

2007 DRAFTING REQUEST

Bill

Received: **10/05/2007**

Received By: **rnelson2**

Wanted: **As time permits**

Identical to LRB:

For: **Mary Williams (608) 266-7506**

By/Representing: **John**

This file may be shown to any legislator: **NO**

Drafter: **rnelson2**

May Contact:

Addl. Drafters:

Subject: **Justice - civil
Courts - costs and fees**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.WilliamsM@legis.wisconsin.gov**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Nuisance lawsuits and authority of DOJ

Instructions:

See Attached 05SB425 remove 1st 5 sections

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	rnelson2 10/05/2007	kfollett 10/12/2007		_____			State
/1			rschluet 10/15/2007	_____	sbasford 10/15/2007		State
/2	rnelson2 11/29/2007	kfollett 12/04/2007	jfrantze 12/04/2007	_____	mbarman 12/04/2007		State
	rnelson2 01/14/2008	kfollett 01/15/2008		_____			

Vers. Drafted Reviewed Typed Proofed Submitted Jacketed Required

/3

jfrantze _____
01/15/2008 _____

sbasford
01/15/2008

cduerst
01/31/2008

FE Sent For:

*at
intro*

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jfrantze _____
01/15/2008 _____

sbasford _____
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13 kf
11/15

11/15

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<END>

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Bill

Received: **10/05/2007**

Received By: **rnelson2**

Wanted: **As time permits**

Identical to LRB:

For: **Scott Suder (608) 267-0280**

By/Representing: **Anne**

This file may be shown to any legislator: **NO**

Drafter: **rnelson2**

May Contact:

Addl. Drafters:

Subject: **Justice - civil
Courts - costs and fees**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Suder@legis.wisconsin.gov**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Nuisance lawsuits and authority of DOJ

Instructions:

See Attached 05SB425

*Williams took over -
John: take out sections 1-5*

Drafting History:

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By/Representing: **Anne**

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May Contact:

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Subject: **Justice - civil
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Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Suder@legis.wisconsin.gov**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Nuisance lawsuits and authority of DOJ

Instructions:

Anne - change to either house asking DOJ

See Attached 05SB425

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/?	rnelson2 10/05/2007	kfollett 10/12/2007		_____			State
/1		<i>12 kjf</i> 12/4	rschluet 10/15/2007	_____	sbasford 10/15/2007		

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[Handwritten signatures and initials]
<END>
12/4

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/?	rnelson2	11 kjf 10/12					

FE Sent For:

<END>

Nelson, Robert P.

From: Duerst, Christina
Sent: Friday, October 05, 2007 8:56 AM
To: Nelson, Robert P.
Subject: FW: Drafting request

From: Emerson, Anne
Sent: Friday, October 05, 2007 8:45 AM
To: LRB.Legal
Subject: Drafting request

Representative Suder would like to request a redraft of 2005 Senate Bill 425, relating to nuisance lawsuits for reintroduction this session. Should you have any questions, please do not hesitate to contact us.

Thank you!
Anne

Anne Emerson
Research Assistant

*Office of State Representative Scott Suder
Wisconsin's 69th Assembly District
Office: 1-608-267-0280
Toll free: 1-888-534-0069*

3273/1

kgf

PWF

2005 SENATE BILL 425

November 8, 2005 - Introduced by Senators ZIEN, STEPP, LAZICH, REYNOLDS, A. LASEE, DARLING, KEDZIE, BROWN and GROTHMAN, cosponsored by Representatives SUDER, NISCHKE, PETTIS, ALBERS, HAHN, LOTHIAN, F. LASEE, AINSWORTH, HUNDERTMARK, OTT, HINES, WARD, OWENS, KRAWCZYK and LEMAHIEU. Referred to Committee on Judiciary, Corrections and Privacy.

1 AN ACT *to renumber and amend 823.02; to amend 165.25 (1); and to create*
2 *165.016, 165.25 (1m), 165.253, 823.02 (1g) and 823.02 (2) and (3)* of the statutes;
3 **relating to:** the authority of the Department of Justice and public nuisance
4 actions.

