



# TOM TIFFANY

STATE SENATOR • 12TH SENATE DISTRICT

## Testimony on Senate Bill 645 Senate Committee on Judiciary and Public Safety January 30<sup>th</sup>, 2018

Thank you Chairman Wanggaard and members of the Senate Committee on Judiciary and Public Safety for hearing Senate Bill 645 related to lawsuit reform.

The intention of Senate Bill 645 is to bring uniformity between Wisconsin and the Federal government on civil procedure. Uniformity between the state and federal rules makes it easier for both plaintiffs and defendants. It enhances predictability and provides judges with a larger body of case law on which to draw upon.

There are several major components of this legislation:

- implements common sense changes to procedural requirements for class action lawsuits;
- creates guidelines for consumer lawsuit lending;
- brings the statute of limitations for a miscellaneous action more in line with other states;
- prohibits the use of third party auditors operating on a contingency fee basis to enforce unclaimed property laws; and
- modernizes the interest rate insurers must pay on unpaid claims.

Representative Born and I hope to reduce litigation costs for small and large businesses, as well as curtail abuses in the discovery phase of litigation that costs state and local governments taxpayer dollars. We believe this bill will save time and money by more aligning Wisconsin's civil procedures with the Federal Rules on Civil Procedure creating more certainty for all parties involved.

This legislation has the support of the Wisconsin Civil Justice Council, Wisconsin Manufacturers and Commerce, National Federation of Independent Businesses, Wisconsin Insurance Alliance, Wisconsin Builders Association, U.S. Chamber of Commerce Institute for Legal Reform, American Tort Reform Association, and many others.

Again, thank you members of the Senate Committee on Judiciary and Public Safety for taking my testimony on Senate Bill 645. I would appreciate your support.

Thank you.

Tom Tiffany  
Wisconsin State Senate  
12<sup>th</sup> Senate District



# DAVID CRAIG

STATE SENATOR

Senate Committee on Judiciary and Public Safety  
January 30, 2018  
Senate Bill 645  
Senator David Craig, 28<sup>th</sup> Senate District

Chairman Wanggaard and Committee Members:

Thank you for considering my testimony on behalf of my constituents in the 28<sup>th</sup> Senate District regarding SB 645, Civil Litigation Reform legislation.

To begin, let me be clear: these necessary legislative reforms found in SB 645 will not only provide more certainty in the civil litigation process, but will also have a positive impact on Wisconsin's business climate by reducing the cost and duration of litigation for state and local governments, consumers, and businesses alike.

As background, starting with the sweeping reform in 2011 Act 2, Gov. Scott Walker has followed through with his promise to enhance Wisconsin's business climate through the adoption of litigation reforms. These reforms protect small, medium, and large businesses from meritless lawsuits and ultimately reduce costs. This benefits both employers and employees.

The reforms in this bill build on these past successes. Further, these reforms are consistent with the Governor's Small Business Agenda that called for "lawsuit reforms to protect small businesses."

The heart of this litigation reform initiative is to align Wisconsin's civil procedures rules for discovery and class actions with the corresponding federal rules. The modernization of these court procedures and rules, mostly aimed at costly discovery practices, will reduce litigation costs for small and large businesses, as well as state and local governments who must spend taxpayers' dollars responding to abusive discovery practices. Uniformity between the state and federal rules enhances predictability and provides judges with a larger body of case law upon which to draw. This is particularly helpful to Wisconsin Circuit Court judges.

In addition to aligning and providing specificity to state and federal civil procedures with respect to discovery and class actions, this bill would:

- Create guidance for consumer lawsuit lending, protecting taxpayers by capping lawsuit lending interest rate, fees, and disclosing terms – keeping litigation costs lower.
- Streamline Wisconsin's "generic" statute of limitations for a miscellaneous action to promote efficiency and reduce costs by bringing Wisconsin's procedures closer in line with the rest of the nation that have significantly lower limits.

- Prohibit the use of third party auditors operating on a contingency fee basis by limiting the Department of Revenue's ability to enter into a contingent fee agreement with third party auditors when auditing businesses to enforce unclaimed property laws.
- Modernize the interest rate insurers must pay on unpaid claims by changing the interest rate relating to overdue claim payments from a set 12 percent to prime plus 1 percent.

Thank you for consideration of my testimony as we continue to move Wisconsin *FORWARD* by reigning in unnecessary litigation costs and fostering a more consumer and business-friendly climate.



---

# MARK BORN

---

STATE REPRESENTATIVE • 39<sup>TH</sup> ASSEMBLY DISTRICT

## Testimony on Senate Bill 645

*Senate Committee on Judiciary and Public Safety*

*January 30, 2018*

Chairman Wanggaard and members of the Senate Committee on Judiciary and Public Safety,

Thank you for allowing me to testify in favor of Senate Bill 645.

The primary goal of this comprehensive proposal is to reduce litigation costs for small and large businesses, as well as state and local governments who must spend taxpayer dollars responding to abusive discovery practices and questionable lawsuits. This legislation will align Wisconsin's civil litigation procedures for discovery and class actions with the Federal Rules of Civil Procedure, which will be beneficial and less costly for both plaintiffs and defendants.

This proposal also:

- creates guidelines for consumer lawsuit lending;
- brings the statute of limitations for a miscellaneous actions more in line with other states;
- prohibits the use of third party auditors operating on a contingency fee basis to enforce unclaimed property laws; and
- modernizes the interest rate insurers must pay on unpaid claims.

Currently, the discovery process can be very expensive for businesses of all sizes across our state and can be drawn out to make it even more burdensome. This legislation allows for a court to limit certain aspects of discovery if the court finds them to be either duplicative, able to be obtained through another source, or if related costs are not proportional to the claims. In addition, the legislation sets limits for the types of electronic information that must be stored and preserved. With technology continuously advancing, it is important to set reasonable guidelines regarding accessing data from obsolete systems or data that can be produced in another form.

Wisconsin's current class action statute is 168 years old, and provides little, if any, guidance to the parties or the bench. 48 other states currently mirror federal law and Wisconsin would become the 49th under this bill. Among other things, this legislation lays out the prerequisites for filing a class action, requirements that courts must follow in order to certify a class, and describes certain aspects of a class action that may be appealed. This proposal largely mirrors a rule the Wisconsin Supreme Court adopted last month.



This legislation would protect consumers by capping interest rates on consumer lawsuit loans at 18%, require lending agreements to be in writing, and require that any lawsuit lending transactions be disclosed to the court and all parties involved in the civil proceeding.

Wisconsin is currently tied for having the longest window in the nation for our statute of limitations for a miscellaneous actions for injury of character at 6 years. As proposed in this bill, a 3-year statute of limitation promotes efficiency, while reducing the costs for the state and businesses that arise when investigating distant events. The national average for this type of statute of limitation in 2.66 years.

The proposal also prohibits the Department of Revenue from entering into agreements with third-party audit companies operating on a contingency fee basis to examine another person's documents or records in order to administer the state's unclaimed property law.

Lastly, the legislation adjusts the interest rate insurers must pay on overdue claims from 12% to the prime loan rate plus one percent. In doing so, this interest rate will now mirror the interest rate on general judgements. This will effectively make the statute timeless, allowing for the interest rate on overdue claims to adjust with the market rate.

This legislation has the support of the Wisconsin Civil Justice Council, Wisconsin Manufacturers and Commerce, National Federation of Independent Businesses, Wisconsin Insurance Alliance, Wisconsin Builders Association, U.S. Chamber of Commerce Institute for Legal Reform, the American Tort Reform Association, and many others.

Thank you for your consideration. I will now take any questions.



January 30, 2018

**Testimony to the Senate Committee on Judiciary and Public Safety  
Senate Bill 645**

Jonathan Barry, Executive Secretary

Chairman Wanggaard and members of the committee, thank you for the opportunity to testify on SB 645.

My name is Jonathan Barry and I am the Executive Secretary of the Board of Commissioners of Public Lands, or BCPL. BCPL is the State's oldest agency--having been created in the Constitution in 1848.

Pursuant to Article X of the State Constitution, BCPL manages the Common School Fund—the earnings of which provides virtually all the funding for public school libraries in the state. The constitution further provides that moneys, property, fines and forfeitures that accrue to the State are to be deposited in the Common School Fund. That includes unclaimed property that is not reunited with its rightful owner. In 2016, the unclaimed property added to the Common School Fund amounted to just over \$34 million. The amounts coming from Unclaimed Property varies from year to year but has recently averaged close to \$20 million per year.

A provision in this legislation (section three) prohibiting the use of third party auditors, paid by contingency based on their results, would likely have the consequence of reducing the return of unclaimed property to its rightful owners and slowing additions to the Common School Fund, thereby decreasing future state aid for public school libraries. I am not here today to oppose the overall bill but simply to raise certain questions regarding that singular clause of the bill.

The unclaimed property provision is not integral to the tort reform provisions of the bill.

Wisconsin has adopted the **Uniform** Unclaimed Property Administration Act. Before we significantly diverge from that uniform act, there should be a clear analysis as to why such a change is needed in Wisconsin.

Use of private unclaimed property audit firms has been the norm for nearly 40 years and arose because of the difficulty in identifying unclaimed property among multi-state and, indeed, multinational firms. Currently, all states use private firms to conduct some, or all, of their

Senate Bill 645

Jonathan Barry, Executive Secretary  
Board of Commissioners of Public Lands

unclaimed property audits. They do this because it is fiscally responsible as it insures that public funds will not be spent without results being achieved.

As a Republican, can you recall a Republican legislature ever proposing or passing a bill that would prohibit the state from outsourcing any function?

Under current statutes (and the constitution) DOR is responsible for reuniting abandoned property with its rightful owner and if unable to do so, to deliver such unclaimed property to the Common School Fund. As such, DOR and its officials have trust responsibilities with respect to money and assets that rightfully belong to other people and organizations.

If DOR cannot outsource any auditing function under this legislation, it would seem to require the hiring of additional FTEs to perform such audit functions in-house. If such positions were not created, filled and funded, DOR would be unable to fulfill their trust responsibilities. Also, if DOR is prohibited from using contingency based audit firms, audits will still be conducted by private firms under contract to other states—except that Wisconsin will not have joined the compact formed by these states and will, therefore, not see our citizens benefit from the identification of unclaimed property that rightfully belongs to them.

It is important to note that unclaimed property does not belong to the person or organization currently in possession. It belongs to the individual citizens and businesses of our state.

Preventing DOR from fulfilling those responsibilities seems to be inviting lawsuits rather than bringing certainty to business people and their organizations. Such an outcome seems to run counter to the main purpose of this legislation.

Again, I am speaking for information purposes only. I am not presenting an official agency stand against such legislation as our board has not taken a position at this time. However, I felt it was important to raise these unanswered questions regarding this one provision of the proposed legislation to ensure that such concerns are appropriately considered by the legislature before taking action.

Thank you for your time and consideration.



January 30, 2018

Dear Chairman Wanggaard and the members of the Senate Judiciary Committee,

Thank you for taking the time to discuss Senate Bill 645 today.

The Wisconsin Economic Development Corporation's (WEDC) mission is to advance and maximize opportunities in Wisconsin for business, communities and people to thrive in a globally competitive environment. As part of that, we are committed to creating and maintaining a business climate that allows job creators and businesses to be successful. As you well know, lawsuits can cripple small businesses. This comprehensive legislation will reduce litigation costs for all sizes of businesses as well as state and local governments. The costs of pre-trial collection of evidence known as the discovery process can be burdensome and even debilitating to small businesses. These reforms can save significant time and money associated with the litigation process.

Industry magazines are now consistently ranking Wisconsin as one of the best places to do business. Chief Executive Officer magazine ranked Wisconsin as the 10<sup>th</sup> best state to do business, up from a ranking of 41<sup>st</sup> in 2010. However, one area that continues to hurt Wisconsin in these rankings is civil litigation. According to the U.S. Chamber of Commerce Lawsuit Climate Survey, Wisconsin has fallen in the rankings and our state's rules have lagged federal rules as well as rules in other states. Having such a litigation environment could negatively impact Wisconsin when companies choose to locate or relocate their businesses. Aligning Wisconsin's rules with federal code and providing certainty in civil litigation could improve Wisconsin's rankings and business climate even further.

As you will see, a broad collection of stakeholders and partners of WEDC are here today in support of this legislation. WEDC strives to improve Wisconsin's economic outlook and competitiveness. The reforms in this bill could do just that by reducing costly litigation and providing certainty to small businesses.

Thank you,

Mark R. Hogan  
Secretary and CEO

201 W. Washington Avenue  
Madison, WI 53703  
608.210.6700  
855-INWIBIZ  
InWisconsin.com

**THINK·MAKE·HAPPEN.**

# LAW OFFICES OF WILLIAM C. GLEISNER, III

19125 KILLARNEY WAY  
BROOKFIELD, WI 53045

WILLIAM C. GLEISNER, III  
STATE BAR NO. 1014276

e-mail: [wgleisner@sbcglobal.net](mailto:wgleisner@sbcglobal.net)

PHONE (414) 651-3182  
FAX (262) 505-6116

To: the Honorable Van Wanggaard, Chair  
Senate Judiciary Committee  
Madison, Wisconsin 53703

From: Attorney William C. Gleisner, III

Date: January 30, 2018

Re: 2017 Senate Bill 645 and 2017 Assembly Bill 773

## Introduction

I appear for the purposes of supplying testimony concerning proper process and procedure for the adoption, modification or repeal of Court Rules of Civil Procedure, Evidence or Administration. I have been a lawyer for forty-three years and a member of the Wisconsin Judicial Council for ten years. While on the Council, I was one of the primary drafters of Wisconsin's existing rules of ediscovery. For nearly fourteen years, I have co-authored one of the leading national treatises on ediscovery with Marquette Law Professor Jay Grenig, which is entitled eDiscovery & Digital Evidence (Thomson-Reuters – 2005 - 2018).

## Testimony

Senate Bill 645 (which is the Senate version of Assembly Bill 773) (“Bills 645/773”) will affect practice and procedure in our courts for many years to come. Long ago, a system was established in Wisconsin that ensured that before court rules of procedure were created, modified or repealed, whether by the Supreme Court or the Legislature, review was to be provided by a non-partisan body consisting of representatives from the courts of Wisconsin (including the Supreme Court), the Legislature, the Governor's Office and the State Bar of Wisconsin. That non-partisan body is called the Wisconsin Judicial Council.

I have been a member of that Council for ten years, and your Chair, Senator Wanggaard, has been a member of that Council for nearly that long, as has Representative Ott.

The Council was created by the Legislature in 1951. The Council has a special relationship with the Supreme Court. Pursuant to Wis. Stat. §758.13(2)(a), the Council shall “observe and study the rules of pleading, practice and procedure, and advise the Supreme Court as to changes which will ... promote a speedy determination of litigation upon its merits.” In turn, when the Supreme Court creates rules regarding pleading, practice and procedure in the courts of Wisconsin, §751.12(5) specifies that the Council shall advise the Court regarding those rules. In addition, Wis. Stat. §758.13(2)(f) and (g) also provide that when

the Legislature and the Governor seek to modify rules of pleading, practice and procedure the Council should be involved.

The Judicial Council consists of twenty-one members and the Council's Evidence & Civil Procedure Subcommittee ("Subcommittee") has jurisdiction over rules of civil procedure, such as those contemplated by Bills 645/773. That Subcommittee held a meeting on January 19, 2018 and the following members of the Subcommittee were present: Chair Thomas Shriner of Foley & Lardner; State Bar Representative Attorney Sherry Coley of Davis & Kuelthau; the Governor's representative Attorney Ben Pliskie of the Peterman Law Group; the State Bar President-Elect representative Attorney John Orton of Curran, Hollenbeck & Orton; the DOJ's representative Assistant Attorney General Duane Harlow; and State Bar Representative, William Gleisner. In view of Assembly Bill 773, the Subcommittee voted (with Assistant Attorney General Harlow abstaining) to request the Judicial Council to issue the following resolution at its February 15, 2018 meeting:

WHEREAS ASSEMBLY BILL 773 WILL CHANGE A RULE ADOPTED BY THE SUPREME COURT ON DECEMBER 21, 2017 REGARDING CLASS ACTIONS; AND

WHEREAS ASSEMBLY BILL 773 WILL ADOPT RULES OF DISCOVERY AND OTHER RULES OF CIVIL PROCEDURE WHICH ARE INCONSISTENT WITH THE CURRENT FEDERAL RULES OF CIVIL PROCEDURE;

NOW THEREFORE THE JUDICIAL COUNCIL RESPECTFULLY ASKS THE JUDICIARY COMMITTEES OF BOTH THE ASSEMBLY AND THE SENATE TO PROVIDE THE JUDICIAL COUNCIL WITH THE TIME AND OPPORTUNITY TO CARRY OUT THE COUNCIL'S STATUTORY DUTY PURSUANT TO WIS. STAT. 758.13 TO REVIEW AND VET THOSE PARTS OF ASSEMBLY BILL 773 WHICH ADDRESS THE RULES OF CIVIL PROCEDURE, AND PROVIDE THE COUNCIL'S POSITION THEREON TO THE SENATE AND ASSEMBLY JUDICIARY COMMITTEES.

Bills 645/773 have dismissed the hard work of the Judicial Council and its members as being meaningless. The Evidence & Civil Procedure Subcommittee spent over one year carefully reviewing federal class action rules and rules from other states. Upon recommendation from the Subcommittee, the Council filed a Petition with the Supreme Court seeking adoption of a new class action rule in Wisconsin.

That Petition was granted and the Supreme Court unanimously adopted the Council's class action rule on December 21, 2017. A copy of that Order is attached. And yet, almost on the very day of the Supreme Court's Order, Assembly Bill 773 was introduced which frankly undoes the hard work of the Evidence & Civil Procedure Subcommittee, and defies the unanimous Order of the Supreme Court.

It is important to understand that lawyers, Judges and Legislators voluntarily devote hundreds of hours of non-partisan work each year to fulfill the duties of the Council in an effort to provide rules which will be fair to all sides in a case pending in our judicial system and which will supply appropriate guidance to the members of Wisconsin's Judiciary. More than that, Wis. Stat. §758.13 and in particular Wis. Stat. §751.12 are designed to avoid constitutional conflicts between the Courts and the Legislature known as Separation of Power disputes.

Wis. Stat. §751.12(1) places primary responsibility for regulating pleading, practice and procedure in our courts within the jurisdiction of the Supreme Court. This is necessary because disputes involving all aspects of litigation are either regulated by decisions of the Supreme Court or sometimes decided by decisions of the Supreme Court.

Wis. Stat. §751.12(4) permits the Legislature to enact, modify or repeal rules of pleading, practice and procedure. However, the Legislature is not a court instrumentality and, candidly, does not count many lawyers among its ranks.

At a minimum, I would strongly urge this Committee and the Legislature to allow a full vetting of any proposed rules by the Judicial Council. Nothing less than the smooth and fair working of the judiciary is at stake whenever procedural rules are changed or modified. I will give one example of what happens when the Judicial Council is ignored. Many have said that one of the purposes of Bill 773 is to bring Wisconsin practice into conformity with federal practice. That is patently false.

The Federal Rules of Civil Procedure (FRCP) were amended in 2006 to create ediscovery rules for the first time on the federal level. These rules led to unfortunate results in some foreign jurisdictions (but not here in Wisconsin). Wisconsin's existing ediscovery rules are based on those federal rules.

In 2010, there was a meeting held at Duke University by a committee of the U.S. Judicial Conference (the federal equivalent of our Judicial Council). Changes were proposed primarily to fix the ediscovery rules of the FRCP. The 2010 meeting is known as the Duke Proposals. However, those proposals were never adopted and in fact were repudiated in 2014 in what has come to be called the Campbell Report. The changes in Bill 773 track with some (but not all) of the Duke Proposals, but have absolutely nothing at all to do with the 2015 amendments to the FRCP.

The 2015 amendments that were actually adopted by the U.S. Judicial Conference are very different from any part of Bill 773. Rather than bring Wisconsin practice into conformity with federal practice, Bill 773 takes Wisconsin's Judiciary and Bar into completely uncharted territory.

It is very important to vet all proposed rules of procedure correctly. The Judicial Council's vetting process is very thorough. For example, the Judicial Council and its committees compare all major proposed rules with other similar rules in other states and in the federal

system. In this way, we can ensure that proposed rules are adopted that have sufficient existing precedents to ensure that the rules really work.

Your Chair, Senator Wanggaard, and Representative Ott, can attest to the painstaking non-partisan work of members of the Council to ensure that proposed rules will protect the substantive rights of all parties. I respectfully ask that you allow the proper vetting of your proposed rules by the Judicial Council. Procedural rules should not favor one side or the other. Procedural rules should be carefully vetted so that they increase the likelihood that justice will be served.

Respectfully submitted,

William C. Gleisner, III



# SUPREME COURT OF WISCONSIN

NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 17-03

---

In re proposed amendments to Wisconsin  
Statutes §§ 803.08 and 426.110

**FILED**

**DEC 21, 2017**

Diane M. Fremgen  
Clerk of Supreme Court  
Madison, WI

---

On March 16, 2017, Attorney April M. Southwick filed a rule petition on behalf of the Wisconsin Judicial Council asking this court to repeal and replace Wis. Stat. § 803.08, (Class Actions), create Wis. Stat. § 426.110 (4m), (Class actions; injunctions; declaratory relief), repeal Wis. Stat. § 426.110(5) through 13, and amend Wis. Stat. § 426.110(16). The proposed amendments are intended to align Wis. Stats. §§ 803.08 and 426.110 with the federal class action rule, Fed. R. Civ. P. 23.

The court discussed this petition at open administrative rules conference on April 20, 2017 and voted to schedule a public hearing and request additional information from the Judicial Council.

On June 27, 2017, the court asked the Judicial Council to describe the concerns relating to class actions that the 2003 amendments to Fed. R. Civ. P. 23 were intended to address and provide

relevant federal Advisory Committee notes. The Judicial Council responded by letter dated August 18, 2017.

On August 21, 2017, a letter was sent to interested persons seeking input. The court received a memo in support of the petition from Robert Fassbender, Executive Director of the Wisconsin Civil Justice Council, Inc., dated September 2, 2016, which he previously provided to the Judicial Council's Evidence & Civil Procedure Committee.

The court conducted a public hearing on October 30, 2017. Attorney Thomas L. Shriner, Chair of the Judicial Council's Evidence and Civil Procedure Committee, presented the petition to the court on behalf of the Judicial Council. The Honorable Michael R. Fitzpatrick, Court of Appeals District IV, and Attorney William C. Gleisner, III, representative of the Judicial Council, also appeared and spoke in favor of the petition.

At the ensuing closed rules conference, the court discussed the petition and voted unanimously to grant the petition and revise the rules as requested by the petitioner.

IT IS ORDERED that:

**SECTION 1.** 803.08 of the statutes is repealed and recreated to read:

**803.08. Class actions.**

(1) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if the court finds all of the following:

(a) The class is so numerous that joinder of all members is impracticable.

(b) There are questions of law or fact common to the class.

(c) The claims or defenses of the representative parties are typical of the claims or defenses of the class.

(d) The representative parties will fairly and adequately protect the interests of the class.

**(2) TYPES OF CLASS ACTIONS.** A class action may be maintained if sub. (1) is satisfied and if the court finds that any of the following are satisfied:

(a) Prosecuting separate actions by or against individual class members would create a risk of either of the following:

1. Inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class.

2. Adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

(b) The party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

(c) The court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the

controversy. The matters pertinent to these findings include all of the following:

1. The class members' interests in individually controlling the prosecution or defense of separate actions.

2. The extent and nature of any litigation concerning the controversy already begun by or against class members.

3. The desirability or undesirability of concentrating the litigation of the claims in the particular forum.

4. The likely difficulties in managing a class action.

**(3) CERTIFICATION ORDER.**

(a) *Time to issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(b) *Defining the class; appointing class counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under sub. (12).

(c) *Altering or amending the order.* An order that grants or denies class certification may be altered or amended before final judgment.

**(4) NOTICE.**

(a) *For sub. (2)(a) or (b) classes.* For any class certified under sub. (2)(a) or (b), the court may direct appropriate notice to the class.

(b) *For sub. (2)(c) classes.* For any class certified under sub. (2)(c), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The

notice must clearly and concisely state in plain, easily understood language, all of the following:

1. The nature of the action.
2. The definition of the class certified.
3. The class claims, issues, or defenses.

4. That a class member may enter an appearance through an attorney if the member so desires.

5. That the court will exclude from the class any member who requests exclusion.

6. The time and manner for requesting exclusion.

7. The binding effect of a class judgment on members under sub. (5).

**(5) JUDGMENT.** Whether or not favorable to the class, the judgment in a class action must do one of the following:

(a) For any class certified under sub. (2)(a) or (b), include and describe those whom the court finds to be class members.

(b) For any class certified under sub. (2)(c), include and specify or describe those to whom the notice under sub. (4) was directed, who have not requested exclusion, and whom the court finds to be class members.

**(6) PARTICULAR ISSUES.** Notwithstanding ss. 805.05 (2) and 805.09 (2), when appropriate, an action may be brought or maintained as a class action with respect to particular issues.

**(7) SUBCLASSES.** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

**(8) CONDUCTING THE ACTION.**

(a) *In General.* In conducting an action under this section, the court may issue orders that do any of the following:

1. Determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument.

2. Require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of any of the following:

a. Any step in the action.

b. The proposed extent of the judgment.

c. The members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action.

3. Impose conditions on the representative parties or on intervenors.

4. Require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly.

5. Deal with similar procedural matters.

(b) *Combining and amending orders.* An order under sub. (8)(a) may be altered or amended from time to time and may be combined with an order under s. 802.10.

**(9) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. All of the following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(a) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(b) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(c) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(d) If the class action was previously certified under sub. (2)(c), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(e) Any class member may object to the proposal if it requires court approval under sub. (9); the objection may be withdrawn only with the court's approval.

**(10) DISPOSITION OF RESIDUAL FUNDS.** (a) In this subsection:

1. "Residual Funds" means funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorney fees, and other court-approved disbursements in an action under this section.

2. "WisTAF" means the Wisconsin Trust Account Foundation, Inc.

(b) 1. Any order entering a judgment or approving a proposed compromise of a class action that establishes a process for identifying and compensating members of the class shall provide for disbursement of any residual funds. In class actions in which residual funds remain, not less than 50 percent of the residual funds shall be disbursed to WisTAF to support direct delivery of legal

services to persons of limited means in non-criminal matters. The circuit court may disburse the balance of any residual funds beyond the minimum percentage to WistAF for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.

2. This subsection does not prohibit the trial court from approving a settlement that does not create residual funds.

**(11) APPEALS.** The court of appeals may permit an appeal from an order granting or denying class-action certification under s. 808.03 (2), if a petition is filed with the court of appeals as provided in s. 809.50.

**(12) CLASS COUNSEL.**

(a) *Appointing class counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(b) 1. In appointing class counsel, the court must consider all of the following:

a. The work counsel has done in identifying or investigating potential claims in the action.

b. Counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action.

c. Counsel's knowledge of the applicable law.

d. The resources that counsel will commit to representing the class.

2. In appointing class counsel, the court may do any of the following:



a. Consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.

b. Order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs.

c. Include in the appointing order provisions about the award of attorney fees or nontaxable costs under sub. (13).

d. Make further orders in connection with the appointment.

(c) *Standard for appointing class counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under sub. (12)(a) and (d). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(d) *Interim counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(e) *Duty of class counsel.* Class counsel must fairly and adequately represent the interests of the class.

**(13) ATTORNEY FEES AND NONTAXABLE COSTS.** In a certified class action, the court may award reasonable attorney fees and nontaxable costs that are authorized by law or by the parties' agreement. All of the following procedures apply:

(a) A claim for an award must be made by motion, subject to the provisions of this subsection, at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(b) A class member, or a party from whom payment is sought, may object to the motion.

