pumps, allowing for a recovery of more than $800,000, and the overcharging for prescription drugs by a number of pharmaceutical companies. The Zien-Suder bill would jeopardize the work of Wisconsin's MFCU and ignore the needs of Wisconsin's health care consumers and taxpayers.

Under the Zien-Suder Bill:
The constitutional independence of the Attorney General would be subverted.

Furthermore, this legislation would break with Wisconsin tradition and require permission from the Governor or both houses of the Legislature before the Attorney General could bring or participate in any legal action on behalf of the public. The Wisconsin Constitution and Wisconsin state law provide for an independently elected Attorney General with the authority to

bring public nuisance actions and to commence other actions on behalf of the public without seeking permission from a Governor or Legislature which would undercut the independence of this government branch. The public has always supported this independence as a healthy check and balance within our open government.

Under the Zien-Suder Bill:
An incentive would be created not to follow the rules.

Finally, the bill would preclude the Attorney General from independently suing or joining in a suit against an accused violator in the event the defendant is being sued in another action relating to the subject matter of the state's investigation. This measure threatens the essential role of the Attorney General to protect all of our citizens against violations of state law.

- Consider a scenario in which state consumer protection investigators identify a national telemarketer as allegedly violating Wisconsin's No Call Law, as has happened on numerous occasions leading to successful prosecutions. Under the proposed legislation, before pursuing an action, the Attorney General would have to determine whether the telemarketer had been sued in any other state or federal court for violations related to unsolicited phone calls. The search alone would be labor intensive and an expensive obstacle to pursuing an action.

- Simply put, the Attorney General's authority to pursue violations of state law should not be limited by the added condition of seeking permission from the Governor or the Legislature. Under this ill-conceived proposal, if the state of Wisconsin is not the first in the courthouse door, Wisconsin taxpayers and consumers would be left out in the cold.

"Rip-off artists, those that cheat the public and polluters could hardly have written a bill to better suit their interests," Lautenschlager said. "This is a ruthless assault on the public interest and the traditions of democracy that have made Wisconsin great."

"This bill is nothing less than a multi-million dollar give away of public rights to the cheats and polluters that would prey on the Wisconsin public," said Lautenschlager. "Adoption of any part of this bill would do irreparable damage to the public's safety and well being."

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FORWARD
E PLURIBUS UNUM

PRESS RELEASES

A.G. Lautenschlager: Announces Lawsuit Against MMSD
10/25/2005

Kelly Kennedy 608/266-7876

MILWAUKEE - Attorney General Peg Lautenschlager announced today that her office will file a civil environmental lawsuit in Milwaukee County Circuit Court against the Milwaukee Metropolitan Sewerage District (MMSD) for the more than two billion gallons of sewage overflows which occurred during a period of wet weather in the spring of 2004.

"The lawsuit charges MMSD with violating its state water pollution control permit by causing approximately 473,000,000 gallons of sewage to flow into Milwaukee County streams, rivers and Lake Michigan," Lautenschlager said. "The lawsuit also alleges that the adverse effects of raw sewage dumping along with 1.7 billion gallons of combined sewer overflows (CSOs) which occurred during the same period constitute a public nuisance."

The lawsuit will seek a court order requiring MMSD to take steps to eliminate all Sanitary Sewer Overflows (SSOs) as required by law and to take reasonably practical measures to minimize CSOs. The lawsuit will also seek penalties for MMSD's past violations of its water pollution control permit.

"These immense sewage overflows must be prevented in order to ensure the quality of Lake Michigan and the health and safety of the citizenry itself," Lautenschlager said. "While we realize that other factors are involved in the water quality of Milwaukee area lakes and streams, we cannot look the other way when state law is violated and the public enjoyment of Lake Michigan is threatened."

Lautenschlager initially announced her intentions to file a lawsuit against MMSD and 28 tributary municipalities a year ago after the DNR formally referred the matter to the Department of Justice for prosecution. At that time, however, Lautenschlager expressed her hope that the referral would provide a means for bringing together the parties to identify solutions and to commit to undertaking measures necessary to eliminate SSOs and minimize CSOs. She then invited all of the prospective defendants to contact her if they wished to discuss the possibility of an agreed-upon settlement before the lawsuit was filed.

Lautenschlager reports that extensive negotiations commenced shortly thereafter and, with the exception of MMSD, those settlement discussions continue.

"We have had very productive discussions with representatives of the 28 MMSD communities," Lautenschlager said. "Because these discussions have been constructive, we are not filing against the communities today. We hope to reach an agreement with them soon."

"Unfortunately, MMSD, on the other hand, once again has decided to spend taxpayers' money paying private lawyers to defend its actions rather than live up to its responsibility under state law to stop dumping sewage into Lake Michigan. MMSD thinks the Department of Justice should look the other way while it violates state law and dumps over two billion gallons of sewage into Lake Michigan. The choice whether to spend public funds to pay lawyers or keep Lake Michigan swimmable and fishable will be up to MMSD. No amount of public relations from MMSD will ever make dumping raw sewage acceptable."

Lautenschlager said any future agreement with the municipalities would require court approval, at which time there may be an opportunity for public comment on its terms.

The Department of Justice will file the lawsuit at the request of the DNR. Assistant Attorney General Tom Dosch will represent the State.


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PRESS RELEASES

MMSD: Statement on Attorney General's Legal Action
10/25/2005

Contact: Bill Graffin, Public Information Manager, (414) 225-2077

Milwaukee Metropolitan Sewerage District (MMSD) Commission Chair and West Allis Mayor Jeannette Bell issued the following statement today on behalf of MMSD after learning that Attorney General Peg Lautenschlager intends to go ahead with plans to file a lawsuit against the District taxpayers:

"I'm extremely disappointed that the Attorney General is suing MMSD, especially since this legal battle could result in spending millions of dollars and provide virtually zero benefit to our rivers and Lake Michigan."

"The Attorney General's action is aimed at, not only, forcing spending increases at MMSD, but in each of the 28 communities served by the District. Our customers deserve to hear directly from the Attorney General about what measurable water quality improvements she thinks her actions may deliver and how much more she wants to raise taxes to get there. I can tell you what we have planned, after years of research, and it's not cheap."

"Currently, our 1.1 million customers are paying for an Overflow Reduction Plan that will cost more than $900 million. Improvements from this plan will bring the District into compliance with the Clean Water Act and are required by a 2002 court order that was approved by the Wisconsin Attorney General's Office, Wisconsin Department of Natural Resources, and the United States Environmental Protection Agency."

