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WISCONSIN SUPREME COURT

APPEAL NO. 2009AP775

E-Z ROLL OFF, LLC,

Plaintiff-Appellant,

vs.

COUNTY OF ONEIDA,

Defendant-Respondent-Petitioner

APPEAL FROM THE ONEIDA COUNTY CIRCUIT COURT– THE HONORABLE PATRICK F. O'MELIA: CASE NO. 06CV124
ON REVIEW FROM THE DECISION OF THE COURT OF APPEALS, DISTRICT III

BRIEF OF DEFENDANT-RESPONDENT-PETITIONER COUNTY OF ONEIDA

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STATEMENT OF ISSUES

The following issues are presented for review:

1. Do the notice requirements mandated by Wis. Stat. § 893.80(1) and § 59.07 apply to Plaintiff-Respondent E-Z Roll Off LLC's[1] action for declaratory relief under Wis. Stat. § 133.03 and damages alleged under Wis. Stat. § 133.18?

Answered By The Trial Court: Yes.

Answered By The Court of Appeals: No.

2. Was the Notice of Injury timely?

Answered By the Trial Court: No.

Answered By The Court of Appeals: The Court of Appeals did not address this issue.

3. Did Oneida County have actual notice of the injury and was it prejudiced because it was not timely served with the Notice of Injury?

Answered By The Trial Court: Yes.

Answered By The Court of Appeals: The Court of Appeals did not address this issue.

4. Does the continuing violations doctrine apply to Wis. Stat. § 893.80(1)?

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[1] E-Z Roll Off LLC will be referred to as "E-Z".

Answered By The Trial Court: No.

Answered By The Court of Appeals: The Court of Appeals did not address this issue.

STATEMENT AS TO ORAL ARGUMENT

Oral argument is scheduled before this Court on February 2, 2011.

STATEMENT AS TO PUBLICATION

It is submitted that this opinion will create a need for publication because the issues have state-wide impact and will resolve inconsistent decisions on the application of Wis. Stat. § 893.80(1) to statutory causes of action and the scope of application of the test for exceptions to application of Wis. Stat. § 893.80(1).

STATEMENT OF THE CASE

The underlying action centers on an agreement executed on June 25, 2003 between Oneida County and Waste Management, Wisconsin, Inc. ("Waste

Management") concerning the delivery, collection, transfer, transport and disposal of municipal solid waste. (R.1, p.3; R.25, p.2, Ex.1 at p.3). E-Z claimed the agreement constituted unlawful restraint of trade. (R.25, p.2, Ex.1 at p.3).

The Oneida County Clerk was served with E-Z's "Notice of Injury" and "Statement of Claim" on September 28, 2005, over two years from the execution of the Waste Management agreement and several months after E-Z complained about the factual basis for this complaint to Oneida County. (R.24, p.2, Ex.3; R.7, p.2, Ex.A). On April 20, 2006, E-Z's complaint followed, in which E-Z demanded the following relief:

> A. For an Order declaring the Agreement described in paragraphs 3, 4 and 8 an illegal restraint of trade under Wis. Stat. § 133.03(1);
>
> B. For an award of compensatory damages for past and future loss of profits;
>
> C. For an award of treble damages pursuant to Wis. Stat. § 133.18;

> D. For an award of the costs and disbursements of this action and reasonable attorneys fees pursuant to Wis. Stat. §133.18;
>
> E. For such other and further relief as the court may deem just and equitable.

(R.I., p. 3).

E-Z did not specifically request an injunction or any other form of relief under Wis. Stat. § 133.16. (R.I, p. 3). E-Z did not request injunctive relief of any kind: E-Z Roll-Off requested a declaration as to the meaning of the contract and its legality as compared to the legal requirements of Wis. Stat. §133.03(1)[2], as well as compensatory and punitive damages, costs and attorneys fees under § 133.18. (R.I)

Oneida County moved for summary judgment pursuant to Wis. Stat. § 802.08, on the following grounds:

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[2] Sec. 133.03(1) provides: (1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal. Every person who makes any contract or engages in any combination or conspiracy in restraint of trade or commerce is guilty of a Class H felony, except that, notwithstanding the maximum fine specified in § 939.50(3)(h), the person may be fined not more than $100,000 if a corporation, or, if any other person, may be fined not more than $50,000.

1. Home rule exempted Oneida County from Chapter 133;

2. The complaint failed to state a claim for treble damages, costs and attorneys fees and those claims were time-barred; and

3. E-Z failed to comply with § 893.80(1) and § 59.07.

(Appx. 071-072).

On March 14, 2008, the trial court found that Oneida County was not exempt from antitrust laws, and that the request for treble damages, costs and attorneys fees failed to state a claim and was stricken. (Appx. 071-083). On December 11, 2008, the trial court dismissed the complaint, holding that E-Z was subject to the requirements of Wis. Stat. § 893.80(1) and failed to comply with those statutory requirements. (Appx. 084-100).

The Court of Appeals reversed. (Appx. 103-120). The Court held that antitrust claims brought under Chapter 133 were exempt from the notice provisions of § 893.80(1) under the three factor test adopted in *Town of Burke v. City of Madison,* 225

Wis. 2d 615, 625, 593 N.W.2d 822 (Ct. App. 1999). (Appx. 103-120).

In doing so, the Court was required to expressly state that *DNR v. City of Waukesha,* 184 Wis. 2d 178, 515 N.W.2d 888 (1994) had been abrogated by this court as to statutory claims:

> In *State ex rel. Auchinleck v. Town of LaGrange,* 200 Wis. 2d 585, 596, 547 N.W.2d 587 (1996), the court also observed: "Further, Wis. Stat. § 893.80(5) expressly states that specific rights and remedies provided by other statutes take precedence over the provisions of § 893.80." This effectively overruled the court's prior holding in *DNR v. City of Waukesha,* 184 Wis. 2d 178, 191-93, 515 N.W.2d 888 (1994), where the court had concluded subsec. (5) only applied to subsec. (3)'s damage caps, not subsec. (l)'s notice provisions.

Id. at 192. (Appx. 112).

Oneida County's petition for review followed.

STATEMENT OF FACTS

E-Z was "in the solid waste hauling business." (R.24, p 1, Ex.1). Oneida County is a municipal body organized and existing under the laws of the State of Wisconsin. (R.l, p 3). The underlying action and

appeal centers on E-Z's issues with an agreement between Oneida County and Waste Management, Wisconsin, Inc. executed on June 25, 2003, concerning the delivery, collection, transfer, transport and disposal of municipal solid waste. (R.l, p.3; R.25, p.2, Ex.1 at p.3).

Under the agreement, Oneida County was to receive a $5.25 "tipping fee" (the fee charged for loading compacted waste) for each ton of municipal solid waste that Waste Management delivered to the Oneida County Solid Waste Facility transfer station. (R.25, p.2, Ex.1 at 1-12). Waste Management was required to transfer municipal solid waste from the transfer station to another landfill, and was paid $24.50 per ton for solid waste loaded by Oneida County onto Waste Management trucks. (R.25, p. 2, Ex.1 at ¶9).

When the agreement was executed, Oneida County had established a charge of $54.00 for each ton of municipal solid waste that other haulers, including E-Z, delivered to the Oneida County Solid Waste Facility. (R.25, p.2, Ex.1 at 19). Other haulers could also qualify for a $10 a ton credit rebate if they delivered at least 100 tons of solid waste a year to the Facility. (R.25, p.3).