(c) The court may hold a hearing and must find the facts and state its legal conclusions under s. 805.17 (2).

(d) The court may refer issues related to the amount of the award to a referee, as provided in s. 805.06.

**(14) PROHIBITION AGAINST CERTAIN CLASS ACTIONS.** No claim may be maintained against the state or any other party under this section if the relief sought includes the refund of or damages associated with a tax administered by the state.

#### **Judicial Council Committee Notes**

By S. Ct. Order 17-03, [Public Domain Citation Number] (issued [Month, Day, Year], eff. July 1, 2018) the supreme court repealed and recreated s. 803.08. Recreated s. 803.08 is based on Rule 23 of the Federal Rules of Civil Procedure. Federal Rule 23 was adopted in its modern form in 1966, and it has been the subject of decades of careful review by the federal Advisory Committee on Civil Rules.

The Judicial Council's intent was to craft a Wisconsin class action rule that tracks as closely as possible federal practice so that Wisconsin courts and practitioners can look to the well-developed body of federal case law interpreting Rule 23 for guidance. Additionally, the federal Advisory Committee Notes accompanying Rule 23 are instructive, though not binding, and should be consulted.

To the extent that the language of s. 803.08 differs from federal Rule 23, the Committee's intent was to conform the federal rule to Wisconsin statutory drafting standards without changing the substantive meaning of any provision.

Subsection (6), Particular issues. In Waters ex rel. Skow v. Pertzborn, 243 Wis. 2d 703 (2001), the Wisconsin Supreme Court held that the circuit court was barred by statute from ordering separate trials before different juries on the issues of liability and damages arising from

the same claim. The court's holding was based on Wis. Stats. ss. 805.05 (2) and 805.09 (2).

Without deciding whether these rules would preclude a court from permitting a class action with respect to particular issues, the Committee has added the introductory phrase to this section to make it clear that such class actions are permitted. The inability to bring or maintain a class action with respect to particular issues would create an undesirable difference between Wisconsin practice and practice in the federal courts under Fed. R. Civ. P. 23(c)(4). Moreover, the Wisconsin Legislature has already adopted a former version of Rule 23(c)(4) as part of the procedure for class actions brought under the Wisconsin Consumer Act, in current s. 426.110 (10). (The procedures for class actions under that act are proposed for repeal as unnecessary after the adoption of revised s. 803.08.)

Subsection (10), Disposition of residual funds, and sub. (14), Prohibition against certain class actions, are the only provisions in recreated s. 803.08 that depart from the federal rule. Federal Rule 23 does not contain a provision comparable to sub. (10), which was originally adopted by the Wisconsin Supreme Court as s. 803.08 (2), effective January 1, 2017. Federal Rule 23 also does not contain a provision comparable to sub. (14), which was added by 2011 Wis. Act 68 to prohibit class action suits against the state seeking tax refunds, effective March 1, 2012.

Subsection (11), Appeals. Subsection (11) is modeled on F.R.C.P. 23(f). Interlocutory appeals specific to class certifications present unique considerations as compared to other appeals. The federal Advisory Committee Note 1998 amendment is instructive, though not binding, and should be consulted.

**SECTION 2.** 426.110 (4m) of the statutes is created to read:

**426.110 (4m)** Actions commenced under this section shall be conducted under the procedures set forth in s. 803.08.

**Judicial Council Committee Note**

Repealed subs. (5) through (13) were procedural rules modeled on a previous version of Rule 23 of the Federal Rules of Civil Procedure. Recreated s. 803.08 is modeled

on the current version of Rule 23. The procedural provisions in s. 426.110 were repealed and replaced with the new procedures in s. 803.08 to maintain consistency in the statutes and to reflect current law.

**SECTION 3.** 426.110 (5) through (13) of the statutes are repealed.

**SECTION 4.** 426.110 (16) of the statutes is amended to read:

**(16)** The administrator, whether or not a party to an action, shall bear the costs of notice except that the administrator may recover such costs from the defendant ~~as provided in sub. (11)~~.

IT IS FURTHER ORDERED that these amendments to Wis. Stats. §§ 803.08 and 426.110 are effective July 1, 2018.

IT IS FURTHER ORDERED that the rule adopted pursuant to this order shall apply to court proceedings commenced after the effective date of this rule and to any proceedings within a court proceeding then pending, except insofar as, in the opinion of the circuit court, application of the rule change would not be feasible or would work injustice, in which event the former rule applies.

IT IS FURTHER ORDERED that the Judicial Council Committee Notes above are not adopted, but will be published and may be consulted for guidance in interpreting and applying these rules.

IT IS FURTHER ORDERED that notice of the above amendments be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 21st day of December, 2017.

BY THE COURT:

Diane M. Fremgen  
Clerk of Supreme Court

## CURRAN, HOLLENBECK & ORTON, S.C.

MAUSTON OFFICE:

111 OAK STREET  
P.O. BOX 140  
MAUSTON, WI 53948-0140  
TELEPHONE (608) 847-7353  
FACSIMILE (608) 847-4155  
CURRANLAWOFFICE.COM

ATTORNEYS AT LAW:

WILLIAM T. CURRAN  
JOHN R. ORTON  
THOMAS J. CASEY  
CATHERINE CURRAN ORTON  
ERIC S. JOHNSON  
PETER J. CURRAN  
STEFANIE P. WAGNER  
ANDREA VON HOFF

DELLS / DELTON OFFICE:

140 EAST ADAMS STREET  
P.O. BOX 370  
LAKE DELTON, WI 53940-0370  
TELEPHONE (608) 253-7363  
FACSIMILE (608) 253-4155  
CURRANLAWOFFICE.COM

---

FRED D. HOLLENBECK\*  
\*of counsel

January 29, 2018

**Via U.S. Mail and Email**

Honorable Van Wanggaard  
Chairman Senate Judiciary Committee  
State Capitol  
Madison, WI 53708-8953

Re: Senate Bill 645 and Assembly Bill 773

Dear Senator Wanggaard,

I understand that the Senate Judiciary Committee will be considering 2017 Senate Bill 645 on Tuesday, January 30, 2018. As a practicing member of the State Bar, and as a member of the Judicial Council, I am writing to express my concerns regarding Senate Bill 645.

First, this Bill makes sweeping changes to the Rules of Civil Procedure which have historically been vetted by the Judicial Council, the Supreme Court and other stakeholders. I hope that the Senate Judiciary Committee will recommend that Bill 645 be referred to the Judicial Council for review and comment.

Second, Bill 645 contains a proposed class action rule which is significantly different from the class action rule which the Judicial Council worked on for several years, and which the Wisconsin Supreme Court recently reviewed and approved.

Third, Bill 645 purports to adopt the 2015 Amendments to the Federal Rules of Civil Procedure. This is simply untrue. The Bill attempts to adopt the rules suggested by the so-called "Duke Conference," which were ultimately rejected by the Federal Rules Committee. There are significant differences between the Federal Rules and Bill 645.

CURRAN, HOLLENBECK & ORTON, S.C.

January 29, 2018

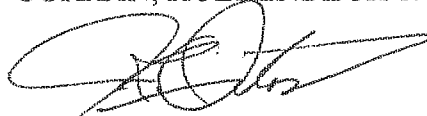
Page 2

Finally, I fear that there are certain political interests at work which hope to make sweeping changes to the Rules of Civil Procedure during a time when the Judicial Council has been hamstrung by the lack of funding. While a small minority of political operatives may be salivating at the prospect of a quick change of the Rules, those of us who work with these Rules every day know that a slow, methodical well-considered evaluation of these Rules by the Judicial Council, and by other stake-holders (e.g., defense bar, plaintiffs' bar, circuit judges, Supreme Court, etc.) is the best way to develop this type of arcane legislation. I hope that the Senate Judiciary Committee will handle this legislation in the same manner that similar legislation has been historically handled.

Thank you for your kind consideration.

Very truly yours,

CURRAN, HOLLENBECK & ORTON, S.C.

A handwritten signature in black ink, appearing to read "John R. Orton", written over a horizontal line.

By: John R. Orton

JRO/cmw

RE: Opposition to Senate Bill 645

Chairman Wanggaard & Committee Members:

I am the Chief Executive Officer of Verus Financial, LLC. Verus serves as a third-party unclaimed property auditor for the State of Wisconsin. Over the past several years, Verus has returned to the State more than \$48 million in unclaimed property belonging to tens of thousands of Wisconsin citizens. During this same time period, a comparably large amount of unclaimed property has been returned directly to Wisconsin citizens by companies as a result of audits conducted by Verus.

Verus is compensated for its services on a contingency fee basis. The work that Verus performs for Wisconsin and the contingent nature of its fee arrangement provide a substantial benefit to both the State and its citizens. Under this arrangement, Wisconsin is able to perform audits to ensure that companies are complying with the State's unclaimed property laws, without having to expend State funds. This is because Verus is only paid when unclaimed property is actually delivered to the State, and payment is based on the amount of property received by the State. Moreover, Verus is not compensated for any unclaimed property that is identified during the audit if it is able to be returned to the owner before it is turned over to the State. In this regard, before unclaimed property is turned over to the State in connection with an audit, the company first undertakes efforts to locate and pay the owner. As I noted above, a substantial amount of unclaimed property is returned to the owner directly by the companies, without any fee being paid to Verus. Finally, when an owner claims property identified during an audit after it has been delivered to the State, the owner always receives 100% of the value of the property without any deduction of fees.

It is important to note that the audits that Verus has performed on behalf of Wisconsin have been conducted on a multi-state basis, and have focused on some of the largest insurance companies and financial institutions in the country. Moreover, all of the \$48 million in unclaimed property that Verus has returned to Wisconsin in connection with its audits has come from companies that are incorporated outside of Wisconsin with their principal places of business located in another state. Wisconsin does not have the staff or resources that would be necessary for it to directly conduct the type of audits that it has authorized Verus to conduct on its behalf. It is also important to note that all of the unclaimed property that Verus has identified is based on records of the company under audit identifying an unpaid liability owed to a specific individual with a last known address in the State of Wisconsin.

But for the audits that Verus has conducted, tens of millions of dollars belonging to Wisconsin citizens would have remained unclaimed and unpaid. This includes money that insureds paid premiums to insurance companies for decades so that their loved ones could be provided for after their deaths, as well as forgotten brokerage accounts that were established to provide for people

in their retirement. These audits have ensured that this property is identified and either paid to the owner directly, or turned over to the State, where it is kept in perpetuity until the owner can be located. Significantly, if Senate Bill 645 had been in effect at the time, Wisconsin would not have been able to participate in the audits that Verus has conducted, and the companies would have been allowed to keep substantial amounts of money rightfully owed to Wisconsin citizens.

Based on the foregoing, I urge the legislature to reject adopting any bill that would completely ban the State's ability to utilize third-party auditors compensated on a contingency fee basis. Instead, as an alternative to Senate Bill 645 as it is currently written, I respectfully suggest that the legislature consider limiting the bill to preclude the State from compensating auditors on a contingency fee basis if the property is being reported on the basis of estimation or extrapolation [absent evidence of records having been intentionally destroyed in violation of State law]. This would eliminate the ability of auditors to receive compensation calculated on the basis of subjective or projected unclaimed property liabilities, while continuing to allow for auditors to be compensated on a contingency basis where specifically identifiable properties, belonging to specifically identifiable owners, are determined to be unclaimed as a result of an audit.

Alternatively, Senate Bill 645 could be limited to preclude use of third party auditors compensated on a contingency fee basis when the company being audited is a company incorporated in the State of Wisconsin. This would prevent the State from using third-party auditors to conduct audits that are feasible to be carried out by the State's own audit personnel, while still allowing it to utilize third-party auditors to conduct audits that the State would not otherwise be able to conduct.

In closing, it is my belief that appropriate use of third-party auditors compensated on a contingency fee basis is an important part of ensuring that Wisconsin is able to protect its citizens and that companies comply with the State's unclaimed property laws. Therefore, the legislature should reject Senate Bill 645 in its current form, as it would create an impediment to the State's ability to run an efficient audit program that results in unclaimed property belonging to Wisconsin citizens being identified, so that the property can be returned with its rightful owners.

James Hartley  
Chief Executive Officer  
Verus Financial, LLC  
500 Chase Parkway  
Waterbury, CT 06708  
Phone: (888) 308-3787  
Email: [jhartley@verusfinancial.com](mailto:jhartley@verusfinancial.com)





Chairman Wanggaard and Members of the Committee:

Good Morning. My name is Eric Schuller and I am the President of the Alliance for Responsible Consumer Legal Funding also known as ARC.

We are a trade organization that represents the interest of companies that provide financial assistance to consumers who have a pending legal claim, typically a car accident or some sort of personal injury situation.

I am here today to speak in opposition to Senate Bill 645 as it relates to the section of Consumer Lawsuit Lending. The bill, as drafted, would eliminate the Consumer Legal Funding industry in the state which I do not think is the intention of the bill or the legislature.

Let me walk you through what Consumer Legal Funding is and more importantly what it is not.

Let's say that you are driving home from work one day and another driver goes through a red light and causes damage to your car and you. As a result of your injuries you miss some work and a couple of paychecks. You have retained an attorney to assist you in your legal claim, but come to find out that it could be several months before your claim is resolved. As a result of your loss of income you have fallen behind in your financial obligations, such as your mortgage, rent, car payments and such but you need some financial assistance today to help you meet your obligations. That is where Consumer Legal Funding comes in. We provide financial assistance to consumers so that they can use the funds to help meet their financial obligation while their claim is pending for their immediate household needs.

When a consumer contacts a company, they are asked two questions right from the start: 1) Do you have a pending legal claim? 2) Do you have an attorney? If the answer is no to either one of the questions, the call stops and they are informed that those steps need to follow before they are eligible for legal funding. If they do already have a legal claim and have retained an attorney, the companies get some basic information from the consumer on their claim and permission to contact their attorney. The companies then contact the consumer's attorney, to verify the information from the consumer. The companies then make a determination if they will provide financial assistance to the consumer, and if they do they will fund, typically, no more than 10% of what they determine is the value of the legal claim. In addition, the consumer's attorney has to sign off on the transaction. This is a built-in consumer protection to ensure that the consumer is not getting into a situation that is not appropriate for them to enter into.



Once both the consumer and their attorney sign off on the transition, with clearly disclosed terms, the funds are then delivered to the consumer.

The companies then recover on the back end when the claim is resolved out of the proceeds of the settlement. Legal funding companies are only paid once other financial obligations are satisfied (such as attorney fees, medical liens, and statutory liens). If there are insufficient funds to satisfy what is due to the consumer legal funding companies the consumer has no further obligation. In other words they owe nothing. If the consumer drops the legal claim for any reason, they owe the companies nothing.

As you can see there is a lot of risk to legal funding companies associated with this product, and a number of consumer protections already built into a typical transaction.

One point I want to make clear is that the funds that are provided to the consumer are not used to fund the litigation or the legal claim. They are only used to ensure the consumer can have a roof over their head, and put food on the table.

Now that you are aware of what this transaction is and is not, let me walk you through some of the concerns we have with the bill as drafted.

- The bill uses the terms *Lender* and *Lending* which are associated with loans but the bill states it is a *purchase*. This is contradictory and causes conflict in the law.
- The bill states: *Providing money to any consumer, for the consumer to use for any purpose other than prosecuting the consumer's dispute, with repayment of the money conditioned on and derived from the consumer's proceeds of the dispute, regardless of whether these proceeds result from a judgment, settlement, or other source.*
  - This means that you can provide money to a consumer to pay for the legal fees, attorney fees, and any costs associated with the claim. But you are limiting the ability of a company to provide funds to a consumer pay for immediate household needs such as rent, mortgage, and putting food on the table.
- The 18% rate cap along with the cap of \$360 per year
  - This will eliminate the industry.
    - Do to the associated risk, loss rates and cost of capital to the companies.
    - It will cost prohibited to operate under those terms.



- As a licensed lender in Wisconsin you are able to charge any agreed to fee as long as both parties are in agreement.
- This sets up a separate standard between recourse and non-recourse products. If the product is recourse companies are able to recover their funds from the consumer if the consumer does not repay.
- Now if the product is non-recourse, where there is no action against the consumer they are forced to accept a lower rate.
  
- The section on “pre-payment” does not make sense.
  - There is payment or no payment. There is no provision in the industry for “pre-payment”
  
- The bill states: *A provision that the consumer lawsuit lender accepts only an assignment of an amount of the potential proceeds from the dispute and does not accept an assignment of the consumer's legal claim.*
  - Does not make sense. You need to have an assignment on the claim to receive funds
  
- The bill states: *Except as provided in par. (b), any consumer lawsuit lender that violates this section is subject to a forfeiture of not less than \$25 nor more than \$5,000 for each violation.*
  - In the description, it states: *The Department of Trade, Agriculture and Consumer Protection has enforcement authority over violations.*
  - The authority to enforce the statute is omitted from the bill.
  
- The bill states: *A provision that, if the consumer is represented by an attorney, any proceeds from the dispute paid to the consumer lawsuit lender may be paid only from the trust account of the consumer's attorney.*
  - The problem with this is this prevents the consumer from being allowed pay off the company before the case is resolved if they want to.
  - In addition, it prevents the companies collecting funds if the attorney should disperse the funds directly to the consumer rather than to the funding company.



We are not opposed to regulating the industry, we just do not want to be regulated out of business, which the bill in its current form would do.

We have already proposed to the authors amending the language in the bill to a regulatory scheme that is fitting for the industry. We look forward to continuing that discussion in hopes that we can find an agreement that puts stronger safe-guards on legal funding products in an effort to further protect consumers from any bad actors in the industry.

As an example, Vermont passed language in 2016 that we feel satisfies what is trying to be accomplished in Wisconsin Senate Bill 645. It ensures that the companies that are operating in the state are legitimate and able to meet the needs of the consumer, along with ensuring the consumer is fully aware of the transaction, along with their attorney. There are no hidden transactions; everything is fully disclosed to the consumer and their attorney. There are also stiff penalties to those who violate the statute. In addition, it provides the legislature with the ability to oversee the process with annual reporting by the department as to the transactions that are being done in the state.

We would like to recommend that this committee look at amending SB-645 so that it protects consumers, while still allowing the product to be available to those that need it.

Thank you for the opportunity to testify today. I would be happy to answer any questions you might have.



## State of Wisconsin • DEPARTMENT OF REVENUE

2135 RIMROCK ROAD • Mail Stop 624A • P.O. BOX 8933 • MADISON, WISCONSIN 53708-8933 • 608-266-6466 • FAX (608) 266-5718  
<http://www.revenue.wi.gov>

*Scott Walker*  
Governor

*Richard G. Chandler*  
Secretary of Revenue

January 30, 2018

### **Testimony to the Assembly Committee on Judiciary on Senate Bill 645**

Chairman Wanggaard and members of the committee, thank you for the opportunity to testify on SB 645.

Currently, Wisconsin law requires businesses and other organizations to review their financial records each year to determine whether they hold any unclaimed property. Examples of unclaimed property include abandoned checking and savings accounts, abandoned life insurance policies, or uncashed payroll or pension checks. A business with unclaimed property is required to attempt to locate an owner of the property. When they are unable to locate the owner, businesses are required to file reports and transfer unclaimed property to the state.

In 2013, the Department of Revenue (DOR) was given responsibilities for administering Wisconsin's unclaimed property program. Like the Treasurer's Office did in the past, we contract with auditing firms to audit companies across the country to locate unclaimed property that hasn't been reported. DOR does not have any of its own auditors funded by the unclaimed property program.

The objectives of an unclaimed property audit are similar to the objectives of a tax audit: 1) to ensure that proper reporting is occurring, and 2) to make adjustments to correct improper reporting. Currently, the department recommends or receives recommendation from the firms on companies they believe are good candidates for multi-state examinations and the department can authorize the firm to begin the audit. No audit can begin unless DOR specifically authorizes the audit in writing by sending an initial contact letter to the business being audited. Once the audit

is completed, the company provides a report with remittance to account for the adjustments made and an invoice is sent to the department.

During these audits, the department uses best practices for effectively managing contract audits. For example, we require a monthly status update on all audits in progress and we control the structure and detail level of that report. The auditor cannot make any estimates or use sampling without written approval from the state. Since DOR has been administering the program, no audit firm has asked permission to do an estimate or sample. We do not allow auditors to require companies to refute assertions based on “fuzzy matches” that are only remotely possible. Additionally, no compensation will be paid to the contractor without an audit report explaining the procedures performed and the findings.

Most states hire the same contingency fee auditors to perform these audits. By using common firms, businesses experience just one unclaimed property audit, instead of numerous audits by each individual state. We pay the audit firms 12% of the value of the past due property found in an audit. This percentage is of the actual property found, which does not include any interest or penalties.

For the last four years 99% of the unclaimed property audits we participated in were of out-of-state businesses. DOR has been holding off on signing onto audits of Wisconsin businesses because we were hoping to be able to create a statutory voluntary disclosure program. We realize that many companies may not be familiar with the unclaimed property laws and we would like to educate them about their responsibilities and bring them into compliance without fear of facing large penalties.

Entities are audited to ensure they remit unclaimed property to the department. If there were no audits of unclaimed property, a large portion of property would never be identified and remitted to the state and therefore never returned to the proper owner. Compliance is already low; only about 7,600 holder reports are filed annually in Wisconsin. We believe the number of entities that should be filing is much higher.

Once the department receives unclaimed property, we make every attempt to connect the unclaimed property to the rightful owner. Since the department took over the program we have returned over \$122 million in paid claims. If we are unable to find the proper owner, property is then deposited into the Common School Fund.

A provision in this bill would prohibit the department from contracting with third party auditors for unclaimed property on a contingent fee basis. If this provision is passed, it could potentially result in no audits of unclaimed property. The department would be forced to renegotiate contracts with firms to provide a different fee structure, such as an hourly rate rather than on a contingency fee basis. Since most states use these common audit firms on a contingency fee basis, it would be difficult to find a company that would be willing to bill at an hourly rate. Furthermore it may be more expensive and less cost-effective, to pay an auditor an hourly rate. For example, if a multistate audit is completed and found that a national life insurance company owed a Wisconsin resident \$150.00 in unclaimed property, we would only owe 12% of that amount, or \$18. If we paid an auditor an hourly rate to conduct that same audit, their fee would almost certainly exceed \$150.

Page 4  
January 30, 2018

It is important to note that even if this provision passes, Wisconsin companies will still be audited by these contract firms for other states that are participating in unclaimed property audits. Wisconsin would just be precluded from participating.

Thank you again for the opportunity to discuss SB 645. I'm happy to take questions.





**TESTIMONY OF MARK BEHRENS, ESQ.  
SHOOK, HARDY & BACON L.L.P.  
1155 F STREET, NW, SUITE 200  
WASHINGTON, DC 20004  
(202) 639-5621  
MBEHRENS@SHB.COM**

**BEFORE THE WISCONSIN SENATE  
COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY**

**ON BEHALF OF THE  
AMERICAN TORT REFORM ASSOCIATION (ATRA)**

**IN SUPPORT OF SENATE BILL 645**

**JANUARY 30, 2018**

**TESTIMONY OF MARK BEHRENS  
SHOOK, HARDY & BACON L.L.P.  
ON BEHALF OF THE AMERICAN TORT REFORM ASSOCIATION (ATRA)**

Mr. Chairman and Members of the committee, I am testifying today on behalf of the American Tort Reform Association (ATRA) in support of Senate Bill 645. ATRA is a broad-based coalition of businesses, municipalities, associations, and professional firms that promote fairness, balance, and predictability in civil litigation. ATRA supports the package of reforms in Senate Bill 645. ATRA's members are particularly supportive of the class action and discovery improvements that are the focus of my testimony.

**Class Action Reform**

We applaud the Wisconsin Supreme Court's December 2017 order replacing Wisconsin's previous one-sentence class action statute, Wis. Stat. 803.08, with language that generally aligns the state's class action procedures with Rule 23 of the Federal Rules of Civil Procedure. Senate Bill 645 improves upon the state's new approach in three key ways: the bills addresses overly broad, "no-injury" class actions, adds an explicit ascertainability requirement, and provides for interlocutory appeal of class certification decisions.

**No-Injury Class Actions**

Overly broad, "no-injury" class actions are cases in which a named plaintiff with a concrete injury brings a lawsuit seeking to represent a class that includes countless others that have suffered no genuine injury at all. The cases often involve a product that has malfunctioned for the named plaintiff and that has the potential to malfunction for others, but has not actually caused any problems for most of the class members. "No-injury" class actions can also arise in privacy/data breach and labeling/advertising cases, among others.

Plaintiffs' theory in these cases is that the named plaintiff and the class members share a common "injury"—e.g., alleged overpayment of the product they purchased. In reality, these

cases involve a named plaintiff whose claim is highly *atypical* of the class because the named plaintiff has suffered an *actual* harm while the class members merely have a *speculative* economic harm. Unlike the named plaintiff, whose product has malfunctioned, the class members' products may never malfunction.

“No-injury” class actions are unfair to class members that *have* an actual harm because they may have to sacrifice valid claims in order to preserve the lesser claims that everyone in the class can assert. This may lead to under-compensation for consumers who have suffered an actual harm. The actions are unfair to defendants because of the settlement pressure imposed by an artificially enlarged class.

Many of these types of cases are not successful. When they do produce a settlement, there is usually little interest among class members in participating. As one commentator has explained:

Billed as “consumer protection” measures, these cases allege causes of action under the auspices of both product liability and consumer fraud. However, these so-called “no-injury” actions are very often nothing more than an attempt by creative plaintiffs’ lawyers to cash in on the class action concept—the plaintiffs themselves, if successful, would each be entitled to a relatively minimal amount of money, while their attorneys would collect millions upon millions of dollars in fees.

“No-injury” class actions create enormous costs on companies, even in the vast majority of cases that are resolved with no settlement or just tiny payments to class members. The legal fees can be enormous. Ultimately, consumers bear these costs.

There is public support to address overly broad no-injury class actions. A 2015 DRI – *The Voice of the Defense Bar* National Poll on the Civil Justice System found that 78% of Americans would support a law requiring a person that joins a class action to show actual harm rather than just the potential for harm.

Senate Bill 645 modestly amends the current Rule 23 approach by requiring that the “claims or defenses and type and scope of injury of the representative parties are typical of the claims or defenses and type and scope of injury of the class.”

### **Ascertainability**

Courts recognize that an appropriate definition of the class is fundamental to class certification, so it makes sense to address and delineate this universally recognized implicit requirement. Senate Bill 645 requires that class members must be “objectively verifiable by reliable and feasible means without individual testimony from putative class members and without substantial administrative burden.”

### **Interlocutory Appeal of Class Certification Orders**

Presently under the Rule 23 approach, appellate courts have discretion to grant appeals of trial court decisions certifying or denying certification of a class action. Senate Bill 645 provides plaintiff and defendants with a right to appellate review of such important decisions.

The right to appellate review provided in the legislation is important because when a class is certified, defendants often have little practical choice but to settle. As Judge Posner of the Seventh Circuit Court of Appeals observed, certification of a class action forces defendants “to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability.” “[Defendants] may not wish to roll these dice,” he said. “They will be under intense pressure to settle.” Judge Posner called the resulting settlements “blackmail settlements.” Some have called them “legalized blackmail.”

By enacting this provision, Wisconsin would join other states that specifically allow interlocutory appeals of class certification decisions as a matter of right to the parties.

## Discovery Reform

Civil litigation is widely perceived to take too long and cost too much. Much of this time and expense relates to pretrial discovery. All too often the discovery process is subject to abuse, marked by “fishing expeditions” by plaintiffs and use of the tools of discovery to harass and pressure defendants into settlements.

In December 2015, a number of amendments to the Federal Rules of Civil Procedure took effect to address some of these concerns. The overarching goal of these amendments—the product of years of discussion and debate—was to improve early case management and the scope of discovery in civil litigation. Important changes were made regarding obligations for preserving evidence, proportionality of discovery, and standards for imposing sanctions, among other areas. At the end of my testimony you will find summaries of some of the many comments submitted by employers to demonstrate the need for discovery reform.

