STATE OF WISCONSIN

SUPREME COURT

In re:

PROPOSED AMENDMENT TO
WISCONSIN STATUTES §§ 803.08 and 426.110

**MEMORANDUM IN SUPPORT OF PETITION
OF WISCONSIN JUDICIAL COUNCIL
FOR AN ORDER AMENDING WIS. STATS. §§ 803.08 AND 426.110**

April M. Southwick
WI State Bar No. 1070506
110 East Main Street, Suite 822
Madison, WI 53703
(608) 261-8290
(608) 261-8289 (facsimile)
april.southwick@wicourts.gov

ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

March 16, 2017

TABLE OF CONTENTS

The Wisconsin Judicial Council respectfully petitions the Wisconsin Supreme Court to repeal and replace WIS. STAT. § 803.08, create WIS. STAT. § 426.110 (4m), repeal WIS. STAT. § 426.110 (5) through (13), and amend WIS. STAT. § 426.110 (16). This petition is directed to the Supreme Court's rule-making authority under WIS. STAT. § 751.12.

I. INTRODUCTION

"A class action is a procedural device that permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group, or 'class'. Put simply, the device allows courts to manage lawsuits that would otherwise be unmanageable if each class member (individuals who have suffered the same wrong at the hands of the defendant) were required to be joined in the lawsuit as a named plaintiff."[1] While the class is acting as the plaintiff in a vast majority of class actions, the federal rule also provides for defendant class actions.[2]

Class actions enable parties to unite to bring claims that otherwise could never be litigated, no matter how meritorious. It is only practical to use the courts to assert rights when the potential benefits exceed the cost, and the cost of litigation is high. Without class actions, claims that are too small to cover the cost of litigation will not be pursued. The end result is that no matter what rights may be granted under the law, if there is no means by which to enforce those rights, they can be violated without consequences.

[1] "Class Action." *Wex Legal Dictionary*. https://www.law.cornell.edu/wex/class_action (retrieved January 26, 2017); *See also Hansberry v. Lee*, 311 U.S. 32, 41, 61 S.Ct. 115, 118 (1940).
[2] Francis X. Shen, *The Overlooked Utility of the Defendant Class Action*, 88 Denv. U. L. Rev. 73 (2010).

By adopting WIS. STATS. §§ 803.08 and 426.110, the Wisconsin Supreme Court and the Wisconsin Legislature have recognized the importance of class action litigation and endorsed its use in Wisconsin state courts. However, in the years since adoption, both sections have become outdated. Both provisions require updates to better serve Wisconsin residents and businesses, as well as ensure an efficient court.

Current s. 803.08(1) contains Wisconsin's single-sentence class action statute.[3] As adopted by supreme court order, today's statute remains nearly identical to the 1849 Field Code.[4] In 1971, Professor Adolf Homburger observed that the Field Code's class action provision "may well qualify as one of the worst in the Code. Nevertheless its capacity for endurance has been remarkable."[5] Efforts to replace the Field Code statute with the federal class action rule have been on-going for decades. Those efforts have been quite successful. Wisconsin is one of only three states that still retain the terse class-action provisions based on the nineteenth-century Field Code.[6]

---

[3] WIS. STAT. § 803.08(1) states: "When the question before the court is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole, except that 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."

[4] The last phrase of subsection (1) was added by 2011 WIS. ACT 68 to prohibit class action suits against the state seeking tax refunds, effective March 1, 2012. Subsection (2), addressing residual funds, became effective January 1, 2017. *See* 2016 WI 50.

[5] Adolf Homburger, *State Class Actions and the Federal Rule*, 71 Colum. L. Rev. 609, 613 (1971).

[6] California Code of Civil Procedure section 382 specifies that "when the question is one of common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." Nebraska remains one of the few states that continue to use procedural statutes based on the Field Code, and its class action statute, section 25-319 of the Nebraska Revised Statutes, is almost identical to the class action provision of the Field Code.

For the reasons set forth in this memorandum, the Judicial Council urges the court to repeal s. 803.08 and replace it with a class action rule modeled on the federal class action rule, as set forth in the accompanying petition.

II. DISCUSSION

A. The Supreme Court Has Rule Making Authority to Amend Class Action Statutes.

Wisconsin's Constitution establishes three branches of government: the legislative, the executive, and the judicial.[7] The separation of powers doctrine, although not expressly stated, is inferred through several constitutional provisions.[8] The constitution does not explicitly deal with the supreme court's authority to adopt rules of practice or procedure, but that power is acknowledged by statute. WIS. STAT. § 751.12(1) states that, "The state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts…" Sub. (2) states, "All statutes relating to pleading, practice, and procedure may be modified or suspended by rules promulgated under this section."