Analysis by the Legislative Reference Bureau

X Currently, the Department of Justice (DOJ) is required to prosecute and defend all civil and criminal actions in the court of appeals and supreme court in which the state is interested or is a party. In addition, if requested by the governor or either house of the legislature, DOJ must represent the state or a state agency in any action in which the state or the people of the state may have an interest. This bill requires both houses, rather than just one house, of the legislature to make the request for DOJ to act in such cases. The bill also prohibits DOJ from doing any of the following:

1. Starting a civil action against a party regarding any issue that is the subject of another civil action against that party unless the governor or both houses of the legislature request the department to start the action.
2. Joining in any action that has been commenced by another state unless the governor requests that joinder.
3. Intervening in a civil action unless the governor or both houses request it, all parties agree to the intervention, or the department is required by statute to intervene.

The bill prohibits the attorney general from contracting with or appointing a private attorney as a temporary assistant attorney general unless the governor

SENATE BILL 425

requests that the attorney general do so. The bill also requires DOJ to repay a party the amount of any monetary penalty that was paid by the party to the state as the result of an environmental violation if that party was required to pay a monetary award to another person as the result of an action arising out of the same conduct.

Under current law, DOJ, counties, and local units of government may bring an action to enjoin a public nuisance. Generally, the costs of bringing the action and defending the action are born by each party, except for disbursements and specific amounts for expert and attorney fees. This bill requires a court to award the defendant all of the defendant's costs and expenses, including reasonable attorney fees, expert fees, and engineering fees, if the court determines that the defendant's activity was not a public nuisance. The bill also prohibits DOJ from bringing an action to enjoin a public nuisance if the alleged activity is not in violation of a statute, rule, permit, or ordinance.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

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

1 **SECTION 1.** 165.016 of the statutes is created to read:

2 **165.016 Prohibition.** The attorney general may not contract with, or appoint
3 as a temporary assistant attorney general, any private attorney to assist the
4 department of justice in any court action unless the governor requests the attorney
5 general to enter into the contract or appoint the temporary assistant attorney
6 general.

7 **SECTION 2.** 165.25 (1) of the statutes is amended to read:

8 165.25 **(1)** REPRESENT STATE. Except as provided in s. ss. 165.253 and 978.05
9 (5), appear for the state and prosecute or defend all actions and proceedings, civil or
10 criminal, in the court of appeals and the supreme court, in which the state is
11 interested or a party, and attend to and prosecute or defend all civil cases sent or
12 remanded to any circuit court in which the state is a party; and, if requested by the
13 governor or either house of by the legislature, by adoption in both houses of a joint
14 resolution. appear for and represent the state, any state department, agency, official,

SENATE BILL 425

1 employee or agent, whether required to appear as a party or witness in any civil or
 2 criminal matter, and prosecute or defend in any court or before any officer, any cause
 3 or matter, civil or criminal, in which the state or the people of this state may be
 4 interested. The public service commission may request under s. 196.497 (7) that the
 5 attorney general intervene in federal proceedings. All expenses of the proceedings
 6 shall be paid from the appropriation under s. 20.455 (1) (d).

Insert
3-6

7 SECTION 3. 165.25 (1m) of the statutes is created to read:

8 165.25 (1m) RETURN OF CERTAIN PENALTIES. Repay to a party, upon that party's
 9 request, the amount of any monetary penalty that was paid by the party to the state
 10 as the result of an action brought by the state against the party for a violation of an
 11 environmental requirement, as defined in s. 299.83 (1) (d), if a private person or the
 12 federal environmental protection agency commenced an action against the same
 13 party and received a monetary award from the party arising out of the same course
 14 of conduct as the conduct that resulted in the department bringing its action.

15 SECTION 4. 165.253 of the statutes is created to read:

16 165.253 Limits on representation. (1) The department may not do any of
 17 the following:

18 (a) Commence a civil action against a party regarding any issue that is the
 19 subject of another civil action against that party unless the governor or the
 20 legislature, by adoption in both houses of a joint resolution, requests the department
 21 to commence the action or unless required to do so under s. 165.25 (2) to (9).