Senate Bill 645 will help align Wisconsin’s state court discovery with the current federal court approach. The bill also incorporates recommendations from respected organizations such as Lawyers for Civil Justice (LCJ), DRI – *The Voice of the Defense Bar*, Federation of Defense & Corporate Counsel, and International Association of Defense Counsel.

ATRA appreciates that discovery is a two-way street. Businesses may find themselves as plaintiffs in business-versus-business cases. Business plaintiffs need access to information to prosecute their claims. Further, defendants in all cases need access to information to determine the validity of a claim and mount a defense.

ATRA supports the discovery provisions in Senate Bill 645 because they are fair and balanced. The bill will allow parties access to the information they need to bring or defend a case while addressing the worst abuses that unjustifiably drive up the costs of litigation.

### **Cooperation**

Like federal Rule 1, Senate Bill 645 makes clear that courts and parties have an obligation to secure the just, speedy, and inexpensive determination of every action.

### **Cost-Benefit and Proportionality Requirements**

Early settlement demands often reference the high cost of discovery as a basis to encourage settlement. Defendants may be compelled to settle, regardless of the merits of a case, simply to avoid spending thousands or even millions of dollars in discovery costs.

The bill establishes cost-benefit and proportionality requirements for civil discovery modeled after federal Rule 26(b)(1). Senate Bill 645 allows a court to limit discovery if “the burden or expense of the proposed discovery outweighs its likely benefit or is not proportional to the claims and defenses at issue considering the needs of the case, the amount in controversy, the parties’ resources, the complexity and importance of the issues at stake in the action, and the importance of discovery in resolving the issues.”

This cost-benefit and proportionality requirements prevent litigants from abusing the discovery process to leverage a higher potential settlement or engage in a “fishing expedition.”

### **Cost Allocation**

Consistent with federal Rule 26(c), the bill provides that a court may allocate expenses to the requesting party, such as when disproportionate discovery is sought. This provision encourages parties to be reasonable in their requests. The provision also discourages the use of discovery as a weapon to try to force settlements that are not based on the merits of the case.

### **Stay of Discovery Pending Certain Motions**

Senate Bill 645 provides that upon the filing of a motion to dismiss, a motion for judgment on the pleadings, or a motion for more definite statement, discovery and other proceedings will be put on hold until the motion is decided unless the court finds good cause for

allowing particularized discovery. This common sense provision prevents a defendant from having to respond to discovery when a motion is pending that may make the case go away.

### **Third Party Agreements**

The bill requires disclosure of any agreement under which a third party has a right to receive compensation that is contingent on and sourced from the proceeds of a civil action. This information is important for a number of reasons. For instance, if the third party is a consumer lawsuit lender, disclosure of the agreement will help ensure that consumer protections found elsewhere in Senate Bill 645 are satisfied. If the third party is providing funds to a contingency fee plaintiffs' law firm, disclosure of the fee agreement will help ensure that the common law doctrine of champerty has not been violated and that ethical obligations are met, such as the need for the lawyer to exercise independent judgment and put the client's interests first. Further, such disclosure can help courts identify and avoid potential conflicts, and facilitate settlements by identifying parties not at the settlement table that have a stake in the case.

### **ESI**

The escalating volume of electronically stored information (ESI), such as e-mails, is one of the most significant drivers of high discovery costs. Senate Bill 645 contains clear standards for the preservation and production of ESI.

Under the bill, a party is not required to preserve certain categories of ESI absent a showing by the requesting party of a substantial need for discovery of the ESI requested. These categories are limited to situations where a preservation obligation would be unreasonable: data that cannot be retrieved without substantial additional programming or without transforming it into another form before search and retrieval can be achieved; backup data that are substantially duplicative of data that are more accessible elsewhere; legacy data on obsolete systems; and

other data that are not available to the producing party in the ordinary course of business. There is also no requirement to produce such data absent a showing of substantial need and good cause.

**Limits on Frequency and Time**

Senate Bill 645 provides that, unless otherwise stipulated or ordered by the court, parties are limited to 25 interrogatories, 10 depositions—none of which may exceed 7 hours in duration (important for very sick plaintiffs and other witnesses)—and a reasonable look-back of 5 years from the time the cause of action accrued.

\* \* \*

Thank you again for the opportunity to testify before the Committee.



**BROAD AND DIVERSE CORPORATE SUPPORT  
EXISTS FOR CIVIL DISCOVERY REFORM**

In support of amendments to the Federal Rules of Civil Procedure that went into effect in December 2015, many corporations told the Federal Civil Rules Advisory Committee about the need for civil discovery reform. Below are statements by some of the companies supporting reforms of the type now being considered in Wisconsin.

**Google Inc.**

“In an age where email and word processing documents create huge volumes of data, discovery for even a single lawsuit often costs millions of dollars.”

“Google preserves hundreds of terabytes of data, yet only a tiny fraction is actually produced in litigation or used at trial.”

**General Electric Company**

“[O]ur experience under the current discovery rules has been one of waste and needless burden and costs. . . . [In one case,] GE produced approximately 340,000 unique documents (in pages, more than 6 million) to plaintiffs. . . . At trial, a total of 194 documents were marked as exhibits by both sides. Thus, less than 0.1% of the documents produced (and a far, far smaller percentage of the documents preserved or collected) were actually used at trial.”

“We recently saw the same pattern in an intellectual property dispute that culminated in a \$170 million judgment for GE in federal court in Dallas. For that case (and directly related litigation against the same party), GE collected and preserved 2.4 terabytes of data or roughly 180,000,000 pages. To provide a tangible comparison, that is about 72,000 banker’s boxes of documents. We produced only 7% of that in discovery. The total volume of exhibits eventually admitted in evidence fit into two binders, a total of 165 documents.”

**Johnson & Johnson**

“In one representative set of cases, J&J companies had to collect documents from 350 custodians. Under the current discovery practice, J&J collected over 56 *million* documents amounting to 625 *million* pages. Even after application of extensive key word filtering and de-duplication, third party vendors reviewed over 13 *million* documents amounting to over 148 *million* pages. After this massive discovery effort, in two resulting trials, the parties entered into evidence a grand total of less than 200 documents in each trial.”

“In another representative set of cases, J&J companies collected documents from 370 custodians amounting to 194 *million* pages of electronically stored information that J&J had to pay to de-duplicate and filter prior to review of over 22 *million* pages of documents. At trial, the parties submitted only 410 documents into evidence.”

**Hallmark Cards, Inc.**

“In one recent case, in response to our opponent’s third set of document requests, and utilizing the efforts of nearly 85 people, Hallmark produced more than a million pages of electronic documents – and only one was utilized at the subsequent jury trial.”

## **Pfizer Inc.**

“Over the years, Pfizer has been subjected to tens of thousands of discovery requests. Responding to these requests under the current rules has required Pfizer to preserve and collect staggering amounts of data far out of proportion to the volume of data actually produced and, even more telling, the number of documents ultimately used at trial. Pfizer’s experience with a recent products liability litigation is illustrative. In that matter, for eight years, Pfizer preserved an extraordinary 1.2 million back-up tapes, each of which holds up to 100 gigabytes of data. Preservation of these tapes cost Pfizer nearly \$40 million, yet Pfizer never had to retrieve a single document from the tapes. Rather, Pfizer collected millions and millions of documents from more than 170 custodians and over 75 centralized systems (e.g., databases housing regulatory documents). Ultimately, approximately 2.5 million documents (representing more than 25 million pages) were produced to plaintiffs, but only about 400 company documents were marked at trial. Thus, for every one document used at trial, approximately 625,000 additional documents were produced.”

## **Anadarko Petroleum Corporation**

“Much money, time and effort is spent in litigation today on discovery gamesmanship and cost shifting efforts due in large part to threats of discovery sanctions encouraged by the currently worded Rules.”

“In many cases, corporate parties . . . over-preserve at exorbitant expense in order to avoid tactical threats of spoliation sanctions. At present, 16% of our electronic data and 60% of our corporate e-mail are subject to a Legal Hold.”

## **Microsoft**

Results of Microsoft case study:

- “Microsoft placed an average of 45 custodians under a litigation hold per matter in 2013, and preserved – as a result – approximately 59,285,000 pages of material per matter.
- As Microsoft moves through a case, we narrow the group of custodians for collection and processing. At this stage Microsoft collects from an average of 8 custodians, and processes, on average, 241 GB, or 10,544,000 pages of data.
- After applying a range of technological tools to filter that data, Microsoft ends up with about 8 GB, per case, or about 350,000 pages that need to be manually reviewed by attorneys for privilege and responsiveness.
- That process further narrows the set to about 2 GB, or 87,500 pages that Microsoft produces in the average case.
- Of that, only about 1 in 1000 pages are ever actually admitted as exhibits in trial. In the average case, therefore, only about 88 pages of material are actually used.”

“[F]or every single page that is actually used as evidence in litigation, Microsoft produces about 1000 pages, manually reviews about 4000 pages, collects and processes about 120,000 pages (both physically and through the use of technology), and preserves 673,693 pages. . . .”

“Put simply, discovery is too broad. The entire process has taken on a life of its own, and it has made litigation enormously costly. About 30% to 50% of Microsoft’s out-of-pocket litigation costs (depending on the type of case and the time it takes to resolve) are attributable to this discovery process. In the last decade, Microsoft paid about \$600 million in fees to outside counsel and vendors, just to manage this process. And that figure captures only some of the costs.

- It does not include Microsoft’s investment in in-house technology and personnel. . . .
- It does not take into account the costs of database management, and in particular the management of data that from time to time must be extracted from legacy systems that are not currently used for business purposes.
- It does not address all of the employee time spent managing the discovery process, and the lost productivity of the thousands of employees that must take time away from their productive tasks to comply with preservation and discovery obligations.
- Most fundamentally, it does not address how the costs of preservation and discovery impact the calculus involved in whether to litigate to reach a result on the merits or to settle. . . . There have been occasions on which we have settled a case to avoid incurring disproportionate expense, although we sometimes choose to continue litigating even though a strict cost-benefit analysis might militate in favor of settling.”

#### **Verizon Communications Inc.**

“The mounting costs of the preservation, review, and production of electronically stored information do not solely affect large scale litigation; in fact, it may have an even greater impact on small to medium size cases. In such cases, the potential discovery costs often approach or exceed the amount at issue. Such discovery costs are often one-sided: while Verizon may incur large expenses to preserve and produce information from a large number of employees or systems, the opposing party may not have much if any relevant information to collect or produce. This results in an incentive for that party to use disproportionate discovery as leverage to increase the costs associated with litigating the case for one party in order to secure a favorable settlement.”

#### **Altec Industries**

Altec reported spending twice as much on discovery as it did to pay claims in 2012.

#### **Ford Motor Company**

“In *Stokes v. Ford Motor Co.*, [No. 05-1236 (Mont. 13th Jud. Dist. Ct. 2011)] the plaintiff sued Ford in a products liability action relating to a fatality arising from a single-vehicle crash. The plaintiff propounded requests for discovery seeking litigation materials from other personal injury cases, including cases involving other vehicle models. Ford responded with uncontroverted evidence demonstrating that these other vehicle models had entirely distinct designs and *did not share any of the components at issue*. [T]he court . . . ordered Ford to produce the requested material.”

“Compliance with the court’s order imposed an enormous burden. Ford identified more than 1,300 lawsuits and 1,200 witness transcripts meeting the parameters specified in the

requests. The vast majority of these 1,300 cases had been closed years earlier, and most of the specific documents covered by the court's order were maintained only within the archived or off-site files of the outside counsel who had represented Ford. Culling through these 1,300 other cases—by hand on a document-by-document basis to identify responsive items, separate out materials not requested, and log and remove privileged documents from this enormous number of cases—required the work of 60 law firms and numerous individuals from Ford's in-house legal team. Ford estimated that complying with the court's discovery order would consume more than 800 hours from Ford's legal staff and cost \$2 million in outside counsel legal fees."

"All told, Ford produced to the *Stokes* plaintiff nine computer hard drives containing more than 360 GB of documents and 1,200 witness transcripts. . . . The true purpose of the *Stokes* plaintiff's discovery requests was to drive settlement value that was not warranted by the case facts."

"[T]he evidence actually presented at trial demonstrated just how insignificant the onerous discovery was to the plaintiff's case: he attempted to introduce exactly *one* document drawn from the court-ordered other lawsuit production and he initially offered only *six* transcripts. After the court ruled on admissibility from the "other lawsuit" production, *none* of the testimony transcripts were actually presented to the jury and *none* of the documents gleaned from the court-ordered production were admitted into evidence. Thus, the court's order . . . resulted in the utter waste of hundreds of hours of internal legal staff time and millions of dollars. The interests of justice were not served at all."

"Ultimately Ford won the battle with a 12-0 defense jury verdict, but lost the war in the sense that Ford cannot recover the wasted expenditures required by the sweeping court order...."

#### **Farmers Insurance Exchange**

"The single largest factor contributing to the unusually high cost of litigation in the United States is discovery. Yet, in large cases, very few documents obtained in discovery impact the lawsuit. A survey on the topic found that when cases of at least moderate size (with defense costs exceeding \$250,000) go to trial, on average just 0.1% of the pages produced in discovery are even offered as trial exhibits."

#### **The Hartford Financial Services Group, Inc.**

"The preservation and production of stored information that is either irrelevant or, at best, tangentially related to the just resolution of litigated disputes pose enormous financial burdens. The Hartford alone spends millions of dollars every year preserving and producing documents that never find their way into a courtroom and play no part in the ultimate outcome of any lawsuit. These substantial costs skew heavily against corporate defendants and are borne ultimately by customers and clients of those defendants."

#### **Services Group of America**

In 2014, Services Group of America reported spending \$1 million on discovery in cases where legal costs exceeded the amount in controversy and no findings were made against the company.

### **QVC, Inc.**

“QVC is forced to preserve far more material than could ever be used at trial or produced in discovery. QVC currently has over 600 email custodians on legal hold, and only a small fraction of this vast amount of information will ever be reviewed, let alone produced in discovery or offered at trial.”

### **Hewlett-Packard Company**

“HP, like other companies, incurs enormous costs in reviewing and producing materials, particularly electronically stored information, in response to broad discovery requests.”

### **Avnet, Inc.**

“In many cases, companies, often because of plaintiffs’ tactical leveraging of the federal rules’ overbroad standards, are forced to spend more on discovery expenses, mostly e-discovery, than their possible exposure in the litigation. For example, in one of our lawsuits Avnet produced the equivalent of more than 1.3 million pages of information in e-discovery, only to be served with additional discovery demands and a motion to compel *despite the fact that the plaintiff had already been provided significant portions of the information it demanded.*”

### **BP America Inc.**

“[T]he costs of preserving, collecting, reviewing, and producing documents and information, and especially electronically stored information, is by far the most significant, and rapidly increasing, expense in civil litigation.”

\* \* \*

“Our experience has been that even seemingly modest-sized civil disputes routinely require collection and review of tens or hundreds of thousands of electronic documents and communications under the current rules. More complex disputes require processing volumes many times that, often including millions of documents measured in multiple gigabytes or terabytes of electronic data. A common rule of thumb is that a gigabyte of data equates to 70,000 pages. Even when technology assisted review is employed, many hundreds or thousands of hours of attorney review time is required for reviewing data and creating privilege logs. Technology assisted review does not result in significant cost savings that make up for the ever-increasing volume of data subject to discovery. Yet for all these efforts and expenses, the number of exhibits used in litigation is a small fraction of the universe of documents and data subject to preservation, collection, review, and production.”

### **Mack Trucks, Inc.**

“[L]itigation today is inefficient, too expensive, and fraught with too many uncertainties that have little or nothing to do with the merits of particular cases. This stems, in large part, from costly and inconsistent obligations to preserve, process and produce vast amounts of data for discovery, even though much of that data has no real relevance to the issues in dispute and, in many cases, the data is never used at trial. . . . [P]arties are driven to simply settle claims or defenses based on the disproportionately high cost of retrieval and production of electronically stored information, rather than on the merits of the litigation.”

## **Bayer**

Bayer reportedly produced 2.1 million pages of documents in a case that went to trial for eight weeks, and only 0.04 percent of that information was used at trial.

## **State Farm**

“In a recent wage and hour collective and class action, plaintiffs requested that State Farm search the email of its managers for emails regarding employees’ right to opt-in to the collective action. The request was prompted by the low percentage of employees who elected to opt-in to the collective action. State Farm’s objections were overruled and the mailboxes of approximately 4,700 management employees were searched. More than 23,000,000 *potentially relevant files* consisting of more than 550 gigabytes of information (the equivalent of 40 million pages) were identified. State Farm hired an outside vendor who used predictive coding to conduct the search and the search yielded approximately 500 emails that met the Court’s criteria. These emails did not substantiate the plaintiffs’ suspicions that State Farm improperly communicated with its employees and none of the emails was ever used in a subsequent hearing or briefing.”

## **Vodafone US Inc.**

“The preferred tactic of the plaintiffs’ bar is to burden corporate defendants with massive discovery requests that force the corporate defendant to ignore the merits of the case and instead weigh the costs of settlement against the costs of production.”

## **GlaxoSmithKline**

“The overly broad scope of discovery . . . creates an overwhelming preservation and production burden for corporate litigants while providing little evidentiary benefit to any party at trial. Fortune 200 companies surveyed reported that in 2008, an average of 1,000 pages was produced in discovery in major cases for every one page used at trial, or one-tenth of 1 percent. GSK’s own experience is similar. For example, in one federal multidistrict product litigation that settled shortly before trial in 2011, GSK produced 1.2 million documents, yet plaintiffs included only 646 GSK documents on their exhibit list – less than five-hundredths of 1% of the production.”

\* \* \*

“More than 45% of GSK’s U.S. employees are subject to at least one preservation notice, as compared with 12.4% of our employees outside the United States. As just one example of the amounts of data at issue, GSK has preserved 57.6% of its company email. It amounts to 203 terabytes of information – roughly equating to 20 sets of the entire print collection at the Library of Congress. The amount of material we collected to respond to specific requests in litigation increased 316% from 2010 (2.86 terabytes) to 2012 (9.03 terabytes). Hosting, processing, collecting, and reviewing this amount of material are not without significant cost.”

## **Boston Scientific**

Boston Scientific reported in 2014 that one-half of its employees were subject to litigation holds, and that preservation had cost the company \$35 million since 2005, and \$5 million in 2013 alone.

### **Polaris Industries Inc.**

“Like most large manufacturing companies, Polaris has been involved in a wide variety of commercial, consumer, products liability, patent, and other cases. In many of those, Polaris was forced to spend significant financial and personnel resources to gather, review, and produce tens of thousands of documents that had no bearing on the outcome of the case. Plaintiff’s attorneys routinely use the burdens of discovery as a means to drive settlement based on nuisance value rather than the merits of the case.”

### **Sanofi US**

“The cost Sanofi faces when made to produce or place electronically-stored information on legal hold, is substantial. These costs are fixed and do not vary with the merits of a given case. In the past five years alone, Sanofi US has produced an estimated 47,095,853 pages of documents in various litigations. The processing, hosting, and production of these pages bore its own cost, an estimated \$20,451,633, which was merely an initial fraction of the total expense Sanofi shouldered. This fraction represented only the base cost – before any lawyer reviewed a single document.”

“Opposing counsel are well-aware of these costs and therefore often employ the strategy of leveraging the high cost of responding to their discovery requests against the value of the case. Indeed, the business distraction and sheer expense associated with excessive discovery all too often drive the outcome of disputes. It is only once Sanofi makes the conscious decision to endure the extortive price tag of currently sanctioned e-discovery practices, that we might hope to eventually defend ourselves in court.”

“The following illustrates an example of how disproportionate and irrelevant discovery practices are currently being exploited in our system:

In an active antitrust litigation . . . Sanofi US has produced more than 12 million pages of documents from more than 110 custodians, more than 8.75 million of which were from the custodial files of 75 sales representatives. Sanofi US employees spent over 4,200 hours working to identify, collect, and facilitate production of documents in response to discovery requests from plaintiff, and Sanofi US’s counsel has spent over 86,000 hours reviewing and producing these documents. The cost to Sanofi US for these discovery efforts exceeded \$10 million.”

### **Nationwide Mutual Insurance Company**

“[T]he costs and burdens of preservation and discovery on Nationwide have continued to grow over time. For example, in a recent case filed against Nationwide, Nationwide was required to search over 11 terabytes of data (approximately 110 million documents). From this search, Nationwide collected approximately 290,000 documents and produced approximately 224,000 documents (approximately 6.4 million pages). Although this case has yet to go to trial, this is but one of the thousands of matters in which Nationwide is involved every year.”

### **ExxonMobil**

ExxonMobil reported in 2013 that it had 5,200 employees subject to litigation holds and estimated that the navigation of those holds required an average of 10 minutes per day per employee, for a total of 867 hour a day or 327,000 hours a year in lost productivity.

### **CSXT Transportation, Inc.**

“*CSX Transportation, Inc. v. Robert N. Peirce, Jr., et al.*, (5:05-cv-202)(N.D.W.V.) is a case ‘aris[ing] from the successful efforts of the defendants to deliberately fabricate and prosecute objectively unreasonable, false and fraudulent asbestosis claims against CSX’. . . . During discovery, the defense adopted a strategy of seeking broad and wide sweeping categories of information that resulted in a CSX discovery spend of *more than \$3.5 million* in attorney fees and expenses. . . .”

“Among other things, CSX collected files from more than 30 law firms scattered across the United States. The volume of those files was enormous—over 75,000 electronic documents and 1,900 boxes of hard copy documents—and the ensuing privilege review was a massive undertaking that resulted in a log containing over 150,000 individual entries. Due to the sheer volume of documents collected, CSX was forced to lease space in three separate locations—at a cost of \$11,000 per month—to house the hard copy documents for privilege review and the defendants’ subsequent inspection and copying. CSX also made 300,000 electronic documents available for copying and inspection via an electronic database hosted by a third party vendor.”

“Having inflicted a substantial burden in money and resources on CSX, the defense made little effort to review the documents made available. For example, they waited over three months before sending just two individuals to review the 900 hard copy boxes at one of the locations. Those two individuals completed the task in just four days and selected only 631 documents for production. Overall, the defendants requested copies of just 4,600 documents from the 1,900 hard copy boxes (i.e., over 3.5 million pages) CSX made available and none of the 300,000 electronic documents.”

“At trial, from the full universe of documents CSX made available in that massive and costly production, the defense offered but a single exhibit. That exhibit was excluded by the court as irrelevant.”

### **Medtronic, Inc.**

“Currently, the costs and burdens of discovery – particularly e-discovery – are far too high.”

### **Vulcan Materials Company**

“I have seen countless cases where the time and cost of discovery was hugely disproportionate to the claims made by the plaintiff. All too often, however, we are forced to settle what we believe are non-meritorious, if not downright frivolous, lawsuits due to the costs and burden of responding to discovery. We encounter plaintiffs lawyers whose strategy is to make the discovery process so time-consuming, burdensome, and costly that we cannot take cases all the way through trial, much as we would like to.”

### **Eli Lilly and Company**

“Companies are pressured by the explosion of data that, under the current rules, has to be preserved, sifted through and produced. To make matters worse, lawyers in mass tort and patent cases have learned to leverage these costs, often by seeking overly broad discovery that can cost companies millions of dollars to produce. The result is a system that consistently creates unbalanced and unreasonable discovery costs for civil defendants, abusive litigation tactics, and the resolution of cases based on costs rather than merits.”



\* \* \*

“Lilly spends tens of millions of dollars to over-preserve vast amounts of information, only a tiny fraction of which will ever be used in determining a case on the merits. Indeed, Lilly has spent tens of millions just to preserve e-mail messages in the past six years. Also, at any given time, more than 10,000 U.S. employees are under multiple litigation holds. These holds impose significant costs, resulting in thousands of employee working hours spent each year on the preservation of documents and information.”

\* \* \*

“In a recent product liability case, Lilly reviewed more than 20 million pages of documents and produced 4.2 million pages, of which about 200 documents were admitted at trial. Similarly, in a recent patent lawsuit, Lilly reviewed 9.5 million pages of documents and produced 1.3 million pages. At trial, about 450 documents were admitted. In another patent lawsuit, Lilly reviewed more than 6 million pages of documents and produced more than 1.2 million pages with fewer than 140 documents being admitted at trial. Overall, Lilly has spent more than \$50 million in the past three years processing, reviewing, and producing documents.”

\* \* \*

**In 2010, Lawyers for Civil Justice, Civil Justice Reform Group, and U.S. Chamber Institute for Legal Reform conducted a joint “Litigation Cost Survey of Major Companies.” Almost twenty percent of the Fortune 200 companies responded to all or a portion of the survey. The survey’s key findings with respect to civil discovery costs were:**

**“Litigation costs continue to rise and are consuming an increasing percentage of corporate revenue.”**

- “The average outside litigation cost per respondent was nearly \$115 million in 2008, up 73 percent from \$66 million in 2000. This represents an average increase of 9 percent each year.”
- “For the 20 companies providing data on this issue for the full survey period, average outside litigation costs were \$140 million in 2008, an increase of 112 percent from \$66 million in 2000.”
- “Between 2000 and 2008, average annual litigation costs as a percent of revenues increased 78 percent for the 14 companies providing data on average litigation costs as a percent of revenues for the full survey period.”
- “Increases in hourly rates do not appear to be driving the increase in litigation costs, as the available data show relatively little change in outside legal fees over time.”

**“Inefficient and expensive discovery does not aid the fact finder.** The ratio of pages discovered to pages entered as exhibits is as high as 1000/1. In 2008, on average, 4,980,441 pages of documents were produced in discovery in major cases that went to trial – but only 4,772 exhibit pages actually were marked.”

“Whatever marginal utility may exist in undertaking such broad discovery pales in light of the costs. While only some of the survey respondents were able to provide data on a per case basis, for the period 2006-2008, the average company paid average discovery costs per case of \$621,880 to \$2,993,567. Companies at the high end during the same time periods reported average per-case discovery costs ranging from \$2,354,868 to \$9,759,900.”





**WISCONSIN**

**Statement Before the  
Senate Committee on Judiciary and Public Safety**

**By**

**Bill G. Smith  
State Director  
National Federation of Independent Business  
Wisconsin Chapter  
and  
President  
Wisconsin Civil Justice Council**

**Tuesday, January 30, 2018**

**Senate Bill 645**

---

Mr. Chairman, and members of the Committee, on behalf of the Wisconsin Civil Justice Council, and the members of the National Federation of Independent Business/Wisconsin, thank you for scheduling today's public hearing for Senate Bill 645 – legislation of great importance to small business, the broader business community, and for the people of Wisconsin who find themselves either a defendant or plaintiff in a civil lawsuit.

As State Director of the NFIB, I am pleased to represent nearly 10,000 small and independent business owners located all across Wisconsin. For 75 years, NFIB has been a leading advocate for our small business community promoting state and federal public policies that will encourage small business creation and promote small business growth in communities throughout our state. Civil justice reform, the subject of today's hearing, is one of those policy areas that has been a key issue and one strongly endorsed by small business.

My testimony today is also on behalf of the Wisconsin Civil Justice Council, which has its mission to promote fairness and equity in Wisconsin's civil justice system, with the ultimate goal of making Wisconsin a better place to work, to start and grow business, and to improve the quality of life throughout our state.

**Statement Before the Senate Committee on Judiciary and Public Safety**  
**Tuesday, January 30, 2018**  
**Page Two**

The Civil Justice Council is governed by a 16-member Board of Directors, which consists of representatives from Wisconsin's leading business and professional organizations. All legislative policies of the Council are established by a process of consensus by members of our Board, a process which has resulted in our strong support for passage of Senate Bill 645.

Since 2011, the legislature has made civil liability reform a key policy priority. The reforms, enacted into law, have brought Wisconsin back into the mainstream, and have created a stable, fair litigation climate.