Before the execution of the Waste Management agreement, Oneida County publicly informed E-Z and other haulers of the change in tipping fees related to the transport and disposal of municipal solid waste. (R.25, p.3, Ex.2). In early April, 2003, notice for request for proposals concerning the trucking and the reduced tipping fee was published in the Rhinelander Daily News. (R.25, p.3, Ex.2). The "Oneida County MSW (Municipal Solid Waste) Service and Equipment Purchase Request for Proposals" was

issued and made available by Oneida County to interested haulers at the time of publication. (R.25, p.3, Ex.3).

E-Z principals Todd and Paula Laddusire provided conflicting testimony on their receipt of notice: Todd Laddusire acknowledged seeing the public notice and a proposal, but claims not to have been aware of the tipping fee; Paula Laddusire claimed she was unaware of the public notice or any proposal. (R.6, p.4; R.24, p.2, Ex.2, p.4, p.5, p.7, p.10).

Oneida County Solid Waste Director Bart Sexton convened two meetings in the April-June, 2003 time period to advise interested haulers of the proposed disposal and tipping fee changes. (R.25, p.3). The two meetings addressed the Request for Proposals and the subsequent Request for Bids ("Oneida County MSW Services and Request for Bids, June 4, 2003"), and both proposals incorporated the

ten year term of the proposed agreement and the $5.25 a ton tipping fee. (R.25, p.3, Ex.3, Ex.4).

Todd Laddusire had attended both meetings and was informed of the transport and trucking arrangements, the lower tipping fee, and other terms of the agreement outlined in the Request for Proposals and the Request for Bids. (R.25, pp.3-4; R.24, p.2, Ex.2, p.6, p.9). He expressed no opposition to the terms of the agreement. (R.24, p.4).

In late June, 2003, Oneida County haulers, including E-Z, were informed that Waste Management had been awarded the agreement. (R.25, p.4, Ex. 5). In February, 2004, approximately 10 months after publication and meetings with haulers, Todd and Paula Laddusire requested a meeting with Sexton to address their concerns regarding the reduced tipping fee charged Waste Management. (R.24, p.2, Ex.2, p.9; R.25, p.4). The

Laddusires claimed that they had just discovered that tipping fees for E-Z were higher than those charged Waste Management. (R.24, p.2, Ex.2, p.9).

A meeting involving Sexton and the Laddusires was held at Sexton's office on February 17, 2004. (R.25, pp.4-5). During the meeting the Laddusires stated that the agreement created "a monopoly," or words to that effect; they also demanded that Oneida County reduce E-Z's tipping fee to $24.50 a ton. (R.25, pp. 4-5; R.24. p.2, Ex.2, pp.9-11). Sexton disagreed and advised that he was unable to reduce the tipping fee. (R.25, p.5).

On May 8, 2004, Sexton received a complaint E-Z filed with the Wisconsin Department of Agriculture, Trade and Consumer Protection ("DATCP"). The Complaint stated in pertinent part:

> Describe your complaint in detail. Oneida County Landfill is a state agency and they are in direct competition with our small business. The second part of the complaint is that they signed a 10 year contract (a monopoly) with Waste

> Management. We are charged $54 per ton to dump our waste from Oneida County Landfill. Waste Management only pays $5.25 to dump their waste from Oneida County. It is my understanding that this is illegal according to other county landfills and our attorney who reference 2 federal laws and 2 state laws. Also under this contract Oneida Cty Landfill pays Waste Management 24.50 per ton to transfer the garbage from the land fill to Waste Management's dump, which at a minimum over 10 years Oneida County would lose 2 million dollars. This Contract is so lucrative for Waste Management, that they "paid" to get it! They pay Oneida County Landfill 200,000/year under the table I believe that would be Racketering (sic)!!
>
> How do you feel your complaint should be resolved? (please be specific) I believe that we should be reimbursed the amount we paid over 5.25/ton since Wastemanagement (sic) was paying this which is about 98,000. I also (sic) this the monolopy (sic) should be broken and Criminal charges filed against all parties involved. We have witnesses to money paid outside of the contract.

(R.25, p.5, Ex.7).

Sexton responded to the complaint through correspondence dated May 20, 2005 sent to the DATCP and to the Laddusires. (R.25, pp.5-6, Ex.8). Sexton's response referenced the public notification concerning the proposed agreement, the two meetings attended by Todd Laddusire, disposal alternatives,

tipping charges and billing claimed. (R.25, p.6, Ex.8). The Laddusires did not contest the facts set forth in this correspondence. (R.25, p.6).

On September 28, 2005, well beyond 120 days after notice of the Waste Management agreement, the execution of that agreement, the meeting with Sexton, and even the filing of the DATCP complaint, E-Z served what E-Z termed its "Notice of Injury" and "Statement of Claim" on the Oneida County Clerk of Courts. (R.24, p.2, Ex.3; R. 7, p.2, Ex. A). The "Notice of Injury" addressed the difference in tipping fees and alleged discriminatory rights for recyclables. (R.24, p.2, Ex.3; R.7, p.2, Ex. A). The "Statement of Claim" sought compensation "...from some period proceeding July 30, 2003 to the present" of $239,814.69 for "Loss of Past Earnings," and $959,285.76 for "Future Loss of Earnings to July 20, 2013." (R.24, p.2, Ex.3; R.7, p.2, Ex. A).

ARGUMENT

I. Standard Of Review.

Summary: The standard of review is *de novo.*

This Court applies the same standards as those used by the circuit court, which are set forth in Wis. Stat. § 802.08. *Noffke v. Bakke,* 2009 WI 10, ¶ 9, 315 Wis.2d 350, 760 N.W.2d 156. A circuit court evaluates a motion for summary judgment using a two-part methodology. *Green Spring Farms v. Kersten,* 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). A circuit court must first "examine the pleadings to determine whether a claim for relief has been stated" by the moving party and then ascertain whether any material facts are disputed. *Id.* If a claim for relief has been stated and no material facts are disputed, then summary judgment will be granted. *Id.*

"'Whether the circuit court properly granted summary judgment is a question of law that this

court reviews de novo.'" *Hocking v. City of Dodgeville,* 2009 WI 70, ¶ 7, 318 Wis. 2d 681, 768 N.W.2d 552 (quoting *Schmidt v. N. States Power Co.,* 2007 WI 136, ¶ 24, 305 Wis. 2d 538, 742 N.W.2d 294).

A question of statutory interpretation is a question of law which this court reviews *de novo. See Lake City Corp. v. City of Mequon,* 207 Wis. 2d 155, 162-63, 558 N.W.2d 100 (1997). The goal of statutory interpretation is to ascertain the legislature's intent. *See Stockbridge School Dist. v. DPI,* 202 Wis.2 d 214, 219, 550 N.W.2d 96 (1996). The main source for statutory interpretation is the plain language of the statute itself. *See Jungbluth v. Hometown, Inc.,* 201 Wis. 2d 320, 327, 548 N.W.2d 519 (1996). If the plain language is clear, courts may not look beyond the language of the statute to ascertain its meaning. *See Lake City Corp.,* 207 Wis. 2d at 164.

