

2013 DRAFTING REQUEST

Bill

Received: 12/27/2012 Received By: tkuczens
Wanted: As time permits Same as LRB:
For: David Craig (608) 266-3363 By/Representing: Amy
May Contact: Drafter: tkuczens
Subject: Courts - garn/injunct Addl. Drafters:
Extra Copies:

Submit via email: YES
Requester's email: Rep.Craig@legis.wisconsin.gov
Carbon copy (CC) to: tracy.kuczenski@legis.wisconsin.gov

Pre Topic:

No specific pre topic given

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Staying injunctions barring laws having statewide effect

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/P5	tkuczens 4/8/2013	evinz 4/8/2013	jmurphy 4/8/2013	_____	srose 4/4/2013		
/P6	chanaman 4/8/2013	evinz 4/8/2013	jmurphy 4/8/2013	_____	lparisi 4/8/2013		
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*None
needed*

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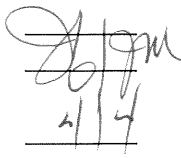
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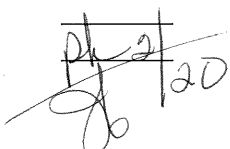
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/? tkuczens

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1/18/13

FE Sent For:

<END>



State of Wisconsin
2013 - 2014 LEGISLATURE

0926/P1



LRB-0243/P1

TKK:eev:ph

insert
d-note
stays

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

in 1/18/13

Today or 1/21/13

1 **AN ACT** ^{reyn} *to renumber and amend* 806.08 (1), 806.08 (3) and 806.08 (5); *to amend*
 2 808.07 (2) (a) (intro.), 808.07 (2) (a) 1. and 808.07 (2) (a) 2.; and *to create* 806.08
 3 (1) (b), 806.08 (3) (b) and 806.08 (5) (b) of the statutes; **relating to:** injunctions
 4 suspending or restraining the enforcement or execution statewide of a statute
 5 of this state.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

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

6 **SECTION 1.** 806.08 (1) of the statutes is renumbered 806.08 (1) (a) and amended
7 to read:

8 806.08 (1) (a) Unless otherwise ordered by the court, and except as provided
9 in par. (b), an interlocutory or final judgment in an action for an injunction or in a

1 receivership action shall not be stayed during the period after its entry and until an
 2 appeal is taken or during the pendency of an appeal. Subsection (3) governs the
 3 suspending, modifying, restoring, or granting of an injunction during the pendency
 4 of an appeal.

5 **SECTION 2.** 806.08 (1) (b) of the statutes is created to read:

6 806.08 (1) (b) The court shall immediately ^{order a 45-day} stay ^{of} an interlocutory or final
 7 judgment that modifies, restores, or grants an injunction that will, in turn, have the
 8 effect of suspending or restraining the enforcement or execution statewide of a
 9 statute of this state. Insert 2-9

10 **SECTION 3.** 806.08 (3) of the statutes is renumbered 806.08 (3) (a) and amended
 11 to read:

12 806.08 (3) (a) When an appeal is taken from an interlocutory or final judgment
 13 or appealable order granting, dissolving, or denying an injunction, the court in its
 14 discretion may, except as provided in par. (b), suspend, modify, restore, or grant an
 15 injunction during the pendency of the appeal upon such terms as to bond or otherwise
 16 as it considers proper for the security of the rights of the adverse party.

17 **SECTION 4.** 806.08 (3) (b) of the statutes is created to read:

18 806.08 (3) (b) 1. The court may not during the pendency of an appeal restore
 19 an injunction stayed as required under sub. (1) (b).

20 2. If the court modifies or grants an injunction as permitted under par. (a) that
 21 will have the effect of suspending or restraining the enforcement or execution
 22 statewide of a statute of this state, the court shall immediately ^{order a 45-day} stay ^{of} the interlocutory
 23 judgment modifying or granting that injunction. Insert 2-23

24 **SECTION 5.** 806.08 (5) of the statutes is renumbered 806.08 (5) (a) and amended
 25 to read:

1 806.08 (5) (a) This section does not limit any power of an appellate court or of
2 a judge or justice thereof to stay proceedings during the pendency of an appeal or,
3 subject to par. (b), to suspend, modify, restore, or grant an injunction during the
4 pendency of an appeal or to make any order appropriate to preserve the existing state
5 of affairs or the effectiveness of the judgment subsequently to be entered.