The complexity and high transaction costs of civil lawsuits can be especially challenging expenses for small business owners whether a plaintiff or defendant.

In fact, Governor Walker has identified lawsuit reform as a key policy initiative of his Small Business Agenda for Wisconsin because litigation costs, whether transactional or damage awards, can cripple a small business.

NFIB is pleased to support legislation that will help reduce litigation costs for small business, update civil court procedures, and help eliminate abusive discovery practices.

On behalf of our state's small business community, **I respectfully request members of the Committee to support passage of Senate Bill 645.**



## Testimony In Favor of Senate Bill 645

### Senate Committee on Judiciary and Public Safety

January 30, 2018

Thank you Chair Wanggaard and members of the Senate Committee on Judiciary and Public Safety for hearing my testimony. A modernization of Wisconsin's civil justice system to address excessive transactional costs and ensure fairness for all parties is overdue. Senate Bill 645 (SB 645) contains a series of common-sense reforms that will do just that.

Wisconsin Manufacturers & Commerce (WMC) is the state chamber of commerce and largest general business association in Wisconsin. We were founded over 100 years ago, and are proud to represent approximately 3,800 member companies of all sizes, and from every sector of our economy. Our mission is to make Wisconsin the most competitive state in the nation in which to do business.

In many respects Wisconsin is a national model in how to improve a state's business climate. Because of the hard work this body has done, CEO Magazine has ranked Wisconsin's business climate the 10<sup>th</sup> best in the nation. However, one area where Wisconsin has stagnated is its litigation climate. A large reason for this stagnation is because of the drastic increases in transactional costs due to the increased retention of data that has come along with modern technology. The U.S. Chamber of Commerce's 2017 Lawsuit Climate Survey ranked Wisconsin 20<sup>th</sup> in the nation for litigation climate, down from 15<sup>th</sup> in the nation in 2012. In a recent survey conducted by the U.S. Chamber of Commerce, 85 percent of corporate attorneys believe the state's litigation environment will affect where their companies choose to locate and do business. This negative perception can be reversed with this bill's common-sense reforms that modernize Wisconsin's civil justice process.

- First, SB 645 aligns Wisconsin's rules on civil procedure for discovery with its federal counterparts ensuring the certainty and predictability in the law. In addition this bill adds a few additional reforms including the ability to stay discovery pending decisions on dispositive motions to resolve the lawsuit. A stay of discovery pending a court's ruling on dispositive motions is important because these motions can change the scope of the suit or stop it completely.

- Second, SB 645 would make Wisconsin the 49<sup>th</sup> state to federalize our state class action rules, which have not been substantially updated since the 19<sup>th</sup> century. Beyond the federalization, the bill would notably allow for an interlocutory appeal of class certification orders for all parties. Allowing both plaintiffs and defendants to have a right to an interlocutory appeal, instead of having to wait until the end of the lawsuit to appeal the certification, will make these actions run far more efficiently. Fifteen other states have a right to interlocutory appeal in their class action laws.
- Third, SB 645 protects consumers from predatory consumer lawsuit lending practices. Consumer lawsuit lending is when a lender provides money to a consumer for purposes other than financing the litigation. This bill protects consumers by requiring a series of disclosures, prohibiting the lender from making decisions in the lawsuit, capping the interest rate and annual fees at 18 percent and \$360 respectively, and requiring the disclosure of the loan to other parties in the suit.
- Fourth, SB 645 takes a step forward in easing compliance costs for businesses being audited by private third-party audit firms looking for unclaimed property by banning the state from engaging in contingency fee contracts with these firms. The ban eliminates the perverse incentive for audit firms to be overly aggressive in their search for unclaimed property. The state would still be able to hire third-party firms using different fee structures.
- Fifth, SB 645 revises Wisconsin's "default" statute of limitations for miscellaneous claims to three years. This default provides ample time for plaintiffs to initiate a lawsuit, while reducing the burdens for the state and private parties for investigating stale claims.
- Sixth, SB 645 changes the interest rates relating to the timely payment of insurance claims. The rate would be revised from 12 percent to prime plus one percent, which would mirror interest rates on general judgments and allow the rates to self-adjust consistent with markets.

In conclusion, while each of the six main sections of the bill touch different portions of Wisconsin's civil justice process, they all work towards the common goal of increasing certainty, reducing costs, and promoting fairness for all parties. Thank you again Chair Wanggaard and committee members for taking the time to hear this testimony. I urge you to support this legislation.



# WISCONSIN CIVIL JUSTICE COUNCIL, INC.

*Promoting Fairness and Equity in Wisconsin's Civil Justice System*

## Officers & Members

President - Bill Smith  
*National Federation of  
Independent Business*

Vice President -  
Scott Manley  
*Wisconsin Manufacturers  
and Commerce*

Treasurer -  
Andrew Franken  
*Wisconsin Insurance  
Alliance*

Secretary - Brad Boycks  
*Wisconsin Builders  
Association*

John Mielke  
*Associated Builders  
& Contractors*

Gary Manke  
*Midwest Equipment Dealers  
Association*

Nickolas George  
*Midwest Food Products  
Association*

William Sepic  
*Wisconsin Automobile &  
Truck Dealers Association*

John Holevoet  
*Wisconsin Dairy Business  
Association*

Jeffrey Leavell  
*Wisconsin Defense Counsel*

Brian Doudna  
*Wisconsin Economic  
Development Association*

Eric Borgerding  
*Wisconsin Hospital  
Association*

Mark Grapentine  
*Wisconsin Medical Society*

Neal Kedzie  
*Wisconsin Motor Carriers  
Association*

Matthew Hauser  
*Wisconsin Petroleum  
Marketers & Convenience  
Store Association*

Edward Lump  
*Wisconsin Restaurant  
Association*

**To:** Members, Senate Committee on Judiciary & Public Safety  
**From:** Bill G. Smith and Andrew Cook, Wisconsin Civil Justice Council  
**Date:** Jan. 30, 2018  
**Re:** SUPPORT for SB 645, Amending Wisconsin's Civil Procedure Laws

The Wisconsin Civil Justice Council's (WCJC) mission is to promote fairness and equity in Wisconsin's civil justice system. We appreciate the opportunity to provide these comments in support of Senate Bill 645, which makes important changes to Wisconsin's discovery, class action, and other civil liability statutes.

The Wisconsin Legislature and Gov. Scott Walker have made civil liability reform a priority since 2011. These substantive civil liability reforms have brought Wisconsin's civil justice system back into the mainstream and have created a stable and fair litigation climate. This in turn has helped with job creation and economic development.

The proposed reforms contained in SB 645 build on these positive reforms by making a number of common sense and reasonable changes to Wisconsin's civil procedure laws. Below is a discussion of the main portions of SB 645 and why WCJC supports the legislation.

## Discovery Reforms in SB 645

The reforms in SB 645 will save costs for both parties in litigation and improves efficiency in the civil discovery process. The Federal Rules Committee, which is responsible for the Federal Rules of Civil Procedure, has already implemented a number of new rules aimed at avoiding excessive costs associated with discovery. Most of the provisions in SB 645 simply incorporate the language in the parallel Federal Rule.

SB 645 makes the following changes to Wisconsin's discovery statutes:

- Put on hold discovery and other proceedings pending the court's decision on a motion to dismiss or other dispositive motions, protecting parties from costly discovery in cases that may be dismissed or where refinement of the pleadings may clarify the allegations and scope of relevant discovery.
- Limit discovery of electronically stored information (ESI) to address the escalating volume of ESI that is now one of the most significant discovery-related costs.
- Establish cost-benefit and proportionality requirements for discovery to prevent litigants from abusing the discovery process to leverage a higher potential settlement or engage in a "fishing expedition."
- Currently, unless a court intervenes, a party to civil litigation may force the opposing party to produce potentially massive amounts of

electronic data, regardless of the cost or the need for the data. The Federal Rules Committee already has addressed this concern in Federal Rule 26. The provision in the pending bill incorporates the “proportionality” test, including the considerations for the court to weigh in applying that test, from Federal Rule 26(b). It adds an additional, though consistent, limitation on discovery requests for information that is “cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” Current law in Wisconsin contains no express limitations on costly, burdensome discovery.

- Unless otherwise stipulated or ordered by the court, limit discovery to 25 interrogatories, 10 depositions, none of which may exceed seven hours in duration, and a look-back period of not more than five years prior to the accrual of the cause of action.
- Limit the types of electronic data that a litigant or prospective litigant would have to preserve, potentially saving parties substantial costs for hardware and IT staff and consultants. Parties would not be required to preserve the same types of costly, burdensome data that they would not be required to produce in discovery – data that cannot be retrieved without substantial additional programming, backup data that are substantially duplicative of more accessible data, and data from legacy systems that are obsolete. Litigants could simply continue enforcing their existing data retention policies while involved in litigation, rather than putting holds on all computer systems. For example, a party that writes over backup tapes – which are extremely expensive – every 180 days can continue that practice, rather than having to save all back up data and purchase new tapes for years of litigation. There is no comparable provision in the Federal Rules; however, courts regularly enter orders pursuant to which parties need not preserve these types of electronic data beyond standard retention periods.
- Unless otherwise stipulated or ordered by the court, limit discovery to 25 interrogatories, 10 depositions, none of which may exceed seven hours in duration, and a look-back period of not more than five years prior to the accrual of the cause of action. As in federal courts, the parties may stipulate to additional interrogatories or more and longer depositions, and the court may adjust by order the amount of permitted discovery.
- Require responding parties to state with specificity the grounds for objections to any discovery request and permit the responding party to produce copies of documents instead of permitting the requester to inspect the documents. Current law expressly requires parties to permit inspection. This provision is consistent with Federal Rule 34(b) and standard practice in state courts.
- Provide notice of third-party litigation financing, if the financier has a right to receive compensation that is contingent on and sourced from the outcome of the action. Such third-party financing can increase the cost of litigation and cause suits to be brought that would not otherwise have been financially justified.

### **Class Action Reforms in SB 645**

SB 645 aligns Wisconsin’s class action statute with Federal Rule 23. This will provide needed specificity, clarity, and consistency not found under Wisconsin’s current law. Wisconsin’s current one-sentence class action statute is essentially identical to the 1849 Field Code. After 168 years, it is time for an upgrade. Wisconsin would be the 48th state to adopt the Federal Rule.



On Dec. 21, 2017, the Supreme Court of Wisconsin issued an order (No. 17-03) (see also 2017 WI 108) adopting many of the class action reforms contained in SB 645. WCJC supported those amendments. SB 645 contains the same statutory provisions contained in the Supreme Court order, including three substantive enhancements:

- Provide a nondiscretionary right to an interlocutory appeal of class certification orders by both plaintiffs and defendants. This is a vital ruling that makes or breaks the case. It should be appealable before other aspects of the case proceed.
- Preclude “no-injury” class actions by requiring the type and scope of injury of the representative parties be typical of the type and scope of injuries of the class.
- Require that the class of consumers eligible to make a claim be “ascertainable” by requiring the members of the class be objectively verifiable by reliable and feasible means.

In addition to the changes already discussed, SB 645 will also:

- Regulate lawsuit lending that provides money to consumers with repayment of the money derived from the consumer’s proceeds from the dispute (e.g., a judgment or settlement). There are times when reasonable settlement amounts that would otherwise be agreed upon between plaintiff and defense counsel are rejected because the injured party is “under water” to lawsuit lenders. The regulation of the industry will protect vulnerable Wisconsin consumers from lawsuit lenders that sometimes prey on those injured and unable to work or who may otherwise have substantial medical bills.
- Reset statute of limitations – the maximum period that one can wait before filing a lawsuit – for certain civil litigation. The revised limits will bring consistency among Wisconsin liability laws and align us better with other states that have significantly lower limits. These lower time limits will promote efficiency and reduce burdens and costs on the state and businesses forced to investigate distant claims.
- Prohibit the Department of Revenue from entering into a contingent fee agreement with third parties to engage in an audit relating to Wisconsin’s unclaimed property law. State unclaimed property laws, when fairly and appropriately enforced, serve several important functions. But private auditors working under contingency fee arrangements have taken an increasingly aggressive approach to the interpretation and enforcement of unclaimed property laws, which in turn increases the costs of doing business in Wisconsin.
- Adjust the interest rate insurers must pay on overdue claims from 12 percent to the prime loan rate plus one percent. In doing so, this rate will mirror interest rates on general judgments and allow the rates to self-adjust consistent with markets.

### **Conclusion**

SB 645 provides common sense reforms to Wisconsin’s civil procedure laws. These reforms are fair and reasonable to all parties and provide efficiency to Wisconsin’s civil litigation process. Therefore, WCJC supports SB 645 and respectfully requests that you vote for the legislation.



**STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE**

**BRAD D. SCHIMEL  
ATTORNEY GENERAL**

**Paul W. Connell  
Deputy Attorney General**

114 East, State Capitol  
P.O. Box 7857  
Madison, WI 53707-7857  
608/266-1221  
TTY 1-800-947-3529

**PREPARED TESTIMONY OF ATTORNEY GENERAL BRAD D. SCHIMEL**  
In Support of 2017 Senate Bill 645  
Senate Committee on Judiciary and Public Safety  
Tuesday, January 30<sup>th</sup>, 2018

Chairman Wanggaard and committee members,

Thank you for the opportunity to submit testimony in favor of 2017 Senate Bill 645. This bill provides a great benefit to the State of Wisconsin through its reduction of transactional costs in litigation. It does this through more closely aligning state rules of civil procedures with the corresponding federal rules. I want to thank Representatives Born and Nygren, and Senators Tiffany and Craig for authoring this necessary reform to our state's rules of civil procedure.

The Department of Justice is charged with defending the State of Wisconsin in state and federal court. The Department handles a wide variety of matters on behalf of the State, its agencies and officials, the University of Wisconsin System, and individual state employees. The Department employs over 100 attorneys to engage in work defending the state. While most often our criminal law cases gain media attention, the Department has a robust civil defense practice as well.

The Department's Civil Litigation Unit's primary mission is civil defense work. This unit defends the State against civil claims in both federal and state court in the areas of civil rights, property and torts, commercial litigation and administrative law and open government and employment. For example, the Department defends against civil lawsuits involving prisoners, medical malpractice, employment disputes, personal injuries, automobile accidents, defamation, and property damage, just to name a few broad categories.

Any time the Department defends the State in these civil actions, either federal or state rules of civil procedure apply. Every discovery request, every interrogatory, and every deposition means a higher fiscal impact on the State of Wisconsin. While all of the reforms in the bill significantly reduce transactional costs for litigants, there are a few that directly and positively impact state resources when the State of Wisconsin is a defendant.

### **Discovery Reform**

This bill adopts the federal rule of proportionality requirements for discovery, puts a hold on discovery and other proceedings while the court considers a dispositive motion, and provides for notice of third-party litigation financing. It requires a court to consider the proportionality of the costs of discovery to the “value” of the claim. This is consistent with procedure in federal court. It places limitations on a litigant’s ability to request discovery purely for the purposes of running up costs to conduct “fishing expeditions” or push a party to settle. Every discovery request the Department receives means more state resources that must be expended. This bill requires a court to weed out requests that do not add value to the litigation. This provision, along with the rest of the bill, does not discriminate between plaintiff and defense and applies equally.

A critical piece of this legislation is the limitations it places on discovery requests for certain electronically stored information (ESI). With the ever increasing use of electronic communication and the seemingly limitless amount of information that can be stored in multiple locations it is critical that some limitations be placed on discovery of electronically stored information. The laws governing discovery must evolve as technology does. Retrieval of ESI has quickly become the most expensive discovery related cost. It comes as no shock to anyone who has worked in state government that, with some exceptions, technology used by the state is not “state of the art.” Retrieval of what is often redundant data from outdated, sometimes unreadable technology is costly. This bill reasonably limits the type of ESI that can be requested to avoid burdensome requests for duplicative and obsolete. Additionally, this bill places limitations on interrogatories and depositions to a reasonable level which results in a direct cost savings to the state taxpayers.

### **State Class Action Reform**

The State of Wisconsin can be subject to class action claims. In fact, plaintiffs brought a class action claim to challenge Wisconsin’s voter ID law in 2013. This bill brings Wisconsin’s class action procedures and requirements in line with federal requirements. Currently, the state statute provides little to no guidance to the courts on class qualification or procedure. The state statute governing class actions has not been amended in well over 100 years. Wisconsin is one of the last states in the U.S. to amend their statutes to more closely align with federal law. The changes in this bill protect against frivolous class action lawsuits which means less state resources expended in their defense.

### **Aligning Residual Statute of Limitations Period**

The Department’s Civil Litigation Unit, when fully staffed, has 23.5 Assistant

Attorneys General and 14.45 paralegals solely doing civil defense work. Of these 23.5 AAGs and 14.45 paralegals, it takes nearly 12 full-time AAG's and 8 full-time paralegals to handle civil prisoner litigation. At any one point the Department of Justice is defending the state in approximately 625 prisoner lawsuits. Sec. 893.53 is the residual statute of limitations period for these prisoner litigation claims. The federal court looks to this residual statute in federal Sec. 1983 claims. Other types of torts have separate statute of limitations periods enumerated elsewhere in Wisconsin statutory scheme. For example, the statute of limitations period for personal injury is three years pursuant to sec. 893.57 and claims of professional malpractice have a three year statute of limitations period from the incident pursuant to sec. 893.55. This bill would change the statute of limitations period for these prisoner litigation claims from six years to three years.

At six years, Wisconsin has one of the longest residual statute of limitations period for Sec. 1983 claims in the country. The vast majority of states enjoy a two or three year statute of limitations period. Below is a state by state comparison of these statute of limitations periods for these types of claims.

<i>Alabama</i> - 2	<i>Indiana</i> - 2	<u><i>Nebraska</i></u> - 3	<u><i>South Carolina</i></u> - 3
<i>Alaska</i> - 2	<i>Iowa</i> - 2	<i>Nevada</i> - 2	<u><i>South Dakota</i></u> - 3
<i>Arizona</i> - 2	<i>Kansas</i> - 2	<u><i>New Hampshire</i></u> - 3	<b><i>Tennessee</i></b> - 1
<u><i>Arkansas</i></u> - 3	<b><i>Kentucky</i></b> - 1	<i>New Jersey</i> - 2	<i>Texas</i> - 2
<b><i>California</i></b> - 1	<b><i>Louisiana</i></b> - 1	<i>New Mexico</i> - 2	<i>Utah</i> - 2
<i>Colorado</i> - 2	<u><i>Maine</i></u> - 6	<u><i>New York</i></u> - 3	<u><i>Vermont</i></u> - 3
<u><i>Connecticut</i></u> - 2	<u><i>Maryland</i></u> - 3	<u><i>North Carolina</i></u> - 3	<i>Virginia</i> - 2
<i>Delaware</i> - 2	<u><i>Massachusetts</i></u> - 3	<u><i>North Dakota</i></u> - 6	<u><i>Washington</i></u> - 3
<i>Florida</i> - 4	<u><i>Michigan</i></u> - 3	<i>Ohio</i> - 2	<i>West Virginia</i> - 2
<i>Georgia</i> - 2	<u><i>Minnesota</i></u> - 5	<i>Oklahoma</i> - 2	<b><u><i>Wisconsin</i></u></b> - 6
<i>Hawaii</i> - 2	<u><i>Mississippi</i></u> - 3	<i>Oregon</i> - 2	<i>Wyoming</i> - 2
<i>Idaho</i> - 2	<u><i>Missouri</i></u> - 5	<i>Pennsylvania</i> - 2	
<i>Illinois</i> - 2	<u><i>Montana</i></u> - 3	<u><i>Rhode Island</i></u> - 3	

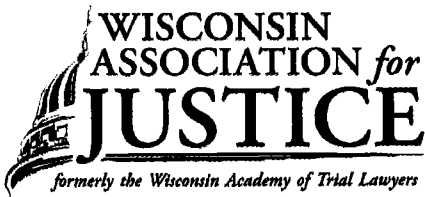
It is estimated that nearly a quarter of civil prisoner litigation cases are brought after the three year mark. Longer statute of limitations periods, in any type of claim, leads to weaker recollection of events by accusers and witness and increases the difficult of obtaining documents and other discovery. This problem is exponentially worse in the instances of prisoner litigation where there is high turnover in staff.

Most legitimate and serious prisoner claims are brought rather quickly, as attorneys for the plaintiffs see the value in moving quickly to preserve memories, documents and other discovery items. It is important to note that nothing about this proposed change in the law impacts the ability to bring criminal charges and it in no way impacts the current statute of limitations period for those criminal claims. This bill simply brings the statute of limitations period in line with a large number of states and significantly reduces the burden on the taxpayers of Wisconsin by reducing

the number of what are often frivolous lawsuits taking up the time and resources of nearly half of the attorneys in DOJ's civil litigation unit. It also brings it into harmony with Wisconsin's statute of limitations period for all other personal injury claims.

This bill makes significant and necessary improvements to Wisconsin's civil procedure. It aligns it more closely with federal law that works well and is balanced. Importantly it leaves in place judicial discretion so that the court may depart from the requirements outlined in the bill when good cause is shown by either party.

Thank you again for hearing this bill and for the opportunity to submit testimony in support of SB 645. If you have any additional questions please contact Lane Ruhland, Director Government Affairs at [ruhlandle@doj.state.wi.us](mailto:ruhlandle@doj.state.wi.us).



**Testimony of Edward E. Robinson  
Wisconsin Association for Justice  
Before the Senate Judiciary Committee  
January 30, 2018  
Regarding  
2017 Senate Bill 645**

**HEATH P. STRAKA**  
*PRESIDENT, MADISON*

**EDWARD E. ROBINSON**  
*PRESIDENT-ELECT, BROOKFIELD*

**BEVERLY WICKSTROM**  
*VICE-PRESIDENT, EAU CLAIRE*

**JAY S. URBAN**  
*SECRETARY, MILWAUKEE*

**KRISTIN M. CAFFERTY**  
*TREASURER, RACINE*

**BENJAMIN S. WAGNER**  
*PAST-PRESIDENT, MILWAUKEE*

**BRYAN M. ROESSLER**  
*EXECUTIVE DIRECTOR*

Good morning, my name is Edward E. Robinson. I am a shareholder with the law firm Cannon & Dunphy, S.C. in Brookfield. I am President-Elect of the Wisconsin Association for Justice. As always, it is a privilege and honor to testify before this committee.

**Key Concerns**

On behalf of the association, I am here to speak against this bill as it is currently drafted. It is our belief that each of the individual items in this bill are worthy of their own, independent evaluation as a stand-alone bill. To the extent the committee would agree to take that step, WAJ would offer our whole-hearted support.

Given the far-reaching scope of the bill, WAJ wishes to focus our concerns and analysis on three core areas:

1. Provisions governing Class Actions
2. Provisions governing Discovery in Civil Litigation
3. Changes to Wis. Stat. § 628.46 governing the Timely Payment of [Insurance] Claims.

Recognizing the committee's longstanding interest in making changes to produce a more efficient and effective civil justice system, I highlight several areas where the bill should be amended in pursuit of that goal. The changes I propose, if amended into the bill, will allow Wisconsin courts to rely on Federal case law and commentary as well as the long-standing, balanced approach employed to create the Federal Rules.

## The Federal Rules Process

Because this bill is premised on the alignment of Wisconsin's rules of civil procedure with those used in Federal courts, it is first worth examining how the Federal process differs from that being proposed here today. As we will detail, SB-645 contains several proposals that have consistently been rejected by Congress and the Federal Rules process as unworkable. If Wisconsin is going to adopt Federal Rules as its own, it should adopt the rules *as written*. In taking this approach, Wisconsin courts benefit from federal guidance, case law and the well-considered process from which they emerged.

The development of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) is a deliberate, multi-year process featuring detailed input from all stakeholders to the judicial system. The Judicial Conference, the policymaking and analysis arm of the Federal Courts, controls the process. It derives its power from the Rules Enabling Act of 1934, an act of Congress that authorizes the judicial branch to promulgate the Federal Rules of Civil Procedure. The Judicial Conference is composed of the most senior judges from each circuit court and a senior district court judge from each regional circuit. Other judges, along with a few members of the academic and legal community, serve on the Committees and Subcommittees that develop and shape the proposals. While membership on the Judicial Conference is based on seniority, membership on the Committees and Subcommittees is determined by appointment of the Chief Justice. The Federal Rules of Civil Procedure are developed and proposed by the Advisory Committee on Federal Rules of Civil Procedure (Advisory Committee) and the Committee on Rules of Practice and Procedure (Standing Committee).

### The Current Federal Rules Emerged from a Five-Year Process

The current version of the FRCP went into effect on December 1, 2015. They resulted from a process that began at least five years earlier in May 2010.

- **May 2010-June 2013:** Initial "Duke Conference" followed by mini conferences and meetings.
- **August 2013-May 2014:** Advisory Committee published proposed amendments for comment- *three public hearings held.*
- **March 2014-May 2014:** Advisory Committee revised rules *after considering comments from stakeholders.*
- **May 2014:** Standing Committee on Rules approved proposed amendments with small changes.
- **September 2014:** Judicial Conference approved rules as offered and approved in May
- **April 29, 2015:** Supreme Court prescribes amendments by sending them to congress.
- **December 1, 2015:** Congress allows the rules to go into effect.

## The Wisconsin Judicial Council

Traditionally, Wisconsin's rules of civil procedure have been vetted and reviewed by the Judicial Council before being promulgated by the Supreme Court. Like its Federal counterpart, the Judicial Council has historically sought input from all stakeholders in the justice system, including judges and litigants. Groups representing various stakeholders are also given opportunity to provide input. The referral process to the Supreme Court, as part of their rulemaking procedures, in fact provides two opportunities for interested parties to provide input. *See Wis. Stat. § 751.12.*

The Council's 21 members "statutory responsibilities are to study and make recommendations relating to: (1) court pleading, practice and procedure; and (2) organization, jurisdiction and methods of administration and operation of Wisconsin courts."<sup>1</sup>

The Council is comprised of legislators as well as members of the legal community, including judges, law professors, lawyers, and elected members of the State Bar of Wisconsin. The Council is comprised of: a Supreme Court justice; a Court of Appeals judge; four circuit court judges; one district attorney; three members of the state bar; two citizen members; and all of the following individuals (or their designees): the Director of State Courts; the chairs of the Senate and Assembly standing committees with jurisdiction over judicial affairs; the Attorney General; the chief of the Legislative Reference Bureau; the deans of the law schools of the University of Wisconsin and Marquette University; the State Public Defender; and the president-elect of the state bar.<sup>2</sup>

---

<sup>1</sup> <https://www.wicourts.gov/courts/committees/judicialcouncil/index.htm> (last accessed Jan 1, 2018), *see also* Wis. Stat. § 758.13(2)(a).

<sup>2</sup> <https://www.wicourts.gov/courts/committees/judicialcouncil/index.htm> (last accessed Jan 1, 2018).



## Supreme Court and Judicial Council Examination of Issues Included in SB-645 E-Discovery and Electronically Stored Information (ESI): Close Examination Does Not Reveal Widespread Problems with E-Discovery in Wisconsin

The Judicial Council has recently been studying an amendment to Wis. Stat. § 804.12(4m), which governs available sanctions for failing to preserve Electronically Stored Information (ESI). The current version of § 804.12(4m) is based on the 2006 version of FRCP 37(e) and went into effect in 2011 after being adopted by the Judicial Council in 2010 and promulgated by the Wisconsin Supreme Court. The Judicial Council resolved in July 2017 to seek comment from stakeholders regarding its recommendation that the Supreme Court adopt the 2015 version of Rule 37(e). While this bill does not address those specific sections of the Wisconsin statutes, the Judicial Council's examination revealed no qualitative or quantitative problems with e-discovery in Wisconsin.