"We're also investing $58 million to plan for the most cost effective, future improvements for 2020 and beyond. On top of those huge investments, we spent $3 billion to improve our regional system in the 1980's and 1990's. Forcing expenditures beyond the cost-effective solutions required by the state and federal Clean Water Acts makes no sense." MMSD Overflow Reduction Spending

· $900 million, Overflow Reduction Plan (2000 to 2010)

· $58 million, long-range planning (2002 to 2007)

· $3 billion, Water Pollution Abatement Program (1980's and 1990's)

"Now, the Attorney General is forcing MMSD taxpayers to waste money to fight her lawsuit. It's our firm belief that the public would prefer we spend limited tax dollars on projects that protect our waterways. "

"We've drastically reduced overflows from the pathetic average of 8 billion to 9 billion gallons that used to occur every year before the Deep Tunnel was built. Here's the record:"

"I am encouraged and proud that each of the 28 communities we serve have pledged their support and assistance to MMSD in this legal matter. After all, whether she's suing the 28 communities or MMSD, she's suing the same taxpayers that will have to foot the bill."


FORWARD
E PLURIBUS UNUM

Legislative Fiscal Bureau
One East Main, Suite 301 • Madison, WI 53703 • (608) 266-3847 • Fax: (608) 267-6873

December 19, 2005

TO: Senator David Zien
Room 15 South, State Capitol

FROM: Paul Onsager, Fiscal Analyst

SUBJECT: Public Nuisance Litigation Initiated by the Department of Justice

The Department of Justice (DOJ), local units of government, or private individuals are authorized to file a general public nuisance claim under s. 823.02 of the statutes. Further, violations of Chapter 30 (Navigable Waters, Harbors and Navigations), Chapter 31 (Regulation of Dams and Bridges Affecting Navigable Waters), Chapter 281 (Water and Sewage), Chapter 283 (Pollution Discharge Elimination), Chapter 285 (Air Pollution), Chapter 289 (Solid Waste Facilities), Chapter 291 (Hazardous Waste Management), Chapter 292 (Remedial Action), Chapter 293 (Metallic Mining), Chapter 295 (Nonmetallic Mining Reclamation; Oil and Gas), and Chapter 299 (General Environmental Provisions) are considered public nuisances. While the Department, on its own initiative, may generally bring a public nuisance action under the above chapters, the more typical practice is for other state agencies to refer violations arising under these chapters to DOJ for enforcement action.

At your request, this memorandum provides information on those public nuisance claims and cases that have been brought by DOJ on its own initiative since 2003-04 and on the amounts expended by the Department in connection with these cases.

Since 2003-04, the Department has initiated two public nuisance actions. First, on June 8, 2004, the Department filed the case of *State v. Zawistowski*. This action was brought against a cranberry operator for allegedly polluting a northern Wisconsin lake. Second, on July 21, 2004, DOJ joined with other states in filing the multi-state litigation of *Connecticut et al. v. American Electric Power et. al.* This multi-state case is a global warming public nuisance suit brought by several states, with New York and California in the lead. As of this writing, neither of these cases has concluded. During the current fiscal year, the Department has not initiated any additional public nuisance lawsuits and advises that it does not currently anticipate any additional filings.

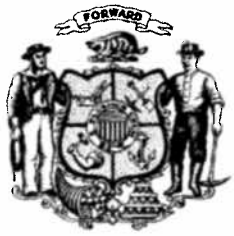
In addition to the two cases cited above, the Department indicates that there have been two regulatory cases referred to the agency since 2003-04 to which DOJ has also initiated a public nuisance claim. These cases are *State v. Milwaukee Metropolitan Sewerage District* and *State v. R. W. Miller*. The former case involves alleged unlawful sewage overflows that occurred during the spring of 2004, and the latter case involves a road construction company whose salt pile on its property allegedly contaminated groundwater, including local residents' wells.

The Department indicates that it has expended approximately $4,000 on deposition transcripts, witness fees, copying costs, and other associated incidental costs in connection with the *Zawistowski* case. The agency further advises that it has not incurred similar costs in connection with the *Connecticut et al. v. American Electric Power et. al.*, multi-state litigation because these types of costs have fallen to the lead states of New York and California. Finally, the Department indicates that it has also not incurred separately identifiable costs in the *State v. Milwaukee Metropolitan Sewerage District* and *State v. R. W. Miller* cases in connection with the public nuisance claims. None of the agency's expenditure estimates include the recognition of staff attorney salary and fringe benefits costs related to these cases. The Department indicates that the attorneys involved in the litigation are permanent salaried employees and that their responsibilities and workload extend beyond these cases.

I hope that this information is of assistance.

PO/lah

WISCONSIN STATE LEGISLATURE



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

PEGGY A. LAUTENSCHLAGER
ATTORNEY GENERAL

Daniel P. Bach
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
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608/266-1221
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STATE OF WISCONSIN LEGISLATURE
BEFORE THE
SENATE JUDICIARY, CORRECTIONS AND PRIVACY COMMITTEE

STATEMENT OF WISCONSIN ATTORNEY GENERAL PEG LAUTENSCHLAGER IN THE MATTER OF SB 425 (LRB-2762/1)

January 11, 2006

INTRODUCTION

As Wisconsin's Attorney General, I am opposed to the passage of Senate Bill 425. I urge you to reject it.

The traditional ability of the Wisconsin Department of Justice (DOJ) to act on behalf of the State and Wisconsin's citizens, as taxpayers, property owners, and consumers, against the powerful special interests this bill seeks to protect, is seriously jeopardized by this bill.

Section 7 of this bill, like its counterpart in 2005 AB 278, would strip the longstanding authority from the Attorney General to bring an action to abate a public nuisance if the activity or use of the property alleged to be a nuisance is not in violation of any statute, rule, permit, approval, or local ordinance or regulation.

Under the bill, unregulated and under-regulated activities, which for over two hundred years would be defined as illegal common law public nuisances because they cause significant and continuous harm to public health, safety or public rights, suddenly would be free to be continued by their sources without fear of action by the State's chief law enforcement officer.

Under the bill, the Attorney General would not be able to protect property owners whose property use would be harmed by public nuisances. Taxpayers and citizens would not get the protection of our air, public lands and waters that they have elected the Attorney General to provide since Statehood. Millions of dollars of private property value and millions of tax dollars invested in State lands and waters would no longer have the State's Attorney General as their guardian. Two landmark cases very clearly illustrate this point.