6 **SECTION 6.** 806.08 (5) (b) of the statutes is created to read:

7 806.08 (5) (b) 1. An appellate court under ch. 752 may not during the pendency
8 of an appeal restore an injunction that has been stayed as required under sub. (1) (b)
9 or (3) (b).

10 2. If an appellate court under ch. 752 modifies or grants an injunction, as
11 permitted under par. (a), that will have the effect of suspending or restraining the
12 enforcement or execution statewide of a statute of this state, the appellate court shall
13 ^{order a 45-day} immediately ^{of} stay the interlocutory judgment modifying or granting that injunction.

14 **SECTION 7.** 808.07 (2) (a) (intro.) of the statutes is amended to read:

15 808.07 (2) (a) (intro.) During the pendency of an appeal, a trial court or an
16 appellate court may do any of the following:

17 **SECTION 8.** 808.07 (2) (a) 1. of the statutes is amended to read:

18 808.07 (2) (a) 1. Stay execution or enforcement of a judgment or order;

19 **SECTION 9.** 808.07 (2) (a) 2. of the statutes is amended to read:

20 808.07 (2) (a) 2. Suspend Except as provided in s. 806.08 (3) (b) 1. and (5) (b)
21 1., and subject to s. 806.08 (1) (b), (3) (b) 2., and (5) (b) 2., suspend, modify, restore,
22 or grant an injunction;~~or.~~

23 **SECTION 10. Initial applicability.**

Insert
3-13

2013-2014 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

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TKK:.....

INSERT 2-9

1 A temporary stay ordered under this paragraph shall become permanent if not
2 suspended or lifted by a court of appeals under ch. 752. A party aggrieved by an order
3 under this paragraph may not appeal the order.

INSERT 2-23

4 A temporary stay ordered under this subdivision shall become permanent if not
5 suspended or lifted by a court of appeals under ch. 752. A party aggrieved by an order
6 under this subdivision may not appeal the order.

INSERT 3-13

7 A temporary stay ordered under this subdivision shall become permanent if not
8 suspended or lifted by the supreme court. A party aggrieved by an order under this
9 subdivision may not appeal the order.

10

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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0926/7dn
TKK:.....

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Representative Craig:

On December 19, 2012, I spoke with Amy Lewis regarding the instructions for this bill. Per Amy's instructions, this bill requires a circuit court judge to immediately stay, for a period of 45 days, an interlocutory or final judgment that modifies, restores, or grants an injunction having the effect of enjoining the implementation or enforcement of a state law. A temporary stay imposed under the bill by the circuit court becomes permanent if not suspended or lifted by a court of appeals. Amy explained that a court of appeals could lift a 45-day stay imposed by a circuit court, but at that time the court of appeals would be required to immediately order another 45-day stay of the injunction. Amy also explained that a court of appeals that would be eligible to lift the temporary stay would be required to be randomly selected. Because I have questions surrounding the appeal of the 45-day stay, this draft does not include this last provision. Finally, a 45-day stay imposed in the court of appeals becomes permanent if not suspended or lifted by the Wisconsin Supreme Court.

As Amy instructed, the bill does not provide for an automatic appeal of a stay imposed under the bill. Amy also instructed me to prohibit a party aggrieved by the order from appealing the stay of the injunction.

The bill does not interfere with either a district court's or a court of appeals' ability to grant an injunction, nor does the bill modify the standards a court must consider prior to granting an injunction. Note that, under current law, an injunction may only be issued if a court has made specific findings, including that a party has no adequate remedy at law and will suffer irreparable harm in the absence of the injunction. See, e.g., Werner v. A. L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520 (1977).

Take out scoring, italicize

The drafting instructions do raise several procedural impediments to due process for aggrieved parties and certain constitutional issues involving the separation of powers between the Legislative and Judicial Branches.