The Judicial Council's research suggests there are few problems with e-discovery in Wisconsin. Specifically, the Judicial Council circulated for comment a memo supporting the adoption of the 2015 version of Rule 37(e) in July 2017.<sup>3</sup> It requested that groups provide comment by September 1, 2017. The July 18 memo indicates Wisconsin has avoided the problems that emerged in Federal Court with regard to ESI preservation. The memo states, straightforwardly:

[Evidence and Civil Procedure] Committee members noted that Wisconsin does not appear to have the volume of complaints of excessive sanctions that have arisen at the federal level[.]<sup>4</sup>

Moreover, the Council aptly noted that “there has been only one Wisconsin appellate case referencing s. 804.12(4m) since its adoption.”<sup>5</sup> *The lack of disputes in this area is demonstrative of an effective and efficient e-discovery process in Wisconsin courts, as governed by the existing rules.*

---

<sup>3</sup> Memo, Comments Requested on the Wisconsin Judicial Council's Proposed Amendment to Wis. Stat. § 804.12(4m), July 18, 2017.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (referencing without citation *FABCO Equipment, Inc. v. Kreilkamp Trucking, Inc.*, 2013 WI APP 141, 352 Wis. 2d 106, 841 N.W.2d 542).

## Class Actions: The Wisconsin Supreme Court Recently Adopted Federal Rule 23

On December 21, 2017, the Wisconsin Supreme Court recommended the adoption of Rule Petition 17-3.<sup>6</sup> Petition 17-3 adopts in full the 2015 version of Fed. R. Civ. P. 23. The Supreme Court acted unanimously as did the Judicial Council below.<sup>7</sup>

The Judicial Council, in response to a request for more information from the Supreme Court, noted that the Federal process emerged in 2003 after 10-years of examination and refinement.<sup>8</sup> The Judicial Council provided the court with information from the Federal Judicial Conference's rulemaking process to aid in their evaluation of the proposal.<sup>9</sup>

WAJ agrees that Wis. Stat. § 803.08 is outdated. As the Judicial Council has noted, “[a]s adopted by supreme court order, today’s statute remains nearly identical to the 1849 Field Code.”<sup>10</sup> As a result, there is a consensus that many problems exist with the statute’s construction, brevity and lack of guidance.

*WAJ supported the Wisconsin Supreme Court’s order adopting the 2015 version of Fed. R. Civ. P. 23 as written. The adoption of the Federal rule will provide judges, attorneys and their clients with the necessary guidance to more effectively and efficiently prosecute and resolve class actions in Wisconsin.*

---

<sup>6</sup> December 21, 2017 Wisconsin Supreme Court Order, In re proposed amendments to Wisconsin Statutes §§ 803.08 and 426.110 [Rule Petition 17-3], <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=206145> (last accessed Jan. 1, 2018).

<sup>7</sup> *Id.*

<sup>8</sup> Judicial Council response to June 27, 2017 Supreme Court request for additional information, <https://www.wicourts.gov/supreme/docs/1703petresp.pdf> (last accessed Jan. 1, 2018).

<sup>9</sup> *See id.* (Attachments 1 and 2), <https://www.wicourts.gov/scrules/1703.htm> (last accessed Jan. 1, 2018).

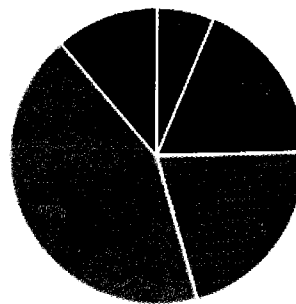
<sup>10</sup> Supporting Memo, Rule Petition 17-3, March 16, 2017. <https://www.wicourts.gov/supreme/docs/1703memo.pdf> (last accessed Jan. 1, 2018).

## Wisconsin's Legal Climate

### Bill Will Have Far-Reaching Impact

The rules changes instituted by SB-645 will have a far-reaching impact on all types of civil litigants. Overall, tort filings are dwarfed in number by other types of civil cases. It is those parties who will feel the brunt of the impact from this bill. For example, in 2016, tort cases represented only 6% of civil case filings overall. Contract/ Real Estate claims, by contrast, **represented three times that amount** at 18%. As noted below, each of these areas is subject to some fluctuation, typically due to economic conditions, but all are experiencing a long-term decline. Even comparing filings from the past decade, tort filings are down 1,000 from 2006 and there has been a major drop in contract and real estate claims as the economy has recovered post-2008.

Civil Case Filings 2016



■ Tort ■ Contracts/Real Estate ■ Other Civil ■ Family ■ Total Contested Small Claims

### Lawsuits are Declining in Wisconsin: a 30+Year Trend

Lawsuits have been declining in Wisconsin for over thirty years. This is both a local and a national trend.<sup>11</sup> This trend has occurred in numerous areas of law. Tort lawsuits, for example, have seen a steady decline since the early 1980s. As reported by the *Wisconsin Law Journal*, over the 30-plus year period from 1982, tort lawsuits have shown a persistent downward trend.<sup>12</sup> By 2016, that number had dropped approximately 40 percent and in some years of comparison, the drop is even greater.<sup>13</sup>

The trend is found not only in tort law, but also in contract and real estate claims. For example, between 1987 and 2014, the number of contract and real estate claims fell from 35,480 in 1987 to 22,777 in 2014 and fell further to 18,070 in 2016.<sup>14</sup>

<sup>11</sup> Joe Palazzolo, *We Won't See You in Court: The Era of Tort Lawsuits Is Waning*, Wall Street Journal, July 24, 2017, <https://www.wsj.com/articles/we-wont-see-you-in-court-the-era-of-tort-lawsuits-is-waning-1500930572> (last visited Jan 1, 2018).

<sup>12</sup> Erika Strelbel, *Despite Latest Uptick, [Wisconsin] Tort Lawsuits Continue Downward Trend*, Wisconsin Law Journal, August 9, 2017, <http://wislawjournal.com/2017/08/09/despite-latest-uptick-state-tort-lawsuits-continue-downward-trend/> (last visited Jan 1, 2018).

<sup>13</sup> Director of State Courts, Civil Disposition Summary, 2016.

<sup>14</sup> *Id.*

## I. Class Actions: SB-645 Departs from the Federal Approach

The majority of the SB-645's provisions impacting class actions (§§13-17) track with the 2015 version of Fed. R. Civ. P. 23. SB-645, however, departs from the Federal rule in key ways:

1. Interlocutory Appeal (§ 17): The bill allows for an automatic appeal from an order granting or denying class certification. This provision was previously rejected by Congress, which removed it from the Class Action Fairness Act (Pub. Law 109-2) because it would have tied up appeals courts with needless work and lead to automatic delays in every case.

This provision has a long-standing history of rejection at the Federal level. It was originally rejected by Congress during their consideration of CAFA, and it was subsequently rejected (again) by the Advisory Committee on Civil Procedure during its revision of Fed. R. Civ. P. 23 scheduled to go into effect December 1, 2018.

2. Scope of Injury/Damages (§14): The bill alters Rule 23 (a) to include language in proposed Wis. Stat. § 803.08(1)(c):

The claims or defenses and type and scope of injury of the representative parties are typical of the claims or defenses and type and scope of injury of the class.

Instead of Fed. R. Civ. P. 23 (a)(3), which reads:

[T]he claims or defenses of the representative parties are typical of the claims or defenses of the class[.]

And adding, in proposed Wis. Stat. § 803.08(1)(e):

(e) The members of the class are objectively verifiable by reliable and feasible means without individual testimony from putative class members and without substantial administrative burden.

These changes undermine the rationale behind Federalizing Wisconsin's rule. The key benefit identified by the Judicial Council and the Wisconsin Supreme Court in adopting Federal Rule 23 is that

“Uniformity between the state and federal rules is desirable because it is easier for practitioners, it enhances predictability for parties, and it helps judges by giving them a larger body of judicial experience to draw upon. In the interest of litigants and their counsel, uniform rules reduce costs and eliminate traps for the unwary.”<sup>15</sup>

By adopting unique language, SB-645 denies Wisconsin courts, and litigants the benefits of a uniform approach.

---

<sup>15</sup> Supporting Memo, Rule Petition 17-3, March 16, 2017. <https://www.wicourts.gov/supreme/docs/1703memo.pdf> (last accessed Jan. 1, 2018).

## II. General Discovery

SB-645 makes several changes to the general rules governing discovery. As with the section dealing with class actions, the conceptual approach is to adopt portions of Fed. R. Civ. P. 26. Like the portions of the statute impacting class actions, SB-645 does so selectively when more complete adoption would allow Wisconsin courts to derive more benefits from the Federal guidance and case law.

1. Automatic Stay (§12): This overbroad provision interferes with the ability of judges to determine the appropriate course of action in their own courtrooms. It is not included in the Federal Rules. This provision is likely to slow litigation even in cases likely to proceed past dispositive motions either to trial or to a later stage of the proceedings.

*W/AJ recommends removing this provision.*

2. Proportionality (§ 19): Instead of implementing the federal discovery amendments of 2015, the bill reverts to an earlier draft of the discovery rule rejected by the drafters for failing to provide adequate discovery. SB-645 blends Rule 26(b)(1)(scope of discovery) and Rule 26(b)(2)(which includes limitations) in part.

Together this:

- 1) Fails to take into account that access to information is asymmetrical; and
- 2) Fails to align the “factors” so that the “issues at stake in the action” factor is listed first.

Proposed Wis. Stat. § 804.01(2)(am), as indicated above, blends Rule 26(b)(1) and Rule 26(b)(2) in part.

F.R.C.P. 26(b)(1)(scope of discovery) contains six factors and now reads: “Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”

SB-645 does not reference all of these factors when creating its section to limit discovery.

Proposed § 804.01(2)(am)2 blends language contained in the scope Rule 26 (b)(1) and limitations (b)(2)(c) to read:

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

- 3) ESI restrictions (discussed in more detail below) weaken court authority to order discovery for good cause.

F.R.C.P. 26(b)(2)(B) provides that “A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.”

Everything in the FRCP is carefully considered, including word order. Altering the language denies Wisconsin courts the ability to rely on Federal case law and guidance interpreting these sections and forces a consideration of factors not found in Federal authority.

*WAJ recommends amending this section to include all the language from Rule 26(b)(1) and Rule 26(b)(2).*

3. Severe Limits on Requirements to Preserve or Provide Electronically Stored Information (§§ 22 and 28):

Departs from Federal Approach to E-Discovery (§22):

Proposed 804.01 (2) (e) 1g reads, introducing unique discovery requirements for ESI not found in the Federal Rules:

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

- a. Data that cannot be retrieved without substantial additional programming or without transforming it into another form before search and retrieval can be achieved.
- b. Backup data that are substantially duplicative of data that are more accessible elsewhere.
- c. Legacy data remaining from obsolete systems that are unintelligible on successor systems.

Proposed 804.01(2)(3)1g then combines a portion of language contained in Rule 26 (b)(2)(B) with modification:

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

No Duty to Preserve (§ 28): Parties would no longer have any duty to preserve:

1. data that cannot be retrieved without additional programming or transforming it into another form before search and retrieval;
- 2) backup data that are duplicative of data that are more accessible elsewhere;
- 3) legacy data remaining from older systems; and
- 4) any other data that are not available to the producing party in the ordinary course of business that the party identifies as not reasonable accessible due to undue burden or cost.

The Wisconsin common law holds generally that “[e]very party or potential litigant is duty-bound to preserve evidence essential to a claim that will likely be litigated.” *American Family Mut. Ins. Co. v. Golke*, 2009 WI 81, ¶21 (quoting *Sentry Ins. v. Royal Ins. Co. of America*, 196 Wis. 2d 907, 918-19, 539 N.W.2d 911 (Ct. App. 1995)). Allowing parties to destroy potential evidence is a major departure from that approach. It is one that deserves careful consideration and a process commensurate with that used by the Federal Advisory Committee and the Judicial Council.

*W.A.J. recommends amending the bill to track the federal scope and limitations, including for ESI.*

### III. § 628.46 Incentivizes Timely Payment of Claims

Section 628.46 incentivizes insurers to pay claims on time. At present, most insurers pay claims to their insureds, or when required, to third parties entitled to payment on time. The current rate of 12 percent simple interest creates incentive for insurers to timely pay claims they legitimately owe. Interest is only owed where an insurer refuses to pay a claim they are legally obligated to pay. For that reason, interest is only triggered in the exception case where a rogue insurance company refuses to timely pay a claim without a reasonable basis.

Under current law, and under this bill, the statute provides that an insurer must promptly pay every insurance claim. The statute then defines a claim as overdue if not paid within 30 days of being provided with written notice. An insurer is not required to pay claims, nor are they subject to pay § 628.46 interest, if there is *any dispute as to liability or the amount owed*. In the third-party context, a claimant is entitled to interest “when there is clear liability, a sum certain owed, and written notice of both.”<sup>16</sup>

SB-645 ignores the different contexts in which these statutes operate. SB-645 proposes to match the interest on judgment statutes (as amended by 2011 Wisconsin Act 69) by setting 628.46 interest in relation to the prime rate, and adding one percentage point. The rationale for lowering this figure under the 2011 law was to not unduly penalize those facing *disputed* claims. *The same logic does not apply to § 628.46*. In every context impacted by the 2011 law, the party forced to pay the interest rate imposed by §§ 807.01 (4), 814.04 (4), or 815.05 (8) faced a disputed claim requiring adjudication.

In contrast, interest under § 628.46 involves a claim or portion of a claim that no reasonable insurer would refuse to pay. At present, the prime rate is approximately 3.75 percent. By setting the rate to the prime rate plus one point, SB-645, when introduced, set the § 628.46 rate at 4.75 percent. Lowering the interest rate from 12% to 4.75% will, for all practical purposes, neuter the intended effect and goal of the timely payments of claims statute.

Businesses and consumers rely on § 628.46 interest to recover from property damage caused by weather and other events. This statute applies to all types of insurance claims. Businesses with property loss claims or other forms of insurance claims need to be paid quickly. A key feature of the statute allows claims to be divided into portions which are indisputable and those which need further attention. This feature prevents litigation by helping get money into the hands of insured individuals on a timely basis.

Many small businesses, including family farms, cannot obtain credit to rebuild in the event of unforeseen damage or loss to their property. The timely payment of claims statute, with the current meaningful interest penalty, enables funds to be made available quickly and seamlessly in the event of loss.

---

<sup>16</sup> *Kontowicz v. American Standard Insurance Co.*, 2006 WI 48, ¶2, 290 Wis.2d 302, 714 N.W.2d 105.



Lowering the interest rate only allows unreasonable insurers to slow the payment of claims without facing significant financial loss.

*WAJ hopes that this committee will preserve § 628.46 as under current law or adopt a figure closer to the 12 percent figure.*

#### **IV. Drafting Concerns**

The effective date should be set for July 1 or January 1 in accordance with the rulemaking procedure employed by the Wisconsin Supreme Court under Wis. Stat. § 751.12. Changes to the rules for civil procedure impact all civil litigants. Because of this breadth, those involved should have adequate warning.

Secondly, the limits on interrogatories and depositions should be placed in their respective sections of the statutes.

#### **Conclusion**

WAJ hopes to work with members of this committee to adopt amendments that will strengthen this bill by to achieve greater commonality with the Federal rules governing civil procedure. The best approach to achieve this goal adopting the Federal Rules, where desired, without alteration.



State of Wisconsin  
2017 - 2018 LEGISLATURE

LRBs0268/1  
MJ/TD/AG/KP/MP:all

ASSEMBLY SUBSTITUTE AMENDMENT,  
TO ASSEMBLY BILL 773

1 AN ACT *to renumber* 804.01 (2) (e) 1., 893.93 (1) (a) and 893.93 (1) (b); *to*  
2 *renumber and amend* 804.09 (2) (a); *to amend* 138.04, 218.0125 (7),  
3 218.0126, 628.46 (1), 801.01 (2), 804.01 (1), 804.01 (2) (a), 804.01 (2) (e) 2.,  
4 804.01 (2) (e) 3., 804.01 (3) (a) 2., 804.01 (4), 804.05 (1), 804.06 (1) (a), 804.08 (1)  
5 (a), 804.09 (2) (b) 1., 804.12 (1) (a) and 893.53; and *to create* 100.56, 177.30 (6),  
6 804.01 (2) (bg), 804.01 (2) (e) 1g., 804.01 (2m), 804.05 (1m), 804.06 (1m), 804.08  
7 (1) (am) and 893.93 (1m) (intro.) of the statutes; **relating to:** discovery of  
8 information in court proceedings; consumer lawsuit lending; the statute of  
9 limitations for certain civil actions; agreements by the secretary of revenue to

- 1 allow third-party audits related to unclaimed property; interest rates for  
2 overdue insurance claims; and providing a penalty.

---

*Analysis by the Legislative Reference Bureau*

**DISCOVERY PROCEDURES**

This substitute amendment makes certain changes to discovery procedure in court proceedings. Under the substitute amendment, the court must limit the frequency or extent of discovery if it determines that the burden or expense of the proposed discovery outweighs its likely benefit or is not proportional to the claims and defenses at issue. The substitute amendment also limits discovery of electronically stored information that the party identifies as not reasonably accessible because of undue burden or cost. In addition, under the substitute amendment, parties' discovery is limited to ten depositions and 25 interrogatories, unless otherwise stipulated by the parties or ordered by a court.

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

**CONSUMER LAWSUIT LENDING**

This substitute amendment creates provisions governing consumer lawsuit lending transactions. Under the substitute amendment, a "consumer" is an individual who is or may become a plaintiff or claimant in a civil action or other proceeding (dispute). "Consumer lawsuit lending" means 1) providing money to a consumer, for the consumer to use for any purpose other than prosecuting the consumer's dispute, with repayment of the money conditioned on and derived from the consumer's proceeds of the dispute or 2) purchasing from a consumer a contingent right to receive a share of the potential proceeds of the consumer's dispute. In a consumer lawsuit lending transaction, all of the following apply: 1) the lender may charge interest at a rate of no more than 18 percent per year; 2) the consumer may prepay the transaction at any time and, upon prepayment in full, is entitled to a refund of unearned interest charged; 3) the transaction term may not exceed 36 months; 4) the lender may not charge fees of more than \$360 per year; 5) the lender may not pay commissions or referral fees to attorneys or health care providers; and 6) there must be a written agreement between the lender and the consumer that contains specified information, including the interest rate and the consumer's right to receive a refund of interest charged if prepayment is made in full, as well as provisions that disclose all one-time fees charged to the consumer, disclose the amount to be received by the consumer and the amount the consumer assigns to the lender, state that the consumer has a right to cancel the agreement within five days, state that the lender has no right to make decisions or otherwise participate in the dispute, and state that the lender may be paid only from the consumer's proceeds of the dispute and is not entitled to be repaid if there are no such proceeds.

A lender that violates any of these requirements or restrictions is subject to a civil forfeiture of not less than \$25 nor more than \$5,000, unless the lender establishes that the violation was the result of an unintentional good faith error and the lender had in place policies or procedures designed to achieve compliance. The Department of Agriculture, Trade and Consumer Protection has enforcement authority over violations.

The substitute amendment requires a consumer, upon commencing a lawsuit or within ten days after entering into a consumer lawsuit lending transaction, to provide the court and all parties to the lawsuit with a copy of the consumer lawsuit lending transaction agreement and any documents the consumer provided to the lender in connection with the agreement.

### **STATUTES OF LIMITATION**

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

Under current law, the statute of limitations for an action upon a liability created by statute when a different limitation is not prescribed by law and for an action for relief on the ground of fraud is six years. Under the substitute amendment, the statute of limitations is shortened to three years.

### **THIRD-PARTY TAX AUDITS**

This substitute amendment prohibits the secretary of revenue from entering into an agreement to allow a person to engage in an audit on a contingent fee basis of another person's documents or records in order to administer the unclaimed property law or to purchase information arising from the audit, except for information received by the federal government.

### **TIMELY PAYMENT OF CLAIMS**

This substitute amendment changes the interest rate that an insurer must pay for overdue insurance claims from 12 percent to 10 percent. Current law requires an insurer to promptly pay every insurance claim and, generally, a claim is considered overdue if the claim is not paid within 30 days after the insurer has written notice of the fact and amount of a covered loss.

---

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

- 1           **SECTION 1.** 100.56 of the statutes is created to read:
- 2           **100.56 Consumer lawsuit lending.** (1) In this section:
- 3           (a) "Consumer" means an individual who is or may become a plaintiff or
- 4           claimant or demandant in any dispute.

1 (b) "Consumer lawsuit lender" means any person that engages in consumer  
2 lawsuit lending.

3 (c) "Consumer lawsuit lending" means any of the following:

4 1. Providing money to any consumer, for the consumer to use for any purpose  
5 other than prosecuting the consumer's dispute, with repayment of the money  
6 conditioned on and derived from the consumer's proceeds of the dispute, regardless  
7 of whether these proceeds result from a judgment, settlement, or other source.

8 2. Purchasing from any consumer a contingent right to receive a share of the  
9 potential proceeds of the consumer's dispute, regardless of whether these proceeds  
10 result from a judgment, settlement, or other source.

11 (d) "Dispute" means any of the following:

12 1. Any civil action.  
13 2. Any alternative dispute resolution proceeding.  
14 3. Any administrative proceeding before any agency or instrumentality of the  
15 state.

16 (2) (a) A consumer lawsuit lender may charge or contract for interest in a  
17 consumer lawsuit lending transaction at a rate not exceeding 18 percent per year.

18 (b) A consumer lawsuit lending transaction may be prepaid by the consumer  
19 at any time in whole or in part. Upon prepayment of the consumer lawsuit lending  
20 transaction in full by cash, renewal, or refinancing, the consumer is entitled to a  
21 refund of unearned interest charged, which shall be determined as follows:

22 1. On a consumer lawsuit lending transaction that is repayable in substantially  
23 equal, successive installments at approximately equal intervals of time and the face  
24 amount of which includes predetermined interest charges, the amount of the refund  
25 shall be as great a proportion of the total interest charged as the sum of the balances

1 scheduled to be outstanding during the full installment periods commencing with  
2 the installment date nearest the date of prepayment bears to the sum of the balances  
3 scheduled to be outstanding for all installment periods of the consumer lawsuit  
4 lending transaction.

5 2. On any consumer lawsuit lending transaction other than one under subd.  
6 1., the amount of the refund shall not be less than the difference between the interest  
7 charged and interest, at the rate contracted for, computed upon the unpaid principal  
8 balances of the consumer lawsuit lending transaction from time to time outstanding  
9 prior to prepayment in full.

10 (3) (a) The term of a consumer lawsuit lending transaction may not exceed 36  
11 months.

12 (b) The maximum total annual fee charged by a consumer lawsuit lender in a  
13 consumer lawsuit lending transaction, including any underwriting fee, organization  
14 fee, or other fee or charge, may not exceed \$360 per year.

15 (4) (a) A consumer lawsuit lender may not enter into a consumer lawsuit  
16 lending transaction unless there is a written agreement between the consumer  
17 lawsuit lender and the consumer that includes all of the following:

18 1. The rate of interest agreed upon in terms either of simple interest computed  
19 on the declining principal balance or of the actual interest cost in money.

20 2. A statement that the consumer lawsuit lending transaction may be prepaid  
21 in full or in part and that, if the consumer lawsuit lending transaction is prepaid in  
22 full, the consumer may receive a refund of interest charged.

23 3. On the front page of the agreement, a disclosure of the amount of money to  
24 be provided to the consumer and the total amount of money to be assigned by the  
25 consumer to the consumer lawsuit lender, described in 6-month intervals for a total

1 period of 36 months, along with an itemization of all one-time fees to be charged to  
2 the consumer.

3 4. A provision that the consumer may cancel the agreement, without penalty  
4 or further obligation, within 5 business days after entering into the consumer  
5 lawsuit lending transaction if, during this period, the consumer returns to the  
6 consumer lawsuit lender either the lender's unnegotiated check or all money  
7 provided to the consumer as well as notice of cancellation.

8 5. A provision that the consumer lawsuit lender has no right to, and will not,  
9 make any decisions with respect to the conduct of the dispute or any settlement or  
10 resolution of the dispute and that those decisions remain solely with the consumer  
11 and the consumer's attorney.

12 6. A provision that the consumer lawsuit lender has no right to participate in  
13 the prosecution of the dispute or to obtain documents or evidence connected with the  
14 dispute.

15 7. A provision that the consumer lawsuit lender accepts only an assignment of  
16 an amount of the potential proceeds from the dispute and does not accept an  
17 assignment of the consumer's legal claim. This provision shall also specify that the  
18 consumer lawsuit lender has no right to pursue the consumer's legal claim on behalf  
19 of or in lieu of the consumer.

20 8. A provision that the consumer lawsuit lender may be paid only from the  
21 consumer's proceeds of the dispute. This provision shall also specify that the  
22 consumer does not owe the consumer lawsuit lender anything if there is no recovery  
23 by the consumer in the dispute unless the consumer violates the terms of the  
24 agreement. This provision shall also specify that, if there are insufficient proceeds  
25 to pay the consumer lawsuit lender in full, the consumer lawsuit lender may be paid

1 only to the extent that there are available proceeds from the dispute, unless the  
2 consumer violates the terms of the agreement.

3 9. A provision that, if the consumer is represented by an attorney, any proceeds  
4 from the dispute paid to the consumer lawsuit lender may be paid only from the trust  
5 account of the consumer's attorney.

6 (b) Each provision or disclosure required under this subsection shall be in  
7 boldface type and of a type size no smaller than 12-point, except that the provision  
8 under par. (a) 8. shall be of a type size no smaller than 15-point.

9 (5) (a) In this subsection, "health care provider" has the meaning given in s.  
10 146.81 (1), but also includes any individual licensed or certified in another state for  
11 the same or equivalent profession.

12 (b) A consumer lawsuit lender may not pay or offer to pay commissions or  
13 referral fees to any attorney or employee of a law firm, or to any health care provider  
14 or employee of a health care provider, for referring a consumer to the consumer  
15 lawsuit lender.

16 (6) (a) Except as provided in par. (b), any consumer lawsuit lender that violates  
17 this section is subject to a forfeiture of not less than \$25 nor more than \$5,000 for each  
18 violation.

19 (b) It is a defense to a violation of this section if the consumer lawsuit lender  
20 establishes that the violation was the result of an unintentional good faith error and,  
21 at the time of the violation, the consumer lawsuit lender had in place policies or  
22 procedures designed to achieve compliance with this section.

23 **SECTION 2.** 138.04 of the statutes is amended to read:

24 **138.04 Legal rate.** The rate of interest upon the loan or forbearance of any  
25 money, goods, or things in action shall be \$5 upon the \$100 for one year and according



1 to that rate for a greater or less sum or for a longer or a shorter time; but parties may  
2 contract for the payment and receipt of a rate of interest not exceeding the rate  
3 allowed in ss. 100.56 (2) (a), 138.041 to 138.056, 138.09 to 138.14, 218.0101 to  
4 218.0163, or 422.201, in which case such rate shall be clearly expressed in writing.

5 **SECTION 3.** 177.30 (6) of the statutes is created to read:

6 177.30 (6) The administrator may not enter into a contract or other agreement  
7 to allow any person to engage in an audit on a contingent fee basis of another person's  
8 documents or records as part of an effort to administer this chapter or to purchase  
9 information or documents arising from the audit, except that this subsection does not  
10 apply to information received from the federal government.

11 **SECTION 4.** 218.0125 (7) of the statutes is amended to read:

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

1           **SECTION 5.** 218.0126 of the statutes is amended to read:

2           **218.0126 Promotional allowances.** A claim made by a franchised motor  
3 vehicle dealer for promotional allowances or other incentive payments shall be either  
4 approved or disapproved within 30 days after the claim is submitted to the  
5 manufacturer, importer or distributor in the manner and on the forms the  
6 manufacturer, importer or distributor reasonably prescribes. An approved claim  
7 shall be paid within 30 days after its approval. If a claim is not specifically  
8 disapproved in writing or by electronic transmission within 30 days after the date  
9 on which the manufacturer, importer or distributor receives it, the claim shall be  
10 considered to be approved and payment shall follow within 30 days after approval.  
11 A manufacturer, importer or distributor retains the right to audit a claim for a period  
12 of 2 years after the date on which the claim is paid and to charge back any amounts  
13 paid on claims that are false or unsubstantiated. If there is evidence of fraud, this  
14 section does not limit the right of the manufacturer to audit for longer periods and  
15 charge back for any fraudulent claim, subject to the limitations period under s.  
16 893.93 (1) (1m) (b).