In *State v. Michels Pipeline Company*, 63 Wis. 2d 278 (1974), the Attorney General intervened on behalf of a community of property owners to abate the nuisance caused by the unregulated pumping of groundwater by this financially powerful construction company. The property owners' wells dried up and the foundations of their homes caved in due to subsidence caused by the company's unregulated pumping of groundwater. Their homes and properties were being rendered valueless. The Attorney General sued the company to abate this public nuisance.

The company argued it was doing nothing wrong under the existing common law and that it had no responsibility for the damage it was causing – that it could pump groundwater with impunity. In this landmark case, the Court agreed with the Attorney General to over-rule outdated and an unjust precedent, and to adopt the majority "reasonable use" doctrine of groundwater law, agreeing that a public nuisance case is presented whenever someone unreasonably causes substantial harm to their neighbors by pumping groundwater without limit.

Perhaps even more significantly, in that case the defendant tried to get the Court to do what this bill attempts to do – declare that the Attorney General has no legal standing to bring a nuisance action on behalf of the community of property owners damaged by the corporation's actions. After all, if the Attorney General could not bring the nuisance action, the property owners would have to fend for themselves – a lawsuit economically advantaged defendants know that financially destroyed property owners can ill-afford. The Supreme Court soundly rejected this argument, finding that the Attorney General had standing to bring the case on behalf of the beleaguered owner-taxpayers.

The pumping that caused the nuisance in this case is unregulated to this day, and the bill would render the Attorney General, current or future, Democrat, Republican or Independent, powerless to do anything about it.

In another case, *State v. Quality Egg Farm, Inc.*, 104 Wis. 2d 506 (1981), a community of property owners objected to a factory chicken operation that produced 15 tons of manure a day, created a pervasive bad smell, and attracted an unusually large number of flies. The neighbors testified the odor was nauseating, pungent, and unbearable, and that it made them ill. Although DNR investigated the odors and proposed an abatement order, the DNR order was rescinded after hearing. The unregulated nuisance continued.

As in the *Michels Pipeline* case, the corporate defendant argued that the Attorney General did not have legal standing to represent the community of property owner-taxpayers – and argued that they should have to hire their own lawyers and suffer the expense of obtaining justice in the courts on their own. Again the Supreme Court rejected the corporate defendant's argument, allowing the Attorney General to prosecute the case to abate the nuisance. The corporation was given several opportunities to remedy the problem, and it failed to do so. The illegal nuisance persisted, forcing the reluctant court eventually to shut down the operation in utter frustration. Odors from such operations remain unregulated today, and this bill would render the Attorney General powerless to do anything about them in the future.

The supporters of this bill are in part motivated by the case of an unregulated public nuisance; in this case they seek to shield a cranberry grower who has polluted a northern Wisconsin lake. Attached are photos of the damage the Department of Justice has shown is being done. The pollution from the operation also is *unregulated* because the federal government exempts from regulation "return flow" discharges from cranberry farms under the

Clean Water Act, and the Wisconsin Legislature has provided that Wisconsin regulatory law may not be stricter than the federal law. Thus, neither the federal government nor the DNR have stepped forward to regulate this pollution. I have brought a public nuisance action to abate this pollution. Yet this bill would prevent any Attorney General from stopping this damage to public trust waters and property.

NEITHER THE ATTORNEY GENERAL NOR LOCAL GOVERNMENTS HAVE ABUSED THEIR PUBLIC NUISANCE AUTHORITY

In their October 6, 2005, press release, the bill's authors, Sen. Dave Zien (R-Wheaton) and Rep. Scott Suder (R-Abbotsford), said they "are introducing legislation today to curb unfair litigation brought by government against businesses and citizens. The Fairness in Litigation Act will protect private citizens against frivolous and unfair lawsuits brought forth by an Attorney General (AG)." Yet neither Sen. Zien nor Rep. Suder cite one case in which a court has found that the Attorney General, Republican or Democrat, has ever been found to have filed a frivolous or unconstitutional nuisance lawsuit, a finding the courts can make in such cases. That's because there are none.

The claim that "[o]organizations representing farmers, businesses, cranberry growers, realtors, developers, utilities, and others showed the lawmakers case after case where the current AG has overstepped her bounds and abused her power as an elected official" is an outright falsehood. Since the 1970s, the Attorneys General have filed approximately eight nuisance actions. Not one has been found to be frivolous.

The claim that "the legislation is needed to shield Wisconsin citizens and businesses against unfair lawsuits, which ultimately cost millions of dollars in economic development each year" is false and misleading. It diverts attention from the reality of the consequences of the bill if passed: potentially millions of dollars in damage to taxpayer property owners and public property.

Section 7 of the bill would require the State's taxpayers and local governments to pay the litigation costs of a nuisance action brought by the Attorney General, or a local government, if such a case was to be unsuccessful. Characteristically, the bill does not provide the same relief to the government and its taxpayers for a successful prosecution of a public nuisance action. This is an audacious attempt to discourage any lawsuits against powerful special interests.

It is no consolation that local governments would remain able under the bill to bring public nuisance actions. The supporters of the bill know that local governments have depended on the Attorney General to shoulder the burdens of this kind of litigation. In the absence of Attorney General backup, local governments are much less likely to expend the resources needed to take on polluters at the risk of paying a defendant's litigation costs even in the unlikely event they might lose. Even the smallest risk of a financial loss is enough to discourage much- needed action. The bill is a "lose-lose" for local governments and the public, and a no-risk "win-win" for powerful interests that may seek to disregard Wisconsin's environmental protection laws.

SB 425 has no place in Wisconsin jurisprudence, or in our traditions of public accountability and fairness. This bill turns public nuisance law on its head by putting conduct, which long has been illegal at common law, above and out of reach of the law. This bill would reverse long-established and accepted principles that serve to protect the public from harmful

activities, and effectively leave the public without a remedy to abate public nuisances that harm public property, health, and habitability.

The long-established jurisprudence on the common law of nuisance is well-defined, and steeped in common sense. If we understand the basic principles governing common law public nuisance protections, we start to see the dangers this bill presents to the public.

According to long established legal authority, a public nuisance *is* a violation of law. A ***nuisance*** is an unreasonable activity or use of property that interferes substantially with the comfortable enjoyment of life, health, safety of another or others.

A ***public nuisance*** is defined as an injurious effect on the safety, health or morals of the public or use of property which works some substantial annoyance, inconvenience, or injury to the public. A public nuisance causes hurt, inconvenience, or damage to the public generally, or the public that is exercising a public or common right.