1. Procedural impediments: In the absence of either an automatic appeal of the stay or the right of the aggrieved party to initiate an appeal of the stay, no court of appeals would be able to hear an appeal of the stay by the aggrieved party. A court of appeals has no inherent power to, on its own initiative, pursue a case in order to consider an matter raised in the case; a party must initiate an appeal. See, for example, s. 808.03 (2) (b), stats., (which permits an appeal of a non-final judgment that would protect the

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petitioner from substantial or irreparable injury). See also s. 808.04, stats., governing the timing initiating an appeal, and s. 808.075, stats., governing permitted court actions pending appeal. But see s. 809.70, stats., (permitting “a person . . . [to] request the supreme court to take jurisdiction of an original action by filing a petition which may be supported by a memorandum.”). Without an appeal to the court of appeals, any temporary stay imposed under this bill by a circuit court would become a permanent stay.

Current law s. 808.05 (3), stats., does permit the Supreme Court to take jurisdiction of an appeal on its own motion. However, for the Supreme Court to take this action, the matter must first be appealed (brought to the court of appeals): “The supreme court may take jurisdiction of an appeal or any other proceeding pending in the court of appeals if . . . [i]t, on its own motion, decides to review the matter directly.”

2. Constitutional Concerns: This bill may be subject to a constitutional challenge as in violation of the separation of powers provisions of the Wisconsin Constitution. As you are aware, article IV, section 1, of the Wisconsin Constitution vests the legislative powers in the senate and assembly. Article VII, sections 2, 5, and 8, vest the judicial powers of the state in a unified court system and grants circuit courts and the courts of appeals original and appellate jurisdiction, respectively.

Under the separation of powers doctrine, the constitution confers on each branch of government certain powers upon which the other branches may not intrude. See, e.g., *State v. Holmes*, 106 Wis. 2d 31, 42 (1981); *Thoe v. Chicago M. & St. P. R. Co.*, 181 Wis. 456, 465 (1923) (involving an attempt by the legislature to legislate what constitutes legally sufficient evidence). Although the separation of powers doctrine does not always require a strict, absolute division of powers, in areas of shared power, one branch may not exercise power in a manner that will unduly burden or substantially interfere with another branch’s essential role and powers. See *Demmith v. Wisconsin Judicial Conference*, 480 N.W.2d 502, 508, 166 Wis. 2d 649, 663 (1992).

Further, the Supreme Court has held that “the setting and enforcement of time periods for judges to decide cases lies within an area of authority exclusively reposed in the judicial branch of government.” *In Matter of Complaint Against Grady*, 118 Wis. 2d 762, 783, 348 N.W.2d 559 (1984) (finding the statute at issue to be an unconstitutional intrusion by the legislature into the exclusively judicial area of judicial decision-making); *but see Grady*, 118 Wis. 2d at 792–93 (Justice Abrahamson, concurring) (finding that the statute governing the timing of judicial decision-making at issue in the case is not unconstitutional as a violation of the doctrine of separation of powers because it does not thwart the court’s power or unduly burden the judicial branch).

This bill withdraws from the circuit and appellate courts the ability to enforce certain judgments (temporary and permanent injunctions), that may in some cases be the only form of remedy available to the party seeking the injunction (restraining the enforcement of a law that may cause irreparable harm if enforced). In so doing, this bill effectively deprives these courts of judicial decision-making authority. In addition, the bill requires the temporary stay of an injunction to become a permanent stay unless the stay is suspended or lifted within 45 days; this requirement effectively imposes a

time period on judicial decision-making in contravention of *Grady*. A court considering the constitutionality of this bill may determine that this bill substantially interferes with the judicial branch's essential role and powers.

Please let me know if you have any questions or wish to make any changes to the draft.