II. Wis. Stat. § 893.80(1) And § 59.07 Apply To Complaints For Declaratory Relief Under Wis. Stat. § 103.03 And Damages Asserted Under Wis. Stat. § 133.18.

Summary: Wisconsin Statute § 893.80(1) and § 59.07 apply to complaints for declaratory relief under Wis. Stat. § 103.03 and damages asserted under Wis. Stat. § 133.18.

A. The Requirements of Wis. Stat. § 893.80(1) Apply To Claims For Declaratory Relief And Damages.

Wisconsin Stat. § 893.80(1) sets forth two prerequisites to bringing an action against a governmental body such as Oneida County, a notice of circumstances, § 893.80(l)(a), and a claim, § 893.80(l)(b). The notice of circumstances must be given "[w]ithin 120 days after the happening of the event giving rise to the claim," and must supply "written notice of the circumstances of the claim." Wis. Stat. § 893.80(l)(a). The claim, on the other hand, is to contain the claimant's address and "an itemized statement of the relief sought," and no

action may be brought until the claim has been disallowed. Wis. Stat. § 893.80(l)(b); *Vanstone v. Town of Delafield,* 191 Wis. 2d 586, 593, 530 N.W.2d 16 (Ct. App. 1995); *see also Thorp v. Town of Lebanon,* 2000 WI 60, ¶ 28, 235 Wis. 2d 610, 612 N.W.2d 59.

These notice provisions apply generally to all actions, not just those in tort or those for money damages, unless it is not possible to adequately utilize a statutory remedy and require notice at the same time. *Waukesha*, 184 Wis. 2d at 191; *State ex rel. Auchinleck v. Town of La Grange*, 200 Wis.2d 585, 547 N.W.2d 587 (1996). Requests for declaratory judgment are subject to Wis. Stat. § 893.80(1). *Ecker Bros. v. Calumet County*, 2009 WI App 112, ¶ 5, 321 Wis. 2d 51, 772 N.W.2d 240. Requests for money damages are also subject to Wis. Stat. § 893.80(1). *Waukesha*, 184 Wis. 2d at 191.

B. The Court of Appeals Incorrectly Abrogated Waukesha In Holding That Wis. Stat. § 893.80(1) Does Not Apply To Statutory Claims.

A critical flaw in the Court of Appeals decision allowed for an extraordinarily loose application of the criteria required for creation of an exception: the Court of Appeals incorrectly held that the *Waukesha* case was abrogated as to statutory claims.

The court held, in a footnote, that § 893.80(1) did not apply to any claims created by statute by virtue of language in *Auchinleck* interpreting Wis. Stat. § 893.80(5)[3]. The Court of Appeals held: "In [*Auchinleck*], the court also observed: "Further, Wis.

[3] Wis. Stat. § 893.80(5) provides:

(5) Except as provided in this subsection, the provisions and limitations of this section shall be exclusive and shall apply to all claims against a volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency or against any officer, official, agent or employee thereof for acts done in an official capacity or the course of his or her agency or employment. When rights or remedies are provided by any other statute against any political corporation, governmental subdivision or agency or any officer, official, agent or employee thereof for injury, damage or death, such statute shall apply and the limitations in sub. (3) shall be inapplicable.

Stat. § 893.80(5) expressly states that specific rights and remedies provided by other statutes take precedence over the provisions of § 893.80." This effectively overruled the court's prior holding in [*Waukesha*] where the court had concluded subsec. (5) only applied to subsec. (3)'s damage caps, not subsec. (1)'s notice provisions. *Id.* at 192, 515 N.W.2d 888." *E-Z Roll Off, LLC v. County of Oneida*, 2010 Wis. App. 76, 325 Wis. 2d 423, n. 5, 785 N.W.2d 645 (Ct. App. 2010).

The Court of Appeals failed to recognize, however, that this Court had already expressly rejected this holding in *Waukesha.* The *Waukesha* court was required to address the identical argument – whether Wis. Stat. § 893.80(5) precluded the application of notice requirements under Wis. Stat. § 893.80(1) as well as the damage cap provision under Wis. Stat. § 893.80(3). *Waukesha,* 184 Wis. 2d at 192-

193. This Court held that the "plain meaning" of Wis. Stat. § 893.80(5) did not justify such a holding: "The state next argues that sec. 893.80(5), Stats., renders the notice provisions of sec. 893.80(1) inapplicable to this cause of action. . . . The state asks this court to interpret this language to mean that when a claim is based on another statute-sec. 144.99, for example, in this case-that statute controls and all requirements of sec. 893.80 are inapplicable. This interpretation ignores the plain meaning of the statute. Clearly, sec. 893.80(5), Stats., only directs that when a claim is based on another statute, the damage limitations of sec. 893.80(3) do not apply. Section 893.80(5) does not say that the notice provisions of sec. 893.80(1) do not apply." *Waukesha,* 184 Wis. 2d at 192-193.

This Court's interpretation of the scope of Wis. Stat. § 893.80(5) in *Waukesha* remains binding. "It is

deemed the doctrine of the cases is that when an appellate court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is . . . a judicial act of the court which it will thereafter recognize as a binding decision." *Zarder v. Humana Insurance Company*, 2010 WI 35, ¶ 61, 321 Wis. 2d 51, 772 N.W.2d 240.

Nothing this Court said in *Auchinleck* altered *Waukesha*'s holding on this issue. In *Waukesha,* this Court set forth two relevant holdings:

> 1. "The language of [§ 893.80(1)] clearly and unambiguously makes the notice of claim requirements applicable to all actions. The legislature's decision to remove the language limiting the statute to tort claims reinforces this conclusion. Thus, we now hold that sec. 893.80 applies to all causes of action, not just those in tort and not just those for money damages."
>
> b. When a claim is based on another statute, the damage limitations of § 893.80(3) do not apply, but the notice provisions of § 893.80(1) are still applicable.

Waukesha, 184 Wis. 2d at 191-192.

In *City of Racine v. Waste Facility Siting Bd.,* 216 Wis. 2d 616, 575 N.W.2d 712 (1998), this Court discussed the *Auchinleck* court's observations as to the *Waukesha* holding, and rejected the contention that *Auchinleck* abrogated *Waukesha in toto,* stating: "The dissent asserts at page that after this court's holding in [*Waukesha*], we held that that opinion was too broadly written. No such language appears in [*Auchinleck*]*).* In *Auchinleck* this court did say that the holding of *Waukesha.* was too broad but only "to the extent it is interpreted as applying to open records and open meetings actions...." 200 Wis. 2d at 597. *The holding of Auchinleck narrowly applies to the statutes at issue in that case*." *City of Racine,* 216 Wis. 2d at n. 3 (emphasis supplied)

The Court of Appeals' holding is therefore in direct contradiction with *Waukesha*and is inconsistent with the principles of statutory

construction. As the *Waukesha* court recognized, statutory claims described in the "plain language" of Wis. Stat. § 893.80(5) are not exempt from the notice requirements of Wis. Stat. § 893.80(1) because the legislature did not so state. See *C. Coakley Relocation v. Milwaukee*, 2008 WI 68, n. 10, 310 Wis. 2d 456, 750 N.W.2d 900; see also *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 39, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted), asserting that "[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); 2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes and Statutory Construction (7th ed. 2007) (§ 46.3, "Expressed intent," stating "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will"; § 46.6, "Each word given

effect," stating "it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose"; § 47.23, "*Expressio unius est exclusio alterius*," stating "where a form of conduct, . . . there is an inference that all omissions should be understood as exclusions"; § 47.38, "Insertion of words," stating "[i]n construing a statute, it is always safer not to add to or subtract from the language of a statute unless imperatively required to make it a rational statute") (internal punctuation and footnotes omitted). Wis. Stat. § 893.80(5) unambiguously makes inapplicable the damages cap incorporated in Wis. Stat. § 893.80(3), but makes no mention of relief from the notice provisions of Wis. Stat. § 893.80(1). The Court of Appeals erred in adding this statutory subsection to the language of Wis. Stat. § 893.80(5).