Importantly, *at common law*, the lawfulness of the business or property does not control. It is the lawfulness of the activities of the business or on the property that controls. Thus, where government fails to regulate injurious activity, either by inadvertence, neglect, or because of unduly powerful influence in the Legislature or local government, the common law provides the public with a safety net. Where unregulated or inadequately regulated activities cause harm to the public, the Attorney General has the responsibility to seek a remedy to stop such harm in the courts.

Under Wisconsin statutes, citizens may sue where there is a public nuisance, but only to deal with injuries peculiar to them and only to protect their own rights (Wis. Stat. § 823.01). Thus, citizens do not have the same authority to abate a truly "public" nuisance that government has. And, of course, most citizens and small local governments cannot afford the legal costs of such actions. The public depends on the public officials they elect to protect them from public nuisances.

Last, but not least, this bill expressly takes away from the Attorney General the authority to independently act to protect state waters held in trust for the benefit of the public. There is a serious question whether the Constitution of Wisconsin allows the legislature to effectively strip the authority of the state's chief law enforcement officer to protect these waters and to shirk its affirmative duty to protect such waters.

In cases where a violation of an environmental law occurs, Section 3 of the bill would require the Attorney General to repay to the violator any penalties imposed by a court in the event any person or the federal government received a monetary award for a federal violation or to compensate victims arising out of the aberrant conduct.

Criminals and law breakers have always had to pay for the *full* consequences of their actions, both as to *all* the crimes and violations they commit (federal, state and local), and for compensating victims for *all* the damage and injury they cause to people and property. This bill would give environmental criminals and violators one-stop shopping for effectively avoiding their full responsibility under the law.

Setting environmental violators free from the consequences of their unlawful behavior because they are forced to pay, or choose to pay, only one portion of the damage they've done, is

unprecedented, rewards violations, and provides an insurance policy to violators against a full accounting for their actions. We would no more adopt this standard for environmental violators than we would relieve criminals of their fines simply because they are forced to pay restitution to their victims.

Section 4 of the bill would require permission from the Governor or both houses of the Legislature before the Attorney General could bring or participate in any legal action on behalf of the public.

The Wisconsin Constitution and Wisconsin state law provide for an Attorney General with the independence to bring public nuisance actions and to commence other actions on behalf of the public without seeking permission from a Governor or Legislature that may have a different political agenda. The public has always supported this independence as a healthy check and balance within our open government.

Section 4 of the bill could effectively preclude the Attorney General from independently suing or joining in a suit against a wrong-doer in the event the wrongdoer is being sued in another action "regarding any issue that is the subject of another action."

Polluters and those who would seek to cheat the public could hardly have written a bill to better suit their interests at the expense of the Wisconsin public.

Under this proposal, the Wisconsin public would be precluded from having their Attorney General independently seek abatement of pollution or seek restitution for defrauded citizens simply because someone else beat us to the courthouse. This bill would actually encourage any violator to engineer a small claims lawsuit by one pollution victim or one defrauded consumer in order to avoid full accountability for the thousands of citizens they harm.

This bill is nothing less than a multi-million dollar give away of public rights to polluters who would prey on the Wisconsin public for their own ends.

CONCLUSION

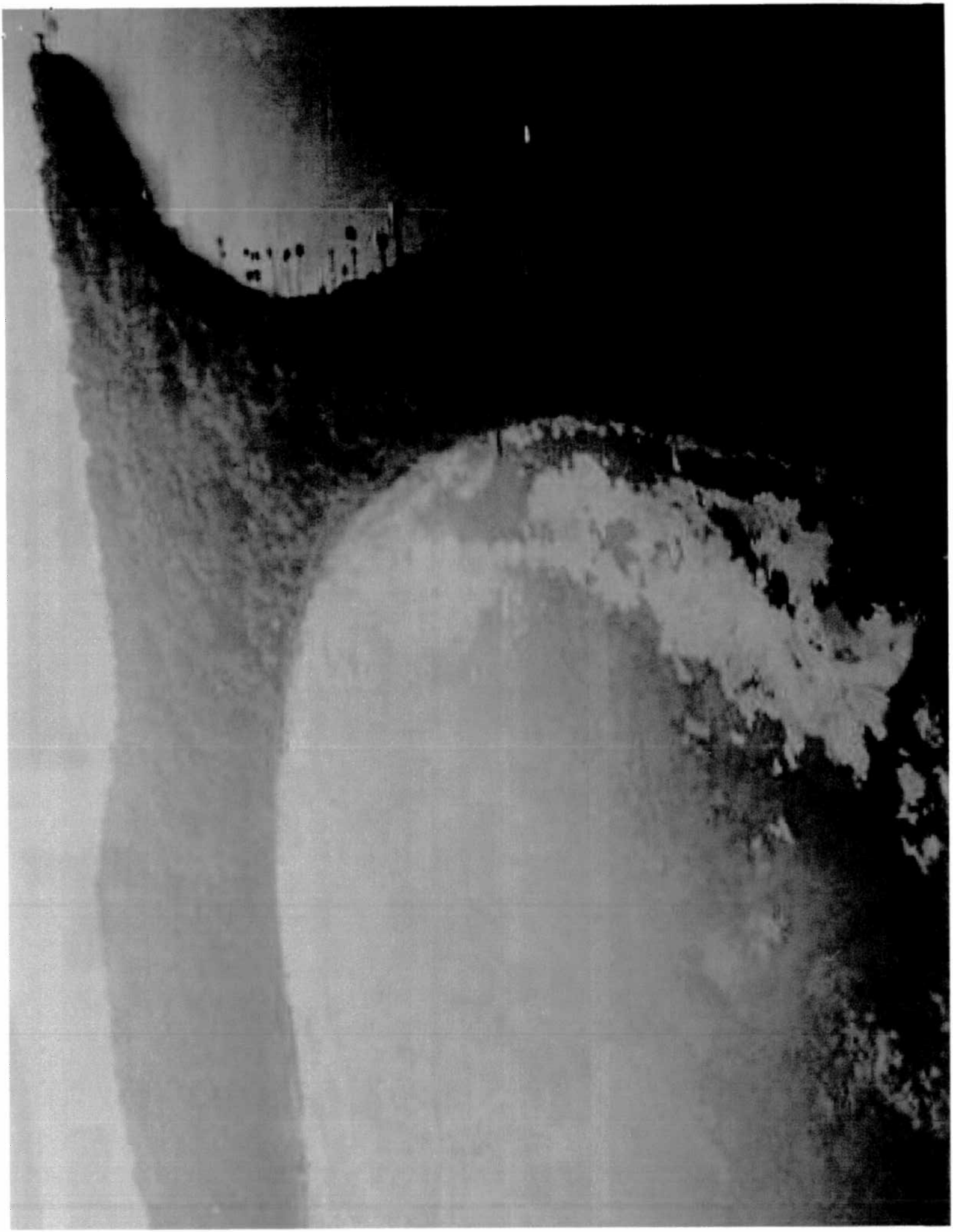
I urge you not to do irreparable damage to the public's safety or welfare by adopting this bill.