Some overlap of power exists between the Wisconsin Supreme Court and the Legislature with respect to adopting procedural rules. While s. 751.12 authorizes the court to adopt rules regulating practice and procedure, it does not change the Legislature's ability to adopt statutes regulating the same areas. Sec. 751.12(4) expressly states, "This

[7] Wis. Const. art. IV, § 1; Wis. Const. art. V, § 1; Wis. Const. art. VII, § 2.
[8] Wis. Const. art. IV, § 1 ("The legislative power shall be vested in a senate and assembly."); Wis. Const. art. V, § 1 ("The executive power shall be vested in a governor ...."); Wis. Const. art. VII, § 2 ("The judicial power of this state shall be vested in a unified court system consisting of one supreme court, a court of appeals, a circuit court ...."); Id. § 3(1) ("The supreme court shall have superintending and administrative authority over all courts."); Id. § 4(3).

section shall not abridge the right of the legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure." While the constitution does not require an absolute division, in areas of shared power, one branch may not exercise power in a manner that will unduly burden or substantially interfere with another branch's essential role and powers.[9]

The subject of the petition presently before this court is s. 803.08 governing class actions. Wisconsin's class action statute was adopted pursuant to this court's rulemaking authority.[10] This court has recognized that a rule adopted by the supreme court can be amended by the supreme court.[11]

This position is further bolstered by the United States Supreme Court's pronouncement that the federal class action statute is a procedural rule.[12] In *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, the issue was whether federal Rule 23 governing class actions was procedural, and did not abridge, enlarge, or modify any substantive right. The court reasoned that a class action "merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits."[13] The Supreme Court held that it was "obvious" that Rule 23 was procedural and properly enacted under the court's rulemaking authority.[14]

---

[9] *See Demmith v. Wisconsin Judicial Conference*, 480 N.W.2d 502 (1992).
[10] *See* Sup. Ct. Order, 67 Wis. 2d 585 (1975) adopting a rule essentially identical to former Wis. Stat. § 260.12, which was promulgated pursuant to Sup. Ct. Order, 271 Wis. vi (1956).
[11] *See Rao v. WMA Sec., Inc.*, 2008 WI 73, ¶ 35, 310 Wis. 2d 623, 639, 752 N.W.2d 220, 228.
[12] *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S. Ct. 1431 (2010).
[13] *Id.* at 1443.
[14] *Id.*

Therefore, this court has rule making authority to amend Wisconsin's class action statutes under s. 751.12.

B. There Are Many Problems With Current s. 803.08.

Wisconsin's current class action statute states, "When the question before the court is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole, except that 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. "[15]

1. Should s. 803.08 be read in the disjunctive or conjunctive? Current s. 803.08(1) contains two alternatives for class certification: commonality or numerosity. If the provision is read literally, Wisconsin circuit court judges could properly certify a class based solely on a common or general interest or solely on numerosity. In practice, Wisconsin courts, like other courts interpreting the Field Code, ignore the plain language of the statute. Wisconsin courts have interpreted s. 803.08 as requiring both commonality and numerosity.[16] The courts reached this interpretation by concluding "the difference between the two seems entirely abstract and of little practical significance. The court always requires class members to have some common or general interest and to be

[15] WIS. STAT. § 803.08(1).
[16] *Mercury Records Prod., Inc. v. Econ. Consultants, Inc.*, 91 Wis.2d 482, 490, 283 N.W.2d 613 (Ct. App. 1979).

numerous."[17] Essentially, the text of the rule is ignored because that is how it has always been done.

2. Useful procedural requirements are missing from s. 803.08. The 1878 Revisers' Note to Wisconsin's class action rule states, "This section is not a very exact definition of the proceeding intended; but as the difficulty lies in the nature of the subject, it has seemed best to attempt no amendment, but to leave the requirements to be worked out by the courts as cases arise."[18] Over a century later, we find s. 803.08 still "left in vague language unamended."[19]

While the courts have attempted to plug some of the many holes in s. 803.08, after more than a century, any procedural guidance is still glaringly absent from the text of the rule. The plain language of s. 803.08 contains only two prerequisites to bringing a class action—commonality or numerosity. Through appellate case law, Wisconsin courts have been instructed to also consider additional prerequisites such as typicality [20] and adequacy of representation.[21] These are but a few of the important procedural requirements that are absent from the text of s. 803.08(1).