22 (b) Join in any action that has been commenced by another state or political
 23 subdivision of another state unless the governor requests the department to join in
 24 the action.

25 (c) Intervene in a civil action unless one of the following conditions exist:

SENATE BILL 425**SECTION 4**

1 1. The governor or the legislature, by adoption in both houses of a joint
2 resolution, requests the department to intervene in the action.

3 2. All parties to the action consent to the intervention.

4 3. The department is required to intervene under s. 165.25 (2) to (9).

5 **SECTION 5.** 823.02 of the statutes is renumbered 823.02 (1m) and amended to
6 read:

7 823.02 **(1m)** An action to enjoin a public nuisance may be commenced and
8 prosecuted in the name of the state, either by the attorney general on information
9 obtained by the department of justice, or upon the relation of a private individual,
10 sewerage commission created under ss. 200.01 to 200.15 or a county, having first
11 obtained leave therefor from the court. An action to enjoin a public nuisance may be
12 commenced and prosecuted by a city, village, town or a metropolitan sewerage
13 district created under ss. 200.21 to 200.65 in the name of the municipality or
14 metropolitan sewerage district, and it is not necessary to obtain leave from the court
15 to commence or prosecute the action. ~~The same rule as to liability for costs shall~~
16 ~~govern as in other actions brought by the state.~~ No stay of any order or judgment
17 enjoining or abating, in any action under this section, may be had unless the appeal
18 is taken within 5 days after notice of entry of the judgment or order or service of the
19 injunction. Upon appeal and stay, the return to the court of appeals or supreme court
20 shall be made immediately.

21 **SECTION 6.** 823.02 (1g) of the statutes is created to read:

22 823.02 **(1g)** In this section, "litigation expenses" means the sum of the costs,
23 disbursements, and expenses, including reasonable attorney fees, expert witnesses,
24 and engineering fees, necessary to prepare or participate in a court action under this
25 section.

SENATE BILL 425

The treatment of section 165.25 (1) and (1m) of the statutes first applies to actions commenced on the effective date of this subsection.

1 SECTION 7. 823.02 (2) and (3) of the statutes are created to read:
2 823.02 (2) No action may be commenced and prosecuted under sub. (1m) by the
3 attorney general if the activity, use, or practice alleged to be a nuisance is not in
4 violation of any statute, rule, order, permit, approval, or local ordinance or
5 regulation.

6 (3) Notwithstanding s. 814.04 (1) and (2), the court shall award litigation
7 expenses to the defendant in any action brought under sub. (1m) in which the court
8 finds that the defendant's activity, use, or practice that was alleged to be a public
9 nuisance was not a public nuisance.

10 SECTION 8. Initial applicability.

11 (1) The treatment of sections 165.25 (1) and (1m) and 165.253 of the statutes,
12 the renumbering and amendment of section 823.02 of the statutes, and the creation
13 of section 823.02 (1g), (2), and (3) of the statutes first apply to actions commenced on
14 the effective date of this subsection.

15 (2) The treatment of section 165.016 of the statutes first applies to contracts
16 entered into, modified, extended, or renewed on the effective date of this subsection.

action: NS: eff date E 17

(B) Section #. (END) Effective dates. This act takes effect on the day of its publication, except as follows: #

*test*NS: eff date → (#) The treatment of sections 165.25 (1) and SECTION # (#) of this act (and (1m) of the statutes) take effect (a.r.) on the initiation date specified in 2007 Wisconsin Act 1, section 209 (1).*

2007-2008 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3273/?ins
RPN:.....