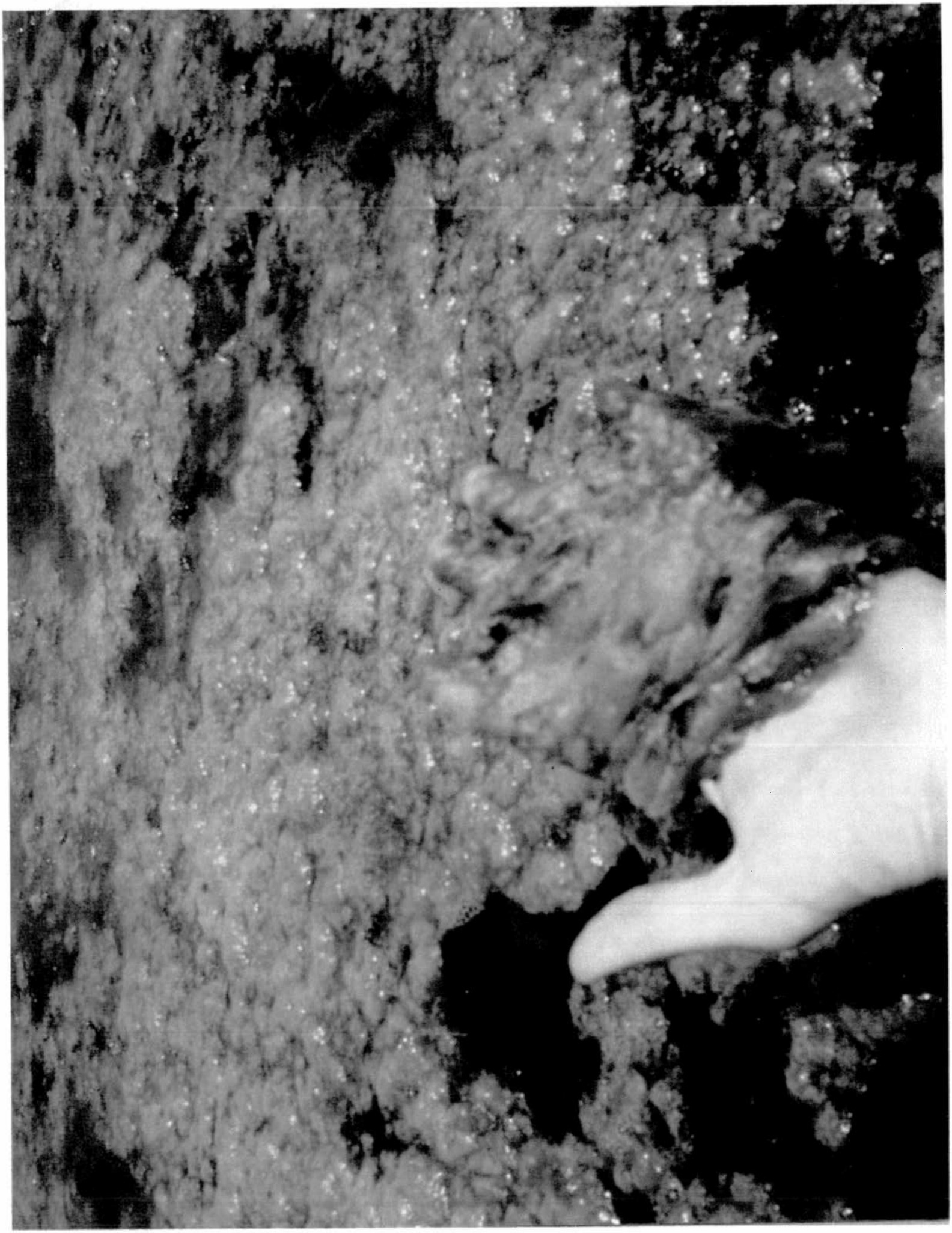
I urge you to vote NO on its passage, and to reject the unprecedented and damaging measures of SB 425 that would so clearly rob our constituents of their traditional rights under our form of government.

I urge you to demand of those sponsoring this bill and misrepresenting the application of the public nuisance doctrine to account for their misleading statements.

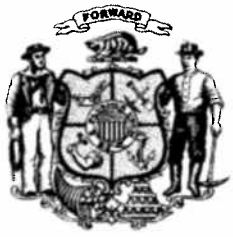
Thank you for the opportunity to provide this testimony.

# # #






WISCONSIN STATE LEGISLATURE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REPRESENTING WISCONSIN BUSINESS

Wisconsin Manufacturers & Commerce

Wisconsin Manufacturers' Association · 1911
Wisconsin Council of Safety · 1923
Wisconsin State Chamber of Commerce · 1929

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TO: Senate Judiciary Committee

FROM: Scott Manley, Director
Environmental Policy

DATE: January 11, 2006

RE: Support for SB 425 – The Fairness in Litigation Act

Wisconsin Manufacturers & Commerce (WMC) strongly supports Senator Dave Zien and Representative Scott Suder's proposal to place reasonable limits on the authority of the Attorney General to litigate nuisance lawsuits. We believe Senate Bill 425 is an appropriate response to a disturbing trend on the part of Attorney General Peg Lautenschlager to use litigation as a means to rewrite the law.

In addition to being costly to defend, slapping law-abiding businesses with frivolous nuisance lawsuits sends the wrong message for job creation.

The most recent example of the Attorney General's abuse of nuisance lawsuits involves a multi-state case she filed against utilities relating to carbon dioxide (CO_2) emissions. The lawsuit was designed to force five major utilities to reduce CO_2 emissions, including a utility in Wisconsin. Despite the fact that the EPA has stated the Clean Air Act does not allow regulation of CO_2 emissions, and Congress has specifically rejected the idea of regulating CO_2, ***Lautenschlager joined the nuisance lawsuit hoping that a judge would rewrite the law to her liking.***

WMC strongly believes that the Constitution reserves lawmaking authority for the legislative branch of government, and Lautenschlager's disagreement with a law does not give her the right to sue law-abiding businesses in an effort to change it. Fortunately, the judge presiding over the utility case agreed, and dismissed the Attorney General's lawsuit last September.