17           **SECTION 6.** 628.46 (1) of the statutes is amended to read:

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

1 not be deemed overdue when the insurer has reasonable proof to establish that the  
2 insurer is not responsible for the payment, notwithstanding that written notice has  
3 been furnished to the insurer. For the purpose of calculating the extent to which any  
4 claim is overdue, payment shall be treated as being made on the date a draft or other  
5 valid instrument which is equivalent to payment was placed in the U.S. mail in a  
6 properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.  
7 All overdue payments shall bear simple interest at the rate of ~~12~~ 10 percent per year.

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

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

15 **SECTION 8.** 804.01 (1) of the statutes is amended to read:

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

23 **SECTION 9.** 804.01 (2) (a) of the statutes is amended to read:

24 804.01 (2) (a) *In general.* Parties may obtain discovery regarding any  
25 nonprivileged matter, ~~not privileged, which that~~ is relevant to the subject matter

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

14 **SECTION 10.** 804.01 (2) (bg) of the statutes is created to read:

15 804.01 (2) (bg) *Third party agreements.* Except as otherwise stipulated or  
16 ordered by the court, a party shall, without awaiting a discovery request, provide to  
17 the other parties any agreement under which any person, other than an attorney  
18 permitted to charge a contingent fee representing a party, has a right to receive  
19 compensation that is contingent on and sourced from any proceeds of the civil action,  
20 by settlement, judgment, or otherwise.

21 **SECTION 11.** 804.01 (2) (e) 1. of the statutes is renumbered 804.01 (2) (e) 1r.

22 **SECTION 12.** 804.01 (2) (e) 1g. of the statutes is created to read:

23 804.01 (2) (e) 1g. A party is not required to provide discovery of electronically  
24 stored information that the party identifies as not reasonably accessible because of  
25 undue burden or cost. In response to a motion to compel discovery or for a protective

1 order, the party from whom discovery is sought is required to show that the  
2 information is not reasonably accessible because of undue burden or cost. If that  
3 showing is made, the court may order discovery from such sources only if the  
4 requesting party shows good cause, considering the limitations of par. (a). The court  
5 may specify conditions for the discovery.

6 **SECTION 13.** 804.01 (2) (e) 2. of the statutes is amended to read:

7 804.01 (2) (e) 2. If a party fails or refuses to confer as required by subd. ~~1.~~ 1r.,  
8 any party may move the court for relief under s. 804.12 (1).

9 **SECTION 14.** 804.01 (2) (e) 3. of the statutes is amended to read:

10 804.01 (2) (e) 3. If after conferring as required by subd. ~~1.~~ 1r., any party objects  
11 to any proposed request for discovery of electronically stored information or objects  
12 to any response under s. 804.08 (3) proposing the production of electronically stored  
13 information, the objecting party may move the court for an appropriate order under  
14 sub. (3).

15 **SECTION 15.** 804.01 (2m) of the statutes is created to read:

16 804.01 (2m) MANDATORY DISCLOSURES. A party who has entered into a contract  
17 or agreement with a consumer lawsuit lender, as defined in s. 100.56 (1) (b), shall,  
18 without receiving a discovery request, provide to the court and to each party in the  
19 matter that is the subject of the contract or agreement all of the following:

20 (a) *Consumer lawsuit lending contract.* A copy of the contract or agreement,  
21 at the time the party files his or her initial pleading in the matter or within 10 days  
22 after the contract or agreement is executed between the party and the consumer  
23 lawsuit lender, whichever is later.

24 (b) *Consumer lawsuit lending documents.* All documents, not privileged, that  
25 the party or the party's representative provided to the consumer lawsuit lender

1 pursuant to the contract or agreement described in par. (a). The party shall provide  
2 the documents to each party at the time the party files his or her initial pleading in  
3 the matter or within 10 days after he or she provides the documents to the consumer  
4 lawsuit lender, whichever is later.

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

6 804.01 (3) (a) 2. That the discovery may be had only on specified terms and  
7 conditions, including a designation of the time or place or the allocation of expenses;

8 **SECTION 17.** 804.01 (4) of the statutes is amended to read:

9 804.01 (4) **SEQUENCE AND TIMING OF DISCOVERY.** Unless the parties stipulate or  
10 the court upon motion, for the convenience of parties and witnesses and in the  
11 interests of justice, orders otherwise, methods of discovery may be used in any  
12 sequence and the fact that a party is conducting discovery, whether by deposition or  
13 otherwise, shall not operate to delay any other party's discovery.

14 **SECTION 18.** 804.05 (1) of the statutes is amended to read:

15 804.05 (1) **WHEN DEPOSITIONS MAY BE TAKEN.** After commencement of the action,  
16 except as provided in sub. (1m) or s. 804.015, any party may take the testimony of  
17 any person including a party by deposition upon oral examination. The attendance  
18 of witnesses may be compelled by subpoena as provided in s. 805.07. The attendance  
19 of a party deponent or of an officer, director or managing agent of a party may be  
20 compelled by notice to the named person or attorney meeting the requirements of  
21 sub. (2) (a). Such notice shall have the force of a subpoena addressed to the deponent.  
22 The deposition of a person confined in prison may be taken only by leave of court on  
23 such terms as the court prescribes, except when the party seeking to take the  
24 deposition is the state agency or officer to whose custody the prisoner has been  
25 committed.

1           **SECTION 19.** 804.05 (1m) of the statutes is created to read:

2           **804.05 (1m) DEPOSITIONS REQUIRING LEAVE OF COURT.** A party shall obtain leave  
3 of court, and the court shall grant leave in a manner consistent with s. 804.01 (2), if  
4 the parties have not stipulated to the deposition and the deposition would result in  
5 more than 10 depositions being taken under this section or s. 804.06 by the plaintiffs,  
6 or by the defendants, or by the 3rd-party defendants.

7           **SECTION 20.** 804.06 (1) (a) of the statutes is amended to read:

8           **804.06 (1) (a)** After commencement of the action, except as provided in sub.  
9 (1m) or s. 804.015, any party may take the testimony of any person, including a party,  
10 by deposition upon written questions. The attendance of witnesses may be compelled  
11 by subpoena as provided in s. 805.07. The attendance of a party deponent or of an  
12 officer, director, or managing agent of a party may be compelled by notice to the  
13 person to be deposed or his or her attorney meeting the requirements of s. 804.05 (2)  
14 (a). The deposition of a person confined in prison may be taken only by leave of court  
15 on such terms as the court prescribes, except when the person seeking to take the  
16 deposition is the state agency or officer to whose custody the prisoner has been  
17 committed.

18           **SECTION 21.** 804.06 (1m) of the statutes is created to read:

19           **804.06 (1m) DEPOSITIONS REQUIRING LEAVE OF COURT.** A party shall obtain leave  
20 of court, and the court shall grant leave in a manner consistent with s. 804.01 (2), if  
21 the parties have not stipulated to the deposition and the deposition would result in  
22 more than 10 depositions being taken under this section or s. 804.05 by the plaintiffs,  
23 or by the defendants, or by the 3rd-party defendants.

24           **SECTION 22.** 804.08 (1) (a) of the statutes is amended to read:

1           804.08 (1) (a) Except as provided in par. (am) or s. 804.015, any party may serve  
2 upon any other party written interrogatories to be answered by the party served, or,  
3 if the party served is a public or private corporation or a limited liability company  
4 or a partnership or an association or a governmental agency or a state officer in an  
5 action arising out of the officer's performance of employment, by any officer or agent,  
6 who shall furnish such information as is available to the party. Interrogatories may,  
7 without leave of court, be served upon the plaintiff after commencement of the action  
8 and upon any other party with or after service of the summons and complaint upon  
9 that party.

10           **SECTION 23.** 804.08 (1) (am) of the statutes is created to read:

11           804.08 (1) (am) A party shall be limited, unless otherwise stipulated or ordered  
12 by the court in a manner consistent with s. 804.01 (2), to a reasonable number of  
13 requests, not to exceed 25 interrogatories, including all subparts.

14           **SECTION 24.** 804.09 (2) (a) of the statutes is renumbered 804.09 (2) (a) (intro.)  
15 and amended to read:

16           804.09 (2) (a) (intro.) Except as provided in s. 804.015, the request may, without  
17 leave of court, be served upon the plaintiff after commencement of the action and  
18 upon any other party with or after service of the summons and complaint upon that  
19 party, and shall meet all of the following criteria:

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

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

24           3. The request may specify the form or forms in which electronically stored  
25 information is to be produced.



1           **SECTION 25.** 804.09 (2) (b) 1. of the statutes is amended to read:

2           804.09 (2) (b) 1. The party upon whom the request is served shall serve a  
3 written response within 30 days after the service of the request, except that a  
4 defendant may serve a response within 45 days after service of the summons and  
5 complaint upon that defendant. The court may allow a shorter or longer time. The  
6 response shall state, with respect to each item or category, that inspection and  
7 related activities will be permitted as requested, unless or state with specificity the  
8 grounds for objecting to the request is objected to, in which event the reasons for  
9 objection shall be stated. If objection is made to part of an item or category, the part  
10 shall be specified. The response may state an objection to a requested form for  
11 producing electronically stored information. If the responding party objects to a  
12 requested form, or if no form was specified in the request, the party shall state the  
13 form or forms it intends to use. The responding party may state that it will produce  
14 copies of documents or of electronically stored information instead of permitting  
15 inspection. The production shall be completed no later than the time for inspection  
16 specified in the request or another reasonable time specified in the request or  
17 another reasonable time specified in the response.

18           **SECTION 26.** 804.12 (1) (a) of the statutes is amended to read:

19           804.12 (1) (a) *Motion.* If a deponent fails to answer a question propounded or  
20 submitted under s. 804.05 or 804.06, or a corporation or other entity fails to make a  
21 designation under s. 804.05 (2) (e) or 804.06 (1), or a party fails to answer an  
22 interrogatory submitted under s. 804.08, or if a party, in response to a request for  
23 inspection submitted under s. 804.09, fails to produce documents or fails to respond  
24 that inspection will be permitted as requested or fails to permit inspection as  
25 requested, the discovering party may move for an order compelling an answer, or a

1 designation, or an order compelling inspection in accordance with the request. When  
2 taking a deposition on oral examination, the proponent of the question may complete  
3 or adjourn the examination before he or she applies for an order. If the court denies  
4 the motion in whole or in part, it may make such protective order as it would have  
5 been empowered to make on a motion made pursuant to s. 804.01 (3).

6 **SECTION 27.** 893.53 of the statutes is amended to read:

7 **893.53 Action for injury to character or other rights.** An action to recover  
8 damages for an injury to the character or rights of another, not arising on contract,  
9 shall be commenced within ~~6~~ 3 years after the cause of action accrues, except where  
10 a different period is expressly prescribed, or be barred.

11 **SECTION 28.** 893.93 (1) (a) of the statutes is renumbered 893.93 (1m) (a).

12 **SECTION 29.** 893.93 (1) (b) of the statutes is renumbered 893.93 (1m) (b).

13 **SECTION 30.** 893.93 (1m) (intro.) of the statutes is created to read:

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

16 **SECTION 31. Initial applicability.**

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

20 (2) **CONSUMER LAWSUIT LENDING.** The treatment of section 100.56 of the statutes  
21 first applies to consumer lawsuit lending transactions first entered into on the  
22 effective date of this subsection.

23 (3) **DISCOVERY PROCEDURES.** The treatment of sections 804.01 (2) (a), (bg), and  
24 (e) 1g., (2m), (3) (a) 2., and (4), 804.05 (1) and (1m), 804.06 (1) (a) and (1m), 804.08

1 (1) (a) and (am), 804.09 (2) (a) and (b) 1., and 804.12 (1) (a) of the statutes first applies  
2 to actions that are filed on July 1, 2018.

3 (END)

## LITIGATION SECTION

---

**To:** Senate Judiciary and Public Safety Committee members

**From:** Litigation Section, State Bar of Wisconsin

**Date:** January 30, 2018

**Re:** SB 645 Discovery Procedure Changes – for informational purposes but seeking amendments

---

The Litigation Section of the State Bar of Wisconsin, an evenly-balanced board representing both the plaintiff and defense bar, reviewed the proposed changes in SB 645 which are relevant to litigators. Board members did not take a position on the overall bill, but the following concerns were raised regarding certain sections within the legislation:

### **Proposed Changes to Discovery in Civil Litigation**

#### **1. Oppose proposed amendments to 804.09 (2)(a)3**

SB645 proposes multiple changes to discovery in civil litigation. The proposed changes to Sec. 804.09 (2)(a)3 limit the number of interrogatories to 25, impose a limit of 10 depositions, none of which may exceed 7 hours, and limit the time period for requests for production of documents to 5 years prior to the accrual of the cause of action.

The Litigation members oppose the 5 year limit for the production of documents. The members representing defendants noted that they routinely require more than 5 years of a plaintiff's medical records to properly investigate which injuries are caused by an accident and which are caused by pre-existing medical conditions. Members also oppose the limitation of 25 interrogatories including subparts. While this limitation is found in the federal rules of civil procedure, those rules also contain a requirement to provide certain information in mandatory initial disclosures. Without the initial disclosure requirement, much of that information is normally provided in written interrogatories in Wisconsin. In addition, members oppose the limitation on the number of depositions. In general, the Litigation Section Board is not aware of substantial problems with discovery abuse and believes any amendments are unnecessary at this time. Each of these proposed limitations can be waived upon good cause and it will likely create more work for the judges in having to review removing these limits on a regular basis.

Finally, Litigation members highlighted the need for these limits to be within the appropriate statutory framework. Section 804.09 is entitled "Production of documents and things and entry upon land for inspection and other purposes." Section 804.08 is entitled "Interrogatories to parties," and Sec. 804.05 is entitled "Depositions upon oral examination." Interrogatories, depositions and requests for production of documents are each separate methods of obtaining information in civil discovery which each have a unique statute. Inserting language limiting the length of time for a deposition into the statute addressing requests for production of documents is illogical, inconsistent, and likely to create additional unnecessary litigation.



**STATE BAR OF WISCONSIN**

## **2. Oppose creation of Secs. 804.01 (2)(e)1g and 804.01 (8)**

The Litigation Section does not see any problems with the discovery of electronically stored information at this time and opposes these amendments. In addition, while it is likely unintentional, the language as drafted appears to encourage the destruction of potential evidence.

## **3. Oppose creation of Sec. 802.06 (1)(b)**

The section has concerns with this provision, which imposes a stay upon discovery upon the filing of a motion to dismiss, and therefore opposes any changes. Currently, motions to dismiss or motions on the pleadings are rarely filed. When those motions are filed, it is likely a trial judge would grant a stay in discovery if requested. Should the statutory framework change to make this stay automatic, there is a greater incentive to file a motion without merit to strategically add delay. The board fears this will lead to more filings and more pleadings that will needlessly take up valuable judicial resources.

## **Proposed Amendment to Sec. 628.46 (1) – Oppose Reduction of Interest Rate**

Members oppose the amendment to lower the interest rate for overdue insurance claims from 12%. The interest provided in Sec. 628.46 (1) is not an automatic payment, but rather is only assessed in circumstances in which the insurance company has received reasonable proof of a legitimate claim and failed to make timely payment. As set forth in Digler v. Metropolitan Property & Casualty Ins. Co., 2014 WI App 108, 357 Wis. 2d 604, 855 N.W.2d 707:

The purpose of this section is to discourage insurance companies from creating unnecessary delays in paying claims and to compensate claimants for the reasonable value of the use of their money. If the insurer has “reasonable proof” that it is not responsible, the statute does not apply.

A claim for Sec. 628.46 (1) interest is very rare and only succeeds when there is truly egregious behavior by the insurer, as set forth in the Dilger case as an example. Part of the intent of this statute is to create a punitive effect to discourage delay and unnecessary litigation. Members of the board that regularly represent defendants point out that Sec. 628.46 (1) is helpful in convincing their clients, insurance companies, to pay justified claims in a timely manner.

## **Proposed Changes to Statutes of Limitation**

### **1. Oppose amendment to Section 893.53**

The bill includes proposed changes to the residual statutes of limitation included in Section 893.53 and would shorten the deadlines from 6 to 3 years. Changes to this section would apply to many claims, including injuries to character and from fraud, liabilities based on statute, legal and engineering malpractice, federal 1983 actions, and claims under Title II of the Americans with Disabilities Act.

The typical defendants in cases of this type—including lawyers--would favor shortening these deadlines to limit their exposure for such claims. However, the section believes that the shorter deadlines would cause too great of harm to those victims of professional malpractice, fraudulent activities, discrimination, and injuries to one’s character. Additionally, since it adversely affects the rights of victims, it was felt that no change should be made without a well stated and logical reason for doing so.

## **2. Oppose amendment to Section 893.89 (1)**

The bill would also shorten the deadline in Section 893.89 (1) for filing claims for injuries caused by improvements to real property from 10 to 6 years. The board overwhelmingly opposes this change. Once again, while attorneys who typically defend those who make improvements to real property may approve of the change, the vast majority (including both plaintiff and defense counsel) opposed this change due to the fact that it is actually a **statute of repose**. There is no discovery rule. Not all defects are discovered within 6 years, and it was felt that the change would unfairly limit potentially legitimate claims. Shortening this period by 40% will mean more injured people will go uncompensated and more negligent property owners will escape responsibility for the harm that unsafe conditions cause.

### **Proposed Legislation regarding Consumer Lending**

The bill creates Section 100.56 governing “consumer lawsuit lending transactions”. Board members expressed concerns about the overly broad definitions of the terms “consumer” and “consumer lawsuit lending” within the bill. It was feared that the broad language within the bill could support an argument that the bill was applicable to plaintiff’s attorneys, or even commercial lending institutions that advance funds to customers on notes, based upon a promise of payment upon conclusion of a claim.

The Litigation Section of the State Bar of Wisconsin encourages your consideration of these concerns and would welcome the opportunity to further discuss the potential implications on the practice of law, should this legislation move forward without any changes.

If you have any questions, please do not hesitate to contact our Government Relations Coordinator, Lynne Davis, [ldavis@wisbar.org](mailto:ldavis@wisbar.org) or 608-852-3603.

*The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.*

*The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.*

**Testimony of John H. Beisner<sup>1</sup>**  
**Before the Committee on Judiciary and Public Safety**  
**Wisconsin Senate**

**Public Hearing Regarding Senate Bill 645**

Good morning, Chairman Wanggaard and Members of the Committee. Thank you for the opportunity to testify on behalf of the U.S. Chamber Institute for Legal Reform (“ILR”) regarding Senate Bill 645. ILR is an affiliate of the U.S. Chamber of Commerce (“the Chamber”) dedicated to making our nation’s overall civil litigation system simpler, fairer, and faster for all participants. The Chamber is the world’s largest business federation, representing the interests of more than three million businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations, and it is dedicated to promoting, protecting and defending America’s free enterprise system.

For too many years, Wisconsin has lagged behind federal courts and other state civil justice systems when it comes to rules governing discovery and class action practice. Most notably, in contrast to the federal legal system and other state analogs, Wisconsin currently has few rules circumscribing any reasonable limits on discovery and only very recently enacted a comprehensive class action rule. With respect to discovery, there is no requirement that the information being sought be proportional to the claims or defenses at issue. As a result, attorneys are able to exploit Wisconsin’s liberal discovery process to gain leverage against corporate defendants by demanding excessive amounts of unnecessary, expensive discovery. The problem of discovery abuse has become particularly acute in recent years due to the advent of electronic data storage. Because technology allows corporations to store far more information in corporate records than they ever could in the past, corporations can now easily incur millions of dollars in discovery costs merely by responding to legitimate discovery requests. It is thus wholly unsurprising that discovery ranks as the top litigation concern for major corporate defendants. Senate Bill 645 would largely align current discovery rules with those that govern federal proceedings by imposing a fundamental proportionality requirement and giving courts the discretion to shift the cost of responding to burdensome discovery from the responding party to the requesting party.

Senate Bill 645 would also streamline the discovery process in ways that are not currently mandated in the federal system by automatically staying all discovery pending the resolution of early dispositive motions and limiting the type of electronic information that can be discovered. In addition, Senate Bill 645 would shine much needed light on third-party litigation funding (“TPLF”) – the practice in which companies “invest” in litigation. There is a growing consensus that these arrangements should, at the very least, be disclosed at the outset of a civil action in order to avoid conflicts of interest and other ethical dilemmas. Notably, the federal judiciary’s Advisory Committee on Civil Rules is now actively considering a proposal that would require

---

<sup>1</sup> John Beisner is head of the Mass Torts, Insurance, and Consumer Litigation Group at Skadden, Arps, Slate, Meagher & Flom LLP, Washington, D.C. He represents defendants in various industries, including the pharmaceutical, medical device, cosmetic, automobile and financial-services sectors. He has testified numerous times on class action and claims aggregation issues before the U.S. Senate and House Judiciary Committees.

the disclosure of TPLF arrangements as a matter of course in federal proceedings, and the U.S. House of Representatives recently passed legislation that would require such disclosure in federal class actions.

Senate Bill 645 would also cultivate a fairer and more efficient class action landscape for Wisconsin consumers and businesses, which, until last month, was governed by a perfunctory one-sentence class action statute. Under a recent rule promulgated by the Wisconsin Supreme Court, that old statute has now been replaced by a comprehensive class action regime that largely mirrors the requirements applicable in federal court, providing much needed specificity, clarity and consistency for litigants and trial courts in Wisconsin. Certain provisions of Senate Bill 645 would enhance that regime to further ensure that class action practice in the State is both fair and efficient. In particular, the legislation would preclude “no-injury” class actions (which have previously been criticized by the Wisconsin Supreme Court) by requiring the type and scope of injury of the representative class members to be typical of the type and scope of injury being alleged by the absent class members. The legislation would also codify an ascertainability requirement – i.e., that class members be objectively verifiable by reliable and feasible means – an implicit requirement recognized by a number of federal courts. And the legislation would provide for interlocutory appeal of class certification orders by both plaintiffs and defendants as of right (in contrast to the recently enacted rule, which gives the Court of Appeals discretion on whether to hear class certification appeals), facilitating the prompt reversal of improvidently certified class actions.

Finally, Senate Bill 645 would also usher in various other sensible reforms related to consumer lawsuit lending and statutes of limitations that should also become law. In the main, the provisions related to consumer lawsuit lending would ensure that consumers receiving loans to support their living expenses during the pendency of litigation are protected from usurious and unfair practices and receive basic information pertaining to their loans. And the statute of limitations provisions would shorten the maximum period that plaintiffs can sit on certain claims. These provisions, like those addressing discovery and class action practice, would make Wisconsin’s civil justice system more fair and less costly.

#### **I. THE DISCOVERY PROVISIONS OF SB 645 WOULD MITIGATE VEXATIOUS AND BURDENSOME DISCOVERY IN WISCONSIN.**

In recent years, requests for electronic discovery have spiraled out of control, with some defendants having to pay hundreds of thousands – or even millions – of dollars to respond to discovery requests in civil litigation. As one report succinctly put it: “[o]ur discovery system is broken.”<sup>2</sup> Senate Bill 645 would institute a series of discovery-related reforms that are aimed at reducing the costs and delays associated with unfettered discovery. Specifically, the legislation would bring Wisconsin’s discovery rules in line with those applicable in federal court by establishing cost-benefit and proportionality requirements for discovery, giving courts the

---

<sup>2</sup> Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and Civil Justice and the Institute for the Advancement of the American Legal System*, 9 (rev. Apr. 15, 2009), [http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS\\_Final\\_Report\\_rev\\_8-4-10.pdf](http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf).



discretion to shift discovery costs and imposing certain numerical limits on interrogatories and depositions. In addition to these important changes (which are already required in federal court), there are a variety of other sensible discovery-related reforms in the legislation, including an automatic stay of discovery during the pendency of early dispositive motions, limiting the kind of electronically stored information (“ESI”) that is subject to discovery and mandating the disclosure of TPLF arrangements in all civil actions.

**A. Proportionality, Cost-Shifting And Numerical Limits On Certain Discovery Will Improve Wisconsin’s Litigation Climate.**

**Proportionality.** Wisconsin law does not currently contain any express limitation on costly, burdensome discovery. Thus, unless a court intervenes, a party to civil litigation may force the opposing party to produce potentially massive amounts of electronic data, regardless of the cost or the need for the data.

The concept of proportionality has long existed under the Federal Rules of Civil Procedure, but was recently clarified in an amendment to Rule 26 of the Federal Rules of Civil Procedure, which became effective December 1, 2015. That amendment deleted phrasing requiring discovery requests to be “reasonably calculated to lead to admissible evidence,” a standard that was often misapplied.<sup>3</sup> In its place, the amendment codified the concept of proportionality in the definition of the scope of permissible discovery, through the addition of language to Rule 26(b)(1), indicating that discovery is permissible where “proportional to the needs of the case.”<sup>4</sup> Factors a court must consider in conducting a proportionality analysis include: “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>5</sup> The proportionality requirement is substantively identical to the proportionality requirement proposed in the second part of Section 19 of Senate Bill 645, and “is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse” by emphasizing the need to analyze proportionality before ordering production of relevant information.<sup>6</sup> Chief Justice John Roberts addressed the 2015 amendment to Rule 26 in his *2015 Year-End Report on the Federal Judiciary*, explaining that the amendments to Rule 26(b)(1) “crystalize[] the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.”<sup>7</sup> He noted that these limits “eliminate unnecessary or wasteful discovery” through “careful and realistic assessment of actual need.”<sup>8</sup>

<sup>3</sup> See Duke Law Ctr. for Judicial Studies, *Revised Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality*, 2 n.7 (June 15, 2017) (citing cases describing the misapplication of the phrase), [https://law.duke.edu/sites/default/files/centers/judicialstudies/annotated\\_june.pdf](https://law.duke.edu/sites/default/files/centers/judicialstudies/annotated_june.pdf).

<sup>4</sup> Fed. R. Civ. P. 26(b)(1).

<sup>5</sup> See *id.*

<sup>6</sup> Fed. R. Civ. P. 26(b)(1) advisory committee’s notes to 1983 amendment.

<sup>7</sup> John Roberts, Chief Justice, U.S. Supreme Court, *2015 Year-End Report on the Federal Judiciary*, 6 (Dec. 31, 2015), <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

<sup>8</sup> *Id.* at 7.

Analysis published in the April 2017 issue of the *Federal Litigator* found that the proportionality doctrine has gained significant momentum since the 2015 amendment, and that courts are narrowing or restricting discovery more than four times as often after the amendment as they did before.<sup>9</sup> As a result, courts have been more careful to conduct a full proportionality analysis, utilizing the factors enumerated in the amended version of Rule 26(b)(1) as guideposts.<sup>10</sup> Courts have also done a better job under the amendment of requiring parties to provide evidence to support their proportionality positions, which has led to appropriate denials of burdensome discovery requests.<sup>11</sup>

Senate Bill 645 would incorporate the proportionality standard, including the considerations for the court to weigh in applying that test, from Rule 26(b). It would also properly limit discovery requests for information that is “cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.”<sup>12</sup> As with the proportionality provision, this additional language merely mirrors what is already required in federal court, which has helped mitigate burdensome and expensive discovery requests.<sup>13</sup>

---

<sup>9</sup> *Tracking the 2015 Discovery Amendments*, Fed. Litigator, Apr. 2017, at 8.

<sup>10</sup> *See, e.g., N.U. v. Wal-Mart Stores, Inc.*, No. 15-4885-KHV, 2016 WL 3654759, at \*7 (D. Kan. July 8, 2016) (“And while Wal-Mart cites to the amendments to Rule 26(b) and raises proportionality concerns, Wal-Mart fails to address a number of factors considered when addressing proportionality, among them: the importance of the issues at stake in this action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, or the importance of the discovery in resolving the issues.”).