C. The Court Of Appeals Incorrectly Read A Claim Under Wis. Stat. § 133.16 Into The Complaint That E-Z Admits It Was Not Alleged.

The Court of Appeals did not accurately apply the three factor test required to exempt a statutory claimant from Wis. Stat. § 893.80(1). In fact, the court identified the wrong statutory remedy to be analyzed, and applied the test as if exceptions were the rule.

The Court of Appeals extensively analyzed Wis. Stat. § 133.16[4], wrongly finding that provision to be the "primary focus." *E-Z* Rolloff, 2010 WI App. 76, ¶ _____. Wis. Stat. § 133.16 governs proceedings for injunctive relief under Chapter 133. However, E-Z

[4] Wis. Stat. § 133.16 provides in relevant part:

Any circuit court may prevent or restrain, by injunction or otherwise, any violation of this chapter. The department of justice, any district attorney or any person by complaint may institute actions or proceedings to prevent or restrain a violation of this chapter, setting forth the cause and grounds for the intervention of the court and praying that such violation, whether intended or continuing be enjoined or prohibited. . .

has all along conceded that it did not seek an injunction under § 133.16. (R.l). Rather, E-Z brought a civil action for money damages under § 133.18[5]: E-Z demanded the following relief:

> A. For an Order declaring the Agreement described in paragraphs 3, 4 and 8 an illegal restraint of trade under Wis. Stat. § 133.03(1);
>
> B. For an award of compensatory damages for past and future loss of profits;

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[5] Wis. Stat. § 133.18 provides in relevant part:

(1) (a) Except as provided under par. (b), any person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue therefor and shall recover threefold the damages sustained by the person and the cost of the suit, including reasonable attorney fees. Any recovery of treble damages shall, after trebling, be reduced by any payments actually recovered under s. 133.14 for the same injury.

(2) A civil action for damages or recovery of payments under this chapter is barred unless commenced within 6 years after the cause of action accrued. When, in a civil class action, a class or subclass is decertified or a class or subclass certification is denied, the statute of limitations provided in this section is tolled as to those persons alleged to be members of the class or subclass for the period from the filing of the complaint first alleging the class or subclass until the decertification or denial.

(3) Whenever any civil or criminal action or proceeding is instituted by the state under this chapter, the running of the statute of limitations in respect of every other right of action based in whole or in part on any matter complained of in the state's action or proceeding shall be suspended during the pendency thereof and for one year thereafter. The pendency of any such action or proceeding instituted by the state shall not be grounds for staying any other action or discovery in such other action.

(4) A cause of action arising under this chapter does not accrue until the discovery, by the aggrieved person, of the facts constituting the cause of action.

(5) Each civil action under this chapter and each motion or other proceeding in such action shall be expedited in every way and shall be heard at the earliest practicable date.

(6) In a civil action against a person or entity specified in s. 893.80, the amount recovered may not exceed the amount specified in s. 893.80(3).

> C. For an award of treble damages pursuant to Wis. Stat. § 133.18;
>
> D. For an award of the costs and disbursements of this action and reasonable attorneys fees pursuant to Wis. Stat. §133.18;
>
> E. For such other and further relief as the court may deem just and equitable.

(R.I., p. 3).

E-Z expressly stated that E-Z had not sought injunctive relief in this action in its brief submitted to the Court of Appeals. (*See* E-Z Ct. App. Brief, p. 13). E-Z criticized the district court's interpretation of the law as applicable to injunctions, and then acknowledged that "*there was no application for injunction in this case* . . ." (See E-Z Ct. App. Brief, p. 13)(emphasis supplied). In short, the Court of Appeals analyzed a cause of action to the complaint that even E-Z admits it never alleged.

However, the Court of Appeals applied the three factor test to the whole of Chapter 133 as if invocation of a right to money damages under Wis.

Stat. § 133.18(8) automatically implied that injunctive relief under Wis. Stat. § 133.18(6) was also being sought. The Court of Appeals erred in reading into the complaint a statutory claim that E-Z made clear it did not make. Oneida County has a right to notice of the claims being made against it in order to adequately defend against the claims. *See Midway Motor Lodge of Brookfield v. Hartford Ins. Group*, 226 Wis. 2d 23, 35, 593 N.W.2d 852 (Ct.App. 1999) ("[T]he complaint must give the defendant fair notice of not only the plaintiff's claim but the grounds upon which it rests as well." (internal quotations omitted)).

D. The Test Allowing For An Exception To Wis. Stat. § 893.80 Is Not Met.

In *Town of Burke*, 225 Wis. 2d at 625, the Court of Appeals identified three factors relevant to whether an action is exempt from the notice of claims statute. *Ecker Bros.*, 2009 WI App 112, ¶ 6. The factors require the court to examine whether:

(1) "there is a specific statutory scheme for which the plaintiff seeks exemption"; (2) "enforcement of Wis. Stat. § 893.80(1) would hinder a legislative preference for a prompt resolution of the type of claim under consideration"; and (3) "the purposes for which § 893.80(1) was enacted would be furthered by requiring that a notice of claim be filed." *Town of Burke*, 225 Wis. 2d at 625 (footnotes omitted).

This test arose from cases such as *Auchinleck,* in which this Court recognized that an exception had to be made to the notice requirements of Wis. Stat. § 893.80(1) for claims under the open records and open meetings law based upon what would become the critical base test for exceptions:

> 1. Wis. Stat. § 893.80(1) was inconsistent on its face with the open records and open meetings laws because both expressly declared their policy to be ensuring public access to the affairs of government "as soon as practicable and without delay", and a 120 day delay would frustrate the purposes of the law by allowing for possible elimination of information from public debate; and

> 2. The enforcement provisions of the open records and open meetings laws expressly required allowance for "immediate" relief;
>
> 3. Other conflicts precluded exercise of statutory remedies and concurrent compliance with § 893.80(1): Wisconsin Stat. § 19.35(l)(i) provides that a person may file an open records request anonymously, while § 893.80(l)(b) requires disclosure of the claimant's identity and address. Wisconsin Stat. § 893.80(2) imposes costs on a claimant who fails to recover as much as the municipality's pre-suit offer, yet Wis. Stat. §§19.37(2) and 19.97(4) permit prevailing claimants costs and fees irrespective of a municipality's pre-suit determination.

Auchinleck, 200 Wis.2d at 593-594.

