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

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## SUMMARY OF ENGROSSED 2017 ASSEMBLY BILL 773 CIVIL LITIGATION REFORM

Engrossed Assembly Bill 773 has been passed by the Wisconsin Assembly and Senate, and has been sent to the Governor for his signature. AB 773 is a significant victory for Wisconsin businesses and will reduce the cost of litigation. Below is a summary of all of the significant reforms contained in AB 773.

### DISCOVERY PROCEDURES

The heart of AB 773 is the discovery provisions. Below are the key provisions in AB 773:

#### 1. Scope of Discovery

- The bill provides that, upon a motion of a party, a court shall limit the frequency or extent of discovery if it determines that one of the following applies:
  - The discovery sought is cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.
  - The burden or expense of the proposed discovery outweighs its likely benefit or is not proportional to the claims or 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.
- The bill provides that a court, when ruling on a motion for a protective order, may order that discovery may be had only on specified terms and conditions, including the allocation of expenses.
- The legislation also adds new language to the general scope of discovery. Specifically, AB 773 provides that parties may obtain discovery regarding any nonprivileged matter that is relevant to the party's claim or defense and is 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.

- Information within this scope of discovery need not be admissible in evidence to be discoverable.

## **2. Mandatory Disclosures of Third Party Litigation Financing**

- The bill provides that, unless stipulated or ordered by the court, a party shall provide to the other parties any agreement under which any person, other than an attorney 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, by settlement, judgement, or otherwise.

## **3. Automatic Stay of Discovery**

- The legislation provides that, upon the filing of a motion to dismiss, a motion for judgment on the pleadings, or a motion for more definite statement, all discovery and other proceedings shall be stayed (stopped) for a period of:
  - 180 days after the filing of the motion, or
  - The ruling of the court on the motion, whichever is sooner.
- The court has discretion to still allow discovery if it finds good cause upon the motion of any party that discovery is necessary.

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

- The bill provides that, absent a showing by the moving party of substantial need and good cause (subject to an assessment of whether the burden of the proposed discovery outweighs its likely benefit), a party is not required to provide discovery of any of the following categories of electronically stored information (ESI):
  - Data that cannot be retrieved without substantial additional programming or without transforming it into another form before search and retrieval can be achieved.
  - Backup data that are substantially duplicative of data that are more accessible elsewhere.
  - Legacy data remaining from obsolete systems that are unintelligible on successor systems.
  - Any other data that are not available to the producing party in the ordinary course of business and that the party identifies as not reasonably accessible because of undue burden or cost. In response for 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. The court may specify conditions for the discovery.
- A similar provision was in the original bill that provided that these same four categories of ESI did not need to be preserved. However, Senate Amendment 1 removed that provision.

## **5. Limitations on Discovery Methods**

- The bill provides the following limitations on the specified methods of discovery, unless otherwise stipulated by the court:
  - 10 depositions, each not to exceed seven hours.
  - 25 interrogatories, including all subparts.

- Requests for production of documents for a reasonable time period of not more than five years prior to the accrual of the cause of action. The limitation does not apply to requests for patient health care records, vocational records, educational records, or any other similar records.

## **CLASS ACTIONS**

When AB 773 was introduced Wisconsin had not updated its class action rules since the 1849 Field Code was adopted. The original legislation contained language identical to federal class action rules (Federal Rule 23). In addition, the original legislation contained three provisions that were not included in federal rule. After AB 773 was introduced, the Supreme Court of Wisconsin issued an order<sup>1</sup> adopting Federal Rule 23, but it did not include any of the three additional provisions contained in AB 773.

The Assembly amended AB 773 to include one of the three additional provisions. Specifically, AB 773 provides that any party has a nondiscretionary right to appeal an interlocutory appeal of class certification. This means that once a trial court certifies a class, either party can appeal the court's decision before the case can move forward on the merits. This provision is vital because a lower court's class certification makes or breaks the case.

Combined with the recent Supreme Court order adopting Federal Rule 23, AB 773's right to appeal the class certification, Wisconsin's class action rules will finally be in line with nearly every other state.

## **STATUTE OF LIMITATIONS**

The bill reduces the statute of limitations for a number of causes of action. Below is a discussion of the specific changes:

- Limitation on an action for fraud
  - Currently, an action for fraud must be commenced within 6 years after the cause of action accrues or be barred.
  - AB 773 reduces the time period from 6 years to 3 years.
- Limitation on an action for injury to character or other rights
  - Currently, an action to recover damages for an injury to the character or rights of another, not arising on contract, must be commenced within 6 years after the cause of action accrues, except where a different period is expressly prescribed, or be barred.
  - AB 773 reduces the statute of limitation from 6 years to 3 years.
- Limitation when no other limitation is provided
  - Currently, when a different limitation is not prescribed by law, an action upon a liability created by statute must be commenced within 6 years after the cause of action accrues or the action is barred.
  - AB 773 reduces the period for these other actions from 6 years to 3 years.

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<sup>1</sup> In re proposed amendments to Wisconsin Statutes §§ 803.08 and 426.110, 2017 WI 108, Dec. 21, 2017, available at <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=206145>.

## **STATUTE OF REPOSE**

- The statute of repose is a default time limit for commencing an action for damages that result from deficiency or defect in an improvement to real property.
- Under current law, the exposure period for such a claim is 10 years from substantial completion of the improvements.
- However, if the damages are sustained during years 8 through 10 from substantial completion, the time to commence an action is extended 3 additional years, making it 13 years.
- AB 773 amends current law to provide an exposure period of 7 years.
- AB 773 also provides that if the damages are sustained in years 5 through 7, then the time for commencing an action is extended 3 additional years. Thus, the exposure period would be up to 10 years instead of 13.

## **INTEREST RATES ON UNTIMELY PAYMENT OF INSURANCE CLAIMS**

- Under current law, an insurer is required to promptly pay every insurance claim and 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 current interest rate that an insurer must pay for overdue insurance claims is 12 percent.
- AB 773 changes the interest rate to 7 percent.

## **AUDITS OF UNCLAIMED PROPERTY**

- AB 773 makes the following changes to the Wisconsin Department of Revenue (DOR) as it relates to third party audits of unclaimed property. Specifically, AB 773:
  - Prohibits DOR from entering into a contract that includes contingency fee audits for any company domiciled in the state or that maintains its principal place of business in the state.
  - Limits the contingency fees to 12 percent of unclaimed property recovered for audits of companies not domiciled in the state.
  - Prohibits DOR from entering into an agreement to administer the unclaimed property law that allows a person engaging in an audit of another person's documents or records to use statistical sampling to estimate the liability of that person unless the person consents to the use of an estimate.