<sup>11</sup> *Id.*; *see also, e.g., Smith v. Toyota Motor Corp.*, No. 2:16-CV-00024-ERW, 2017 WL 1425993, at \*6 (E.D. Mo. Apr. 21, 2017) (finding plaintiffs’ need for certain requested discovery “is surpassed by the onerous, and expensive, burden on Defendants to produce” it); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2016 WL 6779901, at \*4 (S.D.N.Y. Nov. 16, 2016) (denying motion to compel in putative class action on “relevance, proportionality, and overbreadth grounds” and finding that “production of all of the requested documents would be unduly burdensome”); *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562, 566 (D. Ariz. 2016) (finding burden of discovering ESI held by the defendant’s foreign subsidiaries outweighed the benefit of such discovery under the factors enumerated in Rule 26(b)(1)); *Hankinson v. Class Action R.T.G. Furniture Corp.*, No. 15-81139-CIV-COHN/SELTZER, 2016 WL 1182768, at \*2 (S.D. Fla. Mar. 28, 2016) (finding several of plaintiffs’ discovery requests in putative class action were not “proportional to the needs of the case”); *Adair v. EQT Prod. Co.*, Nos. 1:10CV00037 et seq., 2015 WL 505650, at \*6 (W.D. Va. Feb. 6, 2015) (granting motion for protective order in class action where “burden and expense of any further discovery outweighs its likely benefits”).

<sup>12</sup> SB 645, § 19, 2017-2018 Leg. (Wis. 2017).

<sup>13</sup> Fed. R. Civ. P. 26(b)(2)(C) (“On motion or on its own, the court *must* limit the frequency or extent of discovery . . . if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.”) (emphasis added); *see also, e.g., Jones v. Nutiva, Inc.*, No. 16-cv-00711-HSG(KAW), 2016 WL 5858467, at \*2 (N.D. Cal. Oct. 7, 2016) (applying rule and denying motion to compel discovery because “the request seeks company-wide audited financial statements rather than being limited to the challenged products” and “[p]laintiff does not explain why company-wide financial statements are necessary nor does he agree to narrow the request to those documents pertaining to the challenged products”); *Rice v. Rutledge Rd. Assocs., LLC*, No. 1:15-CV-269-MR-DCK, 2016 WL 3436413, at \*5 (W.D.N.C. June 16, 2016) (“RRA persuasively notes that the Rules require courts to limit discovery that is ‘unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive . . . .’”) (quoting Fed. R. Civ. P. 26(b)(2)(C)).

**Cost-shifting.** Wisconsin law currently does not contain any express authorization for the shifting of discovery costs. One of the gravest problems with the American discovery system is that it incentivizes parties to seek overbroad and burdensome discovery at the opposing party's expense.<sup>14</sup> Attorneys often seek large numbers of documents and, especially, electronic data that bear only tangentially on the claims or defenses at issue, simply to burden the other side and improve the prospect of an early, favorable settlement. As Professor Martin Redish has explained, "the fact that a party's opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests, and the bigger the expense to be borne by the opponent, the bigger the incentive to make the request."<sup>15</sup> Even the U.S. Supreme Court has recognized this problem, lamenting that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" trial.<sup>16</sup>

The drafters of the federal rules have already begun to address this issue by permitting courts to shift discovery costs from the party responding to the discovery request to the party requesting the information.<sup>17</sup> The federal rules "permit cost-sharing and cost-shifting as a means of making discovery more proportional and fair."<sup>18</sup> One leading set of best practices recommends that the "costs of retrieving and reviewing" electronic information can be shifted in appropriate cases – for example, where "the information sought is not reasonably available to the responding party in the ordinary course of business."<sup>19</sup> As one federal court explained, when class action plaintiffs request "very extensive discovery, compliance with which will be very expensive," plaintiffs typically should share the defendant's discovery costs – at least until plaintiffs' certification motion has been filed and decided.<sup>20</sup> Similarly, cost-shifting may be appropriate where the ESI sought is beneficial to both parties.<sup>21</sup>

Section 26 of Senate Bill 645 would modify Wisconsin Statutes section 804.01 by giving courts the discretion when granting protective orders concerning discovery to allocate the expenses of the discovery to the requesting party. Authorizing cost-shifting would place the

---

<sup>14</sup> See generally Peggy E. Bruggman, *Reducing the Costs of Civil Litigation: Discovery Reform*, Pub. L. Res. Inst. (1995), <https://gov.uchastings.edu/public-law/docs/plri/discov.pdf> (describing several factors that incentivize discovery abuse).

<sup>15</sup> Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 603 (2001).

<sup>16</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

<sup>17</sup> See Fed. R. Civ. P. 26(c)(1)(B).

<sup>18</sup> Michael C. Zogby & Sean A. Kennedy, *Cost-Shifting and Cost-Sharing Approaches under the Proportionality Principles*, N.J. L.J. (Dec. 8, 2017), <https://www.law.com/njlawjournal/sites/njlawjournal/2017/12/08/cost-shifting-and-cost-sharing-approaches-under-the-proportionality-principles/>.

<sup>19</sup> *The Sedona Principles: Best Practices Recommendations & Principles for Electronic Document Production*, at ii (2d ed. 2007) (Principle 13).

<sup>20</sup> *Boeynaems v. LA Fitness Int'l, LLC*, 285 F.R.D. 331, 341 (E.D. Pa. 2012).

<sup>21</sup> See *Zeller v. S. Cent. Emergency Med. Servs., Inc.*, No. 1:13-CV-2584, 2014 WL 2094340, at \*10 (M.D. Pa. May 20, 2014).

onus of burdensome discovery requests on the party making the requests and encourage requests that are more narrowly tailored to obtaining relevant evidence. While cost-shifting has largely been guided by a checkerboard of nebulous standards that vary from court to court, there is a growing consensus that the seven factors enunciated by Judge Shira Scheindlin in *Zubulake v. UBS Warburg LLC*,<sup>22</sup> are a sensible starting point. These include: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.<sup>23</sup> The American Bar Association has articulated 16 factors a court should apply when considering cost-shifting.<sup>24</sup> Incorporating a combination of the *Zubulake* and ABA factors

<sup>22</sup> 217 F.R.D. 309 (S.D.N.Y. 2003).

<sup>23</sup> *Id.* at 322.

<sup>24</sup> See ABA Section of Litig., *Civil Discovery Standards* 60-61 (2004), <http://www.americanbar.org/content/dam/aba/administrative/litigation/litigation-aba-2004-civil-discovery-standards.authcheckdam.pdf>. These factors include:

- A. The burden and expense of the discovery, considering among other factors the total cost of production . . . compared to the amount in controversy;
- B. The need for the discovery, including the benefit to the requesting party and the availability of the information from other sources;
- C. The complexity of the case and the importance of the issues;
- D. The need to protect the attorney-client privilege or attorney work product . . . ;
- E. The need to protect trade secrets, and proprietary or confidential information;
- F. Whether the information or the software needed to access it is proprietary or constitutes confidential business information;
- G. The breadth of the discovery request;
- H. Whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data;  
...
- J. Whether the requesting party has offered to pay some or all of the discovery expenses;
- K. The relative ability of each party to control costs and its incentive to do so;
- L. The resources of each party as compared to the total cost of production;
- M. Whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information;

(cont'd)

– several of which overlap – into the Wisconsin discovery rules could provide helpful guidance to courts tasked with adjudicating requests for cost-shifting.

**Numerical limits on interrogatories and depositions.** Senate Bill 645 would also place reasonable limitations on the number of interrogatories (25) each party may propound on the other; the number of depositions (10) per party, and the length of each deposition (seven hours). These are exactly the same limitations that already apply in federal court and that have made discovery in the federal system more efficient and less abusive.<sup>25</sup> As one leading treatise explains, a limit of 25 interrogatories “is large enough to reveal relevant information in most cases, and reasonable enough to eliminate the harassment of another party.”<sup>26</sup> Similarly, the 10-deposition limit reflects the basic precept that “counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case.”<sup>27</sup> And limiting depositions to seven hours is necessary to avoid “overlong depositions” that “result in undue costs and delays.”<sup>28</sup> Other states have adopted similar numerical limitations.<sup>29</sup> Of course, the parties may stipulate to additional interrogatories or more and longer depositions, and the court may adjust by court order the amount of permitted discovery, since some cases may require more extensive discovery.<sup>30</sup>

**B. Staying Discovery Pending Resolution Of Dispositive Motions And Limiting Discovery Of Certain Kinds Of Unnecessary ESI Will Promote More Efficient And Proportional Discovery.**

---

(cont'd from previous page)

- O. Whether the responding party stores electronic information in a manner that is designed to make discovery impracticable or needlessly costly or burdensome in pending or future litigation, and [is] not justified by any legitimate personal, business, or other non-litigation-related reasons; and
- P. Whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable . . . .

*Id.*

<sup>25</sup> See Fed. R. Civ. P. 33(a)(1) (limit of 25 interrogatories); Fed. R. Civ. P. 30(a)(2)(A)(i), (d)(2) (limit of 10 depositions per party and seven-hour limit for each deposition).

<sup>26</sup> Roger S. Haydock & David F. Herr, *Discovery Practice* §22.02[B] (8th ed. 2017).

<sup>27</sup> Fed. R. Civ. P. 30(a) advisory committee’s note to 1993 amendment.

<sup>28</sup> Fed. R. Civ. P. 30(d) advisory committee’s note to 2000 amendment.

<sup>29</sup> See e.g., Paul Michael Lisnek & Michael J. Kaufman, *Depositions: Procedure, Strategy & Technique* § 4:3 (3d ed. 2017).

<sup>30</sup> See *id.* (“Some critics argue that this is a detriment to the discovery process because it limits counsel’s ability to obtain proper information from deponents . . . . However, these concerns are addressed in the many exceptions allowed in the rule and by the available discretion of the court and stipulation by the parties.”).

Senate Bill 645 would also institute a couple of other significant reforms – staying discovery during the pendency of early dispositive motions and limiting discovery of certain types of burdensome ESI – that would promote the just, speedy and inexpensive resolution of litigation.

***Automatic stay of discovery pending early pretrial dispositive rulings.*** Under current law, when an early dispositive or partially dispositive motion is filed – i.e., a motion to dismiss, for judgment on the pleadings, or for a more definite statement – the parties generally continue with costly discovery, even though the motion may end or substantially narrow the action. This is bad policy. Forcing defendants to undertake burdensome discovery before a case has even withstood a motion to dismiss is contrary to Wisconsin case law making clear that a “complaint stands or falls by virtue of its own allegations, not by virtue of whatever facts [a plaintiff] might learn of during discovery.”<sup>31</sup> It is also contrary to the U.S. Supreme Court’s pronouncement that courts must carefully scrutinize motions to dismiss because “before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct.”<sup>32</sup>

In light of these concerns, many federal courts (including those in Wisconsin) routinely stay discovery and other pre-trial proceedings pending the resolution of a potentially dispositive motion to dismiss.<sup>33</sup> In addition, at least one Wisconsin circuit court has stayed discovery during the pendency of a motion to dismiss, although the reasoning for the court’s ruling granting the stay was not reported.<sup>34</sup> Senate Bill 645 addresses these concerns definitively by providing for an automatic stay of discovery upon the filing of a motion to dismiss, a motion for judgment on the pleadings, or a motion for more definite statement.

***Limiting discovery of certain kinds of unnecessary ESI.*** Section 22 of Senate Bill 645 would facilitate the just, speedy and inexpensive resolution of civil litigation by limiting discovery of ESI that is extremely difficult or burdensome for the responding party to access “absent a showing by the moving party of substantial need and good cause, subject to a

---

<sup>31</sup> *Thomas v. Johnson*, 198 Wis. 2d 390, 542 N.W.2d 239 (table), 1995 WL 697533, at \*2 (Ct. App. 1995).

<sup>32</sup> *Twombly*, 550 U.S. at 563 n.8; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (“Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions”).

<sup>33</sup> *See, e.g., Thompson v. Ret. Plan for Employees of S.C. Johnson & Sons, Inc.*, No. 07-CV-1047, 2008 WL 4964714, at \*10 (E.D. Wis. Nov. 14, 2008) (staying discovery in putative class action, reasoning that “any discovery conducted prior to issuance of [an] order [dismissing the complaint] would constitute needless expense and a waste of attorney time and energy”); *Dresser v. MEBA Med. & Benefits Plan*, No. 08-2662, 2008 WL 2705584, at \*2 (E.D. La. July 10, 2008) (staying discovery because if motion to dismiss is granted, the “discovery . . . would be . . . for naught”); *In re Graphics Processing Units Antitrust Litig.*, No. 06-07417 WHA, MDL No. 1826, 2007 WL 2127577, at \*5 (N.D. Cal. July 24, 2007) (granting motion to stay discovery in putative class action and other cases pending resolution of motion to dismiss because “[i]f . . . the complaint proves to be so weak that any discovery at all would be a mere fishing expedition, then discovery likely will be denied”); *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, No. CV 05-4294 DRH ETB, 2006 WL 897996, at \*2 (E.D.N.Y. Mar. 31, 2006) (staying discovery where “the defendants raise substantial issues with regard to the viability of plaintiffs’ complaint as against defendants CRH and Tilcon, Inc., and defendants’ arguments do not appear to be frivolous or unfounded”).

<sup>34</sup> *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 8, 303 Wis. 2d 94, 103, 735 N.W.2d 418, 422 (noting that circuit court granted Harley’s motion to stay discovery and later dismissed the entire complaint for failure to state a claim).

proportionality assessment.”<sup>35</sup> Relatedly, under Section 28 of Senate Bill 645, a party would not be required to preserve the same kinds of ESI absent a court order finding that the requesting party has a substantial need for the information.<sup>36</sup> As previously discussed, under current law, there is no limit on the amount or types of electronic data a party may request – irrespective of the cost or burden to the other side. Under SB 645, a party would not be required to preserve – much less produce – electronic data that would require substantial “additional programming or without transforming it into another form before” searching; “[b]ackup data that are substantially duplicative of data that are more accessible elsewhere”; “[l]egacy data remaining from obsolete systems that are unintelligible on successor systems”; or “[a]ny other data that are not available to the producing party in the ordinary course of business[.]”<sup>37</sup>

That certain categories of ESI should generally be deemed undiscoverable is not a new concept.<sup>38</sup> In 2014, the Illinois Supreme Court formally adopted rules relating to the discovery of ESI that included a proportionality requirement. The Committee Comments to the proportionality rule enumerated substantially similar categories of burdensome ESI that the proportionality balancing test “often may indicate . . . should not be discoverable,” including “information whose retrieval cannot be accomplished without substantial additional programming or without transforming it into another form before search and retrieval can be achieved”; “backup data that is substantially duplicative of data that is more accessible elsewhere”; “legacy data”; or “other forms of ESI whose preservation or production requires extraordinary affirmative measures.”<sup>39</sup> As one court explained, these types of ESI are “presumptively nondiscoverable, shifting the burden to the requesting party to justify the making of an exception based on the particular circumstances of the case,” “because the burden of producing such ESI generally is high.”<sup>40</sup>

While there is no comparable provision in the Federal Rules, Rule 26(b)(2)(B) does prohibit discovery of ESI “from sources that the party identifies as not reasonably accessible because of undue burden or cost.”<sup>41</sup> According to the Civil Rules Advisory Committee, sources that might be considered not reasonably accessible include: backup tapes intended for disaster recovery purposes; legacy data remaining from obsolete systems that is unintelligible on successor systems; deleted electronically stored information that remains in a fragmented form requiring a forensics analysis to restore and retrieve; and electronically stored information in a

---

<sup>35</sup> SB 645, § 22.

<sup>36</sup> *Id.* § 28.

<sup>37</sup> *Id.* §§ 22, 28.

<sup>38</sup> See Seventh Circuit Elec. Discovery Comm., *Principles Relating to the Discovery of Electronically Stored Information* (Aug. 1, 2010), [https://www.discoverypilot.com/sites/default/files/Principles8\\_10.pdf](https://www.discoverypilot.com/sites/default/files/Principles8_10.pdf).

<sup>39</sup> See Ill. S. Ct. R. 201(c)(3), Committee Comments (adopted May 29, 2014).

<sup>40</sup> See *Carlson v. Jerousek*, 68 N.E.3d 520, 533-34 (Ill. App. Ct. 2016).

<sup>41</sup> Fed. R. Civ. P. 26(b)(2)(B).

database that was designed to create information in ways such that it would lose its significance when produced outside the database.<sup>42</sup>

Rule 26(b)(2)(B) creates what is often referred to as a “two-tier” system. A party is not required to provide discovery of electronically stored information from sources the party identifies as not reasonably accessible because of undue burden or cost; however, a court may nonetheless order discovery from sources identified as not reasonably accessible if the requesting party shows good cause.<sup>43</sup> Sections 22 and 28 of Senate Bill 645 would likewise create a two-tier system by permitting discovery of these types of electronic data with a showing of substantial need and good cause, striking precisely the kind of a reasonable balance that should undergird the State’s discovery system.

C. **Automatic Disclosure Of TPLF Arrangements Would Ensure Ethical And Transparent Litigation Practices.**

Senate Bill 645 would also mandate disclosure of TPLF arrangements. TPLF is a rapidly growing business model in which third parties pay money to a litigant or his/her counsel in a lawsuit in exchange for a contingent interest in any proceeds from the litigation. While TPLF usage has increased substantially in recent years, many courts are unaware of this phenomenon, largely because TPLF arrangements need not be disclosed and often are never revealed to the court in a particular case.<sup>44</sup> The growth of TPLF has raised concerns that it adversely affects the U.S. civil justice system by increasing the filing of questionable claims, changing the way traditional litigation-related decisions are made, deterring and prolonging settlement, and compromising the sanctity of the attorney-client relationship. However, because TPLF comes in many different forms and applications, it is difficult to surmise whether these concerns are implicated to the same degree in every instance in which TPLF is being used in a given case. Making the practice more transparent would equip the opposing party and the court with the necessary information to assess whether such arrangements are unlawful.

***First, disclosure of TPLF arrangements will mitigate violations of ethical rules prohibiting the sharing of attorney fees with nonlawyers.*** Under the Rules of Professional Conduct for Attorneys, an attorney or law firm may not share legal fees with a nonlawyer except in limited circumstances.<sup>45</sup> As stated in the comments to Rule 5.4, this prohibition is intended

---

<sup>42</sup> Comm. on the Rules of Practice & Procedure of the Judicial Conference of the United States, *Report of the Civil Rules Advisory Committee* 42 (May 27, 2005).

<sup>43</sup> See, e.g., *Takeda Pharm. Co. v. Teva Pharm. USA, Inc.*, No. 09-841-SLR-LPS, 2010 WL 2640492 (D. Del. June 21, 2010) (finding that information was not reasonably accessible, but finding requesting party had shown good cause to compel requested production).

<sup>44</sup> See Tripp Haston, *The Missing Key To 3rd-Party Litigation Funding*, Law360 (Feb. 7, 2017), <https://www.law360.com/articles/888716/the-missing-key-to-3rd-party-litigation-funding>.

<sup>45</sup> Wisc. Rules of Prof'l Conduct for Att'ys, SCR 20:5.4; see also *id.* SCR 20:1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent); Model Rules of Prof'l Conduct, r.5.4(a) (Am. Bar Ass'n 2010).



“to protect the lawyer’s professional independence of judgment.”<sup>46</sup> “Fee splitting is [also] viewed as running the risk of granting nonlawyers control over the practice of law or potentially enabling lay persons to practice law without authorization.”<sup>47</sup> While “[f]unders may . . . insist upon contracting directly with the client in order to circumvent the prohibition,”<sup>48</sup> some of them appear to be giving only lip service to this important precept.

For example, in *Gbarabe v. Chevron Corp.*,<sup>49</sup> the plaintiffs brought a putative class action arising out of an explosion on an oil drilling rig off the coast of Nigeria. Under the agreement entered into by plaintiffs’ counsel and the funder, counsel agreed that the funder would be repaid its \$1.5 million investment in the case by way of a “success fee” of six times that amount (\$9 million), to be paid from attorneys’ fees – *plus* 2% of the total amount recovered by the putative class members.<sup>50</sup> In other words, the agreement required the class members to share part of their recovery with the funder without their knowledge – much less express approval.<sup>51</sup> While provisions like these blur the line separating the lawyer from the non-lawyer funder, they rarely see the light of day. If TPLF agreements are disclosed as a matter of course early on in the life of a civil case, the parties and the court can determine whether any provisions purport to commingle lawyer and non-lawyer funds in contravention of Rule 5.4.

***Second, disclosure of TPLF arrangements will minimize the risks of conflicts of interest between the plaintiff, the attorney and the funder.*** “Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”<sup>52</sup> However, these twin principles can be in tension with the contractual duties the attorney may have with his or her funder.<sup>53</sup> Moreover, because both third-party funders and attorneys are repeat players in the litigation market, it can be expected that relationships among them will develop over time. Attorneys

---

<sup>46</sup> Wisc. Rules of Prof’l Conduct for Att’ys, SCR 20:5.4 cmt. 1; Earl H. Munson, *The Case Against MDPs*, Wis. Law., Apr. 2001, at 22, 54; see also Timothy J. Pierce, *Dual Practice: Combining the Practice of Law with Other Occupations*, Wis. Law., Apr. 2006, at 20, 23 (“A lawyer must at all times be mindful of SCR 20:5.4 and maintain her professional independence as a lawyer and avoid impermissible fee-sharing.”).

<sup>47</sup> Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1291 (2011).

<sup>48</sup> Jasminka Kalajdzic, et al., *Justice for Profit: A Comparative Analysis of Australian, Canadian & U.S. Third Party litigation Funding*, 61 Am. J. Comp. L. 93, 135 (2013).

<sup>49</sup> *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 WL 4154849 (N.D. Cal. Aug. 5, 2016).

<sup>50</sup> See Litigation Funding Agreement § 1.1, *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI (N.D. Cal. filed Sept. 16, 2016), ECF No. 186-4.

<sup>51</sup> Class certification was denied in *Gbarabe* for reasons unrelated to the presence of a TPLF funder in the case. See *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2017 WL 956628 (N.D. Cal. Mar. 13, 2017). However, the case provides a window to one of the few publicly available TPLF arrangements, the terms of which are deeply problematic and should be eschewed in other cases.

<sup>52</sup> Wisc. Rules of Prof’l Conduct for Att’ys, SCR 20:1.7 cmt. 1; Model Rules of Prof’l Conduct, r. 1.7 cmt. 1 (Am Bar Ass’n 2010).

<sup>53</sup> See, e.g., Wisc. Rules of Prof’l Conduct for Att’ys, SCR 20:1.7(a) (providing that a “concurrent conflict of interest exists if . . . there is a significant risk that the representation . . . will be materially limited by the lawyer’s responsibilities to . . . a third person”).

might “steer” clients to favored financing firms, even if the client’s particular circumstances suggest a different firm may be more appropriate, and *vice versa*.

TPLF arrangements also raise the possibility of judicial conflicts of interest. “As some TPLF entities are multibillion- and multimillion-dollar publicly traded entities, requiring disclosure of their role will allow judges to determine whether they have a conflict of interest in administering a case. And for privately held TPLF entities, the web of personal relationships judges have could be impacted as well, leading to unintentional appearances of impropriety.”<sup>54</sup>

This problem came to light during a racketeering suit arising out of a plaintiffs’ lawyer’s fraudulent prosecution of a class action filed against Chevron and funded by Burford Capital.<sup>55</sup> During a deposition in that proceeding, lead plaintiffs’ lawyer Steven Donziger was asked to identify the company that had helped finance the underlying suit against Chevron.<sup>56</sup> Upon being ordered to answer the question by the special master assigned to the case, Donziger disclosed that the funder was in fact Burford.<sup>57</sup> The special master then disclosed that he was former co-counsel with the founder of Burford, who at one time sent the special master a brochure about funding one of Burford’s cases.<sup>58</sup> The special master also disclosed that he was friends with Burford’s former general counsel.<sup>59</sup> The special master did not recuse himself from the racketeering litigation, and the parties did not insist that he do so.<sup>60</sup> Nonetheless, as the special master recognized, the deposition “prove[d] . . . that it is *imperative for lawyers to insist that clients disclose who the investors are*.”<sup>61</sup>

“The Donziger deposition demonstrates how frequently conflicts of interest may arise as a result of third-party funding.”<sup>62</sup> “Without disclosure,” courts will “be subject to unknown conflicts of interest,”<sup>63</sup> tainting the neutrality of judicial proceedings. “Requiring routine TPLF disclosure” in civil cases “will ensure courts are conflict-free”<sup>64</sup> – which is essential to the proper functioning of our civil justice system.

***Third, disclosure of TPLF arrangements will help ensure that plaintiffs have control over the litigation.*** TPLF companies repeatedly assert that they do *not* control litigation strategy.

---

<sup>54</sup> Haston, *supra* note 44.

<sup>55</sup> Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 *Geo. L.J.* 1649, 1650 (2013).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (alterations in original) (emphasis added) (citation omitted).

<sup>62</sup> *Id.*

<sup>63</sup> Haston, *supra* note 44.

<sup>64</sup> *Id.*

But one of the largest funder's own "best practices" guide tells a different story. The "best practices" guide of Bentham IMF (one of the largest TPLF companies) notes the importance of setting forth specific terms in litigation funding agreements that address the extent to which the TPLF entity is permitted to: "[m]anage a litigant's litigation expenses"; "[r]eceive notice of and provide input on any settlement demand and/or offer, and any response"; and participate in settlement decisions.<sup>65</sup> Whether TPLF companies are employing litigation-control tactics similar to those set forth in Bentham's best practices guide is a closely kept secret given that TPLF agreements need not be disclosed.

The few instances in which TPLF agreements have been made public belie the repeated representations by funders that they are not seeking to influence the cases they fund. One illustrative example was the elaborate funding agreement utilized by Burford in the Chevron litigation discussed above. Specifically, the funding agreement at issue in that case "provide[d] control to the Funders" through the "installment of 'Nominated Lawyers'" – lawyers "selected by the Claimants with the *Funder's approval*."<sup>66</sup> The law firm of Patton Boggs LLP had been selected to serve in that capacity, and the execution of engagement agreements between the claimants and Patton Boggs, "a firm with close ties to the Funder, [was] a condition precedent to the funding."<sup>67</sup> "In addition to exerting control, it [was] clear that the Nominated Lawyers, who among other things control[led] the purse strings and serve[d] as monitors, supervise[d] the costs and course of the litigation."<sup>68</sup>

These kinds of provisions exacerbate the natural tendency of TPLF to subordinate the plaintiff's own interests in the resolution of the litigation to the interests of the TPLF investor. Adopting the disclosure requirement in Senate Bill 645 could curb this problem and restore the primacy of the attorney-client relationship in driving key litigation decisions. After all, if TPLF disclosure becomes the law, funders will likely think twice before inserting these controversial provisions into their agreements. And if they do not, courts will have the information necessary to invalidate such provisions as impermissibly threatening the attorney-client relationship.

*Fourth, disclosure of TPLF can facilitate effective settlement efforts.* A party that must pay a TPLF entity a percentage of the proceeds of any recovery may be inclined to reject what might otherwise be a fair settlement offer in the hopes of securing a larger sum of money. In other words, the party will naturally seek extra money to make up at least some of the amount (likely substantial) that will have to be paid to the TPLF entity. As one state court invalidating a funding agreement warned, the "plaintiff could feel compelled to try the case and ultimately run the risk of receiving no recovery for his or her injuries."<sup>69</sup>

---

<sup>65</sup> *Code of Best Practices*, Bentham IMF (Jan. 9, 2017), [https://www.benthamimf.ca/docs/default-source/default-document-library/bentham-imf-codes-of-best-practices.pdf?sfvrsn=c08ad463\\_10](https://www.benthamimf.ca/docs/default-source/default-document-library/bentham-imf-codes-of-best-practices.pdf?sfvrsn=c08ad463_10).