The factors outlined in the foregoing cases do not support an exception for claims for money damages alleged under Wis. Stat. § 133.18. First, Wis. Stat. § 893.80(1) and Wis. Stat. § 133.18 are not inconsistent on their face. Wis. Stat. § 133.18 provides for a six year statute of limitations and accrual does not commence until discovery of the injury. Requiring the 120 day notice period in no way conflicts with the time frames within which a

plaintiff might seek relief. In fact, the discovery In fact, the statute of limitations and accrual rule are no different or more specific procedurally from most actions based on common law.

In applying the first factor of the three factor test, this Court has generally required enforcement schemes to be sufficiently specific and demonstrably inconsistent with the requirements of Wis. Stat. § 893.80(1), allowing for or requiring filing of actions under statutory provisions more specific than those provided by common law, and generally shorter than the 120-day notice period contained in Wis. Stat. § 893.80(1). *City of Racine,* 216 Wis.2d 616, ¶ 17-18.

The Court of Appeals departed from this Court's authority by diluting the specificity requirement to the point where it has been rendered meaningless. The Court of Appeals held that "'specific' merely recognizes that the *enforcement* of a

claim must be explicitly provided for by statute to qualify for an exception to Wis. Stat. § 893.80(1)." *E-Z Rolloff,* 325 Wis. 2d 423, ¶ 25 (emphasis in original). The Court of Appeals here again attempts to circumvent *Waukesha* by interpreting this factor to apply to every cause of action allowed for by statute regardless of whether procedurally inconsistent with the legislative intent of Wis. Stat. § 893.80(1).

This Court has taken more care to carve out exceptions to Wis. Stat. § 893.80(1). As this Court recognized, "as noted in *Waukesha*, ch. 285, Laws of 1977 changed the statutory language of Wis. Stat. § 895.43 (now Wis. Stat. § 893.80(1)) from "no action founded on tort" may be brought, to "no action" may be brought against a governmental entity without prior notice. It is clear from the plain language, especially as bolstered by the legislative history, that the legislature intended that § 893.80(1)(b) apply to

"all causes of action, not just those in tort and not just those for money damages." *Waukesha*, 184 Wis. 2d at 191." *City of Racine*, 216 Wis. 2d 616, ¶ 14. This Court rejected an attempt to carve out an exception to a claim without a specific statutory conflict:

> RATE asserts that the rationale used in *Auchinleck* to carve out an exception to compliance with Wis. Stat. § 893.80(1) for open meetings and open records laws applies to this case and many other similar situations. The court of appeals, in *Little Sissabagama v. Town of Edgewater*, 208 Wis. 2d 259, 559 N.W.2d 914 (Ct.App. 1997), found an exception to application of § 893.80(1)(b) because the general notice requirements of § 893.80(1)(b) conflicted with the specific appeals procedure in Wis. Stat. § 70.47(13) (reprinted below) for challenging a county's denial of a request for property tax-exempt status. *See* 208 Wis. 2d at 265-266. In both *Auchinleck* and *Little Sissabagama* specific enforcement provisions of the statutes compelled the creation of exceptions to the general notice requirements of § 893.80(1)(b).
>
> RATE has not pointed to specific statutory provisions which would justify carving out yet another exception to Wis. Stat. § 893.80(1)(b) in this case. In fact, RATE states that there is no specific statutory enforcement scheme for alleged violations of Wis. Stat. § 144.445. RATE does point to several specific statutes that include specific enforcement provisions that require filing a claim against a municipality within a time frame shorter than allowed by §

> 893.80(1)(b). However, these statutes are not at issue in this case. Because there are no specific enforcement procedures inconsistent with § 893.80(1)(b) in this case, the notice requirements of § 893.80(1)(b) must apply.

City of Racine, 216 Wis. 2d 616, ¶ 17-18.

Moreover, rather than specifying inconsistent procedures, the legislature chose to apply Wis. Stat. § 893.80 to claims brought under Wis. Stat. § 133.18 by expressly reincorporating Wis. Stat. § 893.80 by reference in Wis. Stat. § 133.18(6). Wis. Stat. § 133.18(6) provides:

> (6) In a civil action against a person or entity specified in s. 893.80, the amount recovered may not exceed the amount specified in s. 893.80(3).

The legislature chose to apply the Wis. Stat. § 893.80(3) damage cap to Wis. Stat. § 133.18 claims but did not expressly exempt these claims from Wis. Stat. § 893.80(1) alone dictates the conclusion that the legislature intended Wis. Stat. § 893.80(1) to apply. *Perra v. Menomonee Mut. Ins. Co.*, 2000 WI App 215, ¶ 12, 239 Wis. 2d 26, 619 N.W.2d 123

("[T]he enumeration of specific alternatives in a statute is evidence of legislative intent that any alternative not specifically enumerated is to be excluded.")

The Court of Appeals found that Wis. Stat. § 133.18(4) dictated in favor of a legislative preference for a prompt resolution of this type of claim. Wis. Stat. § 133.18(4) provides in relevant part:

> A cause of action arising under this chapter does not accrue until the discovery, by the aggrieved person, of the facts constituting the cause of action.

The Court of Appeals accepted that the "event" triggering the 120 notice period was the creation of the contract, and that "a claim might be extinguished before discovery of the facts underlying it by the application of Wis. Stat. § 893.80(1)(a) ."

The Court of Appeals incorrectly applied the accrual rule in defining the "event" relevant to the

application of Wis. Stat. § 893.80(1). "A cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it." *Beaudette v. Eau Claire Cty.*, 2003 WI App 153, ¶ 19, 265 Wis. 2d 744, 668 N.W.2d 133, quoting *Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d 212, 223, 601 N.W.2d 627 (1999). The *Beaudette* court equated "the happening of the event" triggering the 120 day notice period to the date for accrual of the claim. *Beaudette*, 2003 WI App 153, ¶ 19.

In *Colby v. Columbia County*, 202 Wis. 2d 342, 357, 550 N.W.2d 124 (1996), this Court held that the interplay between a tolling statute, Wis. Stat. § 893.23 and Wis. Stat. § 893.80, in effect, created an accrual date and commencement of the statute of limitations allowing for suit as the period equal to the

number of years specified in the limitations period and an additional 120 days to file under § 893.80. Since the discovery rule is expressly applied to the limitations period (six years plus 120 days from discovery of the event) by virtue of Wis. Stat. § 133.18(4), the accrual date is the discovery date, and it is therefore literally impossible for a claim under Wis. Stat. § 133.18 to be extinguished by application of Wis. Stat. § 893.80(1).

The Court of Appeals also found that Wis. Stat. § 133.18(5) was indicative of a legislative preference for a prompt resolution of this type of claim. Wis. Stat. § 133.18(5) provides in relevant part:

> (5) Each civil action under this chapter and each motion or other proceeding in such action shall be expedited in every way and shall be heard at the earliest practicable date.