Typicality is important because it is essentially the class representative's individual claims that are decided by the jury or judge and the outcome is applied to the entire class. Therefore, the class members' and the class representative's common claims

[17] *Schlosser v. Allis-Chalmers Corp.*, 65 Wis. 2d 153, 169, 222 N.W.2d 156, 165 (1974).
[18] Notes to Revision, 1878, ch. 118, sec. 2604, p. 185.
[19] *Schlosser*, 65 Wis. 2d at 168.
[20] *Cruz v. All Saints Healthcare Sys., Inc.*, 2001 WI App 67, ¶ 16, 242 Wis. 2d 432, 445, 625 N.W.2d 344, 351 (the claims of the representative parties are typical of the class).
[21] *Id.* at ¶ 18 (court lists criteria for determining adequacy of representation).

should be based on the same legal theories of liability and arise from the same events or practices.

Adequacy of representation ensures that the representative's interests will not be in conflict with those of the class members. In other words, the representative must be a member of the class who is making the same claims based on the same facts and law, and the representative must have the same interest in a successful outcome.

More recently, the court of appeals observed, "Wisconsin's class action statute is too brief and vague to distinguish among the different types of class actions…"[22] By contrast, the federal rule recognizes several different types of class actions and a class must meet the requirements of one of them to be certified. Under Rule 23(b)(1) there are two types of classes. The first requires that separate actions "would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class."[23] The second type of class action is for actions that, if tried separately, 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."[24] Under Rule 23(b)(2), a class action may be maintained if the class seeks injunctive or declaratory relief where "the party opposing the class has acted or refused to act on grounds generally

[22] *Townsend v. Neenah Joint Sch. Dist.*, 2014 WI App 117, ¶ 16, 358 Wis. 2d 618, 629, 856 N.W.2d 644, 649.
[23] FED. R. CIV. P. 23(b)(1)(A).
[24] FED. R. CIV. P. 23(b)(1)(B).

applicable to the class..."[25] Finally, the United States Supreme Court has commented that the purpose of a 23(b)(3) class is to vindicate the rights of those claimants who, individually, would be unable to bring their claims against opponents in court.[26] These classes have two additional requirements to meet: predominance and superiority. That means the court must find that common class questions predominate over individual issues and that the class action is the superior device for adjudicating the claims.[27]

As far back as 1971, legal scholars have been critical of class action rules such as Wisconsin's. One such scholar wrote, "the amorphous Field Code rule serves no useful purpose; for it does not reflect the true state of the law and it provides no operational guidance for successful class management. The Field Code rule must give way to a statute better attuned to modern needs."[28]

3. There are few useful appellate opinions interpreting current s. 803.08. As the court of appeals observed nearly forty years ago, "there is no case or statutory law in Wisconsin governing the procedural aspects of class action suits ...."[29] The court went on to note, "There has been no real guidance given by our supreme court in the area of state procedural requirements for class actions." [30] Unfortunately, there has been no real procedural guidance from the supreme court in the many decades since that pronouncement.

---

[25] FED. R. CIV. P. 23(b)(2).
[26] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997).
[27] *Id.* at 615.
[28] Homburger, *supra* note 5 at 625.
[29] *Mercury Records Prods., Inc.*, at 490.
[30] *Id.* at 491.

However, the supreme court has suggested a source that might not be acceptable guidance: "…with respect to state class actions, interpretations of federal class action statutes are not necessarily controlling…"[31] With few appellate decisions, grossly inadequate rules, and a supreme court warning against relying on federal law, where are Wisconsin judges and litigants expected to turn for guidance on class action procedures?

C. Wisconsin Should Adopt a New Rule Based on Federal Rule 23.

1. Federal Rule 23 provides guidance for courts and litigants through detailed procedural rules for litigating class actions. For the case to proceed as a class action and bind absent class members, the court must certify the class on a motion from the party wishing to proceed on a class basis. For a class to be certified under federal Rule 23, the party seeking certification must meet the criteria set forth in the rule, including: (1) the class is so numerous that joinder of class members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the class representatives are typical of those of the class (typicality); and (4) the class representatives will fairly and adequately protect the interests of the class (adequacy).[32]

In addition to those four prerequisites, the party seeking certification must meet at least one of the requirements in Rule 23(b), namely: (a) separate adjudications will create a risk of decisions that are inconsistent with or dispositive of other class members' claims, (b) declaratory or injunctive relief is appropriate based on the defendant's acts

[31] *Browne v. Milwaukee Bd. of Sch. Directors*, 69 Wis. 2d 169, 183, 230 N.W.2d 704, 711 (1975).