1 insert 3-6:

2 **SECTION 1.** 165.25 (1) of the statutes, as affected by 2007 Wisconsin Act 1, is
3 amended to read:

4 165.25 (1) REPRESENT STATE IN APPEALS AND ON REMAND. Except as provided in
5 ss. 5.05 (2m) (a), 165.253, and 978.05 (5), appear for the state and prosecute or defend
6 all actions and proceedings, civil or criminal, in the court of appeals and the supreme
7 court, in which the state is interested or a party, and attend to and prosecute or
8 defend all civil cases sent or remanded to any circuit court in which the state is a
9 party. Nothing in this subsection deprives or relieves the attorney general or the
10 department of justice of any authority or duty under this chapter.

NOTE: NOTE: Sub. (1) is shown as amended by 2007 Wis. Act 1 eff. the initiation date as set forth in section 209 (1) of that Act. Prior to that date it reads: NOTE:

11 (1) REPRESENT STATE. Except as provided in s. 978.05 (5), appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the court
12 of appeals and the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded to any circuit court
13 in which the state is a party; and, if requested by the governor or either house of the legislature, appear for and represent the state, any state department, agency, official,
14 employee or agent, whether required to appear as a party or witness in any civil or criminal matter, and prosecute or defend in any court or before any officer, any
15 cause or matter, civil or criminal, in which the state or the people of this state may be interested. The public service commission may request under s. 196.497 (7) that
16 the attorney general intervene in federal proceedings. All expenses of the proceedings shall be paid from the appropriation under s. 20.455 (1) (d).

History: 1971 c. 125 s. 522 (1); 1971 c. 215; 1973 c. 333; 1975 c. 81, 199; 1977 c. 29 s. 1656 (27); 1977 c. 187, 260, 273, 344; 1981 c. 20, 62, 96; 1983 a. 27; 1983 a. 36
s. 96 (2), (3), (4); 1983 a. 192; 1985 a. 29, 66; 1987 a. 416; 1989 a. 31, 115, 187, 206, 359; 1991 a. 25, 39, 269; 1993 a. 27, 28, 365; 1995 a. 27 ss. 4453 to 4454m, 9126 (19);
1995 a. 201; 1997 a. 27, 111; 2001 a. 16; 2003 a. 111, 235; 2005 a. 96, 458; 2007 a. 1.

17 **SECTION 2.** 165.25 (1m) of the statutes, as affected by 2007 Wisconsin Act 1, is
18 amended to read:

19 165.25 (1m) REPRESENT STATE IN OTHER MATTERS. If requested by the governor
20 or either house of by the legislature, by adoption in both houses of a joint resolution,
21 appear for and represent the state, any state department, agency, official, employee
22 or agent, whether required to appear as a party or witness in any civil or criminal
23 matter, and prosecute or defend in any court or before any officer, any cause or
24 matter, civil or criminal, in which the state or the people of this state may be
25 interested. The public service commission may request under s. 196.497 (7) that the

- 1 attorney general intervene in federal proceedings. All expenses of the proceedings
- 2 shall be paid from the appropriation under s. 20.455 (1) (d).

NOTE: NOTE: Sub. (1m) is shown as affected by 2007 Wis. Act 1, s. 179, eff. the initiation date as set forth in section 209 (1) of that Act. NOTE:

History: 1971 c. 125 s. 522 (1); 1971 c. 215; 1973 c. 333; 1975 c. 81, 199; 1977 c. 29 s. 1656 (27); 1977 c. 187, 260, 273, 344; 1981 c. 20, 62, 96; 1983 a. 27; 1983 a. 36 s. 96 (2), (3), (4); 1983 a. 192; 1985 a. 29, 66; 1987 a. 416; 1989 a. 31, 115, 187, 206, 359; 1991 a. 25, 39, 269; 1993 a. 27, 28, 365; 1995 a. 27 ss. 4453 to 4454m, 9126 (19); 1995 a. 201; 1997 a. 27, 111; 2001 a. 16; 2003 a. 111, 235; 2005 a. 96, 458; 2007 a. 1.