A provision for an expedited process, absent some inconsistent procedural rule, is insufficient as a matter of law to justify carving out yet another

exception to Wis. Stat. § 893.80(1). *See City of Racine*, 216 Wis. 2d 616, ¶ 17-18. Analysis of the authorities on which the Court of Appeals makes clear that the court was persuaded primarily by cases in which injunctive relief was the principle remedy, the filing deadlines or procedures were directly inconsistent with the 120 day notice requirement, limitations periods were sufficiently short to demonstrate legislative intent for immediate relief, or the action was an appeal rather than an original action. *See Gillen v. City of Neenah,* 219 Wis. 2d 806, 580 N.W.2d 628 (1998) (public trust cases involving requests for injunctions); *Citizen's v. Oak*, 2007 WI App 196, 304 Wis. 2d 702, 738 N.W.2d 168 (30 day deadline to enact ordinance); *Town of Burke v. City of Madison*, 225 Wis.2d 615, 593 N.W.2d 822 (Ct. App. 1999); (90 day deadline for actions under Wis. Stat. § 66.021 "objecting to a city's annexation of a town's

land"); *Gamroth v. Village of Jackson*, 215 Wis. 2d 251, 259, 571 N.W.2d 917 (Ct. App. 1997) (90 day deadline to appeal special assessments); *Little Sissabagama*, *supra*; *Lake v. Town of Edgewater*, 208 Wis. 2d 259, 265, 559 N.W.2d 914 (Ct. App. 1997) (appeal to a county board's determination under Wis. Stat. § 70.11(20)(d) regarding the requirements for tax-exempt status); *Nesbitt Farms, LLC v. City of Madison*, 2003 WI App 122, ¶ 9, 265 Wis. 2d 422, 665 N.W.2d 379 (requiring notice would preclude third-party intervention).

III. Defective And Untimely Notice Of Claim Precludes Recovery.

Summary: The evidence established and the circuit court agreed that Plaintiff-Appellant's failure to abide by § 893.80, and supporting cited caselaw, warranted dismissal of the Complaint as Oneida County did not receive notification of the claim until well over two years after the execution of the Agreement.

The circuit court's decision granting summary judgment was correct because it has been conceded that the notice was not timely.

IV. Oneida County Was Prejudiced Because It Had No Actual Notice of The Claim.

Summary: The actions of Plaintiff-Appellant following execution of the June, 2003 Agreement were insufficient to alert Oneida County to claims of antitrust violations or to the extent of damages allegedly sustained by Plaintiff-Appellant, under § 893.80(1)(a) and supporting caselaw.

Without proper service a written notice within 120 days, the action is barred unless the plaintiff can show that the defendant had actual notice of the claim and that the failure to give notice within 120 days was not prejudicial. *Weiss v. Milwaukee,* 791 Wis. 2d 213, 227, 255 N.W. 2d 496 (1997). It is the plaintiffs burden to prove both actual notice and lack of prejudice. *Vanstone,* 191 Wis. 2d at 597.

Oneida County did not have actual knowledge of the injury and the extent of injury until the "Notice

of Injury" and "Statement of Claim" were received on September 28, 2005, over two years after the execution of the Agreement between the county and Waste Management and more than 120 days after E-Z knew about the effect of the Agreement. (R.24, p.2, Ex.3). While Sexton may have been aware of general concerns regarding tipping fees, the County had no knowledge of the E-Z's intention to sue for damages involving claimed loss of past and future earnings. Knowledge of the circumstances surrounding a claim is not the same as knowledge of the claim itself. *Rudolph v. Currer*, 5 Wis. 2d 639, 644, 94 N.W.2d 132 (1959).

V. The Continuing Violation Doctrine Is Not Applicable To Bar § 893.80(1) Notice Requirements

Summary: There is no support in *Zenith Radio Corporation v. Hazeltine Research, Inc.,* that the continuing violation doctrine tolls any limitation period to that of the specific dissolution of a business and, therefore, bars application of § 893.80 notice requirements.

Zenith was brought under a federal anti-trust law, and the decision is very clear and limited in its holding. As noted by the court in *Segall v. Hurwitz,* "Federal law will be applied to determine when a claim accrues under federal antitrust statutes." 114 Wis. 2d 471, 483, 339 N.W. 2d 333 (Ct. App. 1983). E-Z's claim arises under a state anti-trust statute, and EZ can cite no authority applying the continuing violations theory to Wis. Stat. § 893.80(1) under state law.

CONCLUSION

Based upon the foregoing arguments and authorities, it is respectfully requested that this Court reverse the Court of Appeals' decision in this case and affirm the decision of the Oneida County Circuit Court granting Summary Judgment to the Defendant-respondent-petitioner.

Submitted this _25th day of October, 2010.

By: __/s/ Michele M. Ford_____
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FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief produced with the following font:

> Proportional serif font: minimum printing resolution of 200 dots per inch, 13-point body text, 11-point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 6,763 words.

I have submitted an electronic copy of this brief, separately including the appendix, which complies with the requirements of § 809.19(12). I further certify that:

> This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _25th___th day of October, 2010.

By: __/s/ Michele M. Ford_____

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Respectfully submitted this 25th day of October, 2010.

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CLERK OF SUPREME COURT
OF WISCONSIN

WISCONSIN SUPREME COURT

APPEAL NO. 2009AP775

E-Z ROLL OFF, LLC,

Plaintiff-Appellant,

vs.

COUNTY OF ONEIDA,

Defendant-Respondent-Petitioner

APPEAL FROM THE ONEIDA COUNTY CIRCUIT COURT– THE HONORABLE PATRICK F. O'MELIA: CASE NO. 06CV124
ON REVIEW FROM THE DECISION OF THE COURT OF APPEALS, DISTRICT III

DEFENDANT-RESPONDENT-PETITIONER'S APPENDIX

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CERTIFICATE OF COMPLIANCE

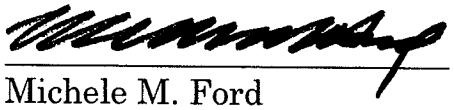
I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of facts and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record

included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced as to preserve confidentiality and with appropriate references to the record.

Respectfully submitted this 25th day of October, 2010.



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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that:

I have submitted an electronic of this appendix, which complies with the requirements of s. 809.19(13). I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Respectfully submitted this 25th day of October, 2010.

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APPENDIX

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3-NC-06
(4/4/2006)

PLEASE SERVE

STATE OF WISCONSIN BRANCH 1 CIRCUIT COURT ONEIDA COUNTY

E-Z ROLL OFF LLC
4170 Bass Bay Drive
Rhinelander, WI 54501

Plaintiff,

vs.

COUNTY OF ONEIDA
A Wisconsin municipal body
1 S. Oneida Avenue
Rhinelander, WI 54501

Defendant

JUDGE ASSIGNED TO THIS CASE
Robert E. Kinney
ONEIDA COUNTY COURTHOUSE
RHINELANDER, WI 54501
715 — 369-6157

SUMMONS

Case No. 06-CV-69

Code # 3213

ONEIDA COUNTY
FILED
APR 20 2006
CLERK OF CIRCUIT COURT

ONEIDA COUNTY
FILED
APR 2 2006
COUNTY

THE STATE OF WISCONSIN to each person named above as a Defendant:

YOU ARE HEREBY notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this Summons, you must respond with a written Answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The Court may reject or disregard an Answer that does not follow the requirements of the statutes. The Answer must be sent or delivered to the Court, whose address is

Clerk of Circuit Court
Oneida County Courthouse
Rhinelander, WI 54501

RECEIVED
MAY 01 2006
By

and to James B. Connell, Plaintiff's attorney, whose address is:

Crooks, Low & Connell, S.C.
531 Washington Street
P. O. Box 1184
Wausau, WI 54402-1184

You may have an attorney help or represent you.

If you do not provide a proper answer within forty-five (45) days, the Court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 7th day of April, 2006.