[32] FED. R. CIV. P. 23(a).

with respect to the class generally, or (c) common questions predominate and a class action is superior to individual actions.[33]

The United States Supreme Court recently made it clear that plaintiffs must not merely plead the existence of the certification requirements, but must prove them.[34] As a result, district courts must perform a "rigorous" analysis to determine whether the Rule 23(a) prerequisites are satisfied prior to certifying a class.[35]

Not only do the amendments proposed in the accompanying petition fill many gaps in current Wisconsin law, but adopting a rule based on current federal Rule 23 opens up a large body of federal case law that can be very helpful in construing the new rules.

2. Detailed procedures are more likely to produce uniform results across the state. In the context of class actions, a court's decision on certification is often dispositive of the litigation.[36] A court's determination as to whether to certify a class action lawsuit in Wisconsin constitutes an exercise of discretion in which the court weighs the advantages of disposing of the entire controversy in one proceeding with the difficulties inherent in handling the proceeding as a single action.[37] To make this determination under current law, Wisconsin circuit court judges are forced to look

[33] FED. R. CIV. P. 23(b).
[34] *Wal-Mart Stores, Incorporated v. Dukes*, 131 S. Ct. 2541, 2551 (2011).
[35] *Id.* (citing *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)).
[36] *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167 (3d Cir. 2001) (observing that "irrespective of the merits, certification decisions may have a decisive effect on litigation"); Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 278 (2008) ("Arguably the most critical stage in a class action is the point at which the court decides whether to certify the class.")
[37] *O'Leary v. Bd. of Directors, Howard Young Med. Ctr., Inc.*, 89 Wis. 2d 156, 172, 278 N.W.2d 217, 223 (Ct. App. 1979).

beyond Wisconsin's "scant" case law and the plain language of the statute for guidance.[38] It is easy to see how this could result in circuit court judges using different standards in their interpretation and application of the statute.

In contrast, the certification requirements in federal Rule 23 are clearly defined. Further, there is a large body of case law interpreting Rule 23(a)'s certification requirements. If Wisconsin were to adopt a rule based on the federal model, the circuit courts would have a much wider, more refined body of precedent as guidance, and certification considerations would likely become more uniform.

3. Detailed procedures are likely to improve efficiency and reduced litigation costs. 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. Many important state-law cases can be brought in either state or federal court, and the absence of any meaningful class action law in the state courts may drive some of those cases to federal court, depriving the state courts of the practical opportunity to further develop state law.

Adopting a more detailed class-action process is especially important to provide guidance to Wisconsin circuit court judges. Most circuit court judges handle a diverse docket, tend to carry heavier caseloads than their federal counterparts, and do not have

[38] *See United Food & Commercial Workers Union v. Hormel Foods Corp.*, 2012 WL 910391, Jan. 13, 2012; *see also* Thomas D. Roe Jr., *State and Foreign Class-Action Rules and Statutes: Differences From- And Lessons From- Federal Rule 23*, 35 W. St. U. L. Rev 147, 149 (Fall 2007).

the same degree of support from law clerks and judicial assistants that federal judges do. Many circuit court judges come from practice backgrounds where they had little or no experience with class actions. Adopting a rule based on the federal model would particularly help circuit court judges who may be faced with a class action for the first time or who have not seen a class action in years.

In addition to aiding judges faced with certification decisions, by adopting the procedures found in federal Rule 23(c), circuit court judges also would have detailed guidance on the required contents of the certification order, the notice to class members, and the judgment.

The proposed new class action rule also provides clear statutory authority to bring or maintain a class action with respect to particular issues. This is important because in *Waters ex rel. Skow v. Pertzborn*, 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.[39] 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.[40]

The procedures found in federal Rule 23(d) provide clear and concise guidance on the circuit court's power to issue orders controlling the course of proceedings.[41] Rule 23(e) specifies the terms under which a class action may be settled, dismissed, or

[39] *Waters ex rel. Skow v. Pertzborn*, 243 Wis.2d 703 (2001).
[40] FED. R. CIV. P. 23(c)(4).
[41] FED. R. CIV. P. 23(d).

compromised.[42] Rule 23(f) provides for a permissive interlocutory appeal from a certification order, consistent with current Wisconsin appellate procedures.[43] Rule 23(g) requires that the court appoint class counsel whenever it certifies a class, and listed factors for a court to consider in deciding whom to appoint as class counsel.[44] It also provides for the appointment of interim class counsel during the period prior to class certification.[45] Rule 23(h) concerns the attorney's fee that may be awarded to counsel and the procedures that govern that determination.[46]

With the adoption of these detailed procedural rules, Wisconsin circuit court judges' questions of what jurisprudence is controlling will be clarified, resulting in an ability to render decisions more promptly and accurately. Clearly defined procedures are also likely to result in fewer appeals. All of these factors result in improved efficiency for the court system and reduced costs for the parties.