In the decision throwing Lautenschlager's case out of court, Judge Loretta Preska stated that the Attorney General's lawsuit sought to impose changes in the law by ***"judicial fiat,"*** and that the policy questions presented in the litigation were more appropriately ***"consigned to the political branches, not the Judiciary."***

In other words, Lautenschlager and the Attorneys General were asking the courts to do what no legislative body or executive had ever approved. ***That is a chilling abuse of power, and needs to be stopped in Wisconsin in order to protect the regulatory certainty industry needs to operate in our state.***

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Senate Bill 425 is consistent with the federal court ruling in this case because it correctly recognizes the Legislature's constitutional role as the lawmaking branch of government.

Setting limits on the authority of the Attorney General to circumvent the Legislature in the lawmaking process is an important backstop in our system of checks and balances in government. We have a legislative process that involves public input for a reason. Long ago, Wisconsin made a determination that we invite scrutiny and public participation in our lawmaking process. Yet Lautenschlager's effort to make laws in a courtroom through nuisance lawsuits denies Wisconsin citizens their right to participate in the legislative process.

In addition to being fundamentally unfair, targeting nuisance lawsuits at businesses who are obeying the law sends the wrong message to prospective job providers.

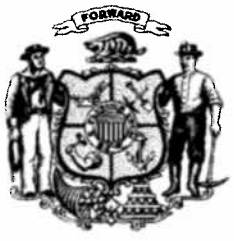
Wisconsin will be less competitive than our neighboring states at attracting and maintaining jobs if employers know that the Attorney General may be looking over their shoulder to sue - even though they are obeying the law. The *Fairness in Litigation Act* provides a common sense solution to this job-killing practice by prohibiting the Attorney General from filing a nuisance lawsuit if the alleged activity is not in violation of a statute, rule, permit, or ordinance.

The *Fairness in Litigation Act* addresses another abuse of our legal system by restricting the Attorney General from "piling-on" by litigating a case that a private party has already filed. Having to fend off legal attacks from two fronts creates needless but expensive layers of liability for Wisconsin job providers. Fairness dictates that the state's highest-ranking law enforcement officer should not leverage the Attorney General's considerable clout to advance the interests of private parties. For this reason, the bill requires the Attorney General to seek approval from the Governor or both houses of the legislature before "piling-on" a private lawsuit.

Finally, Senate Bill 425 recognizes the substantial cost businesses are forced to pay to defend themselves in nuisance cases, and requires that their attorney and expert witness fees be reimbursed if the Attorney General's lawsuit is unsuccessful.

WMC continues to advocate for maintaining a competitive jobs climate through limiting lawsuit abuse in the private sector, and we thank Senator Zien and the authors of Senate Bill 425 for their important effort to rein-in lawsuit abuse in the *public sector*. We hope the Legislature and Governor Doyle will recognize the importance of this bill to Wisconsin's ability to compete for jobs, and we urge passage of the *Fairness in Litigation Act* into law this session.


WISCONSIN STATE LEGISLATURE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Daniel P. Bach
Deputy Attorney General

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February 1, 2006

TO: All Senators

FR: Attorney General Peg Lautenschlager

RE: 2005 SENATE BILL 425

Senate Bill 425 prohibits the Attorney General from bringing a public nuisance suit if the alleged activity is not in violation of a statute, rule, permit, or ordinance. Senate Bill 425 also prohibits the Attorney General from starting, joining, or intervening in most civil actions unless the Governor or both houses of the legislature makes such a request.

Senate Bill 425 would prohibit the Attorney General from filing public nuisance lawsuits.

According to long established legal authority, a public nuisance causes hurt, inconvenience, or damage to the public generally, or the public that is exercising a public or common right. The lawfulness of the business or property does not control; if the activity creates a public nuisance, that is a violation of the law, and has been for centuries. Where government fails to regulate injurious activity, either by inadvertence, neglect, or because of unduly powerful influence in the legislature or local government, the common law provides the public with a safety net. Where unregulated or inadequately regulated activities cause harm to the public, public officials have the ability to seek a remedy to stop public harm in the courts.

SB 425 jeopardizes the Attorney General's ability to join multi-state lawsuits.

Since the early 1990s, DOJ has recovered more than $22 million dollars through multi-state actions aimed at consumer fraud. Wisconsin taxpayers obtained over $9 million in penalties and more than $13 million in restitution to individual Wisconsin consumers.

Senate Bill 425 would jeopardize the work of Wisconsin's Medicaid Fraud Control Unit.

In 1980, the U.S. Congress created Medicaid Fraud Control Units (MFCUs) in the offices of Attorneys General in each of the 50 states. Wisconsin's MFCU has been a national leader in this effort, recovering more than $11 million for Wisconsin taxpayers since 1994. In one such recent case, the negligence in care delivery to patients at a nursing home in Chippewa Falls resulted in a $2.1 million settlement. Other cases involved the short-filling of prescriptions for indigent customers by Wal-Mart, the illegal marketing of feeding pumps, and the overcharging for prescription drugs by a number of pharmaceutical companies.

Enc. DOJ partial case list
DOJ 2005 SB 425 Fiscal Estimate

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February 1, 2006

TO: All Senators

FR: Attorney General Peg Lautenschlager

RE: 2005 Senate Bill 425

The following list is a small sample of the many recent cases in which DOJ has won damages, penalties, and restitution for Wisconsin's elderly, consumers, and taxpayers.

2001	Publishers Clearing House	$2.79 million
2001	Bridgestone Firestone	$1.2 million
2001	TAP Pharmaceuticals	$605,000
2002	Rent A Center	$8.4 million
2002	Household International Inc.	$5.37 million
2003	Abbott Laboratories	$803,000
2003	GlaxoSmithKline	$563,000
2004	Bayer	$1.82 million
2004	Schering Plough	$1.4 million
2005	Parke-Davis	$1.38 million
2005	Gambro Healthcare	$319,000

Wisconsin Department of Administration
Division of Executive Budget and Finance

Fiscal Estimate - 2005 Session

☒ Original ☐ Updated ☐ Corrected ☐ Supplemental

LRB Number **05-2762/1**	Introduction Number **SB-425**

Description
The authority of the Department of Justice and public nuisance actions

Fiscal Effect

State:

☐ No State Fiscal Effect
☒ Indeterminate
- ☐ Increase Existing Appropriations
- ☐ Decrease Existing Appropriations
- ☐ Create New Appropriations
- ☐ Increase Existing Revenues
- ☐ Decrease Existing Revenues
- ☐ Increase Costs - May be possible to absorb within agency's budget
  - ☐ Yes ☐ No
- ☐ Decrease Costs