2007 BILL

Regen

1 AN ACT *to renumber and amend* 823.02; *to amend* 165.25 (1) and 165.25 (1m);
2 and *to create* 165.016, 165.25 (1r), 165.253, 823.02 (1g) and 823.02 (2) and (3)
3 of the statutes; **relating to:** the authority of the Department of Justice and
4 public nuisance actions.

by adoption of a resolution

either

Analysis by the Legislative Reference Bureau

Currently, the Department of Justice (DOJ) is required to prosecute and defend all civil and criminal actions in the court of appeals and Supreme Court in which the state is interested or is a party. In addition, if requested by the governor or either house of the legislature, DOJ must represent the state or a state agency in any action in which the state or the people of the state may have an interest. This bill requires both houses, rather than just one house, of the legislature to make the request for DOJ to act in such cases. The bill also prohibits DOJ from doing any of the following:

X
X

all laws

1. Starting a civil action against a party regarding any issue that is the subject of another civil action against that party unless the governor or both houses of the legislature request the department to start the action.

X

(S)

either ← use twice

2. Joining in any action that has been commenced by another state unless the governor requests that joinder.

X

3. Intervening in a civil action unless the governor or both houses request it, all parties agree to the intervention, or the department is required by statute to intervene.

The bill prohibits the attorney general from contracting with or appointing a private attorney as a temporary assistant attorney general unless the governor

BILL

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2 **165.016 Prohibition.** The attorney general may not contract with, or appoint
3 as a temporary assistant attorney general, any private attorney to assist the
4 department of justice in any court action unless the governor requests the attorney
5 general to enter into the contract or appoint the temporary assistant attorney
6 general.

7 **SECTION 2.** 165.25 (1) of the statutes, as affected by 2007 Wisconsin Act 1, is
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9 **165.25 (1) REPRESENT STATE IN APPEALS AND ON REMAND.** Except as provided in
10 ss. 5.05 (2m) (a), 165.253, and 978.05 (5), appear for the state and prosecute or defend
11 all actions and proceedings, civil or criminal, in the court of appeals and the supreme
12 court, in which the state is interested or a party, and attend to and prosecute or
13 defend all civil cases sent or remanded to any circuit court in which the state is a

BILL

1 party. Nothing in this subsection deprives or relieves the attorney general or the
2 department of justice of any authority or duty under this chapter.

3 **SECTION 3.** 165.25 (1m) of the statutes, [✓] as affected by 2007 Wisconsin Act 1, is
4 amended to read:

5 **165.25 (1m) REPRESENT STATE IN OTHER MATTERS.** If requested by the governor
6 or ~~either house of~~ ^{plaintiff} by the legislature, by adoption in both houses of a joint resolution,
7 appear for and represent the state, any state department, agency, official, employee
8 or agent, whether required to appear as a party or witness in any civil or criminal
9 matter, and prosecute or defend in any court or before any officer, any cause or
10 matter, civil or criminal, in which the state or the people of this state may be
11 interested. The public service commission may request under s. 196.497 (7) that the
12 attorney general intervene in federal proceedings. All expenses of the proceedings
13 shall be paid from the appropriation under s. 20.455 (1) (d).

14 **SECTION 4.** 165.25 (1r) of the statutes [✓] is created to read:

15 **165.25 (1r) RETURN OF CERTAIN PENALTIES.** Repay to a party, upon that party's
16 request, the amount of any monetary penalty that was paid by the party to the state
17 as the result of an action brought by the state against the party for a violation of an
18 environmental requirement, as defined in s. 299.83 (1) (d), if a private person or the
19 federal environmental protection agency commenced an action against the same
20 party and received a monetary award from the party arising out of the same course
21 of conduct as the conduct that resulted in the department bringing its action.

22 **SECTION 5.** 165.253 of the statutes [✓] is created to read:

23 **165.253 Limits on representation.** (1) The department may not do any of
24 the following:

BILL

1 (a) Commence a civil action against a party regarding any issue that is the
2 subject of another civil action against that party unless the governor or the
3 legislature, by adoption in ^{either} both houses of a joint resolution, requests the department
4 to commence the action or unless required to do so under s. 165.25 (2) to (9).

5 (b) Join in any action that has been commenced by another state or political
6 subdivision of another state unless the governor requests the department to join in
7 the action.