D. Procedures in Wis. Stat. § 426.110 Are Outdated and Should be Replaced.

Sec. 426.110 establishes procedures for class actions in the limited context of consumer transactions based on an earlier version of Rule 23 of the Federal Rules of Civil Procedure. Unfortunately, s. 426.110 has not been updated to keep pace with the amendments to the federal rule upon which it was based. Glaringly absent are the 2003

[42] FED. R. CIV. P. 23(e).
[43] FED. R. CIV. P. 23(f).
[44] FED. R. CIV. P. 23(g).
[45] FED. R. CIV. P. 23(g)(3).
[46] FED. R. CIV. P. 23(h).

amendments when the federal rule was substantially rewritten.[47] These amendments contain some of the most important changes to class action procedures in recent history, and they are included in the proposed new s. 803.08.

The changes proposed in this petition would repeal the procedural provisions in s. 426.110 (5) through (13) and replace them with the new provisions set forth in recreated s. 803.08 based on the most current federal rule. The advantages are two-fold.

First, all Wisconsin class actions would be conducted pursuant to the same procedural rules. This would encourage the development of a larger body of relevant Wisconsin case law and allow the court to look to the well-developed body of federal case law for guidance. It would also promote consistent results in all types of class action cases, as well as make it easier for judges and attorneys by providing a single set of procedural rules for all class action litigation. Conversely, if the current outdated procedures in s. 426.110 are retained, it may be questioned whether federal precedent can be used as guidance for Wisconsin courts. The more Wisconsin's rules are allowed to diverge from the federal model, the more the utility of federal precedent is diminished.

Second, class actions in the area of consumer transactions could take advantage of important aspects of the 2003 federal amendments, including timing of the class certification decision, the content of class notices, appointment of class counsel, and settlement approval procedures.

[47] *See generally* John K. Rabiej, *The Making of Class Action Rule 23*, 24 Miss. C. L. Rev. 323, 368-83 (2005) (describing history and background of 2003 amendments to federal Rule 23).

1. Sec. 426.110(7) does not adequately address timing of the class certification decision. The 2003 revisions to federal Rule 23 included a change to provide that a court should decide "[a]t an early practicable time" whether an action may proceed as a class action. Previously, the rule had stated that class certification should be decided "[a]s soon as practicable."[48]

The federal Advisory Committee notes explain that "[t]he 'as soon as practicable' exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision."[49] Under the old "as soon as practicable" language, some courts determined class certification on the pleadings alone, or used the language to prevent discovery into whether the prerequisites for certification under Rule 23(a) and (b) were satisfied.[50] The Advisory Committee notes that "[t]ime may be needed to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification process, discovery in aid of the certification decision often includes information required to identify the nature of the issue that actually will be presented at trial. In this sense, it is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis."[51] The United States Supreme Court adopted this reasoning in its recent important

[48] FED. R. CIV. P. 23(c)(1).
[49] FED. R. CIV. P. 23, Advisory Comm. Notes to 2003 Amendments.
[50] *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551; *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).
[51] FED. R. CIV. P. 23, Advisory Comm. Notes to 2003 Amendments.

class certification decisions in *Wal-Mart Stores, Inc. v. Dukes* and *Comcast Corp. v. Behrend*.[52]

The 2003 revisions also eliminated the language in Rule 23(c)(1) permitting "conditional" certification of a class action because "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met."[53]

The outdated "as soon as practicable" language is still found in s. 426.110(7). Sub. (7) also still permits "conditional" certification.[54] Sec. 426.110 is long overdue for a procedural update and should be replaced with the procedures in proposed s. 803.08.

2. Sec. 426.110(8) does not provide sufficient guidance on the contents of class notices. In fact, current sub. (8) says very little about the contents of a class notice.[55] Following the 2003 revisions, the federal rule sets forth a longer list of mandatory contents for a class notice, and requires that the notice "clearly and concisely" provide the requisite information "in plain, easily understood language."[56] These important procedural changes will be of great benefit to Wisconsin citizens who find themselves part of a class.

---

[52] *See Wal-Mart*, 131 S. Ct. at 2550-52 ("Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped."); *Comcast*, 133 S. Ct. at 1432 ("Repeatedly, we have emphasized that it 'may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,' and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" (quoting *Wal-Mart*, 131 S. Ct. at 2551-52)).

[53] FED. R. CIV. P. 23, Advisory Comm. Notes to 2003 Amendments.

