

## CO-SPONSORSHIP MEMORANDUM

To: All Legislators

From: Reps. Born, Nygren and Sens. Tiffany, Craig

Date: November 30th, 2017

Re: Co-sponsorship of LRB-4700/1 **relating to:** discovery of information in court proceedings; procedural requirements relating to class actions; consumer lawsuit lending; the statute of limitations for certain civil actions; agreements by the secretary of revenue to allow third-party audits related to unclaimed property; interest rates for overdue insurance claims; and providing a penalty.

**Deadline: Wednesday, December 6th at 5:00PM**

This comprehensive proposal will 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. This legislation, in part, saves everyone time and money by aligning Wisconsin's civil procedures for discovery and class actions with the Federal Rules of 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. This is particularly helpful to Wisconsin Circuit Court judges.

This proposal also:

- 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.

The first major component of this bill is adopting the federal rules of discovery here at the state level. 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 the court to limit certain aspects of discovery if the court finds them to be either duplicative, can be obtained through another source, or if related costs are not proportional to the claims. In addition, the legislation also sets limits for the types of electronic information that must be kept or accessed. With technology continuously advancing, it is important to set reasonable guidelines on accessing data from obsolete systems or data that can be produced in another form.

The second component of this legislation provides a much-needed update to procedural requirements for class action lawsuits. Wisconsin's current one-sentence class action statute is 168 years old, and provides little, if any, guidance to the parties or the bench. Forty-eight 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 Judicial Council has proposed to the Supreme Court.

Next, this proposal creates guidelines for consumer lawsuit lending. Lawsuit lending is a practice in which a third party provides money to a plaintiff or claimant in a dispute to be used for any purpose other than prosecuting the dispute. The consumer is then charged interest by the lender, and/or the lender receives a portion of the settlement or judgement. Most commonly, consumers in the midst of a dispute are approached by lenders offering to provide them money on the condition of repayment derived from the proceedings. The lender then sometimes gets to the point where the resolution of a dispute would yield less than what they owe to their lawsuit lender, and therefore they are less likely to settle and litigation drags out even further and at a greater cost. This legislation would cap interest rates on lawsuit loans at 18%, require lending agreements to be in writing, and require that any lawsuit lending transactions are disclosed to the court and all parties involved in the civil proceeding.

This bill also brings Wisconsin's statute of limitations for a miscellaneous action for injury of character more in line with other states by moving it from 6 to 3 years. Wisconsin is currently tied for having the longest window in the nation for this type of action at 6 years. A majority of states are currently at 2 or 3 years for this type of claim, and some such as California are as low as 1 year. A 3-year statute of limitation promotes efficiency, while reducing the costs for the state and businesses that arise when investigating distant events.

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 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 in effect 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, American Tort Reform Association, and many others.

If you would like to co-sponsor LRB-4700/1, please contact Rep. Born's office at 266-2540 or Sen. Tiffany's office at 266-2509 by **5:00PM on Wednesday, December 6th.**

*Analysis by the Legislative Reference Bureau*

**DISCOVERY PROCEDURES**

This bill makes certain changes to discovery procedure in court proceedings. Under the bill, the court must limit the frequency or extent of discovery if it determines that the discovery sought is cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive or that the burden or expense of the proposed discovery outweighs its likely benefit or is not proportional to the claims and defenses at issue. In addition, the bill limits the type of electronic information that can be discovered such that a court may not require a party to keep or provide the following types of electronic information: 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; and 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.

The bill 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.

### **CLASS ACTIONS**

This bill creates detailed procedures relating to class actions where previously Wisconsin had few procedural requirements relating to class actions. The procedures implemented in the bill closely track the federal procedures for filing and maintaining a class action, and are similar to changes proposed by the Wisconsin Judicial Council in 2017 petition number 17-03 to the Supreme Court. The bill creates prerequisites for filing a class action; differentiates between three different types of class actions that may be certified; creates requirements that the court must follow with regard to certifying a class, notifying potential class members, and entering a judgment; enumerates procedures for conducting a class action; requires the court to be involved in settling a class action; describes certain aspects of appellate procedure for a class action; requires the court to select counsel for the class in a class action; and creates a procedure for recovery of attorney fees.

### **CONSUMER LAWSUIT LENDING**

This bill creates provisions governing consumer lawsuit lending transactions. Under the bill, 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 Trade, Agriculture and Consumer Protection has enforcement authority over violations.

The bill 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 bill, the statute of limitations is shortened to three years. Under current law, the statute of limitations for an action for injury resulting from improvements to real property is ten years. Under the bill, the statute of limitations is shortened to six 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 bill, the statute of limitations is shortened to three years.

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

This bill 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 bill changes the interest rate that an insurer must pay for overdue insurance claims from 12 percent to the Federal Reserve Board's bank prime loan rate on January 1 of the year in which the insurer is furnished written notice of the fact of a covered loss plus 1 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.

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