- 8 (c) Intervene in a civil action unless one of the following conditions exist:
- 9 1. The governor or the legislature, by adoption in ^{either} both houses of a joint
10 resolution, requests the department to intervene in the action.
 - 11 2. All parties to the action consent to the intervention.
 - 12 3. The department is required to intervene under s. 165.25 (2) to (9).

13 **SECTION 6.** 823.02 of the statutes is renumbered 823.02 (1m) and amended to
14 read:

15 **823.02 (1m)** An action to enjoin a public nuisance may be commenced and
16 prosecuted in the name of the state, either by the attorney general on information
17 obtained by the department of justice, or upon the relation of a private individual,
18 sewerage commission created under ss. 200.01 to 200.15 or a county, having first
19 obtained leave therefor from the court. An action to enjoin a public nuisance may be
20 commenced and prosecuted by a city, village, town or a metropolitan sewerage
21 district created under ss. 200.21 to 200.65 in the name of the municipality or
22 metropolitan sewerage district, and it is not necessary to obtain leave from the court
23 to commence or prosecute the action. ~~The same rule as to liability for costs shall~~
24 ~~govern as in other actions brought by the state.~~ No stay of any order or judgment
25 enjoining or abating, in any action under this section, may be had unless the appeal

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1 is taken within 5 days after notice of entry of the judgment or order or service of the
2 injunction. Upon appeal and stay, the return to the court of appeals or supreme court
3 shall be made immediately.

4 **SECTION 7.** 823.02 (1g) of the statutes is created to read:

5 823.02 (1g) In this section, "litigation expenses" means the sum of the costs,
6 disbursements, and expenses, including reasonable attorney fees, expert witnesses,
7 and engineering fees, necessary to prepare or participate in a court action under this
8 section.

9 **SECTION 8.** 823.02 (2) and (3) of the statutes are created to read:

10 823.02 (2) No action may be commenced and prosecuted under sub. (1m) by the
11 attorney general if the activity, use, or practice alleged to be a nuisance is not in
12 violation of any statute, rule, order, permit, approval, or local ordinance or
13 regulation.

14 (3) Notwithstanding s. 814.04 (1) and (2), the court shall award litigation
15 expenses to the defendant in any action brought under sub. (1m) in which the court
16 finds that the defendant's activity, use, or practice that was alleged to be a public
17 nuisance was not a public nuisance.

18 **SECTION 9. Initial applicability.**

19 (1) The treatment of sections 165.25 (1r) and 165.253 of the statutes, the
20 renumbering and amendment of section 823.02 of the statutes, and the creation of
21 section 823.02 (1g), (2), and (3) of the statutes first apply to actions commenced on
22 the effective date of this subsection.

23 (2) The treatment of section 165.25 (1) and (1m) of the statutes first applies to
24 actions commenced on the effective date of this subsection.

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1 (3) The treatment of section 165.016 of the statutes first applies to contracts
2 entered into, modified, extended, or renewed on the effective date of this subsection.

3 **SECTION 10. Effective dates.** This act takes effect on the day after publication,
4 except as follows:

5 (1) The treatment of section 165.25 (1) and (1m) of the statutes and SECTION 9

6 (2) of this act take effect on the initiation date specified in 2007 Wisconsin Act 1,

7 section 209 (1) ^{on} or the day after publication, whichever is later

8

(END)



State of Wisconsin
2007 - 2008 LEGISLATURE

LRB-3273/2

RPN:kjff

2007 BILL

1 *regen.*
2 AN ACT *to renumber and amend* 823.02; *to amend* 165.25 (1) and 165.25 (1m);
3 and *to create* 165.016, 165.25 (1r), 165.253, 823.02 (1g) and 823.02 (2) and (3)
4 of the statutes; **relating to:** the authority of the Department of Justice and
public nuisance actions.