[54] WIS. STAT. § 426.110(7).

[55] WIS. STAT. § 426.110(8).

[56] FED. R. CIV. P. 23(c)(2)(B).

3. Sec. 426.110 does not address appointment of class counsel. Wisconsin law is silent regarding the appointment of an attorney to represent the class. In contrast, a new subsection of Rule 23 was adopted in 2003 requiring that the court appoint class counsel when it certifies a class. The new provision also lists factors for the court to consider in deciding whom to appoint as class counsel. The new provision contains important considerations such as "counsel's experience in handling class actions," "counsel's knowledge of the applicable law," and "the resources counsel will commit to" the case.[57] This is another significant procedural change that will help protect the interests of parties involved in class action litigation if Wisconsin's class action provisions are updated.

4. Sec. 426.110 does not address settlement approval procedures. Wisconsin law is silent as to whether court approval is required for a settlement or dismissal in the pre-certification stage of a case, or for a settlement or dismissal that affected the named plaintiff only. The 2003 amendments to the federal rule plugged that gap in the rules by providing that court approval is required only when a settlement or dismissal would affect the claims of a "certified class."[58]

Wisconsin law does not provide any standards for the court to use in evaluating a settlement. The 2003 amendments to the federal rule provide a standard for a settlement to merit approval: The court must make a "finding that [the settlement] is fair, reasonable and adequate."[59] The updated rule also requires the court to conduct a hearing prior to

[57] FED. R. CIV. P. 23(g).
[58] FED. R. CIV. P. 23(e)
[59] *Id.*

making the finding.[60] The new rule encourages judges to scrutinize settlements more closely to protect class members' interests.

Sec. 426.110 was enacted by the Wisconsin Legislature, although subs. (5) through (13) regulate pleading, practice, and procedure in judicial proceedings.[61] Replacing the procedural provisions in s. 426.110 (5) through (13) with the new provisions set forth in recreated s. 803.08 does not abridge, enlarge, or modify the substantive rights of any litigant. It simply updates the current procedures and ensures more consistent results in class action litigation by establishing one set of procedural rules for all class actions. The recommended changes are intended to simplify and harmonize the procedural rules for class actions to promote the speedy determination of litigation and uniform results. Therefore, the Wisconsin Supreme Court has authority to adopt the recommended changes to s. 426.110.

CONCLUSION

Justice Oliver Wendell Holmes once reflected on the contemporary usefulness of ancient legal institutions:

> When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.[62]

With federal Rule 23 and its revisions, the federal Advisory Committee has provided new purpose and meaning to "a remedy known for centuries but enfeebled by

[60] *Id.*
[61] 1971 Assembly Bill 1057.
[62] Holmes, *supra* note 1, at 469.

inadequate statutory formulation and restrictive judicial interpretation."[63] With the proper procedural framework, class actions have proven to be a useful animal and it is a remedy that is here to stay. It is time for Wisconsin to "tame the dragon" and adopt a useful class action rule modeled on federal Rule 23. With the adoption of the proposed rule, the substantive standards for class certification would not change, but procedures in class actions would be meaningfully clarified and improved.

Dated March 16, 2017.

RESPECTFULLY SUBMITTED,

WISCONSIN JUDICIAL COUNCIL

_____

April M. Southwick, Attorney
WI State Bar #1070506
110 E. Main Street, Suite 822
Madison, Wisconsin 53703
(608) 261-8290
Facsimile: (608) 261-8289
april.southwick@wicourts.gov

[63] Homburger, *supra* note 5 at 610.

Appendix 1

Wisconsin Judicial Council
Class Action Rule Draft

This draft of proposed Wis. Stat. §803.08 contains strike-outs and underlining to indicate where the text of the proposed rule deviates from Rule 23 of the Federal Rules of Civil Procedure. As stated in the Note below, these changes were made to bring the rule more closely in line with Wisconsin statutory drafting standards and are not intended to change the substantive meaning of any provision.

This draft also indicates the proposed changes to Wis. Stat. § 426.110 and includes the text of the subsections that are recommended for repeal.

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.

~~**(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.**~~

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

(b) *For (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 ~~Rule 23(c)(2)~~ 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 fifty 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. ~~In appointing class counsel, the court~~:

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's fees and nontaxable costs.

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

d. Make further orders in connection with the appointment.

(b) *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.

(c) *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.

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

(13) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's 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 ~~under Rule 54(d)(2)~~, 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 ~~special master or a magistrate judge~~ 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.