CROOKS, LOW & CONNELL, S.C.

James B. Connell
State Bar ID#1015474
Attorney for Plaintiff

POST OFFICE ADDRESS:
531 Washington Street
P. O. Box 1184
Wausau, WI 54402-1184
(715) 842-2291

STATE OF WISCONSIN BRANCH I CIRCUIT COURT ONEIDA COUNTY

E-Z ROLL OFF LLC
4170 Bass Bay Drive
Rhinelander, WI 54501

Plaintiff,

vs.

ONEIDA COUNTY
A Wisconsin municipal body
1 S. Oneida Avenue
Rhinelander, WI 54501

Defendant

COMPLAINT

Case No. 06-CV- 89

Code #

ONEIDA COUNTY FILED
APR 26 2006
CLERK OF CIRCUIT COURT

NOW COMES the plaintiff above named, by James B. Connell of Crooks, Low & Connell, S.C., its attorneys, and as and for its cause of action against the defendant, respectfully alleges and shows to the court as follows:

1. The plaintiff is a Wisconsin limited liability company with its principal office and place of business located at 4170 Bass Bay Drive, Rhinelander, Oneida County, Wisconsin. It is in the solid waste hauling business.

2. The defendant, Oneida County, is a Wisconsin municipal body, organized and existing under the laws of the State of Wisconsin with its principal offices located at 1 S. Oneida Avenue, Rhinelander, Oneida County, Wisconsin.

3. In June, 2003, the defendant, Oneida County, through its solid waste department, entered into an agreement with Waste Management, Wisconsin, Inc. The agreement is titled "Agreement for the Transport and Disposal of Municipal Solid Waste from the Oneida County Solid Waste Department". A copy of the Agreement is attached hereto and marked Exhibit 1 and incorporated herein by reference.

4. The Agreement provides that Oneida County will receive $5.25 for each ton of municipal solid waste that Waste Management, Wisconsin, Inc., delivers to the Oneida County solid waste facility. The Agreement also calls for the removal of all municipal solid waste from the transfer station to an operating landfill. For this removal service, Oneida County agreed to pay Waste Management, Wisconsin, Inc., $24.50 per ton for solid waste removed from the transfer station.

5. At the same time that Oneida County entered into the agreement described in paragraphs 3 and 4, above, the defendant, Oneida County, established a charge of $54.00 for each ton of municipal sold waste that plaintiff and haulers other than Waste Management, Wisconsin, Inc., delivered to the Oneida County solid waste facility.

6. The agreement described in paragraphs 3 and 4 above violate Sec. 133.03(1), Wis. Stats., in that the price structure of said agreement is an illegal restraint of trade.

7. The restraint of trade is unreasonable in that it has a significant impact on competition in the market place. By offering Waste Management, Wisconsin, Inc., significantly lower prices, the agreement permits Waste Management, Wisconsin, Inc., to under bid and drive out competition in Oneida County and the areas which the Oneida County Transfer Station has traditionally served.

8. As part of the consideration for the Agreement marked Exhibit 1, Waste Management, Wisconsin, Inc., agreed to purchase two Mack diesel tractors and three transfer trailers for the sum of $243,000.00. By tying the purchase of this equipment to the contract identified as Exhibit 1, Oneida County further acted in restraint of trade by effectively eliminating all locally owned potential bidders.

9. Since the agreement referred to in paragraphs 3 and 4 of this Complaint has been entered into, Oneida County has actively entered the business of delivery of dumpsters for waste

removal in direct competition with the plaintiff and other private businesses. The effect of the defendant's entry into competition is a further restraint of trade and unfair competition in violation of Wisconsin law.

10. As a direct and proximate result of the illegal agreement described in paragraphs 3, 4, and 8 herein, the plaintiff has been damaged in loss of business and in the loss of past and future profits in excess of $500,000.00.

WHEREFORE, the plaintiff demands judgment as follows:

A. For an Order declaring the Agreement described in paragraphs 3, 4 and 8 an illegal restraint of trade under Sec. 133.03(1), Wis. Stats.

B. For an award of compensatory damages for past and future loss of profits.

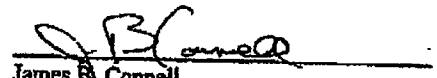
C. For an award of treble damages pursuant to Sec. 133.18, Wis. Stats.

D. For an award of the costs and disbursements of this action and reasonable attorneys fees pursuant to Sec. 133.18, Wis. Stats.

E. For such other and further relief as the court may deem just and equitable.

Dated this 7th day of April, 2006.

CROOKS, LOW & CONNELL, S.C.



James B. Connell
State Bar ID#1015474
Attorney for Plaintiff

POST OFFICE ADDRESS:
531 Washington Street
P. O. Box 1184
Wausau, WI 54402-1184
(715) 842-2291

PLAINTIFF DEMANDS A TRIAL BY JURY

Agreement for the Transport and Disposal of Municipal Solid Waste from the Oneida County Solid Waste Department

1. THIS AGREEMENT, made and entered into this 25 day of June, 2003, by and between Waste Management, Wisconsin, Inc. (hereinafter referred to as WM) and the Oneida County Solid Waste Department (hereinafter referred to as the County).
2. Term of this agreement shall be from July 1, 2003 to June 30, 2013. Upon mutual written agreement the contract may be extended for terms of 1 to 5 years. Upon mutual written agreement the terms of this contract may be amended.
3. MSW shall mean municipal solid waste as defined under Wisconsin Administrative Code NR 500.03(150).
4. Disposal shall mean landfilling in a state approved sanitary landfill specified in this contract.
5. Transport shall mean the removal of MSW filled semi trailers from the County Transfer Station to an approved landfill listed in this contract, emptying of such trailers in said landfill and delivery of empty semi-trailers to the County Transfer Station. WM's trailers shall be compatible with the County's compactor.
6. All MSW landfilled under this contract will be placed in the K & W Landfill of Ontonagon, Michigan, Federal Identification Number 38-2504167, State license number 6942. As an alternative Menominee landfill, Menominee, Michigan, Federal Identification Number 38-1214786, State license number 8746 may be used for emergencies. WM shall guarantee sufficient disposal space in the above listed sanitary landfill(s) under the terms and for duration of this agreement.
7. The County shall be responsible for the switching and loading of semi-trailers with MSW, and for all maintenance and operations costs and for all regulatory compliance costs associated with its transfer station. Net MSW weights loaded into, 48 foot, steel, closed topped trailers will average 28 tons when road limits are not in effect.
8. WM shall be responsible for removal of all MSW loaded transfer trailers from the site pursuant to applicable Wisconsin Department of Natural Resources regulations and conditional plan approvals, and shall be responsible for all transport, maintenance, construction, long term care, remediation, monitoring and regulatory compliance costs associated with transport and disposal operations. WM shall be solely responsible for all MSW under this contract once loaded into WM's trailer. WM's transfer trailers shall be compatible with the County's Sebright compactor.
9. The cost of transport and disposal of the County's MSW including all local, state, and federal surcharges and host fees shall be $24.50 per ton, from the date of execution of this agreement through December 31, 2004. Effective January 1, 2005, and each January 1st thereafter, one hundred percent of the annual cost of living increase or decrease (national Consumer Price Index-Urban Workers (CPI-U)) from the previous calendar year will be added to the County's transport and disposal fee from the previous year. For example if the transport and disposal fee for 2004 is $100 per ton and the percent of CPI-U added is 100% and the CPI-U for 2004 is an increase of 4%, the trucking and tipping fee for 2005 would be $104 per ton.