Tracy K. Kuczenski
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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0926/P1dn

TKK:eev:rs

January 18, 2013

Representative Craig:

On December 19, 2012, I spoke with Amy Lewis regarding the instructions for this bill. Per Amy's instructions, this bill requires a circuit court judge to immediately stay, for a period of 45 days, an interlocutory or final judgment that modifies, restores, or grants an injunction having the effect of enjoining the implementation or enforcement of a state law. A temporary stay imposed under the bill by the circuit court becomes permanent if not suspended or lifted by a court of appeals. Amy explained that a court of appeals could lift a 45-day stay imposed by a circuit court, but at that time the court of appeals would be required to immediately order another 45-day stay of the injunction. Amy also explained that a court of appeals that would be eligible to lift the temporary stay would be required to be randomly selected. Because I have questions surrounding the appeal of the 45-day stay, this draft does not include this last provision. Finally, a 45-day stay imposed in the court of appeals becomes permanent if not suspended or lifted by the Wisconsin Supreme Court.

As Amy instructed, the bill does not provide for an automatic appeal of a stay imposed under the bill. Amy also instructed me to prohibit a party aggrieved by the order from appealing the stay of the injunction.

The bill does not interfere with either a district court's or a court of appeals' ability to grant an injunction, nor does the bill modify the standards a court must consider prior to granting an injunction. Note that, under current law, an injunction may only be issued if a court has made specific findings, including that a party has no adequate remedy at law and will suffer irreparable harm in the absence of the injunction. *See, e.g., Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520 (1977).

The drafting instructions do raise several procedural impediments to due process for aggrieved parties and certain constitutional issues involving the separation of powers between the legislative and judicial branches.

1. Procedural impediments: In the absence of either an automatic appeal of the stay or the right of the aggrieved party to initiate an appeal of the stay, no court of appeals would be able to hear an appeal of the stay by the aggrieved party. A court of appeals has no inherent power to, on its own initiative, pursue a case in order to consider an matter raised in the case; a party must initiate an appeal. *See, for example, s. 808.03 (2) (b), stats.*, (which permits an appeal of a non-final judgment that would protect the

petitioner from substantial or irreparable injury). See also s. 808.04, stats., governing the timing initiating an appeal, and s. 808.075, stats., governing permitted court actions pending appeal. But see s. 809.70, stats., (permitting “a person . . . [to] request the supreme court to take jurisdiction of an original action by filing a petition which may be supported by a memorandum.”). Without an appeal to the court of appeals, any temporary stay imposed under this bill by a circuit court would become a permanent stay.

Current law s. 808.05 (3), stats., does permit the Supreme Court to take jurisdiction of an appeal on its own motion. However, for the Supreme Court to take this action, the matter must first be appealed (brought to the court of appeals): “The supreme court may take jurisdiction of an appeal or any other proceeding pending in the court of appeals if . . . [i]t, on its own motion, decides to review the matter directly.”

2. Constitutional Concerns: This bill may be subject to a constitutional challenge as in violation of the separation of powers provisions of the Wisconsin Constitution. As you are aware, article IV, section 1, of the Wisconsin Constitution vests the legislative powers in the senate and assembly. Article VII, sections 2, 5, and 8, vest the judicial powers of the state in a unified court system and grants circuit courts and the courts of appeals original and appellate jurisdiction, respectively.

Under the separation of powers doctrine, the constitution confers on each branch of government certain powers upon which the other branches may not intrude. See, e.g., *State v. Holmes*, 106 Wis. 2d 31, 42 (1981); *Thoe v. Chicago M. & St. P. R. Co.*, 181 Wis. 456, 465 (1923) (involving an attempt by the legislature to legislate what constitutes legally sufficient evidence). Although the separation of powers doctrine does not always require a strict, absolute division of powers, in areas of shared power, one branch may not exercise power in a manner that will unduly burden or substantially interfere with another branch’s essential role and powers. See *Demmith v. Wisconsin Judicial Conference*, 480 N.W.2d 502, 508, 166 Wis. 2d 649, 663 (1992).