426.110. Class actions; injunctions; declaratory relief

(1) Either the administrator, or any customer affected by a violation of chs. 421 to 427 and 429 or of the rules promulgated pursuant thereto or by a violation of the federal consumer credit protection act, or by conduct of a kind described in sub. (2), may bring a civil action on behalf of himself or herself and all persons similarly situated, for actual damages by reason of such conduct or violation, together with penalties as provided in sub. (14), reasonable attorney fees and other relief to which such persons are entitled under chs. 421 to 427 and 429. The customer filing the action must give prompt notice thereof to the administrator, who shall be permitted, upon application within 30 days, to join as a party plaintiff. For purposes of apportionment of cost, the administrator need not be a party to the action.

(2) Actions may be maintained under this section against any person who in making, soliciting or enforcing consumer credit transactions engages in any of the following kinds of conduct:

(a) Making or enforcing unconscionable terms or provisions of consumer credit transactions;

(b) False, misleading, deceptive, or unconscionable conduct in inducing customers to enter into consumer credit transactions; or

(c) False, misleading, deceptive, or unconscionable conduct in enforcing debts or security interests arising from consumer credit transactions.

(3) Notwithstanding this chapter, no class action may be maintained for conduct proscribed in sub. (2) or for a violation of s. 423.301, 424.501, 425.107, 426.108 or 427.104(1)(h) unless the conduct has been found to constitute a violation of chs. 421 to 427 and 429 at least 30 days prior to the occurrence of the conduct involved in the class action by an appellate court of this state or by a rule promulgated by the administrator as provided in ss. 426.104(1)(e) and 426.108 specifying with particularity the act or practice in question.

(4)(a) At least 30 days or more prior to the commencement of a class action for damages pursuant to the provisions of this section, any party must:

1. Notify the person against whom an alleged cause of action is asserted of the particular alleged claim or violation; and

2. Demand that such person correct, or otherwise remedy the basis for the alleged claim.

(b) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to such person at the place where the transaction occurred, such person's principal place of business within this state, or, if neither will effect actual notice, the department of financial institutions.

(c) Except as provided in par. (e), no action for damages may be maintained under this section if an appropriate remedy, which shall include actual damages and may include penalties, is given, or agreed to be given within a reasonable time, to such party within 30 days after receipt of such notice.

(d) Except as provided in par. (e), no action for damages may be maintained under this section upon a showing by a person against whom the alleged claim or violation is asserted that all of the following exist:

1. All customers similarly situated have been identified, or a reasonable effort to identify such other consumers has been made;

2. All customers so identified have been notified that upon their request such person shall make the appropriate remedy;

3. The remedy requested by such customers has been or in a reasonable time will be given; and

4. Such person has ceased from engaging, or if immediate cessation is impossible under the circumstances, such person will, within a reasonable time, cease to engage in any acts on which the alleged claim is based.

(e) An action for injunctive relief may be commenced without compliance with par. (a). Not less than 30 days after the commencement of an action for injunctive relief, and after compliance with par. (a) the customer may amend his or her complaint without leave of court to include a request for damages. The appropriate provisions of par. (c) or (d) shall be applicable if the complaint for injunctive relief is amended to request damages.

(4m) Actions commenced under this section are to be conducted pursuant to the procedures set for forth in s. 803.08.

~~(5) The court shall permit the suit to be maintained on behalf of all members of the represented class only if:~~

~~(a) The class is so numerous that joinder of all members, if permissible, would be impracticable;~~

~~(b) There are questions of law and fact common to the class;~~

~~(c) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class. This paragraph shall not apply if the administrator is a representative plaintiff;~~

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

~~(6) An action may be maintained as a class action if the prerequisites of sub. (5) are satisfied, and in addition:~~

~~(a) The prosecution of separate actions by or against individual members of the class would create a risk of:~~

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

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

~~(b) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or~~

~~(c) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:~~

~~1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;~~

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

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

~~4. The difficulties likely to be encountered in the management of a class action.~~

~~(7) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and may be altered or amended before the decision on the merits. If the court determines that the action may not be maintained as a class action, it shall allow the action to proceed on behalf of the parties appearing in the action.~~

~~(8) In any class action maintained under sub. (6)(c), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that:~~

~~(a) The court will exclude a class member from the class if the member so requests by a specified date;~~

~~(b) The judgment, whether favorable or not, will include all members who do not request exclusion; and~~

~~(c) Any member who does not request exclusion may, if the member desires, enter an appearance through the member's counsel.~~

~~(9) The judgment in an action maintained as a class action under sub. (6)(a) or (b), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under sub. (6)(c), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in sub. (8) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.~~

~~(10) When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class, and this section shall then be construed and applied accordingly.~~