<sup>66</sup> Maya Steinitz, *The Litigation Finance Contract*, 54 Wm. & Mary L. Rev. 455, 472 (2012) (emphasis added) (citation omitted).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 473.

<sup>69</sup> Jonathan Friedland, et al., *Litigation Risk Mitigation Through The Use of Third-Party Litigation Funding*, Law J. News. (Aug. 1, 2017) (quoting *Boling v. Prospect Funding Holdings, LLC*, No. 14-cv-00081-GNS-HBB, (cont'd)

In addition, some TPLF agreements that have become public reveal that TPLF entities often structure their agreements to maximize their take of the first dollars of any recovery, thereby deterring reasonable settlements. The funding agreement at issue in the Chevron class action litigation discussed above was structured along these lines. The investment agreement included a “waterfall” repayment provision, which provided for a heightened percentage of recovery on the first dollars of any award.<sup>70</sup> Under the agreement, Burford would receive approximately 5.5% of any award, or about \$55 million, on any amount starting at \$1 billion. But, if the plaintiffs settled for less than \$1 billion, the investor’s percentage would actually go up.

The disclosure of TPLF agreements would likely counteract the pressures described above by revealing who is actually on the other side of a particular case. The introduction of such basic information would facilitate more accurate and realistic settlement negotiations between the parties. Further, it would allow courts to structure settlement protocols with greater potential to succeed. For example, if a litigation funder controls settlement decisions (in whole or in part), the court may wish to require that funder to attend any mediation. Absent disclosure, the funder’s presence as a player in the settlement process likely will remain hidden.

## **II. SENATE BILL 645 WOULD STRENGTHEN WISCONSIN’S RECENTLY REVAMPED CLASS ACTION STATUTE.**

Just last month, the Wisconsin Supreme Court replaced the State’s prior one-sentence class action rule, Wisconsin Statutes section 803.08, with a more comprehensive rule “intended to align [Wisconsin’s standards] with the federal class action rule, Fed. R. Civ. P. 23.”<sup>71</sup> Importantly, the new rule adopts the vast majority of the class action provisions of Senate Bill 645. For example, the new rule adopts the numerosity, commonality, adequacy-of-representation and predominance requirements contained in Senate Bill 645. The new rule also sets forth certain other basic class action requirements that have long been the law in federal court – for example, that notice of the class be given to potential class members, and that any class settlement receive approval by the trial court. The notice requirement safeguards the due process rights of class members, who will be bound by any resulting judgment unless they opt out of the class. And involving the court in the settlement process will facilitate fairer and more reasonable agreements that compensate those supposedly aggrieved by a defendant’s alleged misconduct rather than simply provide a hand-out for class counsel who filed the putative class action in the first instance.

---

*(cont’d from previous page)*

2017 WL 1193064, at \*4 (W.D. Ky. Mar. 30, 2017)),

<http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/08/01/litigation-risk-mitigation-through-the-use-of-third-party-litigation-funding/?slreturn=20180027205354>.

<sup>70</sup> See Funding Agreement Between Treca Financial Solutions and Claimants, sch. 1, § 3, *Chevron Corp. v. Donziger*, No. 11-CV-0691 LAK (S.D.N.Y. Nov. 29, 2011), ECF No. 356-2.

<sup>71</sup> See *In re Proposed amendments to Wisconsin Statutes §§ 803.08 and 426.110*, 2017 WI 108, <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=206145>.

There is no question that the recent amendments promulgated by the Wisconsin Supreme Court will substantially improve the State's civil justice system, providing much needed specificity, clarity and consistency with regard to class certification standards. But more can be done to make Wisconsin's class action regime even fairer and more efficient. In particular, the Wisconsin Legislature should enact the other class action provisions of Senate Bill 645 that did not make their way into the Wisconsin Supreme Court's recent order. These provisions would eliminate "no-injury" class actions, require class membership to be ascertainable by objective means, and provide a nondiscretionary right to an interlocutory appeal of class certification orders by both plaintiffs and defendants.

*No-injury class actions.* The past few years have witnessed a growing embrace of overbroad, no-injury class actions by various federal courts. Defendants have long argued that such class actions are illegitimate because the plaintiffs are essentially seeking a windfall – they want to recover damages for a risk that has not materialized and may never materialize over the life of a product. For many years, courts, including the Wisconsin Supreme Court, agreed that no-injury class actions are not viable. Initially, these cases were resolved at the motion-to-dismiss stage because they were typically brought by plaintiffs who themselves had experienced no problem with the product, allowing the courts to conclude that the plaintiff was not injured and thus could not state a claim.

For example, in *Tietsworth v. Harley Davidson, Inc.*, the plaintiffs filed a putative class action on behalf of certain Harley-Davidson motorcycle owners seeking compensatory and punitive damages for an alleged defect in the motorcycles' engines.<sup>72</sup> The plaintiffs did not allege any personal injury or property damage caused by the purportedly defective engines, nor did they allege that their motorcycle engines actually failed or malfunctioned in any way.<sup>73</sup> Rather, they alleged that their motorcycles were diminished in value by virtue of the defect, which supposedly created a "*propensity*" for premature engine failure.<sup>74</sup> The plaintiffs asserted claims for negligence, strict products liability, fraud, and deceptive trade practices – all of which were dismissed by the circuit court for failure to state a claim. The plaintiffs asked the Court of Appeals to reinstate their claims for common-law fraud and statutory deceptive trade practices. While the Court of Appeals reinstated those claims, the Wisconsin Supreme Court reversed. Of most relevance here, the Wisconsin Supreme Court held that "[a]n allegation that a product is diminished in value because the product line has demonstrated a propensity for premature failure such that the product *might* or *will at some point in the future* fail prematurely is too uncertain and speculative to constitute a legally cognizable tort injury and is therefore insufficient to state damages in a tort claim for fraud."<sup>75</sup> The court explained that its holding was "consistent with many federal and state court decisions that ha[d] affirmed the dismissal of claims brought under

---

<sup>72</sup> *Tietsworth v. Harley Davidson, Inc.*, 2004 WI 32, 270 Wis. 2d 146, 677 N.W.2d 233.

<sup>73</sup> *Id.* ¶ 1, 270 Wis. 2d at 152, 677 N.W.2d at 236.

<sup>74</sup> *Id.* (emphasis added).

<sup>75</sup> *Id.* ¶ 3, 270 Wis. 2d at 152-53, 677 N.W.2d at 237 (emphases added).

fraud, strict products liability, and other tort theories where the allegedly defective product has not actually malfunctioned,” noting that “[t]hese ‘no injury’ cases [were] too numerous to list.”<sup>76</sup>

Presumably in reaction to rulings like *Tietsworth*, plaintiffs’ attorneys began recruiting named plaintiffs whose products actually manifested the alleged defect at issue in the litigation, making disposal of the claims at the motion-to-dismiss stage more difficult. But as most courts appropriately recognized, these lawsuits were just another variant of no-injury class actions because while the named plaintiffs may have suffered some injury – e.g., their vehicle actually malfunctioned – the overwhelming majority of the absent class members had not. According to these courts, this new variant of the no-injury class action was not amenable to classwide treatment for a variety of reasons, including that the claims of the named plaintiff were not typical of the absent class members – a fundamental requirement for class certification. The reasoning of these decisions was probably best expressed in the Seventh Circuit’s pronouncement in the Ford Explorer/Firestone tire litigation in 2002 that “[n]o injury, no tort, is an ingredient of every state’s law.”<sup>77</sup> In that litigation, which involved allegations of defective tires, the Seventh Circuit decertified a nationwide class, recognizing that adjudication of varying consumer-fraud and breach-of-warranty law would be utterly unmanageable. As part of its decision, the Seventh Circuit noted that “[i]f tort law fully compensates those who are physically injured, then any recoveries by those whose products function properly mean excess compensation.”<sup>78</sup>

Over the last several years, however, a number of courts have departed from the long line of decisions rejecting no-injury class actions. These courts are certifying such cases, even where it is clear that many class members have never encountered any problem with the subject product and likely never will. The most notorious of these cases have been the “moldy washer” cases in which a few plaintiffs who claim their front-load washing machines exhibited odors have sought to bring class actions on behalf of all owners of the machines at issue, *even though most consumers who purchase these machines never experience the supposed problem*.

For example, in *Glazer v. Whirlpool Corp.*, purchasers of the defendant’s front-load washing machine, the Duet, alleged that the washing machine’s design led to the growth of mold and mildew in the machine.<sup>79</sup> The defendant argued that the class was overbroad, as the definition included Duet owners who had not experienced a mold problem and other purchasers who were pleased with their Duets, unlike the named plaintiffs.<sup>80</sup> Indeed, a majority of the class

<sup>76</sup> *Id.* ¶ 21, 270 Wis. 2d at 160-61, 677 N.W.2d at 240-41 (collecting cases, including, *inter alia*, *Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 627-29 (8th Cir. 1999), which affirmed the dismissal of a class action lawsuit for fraud and breach of warranty where the only alleged damage from the vehicles’ defective brake system was overpayment and diminished resale value). The Wisconsin Supreme Court also determined that the plaintiffs had failed to state a claim for statutory deceptive trade practices because the claim was “premised primarily on the allegation that Harley failed to disclose the alleged motorcycle engine defect” i.e., an omission – which is not actionable under Wisconsin’s consumer protection statute. *Id.* ¶ 40, 270 Wis. 2d at 170, 677 N.W.2d at 245.

<sup>77</sup> *See In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1017 (7th Cir. 2002).

<sup>78</sup> *Id.*

<sup>79</sup> *Glazer v. Whirlpool Corp.*, 722 F.3d 838, 844 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014).

<sup>80</sup> *See id.* at 849.

members did not have a mold problem with their washing machines. The Sixth Circuit issued two decisions in the case, both times holding that all class members, including those who had not experienced a mold problem, could recover economic damages as a class for allegedly paying an inflated price for their washing machines.<sup>81</sup>

Likewise, in *Butler v. Sears, Roebuck & Co.*, the plaintiffs, purchasers of washing machines sold by Sears, brought a class action alleging that defects in their front-load washing machines caused mold growth and sudden stoppages.<sup>82</sup> The Seventh Circuit held that the defendant's argument that "most members of the plaintiff class did not experience a mold problem" was not an argument against certification, but rather an argument in favor of certifying the class and then "entering a judgment that will largely exonerate Sears."<sup>83</sup> Essentially, the court concluded that whether large swaths of the absent class members experienced any problems with their allegedly defective washing machines was irrelevant to class certification. And the court's cavalier suggestion that the defendant roll the dice on a class trial is simply not realistic for many companies that cannot afford to risk bankruptcy in a class trial on principle.

As these and other cases illustrate, named plaintiffs whose products malfunctioned or exhibited an alleged defect are proposing – and some courts are certifying – class actions encompassing a bevy of class members whose products performed as intended. These overbroad class actions are problematic for a variety of reasons. First, they threaten the due process rights of defendants who are forced to defend against hundreds of thousands of claims based on the unique experiences of a handful of people. Second, they undermine the proper administration of justice by creating a mechanism whereby absent class members can recover in a lawsuit, even though they would never recover if they brought a similar lawsuit as individuals. And third, these suits almost always settle because of the exorbitant costs to defendants of litigating these massive lawsuits. And because the great majority of class members are perfectly satisfied with the product or service that is being challenged, there are almost no takers for these class action settlements. Thus, the only people who benefit are the lawyers who brought them. In short, overbroad class action lawsuits undermine justice and put a strain on our economy, on productivity and on innovation.

Senate Bill 645 seeks to eliminate these kinds of unfair and abusive class actions and codify the Wisconsin Supreme Court's pronouncement on this issue by requiring that the "claims or defenses *and type and scope of injury* of the representative parties are typical of the claims or defenses *and type and scope of injury* of the class."<sup>84</sup> Applying the federal typicality requirement – which does not contain the specific type and scope language – certain courts have already recognized that a named plaintiff in a class action cannot be "typical" of absent class

---

<sup>81</sup> See *id.* at 844-45.

<sup>82</sup> *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 360-61 (7th Cir. 2012), *vacated and remanded*, 569 U.S. 1015 (2013), *and judgment reinstated*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014).

<sup>83</sup> *Id.* at 362.

<sup>84</sup> SB 645, § 14, 2017-2018 Leg. (Wis. 2017) (emphases added).

members if he or she experienced a problem that the absent class members did not.<sup>85</sup> But many others have not, underscoring the need for the language contained in Senate Bill 645, which would clearly foreclose these unwieldy class actions in Wisconsin state courts.

***Express ascertainability requirement.*** Senate Bill 645 would also impose an express ascertainability requirement in class actions: “[t]he members of the class [must be] objectively verifiable by reliable and feasible means without individual testimony from putative class members and without substantial administrative burden.”<sup>86</sup> In recent years, a number of courts have recognized that “ascertainability” is an implicit prerequisite to class certification that requires the proponent of certification to prove that membership in the putative class can be easily determined using objective criteria.

In *Carrera v. Bayer Corp.*, for example, the U.S. Court of Appeals for the Third Circuit vacated the district court’s order certifying a class of Florida purchasers of Bayer’s One-A-Day WeightSmart multivitamin who alleged consumer fraud claims.<sup>87</sup> According to the Third Circuit, the class was not viable because “extensive and individualized fact-finding or ‘mini-trials’” would be required to determine who purchased the specific product at issue, and therefore the class was not ascertainable.<sup>88</sup> As the Third Circuit explained, ascertainability serves three essential purposes at the class certification stage:

[(1)] at the commencement of a class action, ascertainability and a clear class definition allow potential class members to identify themselves for purposes of opting out of a class; (2)] it ensures that a defendant’s rights are protected by the class action mechanism; and (3)] it ensures that the parties can identify class members in a manner consistent with the efficiencies of a class action.<sup>89</sup>

Wisconsin state courts have not expressly recognized or rejected an ascertainability requirement. However, some Wisconsin cases appear to have implicitly recognized that difficulties pertaining to class identification are relevant to the potential manageability of the case as a class action. For example, in *In re Wal Mart Employee Litigation*, the plaintiffs alleged that the members of the proposed class “were denied promised compensation for working when they were entitled to a break.”<sup>90</sup> “But whether an employee was on a break or working through, either wholly or partially, the break to which he or she was entitled was . . . determined by that

---

<sup>85</sup> See, e.g., *Kachi v. Natrol, Inc.*, No. 13cv0412 JM (MDD), 2014 WL 2925057, at \*15 n.2 (S.D. Cal. June 19, 2014) (concluding that the proposed class was “woefully overbroad and c[ould not] be maintained as proposed because it incorporate[d] class members who suffered injury and those that did not”); *Burton v. Chrysler Grp. LLC*, No. 8:10-00209-MGL, 2012 WL 7153877, at \*6 (D.S.C. Dec. 21, 2012) (proposed nationwide class “would . . . include those persons and entities who never experienced problems” with their vehicles; this “problem . . . highlights the lack of . . . typicality among putative class members”).

<sup>86</sup> SB 645, § 14.

<sup>87</sup> *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

<sup>88</sup> *Id.* at 305 (citation omitted).

<sup>89</sup> *Id.* at 307.

<sup>90</sup> *In re Wal Mart Emp. Litig.*, 290 Wis. 2d 225, 229-30, 233, 711 N.W.2d 694, 696 (Ct. App. 2006).



employee's own time-clock entries."<sup>91</sup> As the Court of Appeals explained in affirming the denial of class certification, such a determination "would require not only the examination of each and every member of the proposed class, but, also, their co-workers and supervisors, and, in some or many cases, their friends and family."<sup>92</sup>

Section 14 of Senate Bill 645 would essentially codify the *Carrera* approach and guarantee a defendant's fundamental due process right to challenge class membership at the certification stage, thereby ensuring that the Wisconsin class action statute – a purely procedural device – is not converted into a private attorney general remedial scheme.

***Automatic right to interlocutory appeal.*** The recently updated class action statute recognizes the high stakes of class certification rulings by authorizing interlocutory review of such orders at the discretion of the Court of Appeals. While this is an important first step in promoting the correctness and uniformity of class certification decisions, Senate Bill 645 takes a better approach – allowing appeals as of right of class certification rulings. In 1998, subdivision (f) was added to Federal Rule of Civil Procedure 23, which allows for permissive interlocutory appeal of orders denying or granting class certification.<sup>93</sup> A driving impetus behind this amendment was to alleviate the coercive effect of class certification rulings on defendants. As the Advisory Committee's notes accompanying this provision make clear, "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."<sup>94</sup> That is why judges consistently characterize class certification as "in effect, the whole case."<sup>95</sup> As one commentator put it, "certification is the whole shooting match" in most cases, and defendants faced with carelessly certified, meritless lawsuits are often pressured into settling claims regardless of their merit.<sup>96</sup> Thus, meaningful interlocutory review of improvidently certified class actions is an essential safeguard against unwarranted class settlements.

Notably, the available data reveal that federal courts are growing increasingly reluctant to grant 23(f) review. A study of class certification appeals filed over seven years (from October 31, 2006 through December 31, 2013) found that *less than 25%* of the petitions for leave to appeal were granted – a one-third decline in the grant rate from the prior eight-year period.<sup>97</sup>

<sup>91</sup> *Id.* at 229, 711 N.W.2d at 696.

<sup>92</sup> *Id.* at 233, 711 N.W.2d 698; *see also Derzon v. Appleton Papers, Inc.*, No. 96-CV-3678, 1998 WL 1031504, at \*10 (Wis. July 7, 1998) ("The inclusion of consumers of fax paper, and the variety of routes by which fax paper might travel from converter to end user, ma[d]e it imperative that the plaintiff describe and demonstrate a means by which this can be fairly and efficiently organized for proof by common evidence.").

<sup>93</sup> *See* Fed. R. Civ. P. 23(f).

<sup>94</sup> Fed. R. Civ. P. 23 advisory committee's note to 1998 amendment.

<sup>95</sup> Hon. Diane Wood, *Panel 2: Tools for Ensuring that Settlements are "Fair, Reasonable, and Adequate"*, 18 Geo. J. Legal Ethics 1197, 1213 (2004-05) (from *Remarks at the FTC Workshop: Protecting Consumer Interests in Class Actions* (Sept. 13-14, 2004)).

<sup>96</sup> David L. Wallace, *Practice Tip: A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, 28 L.J. NewsL., Product Liability Law & Strategy 8, 1 (2009).

<sup>97</sup> *See* John H. Beisner, Jessica D. Miller & Geoffrey M. Wyatt, Skadden, Arps, Slate, Meagher & Flom LLP, *Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings*, Apr. 29, 2014,

(cont'd)

There is little reason to predict that a different trend will take hold in Wisconsin, especially considering that petitions for leave to appeal outside the class action context “are granted only in rare circumstances.”<sup>98</sup>

Promoting correctness and uniformity of class certification decisions is essential given the critical role of certification in these lawsuits. Unless class certification decisions are made automatically appealable (or at least appealable with greater frequency), erroneous decisions granting and denying class certification will most likely evade any appellate review. As a result, attorneys will be able to mount class actions of enormous scope and questionable merit in the hopes that Wisconsin judges sympathetic to their position will certify such actions, forcing defendants to settle before trial, and that lax class certification rulings will thereby evade judicial review.

### **III. OTHER PROVISIONS OF SENATE BILL 645 WOULD ALSO IMPROVE WISCONSIN’S CIVIL JUSTICE SYSTEM.**

Senate Bill 645 would also improve the State’s civil justice system by regulating consumer lawsuit lending. Consumer lawsuit lending is a variant of TPLF that involves the payment of loans to plaintiffs to recover living and other expenses during a pending lawsuit. Consumer lawsuit lenders prey on vulnerable consumers – those who are injured and unable to work and who may have substantial medical bills, those who have no financial support, and those who are desperate for cash. The companies then offer to lend a portion of the expected settlement or judgment, usually up to 10% and capped at \$100,000, to the plaintiff. The lawsuit lenders charge interest on the loan, with rates often in the range of 3-5% *per month* – i.e., more than 60% interest annually. Even when the plaintiff “wins” or settles the case, he or she may recover little or no money at all, because the entire amount of the award or settlement goes to pay the plaintiff’s attorneys and to repay the lawsuit lender.

What really separates consumer lawsuit lending – or “crash cash” – from other types of credit is that it is “non-recourse.” This means that if the plaintiff loses the case, he or she is not obligated to repay the loan. The lawsuit lending industry has gone to great lengths to tell regulators and the public that consumer lawsuit loans are not really loans but are instead “non-recourse financing.” This mantra has largely enabled consumer lawsuit lenders to skirt Wisconsin usury and fair-lending laws. What the lenders fail to explain is that consumer lawsuit lending dramatically reduces litigation recoveries, while increasing the cost of litigation. As a direct result of consumer lawsuit lending, defendants have to cough up more money to plaintiffs to settle lawsuits, and the plaintiffs then have to turn right around and pay that extra money to the lawsuit lenders. Both the allegedly injured plaintiffs and the defendants lose; the only winners are the consumer lawsuit lenders.

---

*(cont’d from previous page)*

at 1, <http://skadden.com/insights/study-reveals-us-courts-appeal-are-less-receptive-reviewing-class-certification-rulings> (click “PDF” for paginated copy).

<sup>98</sup> *State v. Hawley*, 2013 WI App 84, ¶ 9, 348 Wis. 2d 762, 833 N.W.2d 872 (unreported table decision).

For example, Bloomberg News reported on a Brooklyn man named Elwin Francis who borrowed \$27,000 from consumer lawsuit lenders Law Bucks and Case Cash in connection with a trip-and-fall case.<sup>99</sup> When Francis's lawyers settled his case for \$150,000 the lawsuit lenders took almost \$100,000 – *nearly two-thirds of the settlement and more than three times what they had lent*. After Francis's lawyers took their cut for fees and expenses, Francis was left with \$111. Francis later claimed that his lawyers never told him that he would receive almost nothing from the \$150,000 settlement, and soon after receiving his settlement, he sued his lawyers for malpractice for not advising him of the consequences of his lawsuit loans.

Another problem caused by consumer lawsuit lending is that it drags out litigation and increases the length of time cases remain pending on court dockets. Because consumer lawsuit lending increases the costs of litigation – requiring more money to settle cases so plaintiffs can keep some of what they get – plaintiffs who have borrowed from lawsuit lenders tend to reject early settlement offers in hopes of holding out for more money. The result is that cases stay open longer, taking up valuable court time and judicial resources, as well as defendants' time and money. Importantly, the reason for this delay is not that cases involving consumer lawsuit lending are stronger than other cases, or that defendants in cases involving lawsuit lending are slow to offer reasonable settlements (indeed, defendants seldom even know that the plaintiffs have borrowed money in the first place because the loans are not disclosed). Rather, the reason is that plaintiffs who have borrowed money from lawsuit lenders must turn over to the lenders disproportionately large portions of anything they receive from the defendant. In a typical contingency-fee arrangement, a plaintiff stands to recover about 70% of any settlement reached with the defendant, with the rest going to the plaintiff's lawyer. But when a consumer lawsuit lender is involved, the plaintiff may owe so much money to the lender that he or she ends up with virtually nothing unless the settlement is exorbitant. Thus, the lender's profit motive – not the underlying strength or weakness of the plaintiff's case – is what drives the litigation.

For example, in a notable case from North Carolina, a woman sued the owner of the Charlotte Hornets basketball team for sexual harassment.<sup>100</sup> Unbeknownst to her lawyers, she had taken out a \$200,000 consumer lawsuit loan, which only obligated her to repay the lender if she prevailed. As her case progressed, the defendant offered her up to \$1 million to settle. The woman's lawyers advised her to take the offer, but she refused to settle for anything less than \$1.2 million because the terms of her agreement meant that she would lose money if she won the suit but received less than \$1.2 million. The case then proceeded to trial, and because the plaintiff lost, she was able to keep the \$200,000 loan and not repay it. Later, when her lawyers learned what had happened, they sued the consumer lawsuit lender for interfering with their case – and won.<sup>101</sup> In its ruling denying the defendants' motion to dismiss, the court stated: "In a

---

<sup>99</sup> See Joan C. Rogers, *Law Firm Wins Dismissal of Suit by Client Whose Litigation Loans Ate Up Settlement*, Bloomberg BNA (Jan. 30, 2013), <https://www.bna.com/law-firm-wins-n17179872101/>; see also Ronen Avraham and Abraham L. Wickelgren, *Third-Party Litigation Funding: A Signaling Model*, 63 DePaul L. Rev. 2 (Winter 2014), 233-264.

<sup>100</sup> See *Weaver, Bennett & Bland, P.A. v. Speedy Bucks, Inc.*, 162 F. Supp. 2d 448, 450 (W.D.N.C. 2001).

<sup>101</sup> *Weaver, Bennett & Bland, P.A. v. Speedy Bucks, Inc.*, No. 1:00CV249, 2007 WL 2344820, at \*1 (W.D.N.C. Aug. 14, 2007).

twist perhaps unique in law, a court loss resulting in no award of damages was better for the client than a million dollar settlement.”<sup>102</sup>

Enactment of Senate Bill 645 would protect consumers and curb lending abuses by bringing lawsuit lending into alignment with existing state law governing other consumer loans. Most notably, in a consumer lawsuit lending transaction, the lender would not be permitted to charge interest at a rate of more than 18% per year (the maximum rate for other consumer loans),<sup>103</sup> and there would have to be a written agreement between the lender and the consumer that contains specified information, including the interest rate and the consumer’s right to receive a refund of interest charged if prepayment is made in full, as well as other basic information.<sup>104</sup> In short, the consumer lending provisions of Senate Bill 645 largely aim to make consumer lawsuit lending in Wisconsin subject to the same fair-lending and usury laws already in force in the State, doing away with the fiction that consumer lawsuit loans are not “loans” within the meaning of Wisconsin law.

In addition, Senate Bill 645 would require lawsuit lending arrangements to be disclosed to the court and the opposing party within 10 days after the plaintiff has entered into a consumer lawsuit lending transaction.<sup>105</sup> This provision would protect consumers by ensuring that judges have an opportunity to assess the fairness of these contracts, and it would put defendants on notice that the presence of a consumer lawsuit loan might greatly influence the litigation, especially in settlement discussions, as happened in the Charlotte Hornets case.

In sum, Senate Bill 645 would eliminate the cloak of immunity that has needlessly shielded consumer lawsuit lenders from generally applicable laws – a reform that is long overdue.

## CONCLUSION

The time is ripe for revamping Wisconsin’s stale discovery rules and class action regime, which are imposing burdensome costs on consumers and businesses in the State. On the discovery front, Wisconsin’s rules have long lagged behind the rules in effect in the federal system and other states, which have sought to streamline discovery by making discovery proportional to the claims or defenses at issue in the case. To be sure, the Wisconsin Supreme Court’s recent amendment replacing the State’s prior one-sentence class action rule with a far more robust regime that closely mirrors the federal one is welcome news and should be applauded. Nonetheless, certain aspects of Senate Bill 645 – most notably, those pertaining to “no-injury” class actions, ascertainability and *nondiscretionary* appeal of class certification rulings – were not included in the amended rule and should be enacted. In addition, reasonable limits on consumer lawsuit lending and the shortening of the statutory periods for filing certain

---

<sup>102</sup> *Weaver*, 162 F. Supp. 2d at 451.

<sup>103</sup> Wis. Stat. § 138.09(lm)(a) (“Before any person may do business under this section . . . or assess a finance charge on a consumer loan in excess of 18% per year, that person shall first obtain a license from the division.”).

<sup>104</sup> *See* SB 645, § 1, 2017-2018 Leg. (Wis. 2017).

<sup>105</sup> *Id.* § 25.

civil claims – which are also part of Senate Bill 645 – are uncontroversial measures that should also be swiftly enacted.

I appreciate the Committee allowing me to testify today, and I look forward to answering any questions that the Members of the Committee may have.