Local:

☐ No Local Government Costs
☐ Indeterminate
1. ☐ Increase Costs ☐ Permissive ☐ Mandatory
2. ☐ Decrease Costs ☐ Permissive ☐ Mandatory
3. ☐ Increase Revenue ☐ Permissive ☐ Mandatory
4. ☐ Decrease Revenue ☐ Permissive ☐ Mandatory
5. Types of Local Government Units Affected
   - ☐ Towns ☐ Village ☐ Cities
   - ☐ Counties ☐ Others
   - ☐ School Districts ☐ WTCS Districts

Fund Sources Affected **Affected Ch. 20 Appropriations**

☐ GPR ☐ FED ☐ PRO ☐ PRS ☐ SEG ☐ SEGS

Agency/Prepared By	Authorized Signature	Date
DOJ/ Mark Rinehart (608) 264-9463	Mark Rinehart (608) 264-9463	1/31/2006

Fiscal Estimate Narratives
DOJ 2/1/2006

LRB Number 05-2762/1	Introduction Number SB-425	Estimate Type Original
Description The authority of the Department of Justice and public nuisance actions		

Assumptions Used in Arriving at Fiscal Estimate

Senate Bill 425 prohibits the Attorney General from bringing a public nuisance suit if the alleged activity is not in violation of a statute, rule, permit, or ordinance. Senate Bill 425 also prohibits the Attorney General from starting, joining, or intervening in most civil actions unless the Governor or both houses of the legislature makes such a request.

Under Section 165.253(1)(a) of the bill, the Attorney General is prohibited from independently commencing a civil action against a party regarding any issue that is the subject of another civil action against that party. This could require the Department of Justice to do a nationwide search for any and all civil actions brought against potential defendants in state and federal courts across the country. For example, assume state consumer investigators identify a national telemarketer as allegedly violating Wisconsin's no call law by continually calling Wisconsin consumers who have added their names to the state no call registry. Before pursuing an action against this telemarketer, the Attorney General would have to determine whether the telemarketer is being sued in any other state or federal court for violations related to unsolicited phone calls. The search would be labor intensive, result in unknown costs to DOJ, and could be a huge obstacle to pursuing an action.

Under Section 165.253(1)(b) of the bill, the Attorney General is prohibited from independently joining any action that has been commenced by another state or political subdivision of another state. This jeopardizes the millions of dollars the Attorney General is awarded each year in cases in which states share resources and collaborate on investigations, litigation, and settlements. In these matters, states with similar interests are able to target, investigate, litigate, and arrive at settlements with national and international companies that are violating consumer protection laws in multiple jurisdictions. If the Attorney General is prohibited from joining these actions, Wisconsin citizens could be deprived of restitution that citizens of other states receive. At a time when cutbacks in the state budget are enormous and all state agencies are asked to operate as frugally as possible, this legislation would limit the Attorney General's ability to share resources with other states in order to collectively investigate and litigate against large, wealthy national and international companies.

The power of united state Attorneys General, Democrat and Republican alike, often persuades defendants to settle cases out of court and thus saves both time and taxpayer dollars which are consumed in long drawn out lawsuits. Since the early 1990s, DOJ has recovered more than $22 million through multi-state actions aimed at consumer fraud. Wisconsin taxpayers obtained over $9 million in penalties and more than $13 million in restitution to individual Wisconsin consumers since 1991. Senate Bill 425 would jeopardize the ability of the Attorney General to join multi-state lawsuits which have recouped tens of millions of dollars for Wisconsin consumers.

In 1980, the U.S. Congress created Medicaid Fraud Control Units (MFCUs) in the offices of Attorneys General in each of the 50 states. Wisconsin's MFCU has been a national leader in this effort, recovering more than $11 million for Wisconsin taxpayers since 1994. These actions are often geared to protect our most frail and vulnerable citizens—older adults, the developmentally disabled, and those who require long-term specialized medical care. In some situations, the inability of the MFCU to act would result in continued suffering by, or loss of life of, patients in various residential care facilities. In one such case recently, the negligence in care delivery to patients at a nursing home in Chippewa Falls resulted in a $2.1 million settlement. Other recent cases involved the illegal marketing of feeding pumps, allowing for a recovery of more than $800,000, the short-filling of prescriptions for indigent customers by Wal-Mart, and the overcharging for prescription drugs by a number of pharmaceutical companies. Senate Bill 425 would jeopardize the work of Wisconsin's MFCU and ignore the needs of Wisconsin's health care consumers and taxpayers.

Senate Bill 425 would prohibit the Attorney General from filing public nuisance lawsuits to obtain the same relief for citizens that the Attorney General obtained in the following cases:

• A construction company conducting unregulated pumping of groundwater caused adjacent property owners' wells to dry up. The pumping caused the foundations of area homes to cave in. Property was rendered valueless. The Attorney General sued the company to abate this public nuisance. The construction company tried to persuade the court to do what this legislation is attempting – to declare that the Attorney General has no legal standing to bring a nuisance action on behalf of the community of property owners damaged by the company's actions. The landmark decision by the Wisconsin Supreme Court in 1974 established the "reasonable use" doctrine of groundwater law, agreeing that a public nuisance is presented whenever someone unreasonably causes substantial harm to their neighbors by pumping groundwater without limit.

• In 1993, before there were any rules governing erosion control and storm water discharged to navigable waters, huge amounts of sediment went into Lake Mendota from the Bishops Bay development. The Attorney General sued and successfully obtained injunctions to require corrective action, preventative action and damages to help restore the fishery in the lake.

If the Attorney General had been prohibited from acting in these two cases and the nuisances had remained unabated, the damages would have been exacerbated. It is difficult to determine actual costs, but there is no doubt a greater expenditure of resources would have been required to rectify the increased damages that would have resulted had the two nuisances described above been allowed to continue. Likewise, it is nearly impossible to place a fiscal estimate on the resources that will be required to cover the costs of future unabated nuisances resulting from the passage of SB 425.

Long-Range Fiscal Implications


FORWARD
E PLURIBUS UNUM

Wisconsin Coalition for Civil Justice

TO: Members, Wisconsin State Senate

FROM: Bill Smith, President
Jim Hough, Legislative Director

DATE: February 2, 2006

RE: **Support for SB 425 (Attorney General Authority)**

The Wisconsin Coalition for Civil Justice (WCCJ) (over) has been at the forefront of seeking civil justice reform since the mid 1980's. The Coalition's broad based membership has as its goals a fair and equitable civil justice system in which "neither side" is advantaged by the "rules of the game" and a system that maximizes the ability to find the truth and resolve factual disputes.