Analysis by the Legislative Reference Bureau

Currently, the Department of Justice (DOJ) is required to prosecute and defend all civil and criminal actions in the court of appeals and Supreme Court in which the state is interested or is a party. In addition, if requested by the governor or either house of the legislature, DOJ must represent the state or a state agency in any action in which the state or the people of the state may have an interest. This bill allows either house of the legislature, by adoption of a resolution, to make the request for DOJ to act in such cases. The bill also prohibits DOJ from doing any of the following:

1. Starting a civil action against a party regarding any issue that is the subject of another civil action against that party unless the governor or either house of the legislature requests the department to start the action.
2. Joining in any action that has been commenced by another state unless the governor requests that joinder.
3. Intervening in a civil action unless the governor or either house requests it, all parties agree to the intervention, or the department is required by statute to intervene.

The bill prohibits the attorney general from contracting with or appointing a private attorney as a temporary assistant attorney general unless the governor

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the department of justice

requests that the attorney general do so. The bill also requires DOJ to repay a party the amount of any monetary penalty that was paid by the party to the state as the result of an environmental violation if that party was required to pay a monetary award to another person as the result of an action arising out of the same conduct.

Under current law, DOJ, counties, and local units of government may bring an action to enjoin a public nuisance. Generally, the costs of bringing the action and defending the action are born by each party, except for disbursements and specific amounts for expert and attorney fees. This bill requires a court to award the defendant all of the defendant's costs and expenses, including reasonable attorney fees, expert fees, and engineering fees, if the court determines that the defendant's activity was not a public nuisance. The bill also prohibits DOJ from bringing an action to enjoin a public nuisance if the alleged activity is not in violation of a statute, rule, permit, or ordinance.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

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

1 **SECTION 1.** 165.016 of the statutes is created to read:

2 **165.016 Prohibition.** The attorney general may not contract with, or appoint
3 as a temporary assistant attorney general, any private attorney to assist the
4 department of justice in any court action unless the governor requests the attorney
5 general to enter into the contract or appoint the temporary assistant attorney
6 general.

7 **SECTION 2.** 165.25 (1) of the statutes, as affected by 2007 Wisconsin Act 1, is
8 amended to read:

9 **165.25 (1) REPRESENT STATE IN APPEALS AND ON REMAND.** Except as provided in
10 ss. 5.05 (2m) (a), 165.253, and 978.05 (5), appear for the state and prosecute or defend
11 all actions and proceedings, civil or criminal, in the court of appeals and the supreme
12 court, in which the state is interested or a party, and attend to and prosecute or
13 defend all civil cases sent or remanded to any circuit court in which the state is a

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1 party. Nothing in this subsection deprives or relieves the attorney general or the
2 department of justice of any authority or duty under this chapter.

3 **SECTION 3.** 165.25 (1m) of the statutes, as affected by 2007 Wisconsin Act 1, is
4 amended to read:

5 165.25 (1m) REPRESENT STATE IN OTHER MATTERS. If requested by the governor
6 or by either house of the legislature, by adoption of a resolution, appear for and
7 represent the state, any state department, agency, official, employee or agent,
8 whether required to appear as a party or witness in any civil or criminal matter, and
9 prosecute or defend in any court or before any officer, any cause or matter, civil or
10 criminal, in which the state or the people of this state may be interested. The public
11 service commission may request under s. 196.497 (7) that the attorney general
12 intervene in federal proceedings. All expenses of the proceedings shall be paid from
13 the appropriation under s. 20.455 (1) (d).

14 **SECTION 4.** 165.25 (1r) of the statutes is created to read:

15 165.25 (1r) RETURN OF CERTAIN PENALTIES. Repay to a party, upon that party's
16 request, the amount of any monetary penalty that was paid by the party to the state
17 as the result of an action brought by the state against the party for a violation of an
18 environmental requirement, as defined in s. 299.83 (1) (d), if a private person or the
19 federal environmental protection agency commenced an action against the same
20 party and received a monetary award from the party arising out of the same course
21 of conduct as the conduct that resulted in the department bringing its action.