~~(11) If the judgment is for a class of plaintiffs, the court shall render judgment in favor of the administrator and against the defendants for all costs of notice incurred by the administrator in such action.~~

~~(12) In the conduct of actions to which this section applies, the court may make appropriate orders, which may be altered or amended as may be desirable from time to time, for any of the following purposes:~~

~~(a) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument.~~

~~(b) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.~~

~~(c) Imposing conditions on the representative parties or on intervenors.~~

~~(d) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly.~~

~~(e) Dealing with procedural matters similar to those under pars. (a) to (d).~~

~~(13) A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.~~

(14) A merchant shall not be liable in a class action for specific penalties under s. 425.302(1)(a), 425.303(1), 425.304(1), 425.305(1) or 429.301(1) for which it would be liable in individual actions by reason of violations of chs. 421 to 427 and 429 or of conduct prescribed in sub. (2) unless it is shown by a preponderance of the evidence that the violation was a willful and knowing violation of chs. 421 to 427 and 429. No recovery in an action under this subsection may exceed $100,000.

(15) A plaintiff who prevails shall be awarded a reasonable attorney's fee. Notwithstanding s. 425.308(2), reasonable attorney's fees in a class action shall be determined by the value of the time reasonably expended by the attorney rather than by the amount of the recovery on behalf of the class. A legal aid society or legal services program which represents a class shall be awarded a reasonable service fee in lieu of reasonable attorney's fees, equal in amount to the amount of the attorney's fees as measured by this subsection.

(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).~~

Appendix 2

Judicial Council Evidence & Civil Procedure Committee
Wis. Stat. § 803.08, Class Actions,
Request for Comments -- Potentially Interested Parties
Approved July 18, 2016

Committee of Chief Judges
Attn: Marcia Vandercook
marcia.vandercook@wicourts.gov

Judicial Conference Legislative Committee
Attn: Nancy Rottier
nancy.rottier@wicourts.gov

Department of Justice
Attn: Brad Schimel, Attorney General
Schimelbd@doj.state.wi.us
Francis Sullivan, Consumer Protection Unit
sullivanfx@doj.state.wi.us

University of Wisconsin Law School
Consumer Law Clinic
Sarah Orr, Director
sarah.orr@wisc.edu

Marquette Law School
Attn: Dean Joseph Kearney
joseph.kearney@marquette.edu

Wisconsin State Bar
Litigation & Appellate Practice Sections
Attn: Lynne Davis
ldavis@wisbar.org
Local and Specialty Bar Organizations
kwenzel@wisbar.org

Wisconsin Association for Justice
Bryan Roessler, Executive Director
bryan@wisjustice.org

Wisconsin Defense Counsel
(formerly CTCW)
Jane Svinicki, Executive Director
jane@wdc-online.org

Association of Corporate Counsel- Wisconsin Chapter
Amy Westrup, ACC Wisconsin Executive Director
wisconsin-exec@accglobal.com

Wisconsin Medical Society
Mark Grapentine, Senior Vice President of Government Relations
mark.grapentine@wismed.org

Wisconsin Institute of Certified Public Accountants
Dennis Tomorsky
dennis@wicpa.org

Legal Aid Society
Pete Koneazny, Litigation Director
pkoneazny@lasmilwaukee.com

Legal Action of Wisconsin
David Pifer, Executive Director
law@legalaction.org

Department of Financial Institutions Secretary Lon Roberts
askthesecretary@dfi.wisconsin.gov

Wisconsin Department of Agriculture, Trade and Consumer Protection
John Petty, Administrator
john.petty@wisconsin.gov

Wisconsin Manufacturers & Commerce (WMC)
Scott Manley, Vice President of Government Relations
smanley@wmc.org

Wisconsin Better Business Bureau
Liz Fredrichs, Executive Vice President
lfredrichs@wisconsin.bbb.org

Appendix 3

Members of the Judicial Council Evidence & Civil Procedure Committee

Thomas L. Shriner, Jr., Chair
Foley & Lardner LLP

Thomas W. Bertz
Anderson, O'Brien, Bertz, Skrenes & Golla

Sherry D. Coley
Davis & Kuelthau SC

Hon. Michael R. Fitzpatrick
Rock County Circuit Court

William Gleisner
Law Offices of William C. Gleisner

Devon M. Lee
Office of the State Public Defender

Benjamin J. Pliskie
BP Peterman Law Group

Assist. Attorney General Ann Peacock
Department of Justice

Amy Wochos (Term expired 2016)
Milwaukee County Circuit Court

Assist. Attorney General Richard B. Moriarty (Term expired 2016)
Department of Justice