Further, the Supreme Court has held that “the setting and enforcement of time periods for judges to decide cases lies within an area of authority exclusively reposed in the judicial branch of government.” *In Matter of Complaint Against Grady*, 118 Wis. 2d 762, 783, 348 N.W.2d 559 (1984) (finding the statute at issue to be an unconstitutional intrusion by the legislature into the exclusively judicial area of judicial decision-making); *but see Grady*, 118 Wis. 2d at 792–93 (Justice Abrahamson, concurring) (finding that the statute governing the timing of judicial decision-making at issue in the case is not unconstitutional as a violation of the doctrine of separation of powers because it does not thwart the court’s power or unduly burden the judicial branch).

This bill withdraws from the circuit and appellate courts the ability to enforce certain judgments (temporary and permanent injunctions), that may in some cases be the only form of remedy available to the party seeking the injunction (restraining the enforcement of a law that may cause irreparable harm if enforced). In so doing, this bill effectively deprives these courts of judicial decision-making authority. In addition, the bill requires the temporary stay of an injunction to become a permanent stay unless the stay is suspended or lifted within 45 days; this requirement effectively imposes a

time period on judicial decision-making in contravention of *Grady*. A court considering the constitutionality of this bill may determine that this bill substantially interferes with the judicial branch's essential role and powers.

Please let me know if you have any questions or wish to make any changes to the draft.

Tracy K. Kuczenski
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Kuczenski, Tracy

From: Craig, David
Sent: Sunday, January 20, 2013 11:58 AM
To: Kuczenski, Tracy
Subject: RE: Draft review: LRB -0926/P1 Topic: Staying injunctions barring laws having statewide effect

Ms. Kuczenski,

The answer to your first question regarding the Supreme Court order is "no". My intent is for the automatic stay to only impact orders of the district and appeals courts.

The answer to your second question is "yes". To address the concerns you raised in your drafters notes, I would like the party seeking the injunction to be able to appeal the automatic stay after review by the district court and by the appeals court, however the stay should be left in place pending the review.

With regard to the timelines, please apply our previously outlined time lines assigned to the courts and re-assign them to the party seeking the injunction.

Please let me know if you have further questions regarding the bill.

Thanks again.

Rep. Craig

From: Kuczenski, Tracy
Sent: Sun 1/20/2013 11:22 AM
To: Craig, David
Subject: RE: Draft review: LRB -0926/P1 Topic: Staying injunctions barring laws having statewide effect

Representative Craig:

I'm a little confused by what you are asking me to do in the next version.

The current draft provides that injunctions are immediately stayed when ordered by a district court or by the court of appeals, but not when ordered by the supreme court. Are you asking that I modify the draft to provide that when the supreme court orders an injunction that it be immediately stayed?

The current draft prohibits a party from appealing an injunction that has been stayed by a district court or the court of appeals. Are you asking that I modify the draft to permit an appeal to be filed?

I believe requiring a party to appeal the stay of an injunction within a prescribed time period is not problematic from a constitutional perspective.

Thanks,
Tracy

-----Original Message-----
From: Craig, David

Sent: Fri 1/18/2013 6:10 PM
To: Kuczenski, Tracy
Subject: FW: Draft review: LRB -0926/P1 Topic: Staying injunctions barring laws having statewide effect

Ms. Kuczenski,

Please add that the injunctions at both the appeals and Supreme Court level are stayed once an appeal is filed with the respective court (or however an appeal is generally filed). Also, from your perspective, rather than putting time constraints on the judge, could we put the time constraints from the party appealing the injunction? If so, please use the same deadlines in the draft, but shift them from the court to the party seeking the reinstatement of the injunction.

If the timeline issue cannot be constitutionally shifted to the party seeking the injunction, please eliminate the timeline portion from the draft. Thanks so much for your continued assistance with this bill.

Sincerely,

Rep. Craig

From: Rep.Craig
Sent: Fri 1/18/2013 4:05 PM
To: Schacht, Nathan; Craig, David
Subject: FW: Draft review: LRB -0926/P1 Topic: Staying injunctions barring laws having statewide effect

From: LRB.Legal
Sent: Friday, January 18, 2013 4:05 PM
To: Rep.Craig
Subject: Draft review: LRB -0926/P1 Topic: Staying injunctions barring laws having statewide effect

Following is the PDF version of draft LRB -0926/P1 and drafter's note.