Wisconsin businesses are covered by numerous complex laws and regulations. There is no credible evidence Wisconsin businesses are inadequately regulated. But if that was the case, the proper venue to fill any regulatory gaps is the Legislature. Recently, however, the Attorney General has seen it fit to "legislate" environmental policies through litigation.

Wisconsin business need to know what is expected of them when conducting business in this state. Compliance with laws and regulations should provide them the assurance that their conduct meets the expectations of our elected policymakers. This bill merely provides that assurance; that is, if a business or other citizen is in full compliance with all applicable laws, the government should not bring to bear its considerable resource against them.

WCCJ respectfully urges support for final passage of SB 425.

WCCJ Members

American Council of Engineering
American Insurance Association
Associated Builders & Contractors of Wisconsin
Associated General Contractors of Wisconsin
Building Industry Council
Civil Trial Counsel of Wisconsin
Community Bankers of Wisconsin
National Federation of Independent Business
Petroleum Marketers of Association of Wisconsin
Professional Insurance Agents of Wisconsin
Tavern League of Wisconsin
Wisconsin Asbestos Alliance
Wisconsin Association of Consulting Engineers
Wisconsin Association of Health Underwriters
Wisconsin Auto & Truck Dealers Association
Wisconsin Builders Association
Wisconsin Economic Development Association
Wisconsin Federation of Cooperatives
Wisconsin Grocers Association
Wisconsin Health Care Association
Wisconsin Health & Hospital Association
Wisconsin Institute of CPA's
Wisconsin Insurance Alliance
Wisconsin Manufacturers & Commerce
Wisconsin Medical Society
Wisconsin Merchants Federation
Wisconsin Mortgage Bankers Association
Wisconsin Motor Carriers Association
Wisconsin Paper Council
Wisconsin Petroleum Council
Wisconsin Realtors Association
Wisconsin Restaurant Association
Wisconsin Society of Architects
Wisconsin Society of Land Surveyors
Wisconsin Transportation Builders Association
Wisconsin Utilities Association
Wisconsin Utility Investors


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November 29, 2005

Senator David Zien
Room 15 South
State Capitol
PO Box 7882
Madison, WI 53707-7882

Representative Scott Suder
Room 21 North
State Capitol
PO Box 8953
Madison, WI 53708-8953

Re: Fairness in Litigation Act

Dear Senator Zien and Representative Suder:

I am concerned that your legislative efforts expressed in the proposed Fairness in Litigation Act may be motivated more by political expediency than by a true desire to protect the public and private rights of Wisconsin citizens. My concerns regarding the objectives of your proposed legislation are twofold: first, your attempt to limit prosecutorial authority of the state attorney general, and second, your attempt to curb common law protection of public and private property rights.

First, tying the hands of the state attorney general by restricting prosecutorial discretion and latitude would be an unwise move, in my view. Our state constitution appropriately designates the attorney general as an independent official, answerable to the voters of the state, and responsible for enforcing the laws of the state. Politicizing the enforcement responsibilities of the attorney general, as you have proposed, would be a serious mistake.

I would not want our county board of supervisors and/or our county board chair to have a veto over the enforcement activities of our district attorney. Equally, I would not want our state legislature and/or governor to have veto power over enforcement actions of the attorney general. A decision to prosecute an alleged violation of state law should not become a political football game for the legislature and governor. Political football, I fear, would lead to either enforcement paralysis or, perhaps worse, enforcement solely based on political influence.

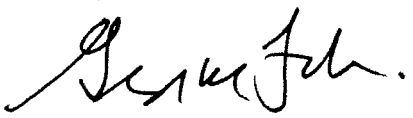
Second, it appears that your proposed legislation seeks to contravene the common law protection afforded to the state's citizens. Common law protection of public and private property rights can be a vital component of environmental and public health protection. How else can the state provide protection to the public from the harmful consequences of unregulated or inadequately regulated activities? How else can an aggrieved individual seek relief if government agencies cannot or will not act?

Your proposed legislation strikes me as a push to curb common law protection of our state's citizens from the negligent acts of others. We do this at our peril, I'm afraid. The next public nuisance and act of trespass may be our next-door neighbor and we will then very much want an effective legal remedy. Common law protection is an important safety net for all citizens and we need to be careful to not tear the fabric.

Encumbering the state attorney general in a straitjacket and gutting common law protection of the public from nuisance, trespass and negligence are not solutions.

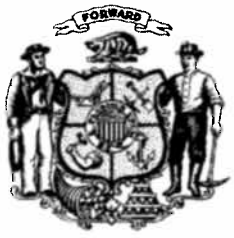
For fairness in litigation, I recommend that we keep our hands off and let matters rest.

Sincerely,



Gregory M. Farnham


WISCONSIN STATE LEGISLATURE


FORWARD

Backgrounder & Update on Wisconsin Attorney General's Nuisance Lawsuit Against a Sawyer County Cranberry Grower

January, 2005

June 8, 2004

Attorney General Peg Lautenschlager, and 14 out-of-state landowners filed a nuisance suit against Sawyer County cranberry grower, William Zawistowski. The suit claims that under the public trust doctrine in Wisconsin, the public has a right to use and enjoy the state's navigable waters for recreational use. The suit claims that with the development of the cranberry farm, water quality has steadily deteriorated.

The plaintiffs are asking the cranberry grower to; 1) stop discharges of phosphorus into the lake, 2) dredge the lake, 3) pay the landowners general damages for loss of use of the lake, 4) pay their attorney fees and other expenses, and, 5) pay any other equitable relief deemed proper.

July 19, 2004

The Wisconsin Farm Bureau Federation and nine other commodity/agricultural organizations filed a motion to intervene in the case.

The other groups include the Wisconsin State Cranberry Growers Association, Wisconsin Federation of Cooperatives, Midwest Food Processors Association, Wisconsin Agri-Service Association, Dairy Business Association, Wisconsin Cattlemen's Association, Wisconsin Corn Growers Association, Wisconsin Pork Association, and Wisconsin Potato & Vegetable Growers' Association.

August 2, 2004

Circuit Court Judge John Anderson conducted a hearing on the 10 agricultural groups request to intervene. At the court hearing the Attorney General's office and the out of state landowners opposed the motion to intervene.

August 19, 2004

Circuit Court Judge Anderson issued a decision denying the 10 agriculture groups motion to intervene.