22 **SECTION 5.** 165.253 of the statutes is created to read:

23 **165.253 Limits on representation.** (1) The department may not do any of
24 the following:

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1 (a) Commence a civil action against a party regarding any issue that is the
2 subject of another civil action against that party unless the governor or the
3 legislature, by adoption in either house of a resolution, requests the department to
4 commence the action or unless required to do so under s. 165.25 (2) to (9).

5 (b) Join in any action that has been commenced by another state or political
6 subdivision of another state unless the governor requests the department to join in
7 the action.

8 (c) Intervene in a civil action unless one of the following conditions exist:

- 9 1. The governor or the legislature, by adoption in either house of a resolution,
10 requests the department to intervene in the action.
11 2. All parties to the action consent to the intervention.
12 3. The department is required to intervene under s. 165.25 (2) to (9).

13 **SECTION 6.** 823.02 of the statutes is renumbered 823.02 (1m) and amended to
14 read:

15 823.02 (1m) An action to enjoin a public nuisance may be commenced and
16 prosecuted in the name of the state, either by the attorney general on information
17 obtained by the department of justice, or upon the relation of a private individual,
18 sewerage commission created under ss. 200.01 to 200.15 or a county, having first
19 obtained leave therefor from the court. An action to enjoin a public nuisance may be
20 commenced and prosecuted by a city, village, town or a metropolitan sewerage
21 district created under ss. 200.21 to 200.65 in the name of the municipality or
22 metropolitan sewerage district, and it is not necessary to obtain leave from the court
23 to commence or prosecute the action. ~~The same rule as to liability for costs shall~~
24 ~~govern as in other actions brought by the state.~~ No stay of any order or judgment
25 enjoining or abating, in any action under this section, may be had unless the appeal

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1 is taken within 5 days after notice of entry of the judgment or order or service of the
2 injunction. Upon appeal and stay, the return to the court of appeals or supreme court
3 shall be made immediately.

4 **SECTION 7.** 823.02 (1g) of the statutes is created to read:

5 823.02 (1g) In this section, "litigation expenses" means the sum of the costs,
6 disbursements, and expenses, including reasonable attorney fees, expert witnesses,
7 and engineering fees, necessary to prepare or participate in a court action under this
8 section.

9 **SECTION 8.** 823.02 (2) and (3) of the statutes are created to read:

10 823.02 (2) No action may be commenced and prosecuted under sub. (1m) by the
11 attorney general if the activity, use, or practice alleged to be a nuisance is not in
12 violation of any statute, rule, order, permit, approval, or local ordinance or
13 regulation.

14 (3) Notwithstanding s. 814.04 (1) and (2), the court shall award litigation
15 expenses to the defendant in any action brought under sub. (1m) in which the court
16 finds that the defendant's activity, use, or practice that was alleged to be a public
17 nuisance was not a public nuisance.

18 **SECTION 9. Initial applicability.**

19 (1) ^{This act} ~~The~~ treatment of sections 165.25 (1r) and 165.253 of the statutes, the
20 renumbering and amendment of section 823.02 of the statutes, and the creation of
21 section 823.02 (1g), (2), and (3) of the statutes first apply to actions commenced on
22 the effective date of this subsection.

23 (2) The treatment of section 165.25 (1) and (1m) of the statutes first applies to
24 actions commenced on the effective date of this subsection.

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1 (3) The treatment of section 165.016 of the statutes first applies to contracts
2 entered into, modified, extended, or renewed on the effective date of this subsection.

3 **SECTION 10. Effective dates.** This act takes effect on the day after publication,
4 except as follows:

5 (1) The treatment of section 165.25 (1) and (1m) of the statutes and SECTION 9
6 (2) of this act take effect on the initiation date specified in 2007 Wisconsin Act 1,
7 section 209 (1), or on the day after publication whichever is later.

8 (END)

Duerst, Christina

From: Hoelter, Jon
Sent: Thursday, January 31, 2008 12:54 PM
To: LRB.Legal
Subject: Draft Review: LRB 07-3273/3 Topic: Nuisance lawsuits and authority of DOJ

Please Jacket LRB 07-3273/3 for the ASSEMBLY.