10. Increases in state surcharges for MSW landfilled will be added to the price effective the date of implementation of such increases and will be allowed prior to January 1, 2005. State landfill surcharges will be based on the location of the primary landfill stipulated in paragraph 6. No other fees or costs, beyond those stipulated in paragraph 9, will be added to the cost to be paid by the County. Net weight of MSW received under this contract shall be determined on the County's scale. Net weight of County MSW shall be determined by subtracting the tons of MSW WM delivered to County's transfer station from the gross MSW tonnage WM transports off site.

11. County Solid Waste Department hours of operation are 7:00 a.m. – 5:00 p.m, Monday through Friday and 8:00 a.m. – 12:30 p.m. on Saturdays. The County shall also allow WM access to the Solid Waste Site during non-operation hours to pick-up filled and weighed MSW trailers, to permit the delivery of empty trailers and to switch and maintain trailers and diesel tractors.

[redacted] WM agrees to deliver a minimum of ten thousand tons of transfer MSW to the County's transfer station for loading in WM's trailers annually. The County will receive $ 5.25 for each ton loaded from execution of this contract through 31 December, 2004. Effective 1 January, 2005, and each January 1st thereafter, one hundred percent (same percent allowance as made in paragraph 9 of this agreement) of the annual cost of living increase or decrease (national Consumer Price Index-Urban Workers (CPI-U)) from the previous calendar year will be added to the per ton loading charges from the previous year. For example if the percent of CPI-U added is 100% and the CPI-U for 2004 is 4%, the loading fee for 2005 would be $5.46 per ton. A maximum of 20,000 tons per year will be loaded out per year under this provision, unless additional tonnage is accepted upon mutual written agreement between WM and the County. Changes in cost under this stipulation shall be commensurate with equipment upgrades and County overtime required. This service is only offered for WM's trucks. Subcontracting for this service will not be allowed under this agreement. If WM fails to deliver the minimum annual tonnage of MSW for transfer, it will be required to pay the County $5.25 for each ton under the minimum that is not delivered.

13. WM shall have the minimum following insurance coverages:

TYPE	LIMITS
Worker's Compensation & Employer's Liability	Coverage A: $ Statutory Coverage B: $ 100,000 Employer's Liability
General Liability, Bodily Injury, Personal Injury, Property Damage	$ 1,000,000 each occurrence Combined single limit
Automobile Liability, Bodily Injury, Property Damage	$ 1,000,000 each occurrence Combined single limit
Umbrella Excess Liability Insurance	$ 1,000,000 each occurrence

All insurance, as set forth above, shall be with a company acceptable to the County. The County shall have the right, at any time, to inspect the insurance policy and to request an insurance certificate evidencing the same. WM agrees to provide to the County thirty (30)

days notice of any termination or cancellation of the contractor's insurance and documentation of annual renewals of insurance.

14. To the fullest extent permitted by law, WM shall indemnify and hold harmless the County, their agents and employees from and against all claims, damages, lawsuits, loss, cost and expenses, including but not limited to attorney fees, arising out of or resulting from the transport and landfilling of the County's MSW provided by WM. This includes bodily injury, sickness, disease or death, damage or destruction to property, environmental damage or impacts or any State or Federally mandated long term care, repairs or remediations.

IN WITNESS WHEREOF, the following parties place their signature on this Agreement on the 25th day of June, 2003.

The County By:

Vern Semling, Chairperson
Solid Waste Committee

Bart T. Sexton,
Solid Waste Administrator

STATE OF WISCONSIN)
) ss.
COUNTY OF ONEIDA)

Personally came before me this 25 day of June, 2003, the above named Vern Semling and Bart Sexton, to me known to be the persons who executed the foregoing instrument and acknowledge the same.

Patricia McKenzie
Notary Public, Oneida County, WI
My commission expires: 4-17-05

For Waste Management of Wisconsin, Inc.

Authorized representative signature

printed name, title Richard L. Ancelet, V.P.

STATE OF WISCONSIN)
) ss.
COUNTY OF WAUKESHA)

Personally came before me this 24th day of June, 2003, the above named RICHARD L. ANCELET, to me known to be the persons who executed the foregoing instrument and acknowledge the same.

Notary Public, WASHINGTON County, WI

My commission expires: 4/24/05

STATE OF WISCONSIN : CIRCUIT COURT : ONEIDA COUNTY

****

E-Z ROLL OFF, LLC.,

Plaintiff,

vs.

Case No. 06-CV-124

COUNTY OF ONEIDA,

Defendant.

****

MOTION HEARING

BEFORE: PATRICK F. O'MELIA
Circuit Judge, Branch I

RHINELANDER, WISCONSIN
DECEMBER 20, 2007

JEAN M. WOOD, R.M.R., C.R.R.
Official Circuit Court Reporter
Oneida County Circuit Court, Branch I,
Rhinelander, Wisconsin 54501

A P P E A R A N C E S

CROOKS, LOW & CONNELL, S.C., by JAMES B. CONNELL, 531 Washington Street, P.O. Box 1184, Wausau, WI, 54402-1184, appeared on behalf of the Plaintiff, E-Z Roll Off, LLC.

CRIVELLO CARLSON, S.C., by MICHELE M. FORD, 710 North Plankinton Avenue, Milwaukee, WI, 53203, appeared on behalf of the Defendant, County of Oneida.

ALSO PRESENT: Todd Laddisure, one of the principals of E-Z Roll Off, LLC, and Paula Laddisure, his wife.

E X H I B I T S

NONE.

PROCEEDINGS

THE COURT: This is an action in Oneida County Circuit Court, 06-CV-124, entitled E-Z Roll Off, LLC, versus County of Oneida. And appearances for E-Z Roll Off are Jim Connell from Wausau.

And next to you, sir, is?

MR. CONNELL: That's Todd Laddusire who's the -- one of the principals of E-Z Roll Off, Your Honor.

THE COURT: And could you spell that last name for the court reporter?

MR. LADDUSIRE: It's L-A-D-D-U-S-I-R-E.

THE COURT: And for Oneida County we have is it Michele Ford?

MS. FORD: That's correct.

THE COURT: Okay. And you are from?

MS. FORD: Crivello Carlson.

THE COURT: Say that again.

MS. FORD: It's Crivello Carlson. And it's actually a new name. We dropped the Mentkowski at the end. We're adding Ford shortly, but I'm not quite sure, in about 20 years.

THE COURT: Okay. We are here as a

result of a motion by the County for judgment on the pleadings. And I have received -- or courts have received in the past briefs, a reply brief. I've had a chance to take a look at those.

Has there been since the filing of these briefs any action in terms of discovery or has everything been on hold?

MS. FORD: Your Honor, everything has been on hold pending disposition of this motion.

THE COURT: All right. And a couple ground rules I guess for today. The pleadings are pretty sparse in terms of what's included. There's the contract. But I notice in the briefs that there are comments and even attachments. And this was referenced by someone in their brief that we were starting to get beyond the pleading stage, and I think Mr. Connell, in fact, in his brief mentioned if we're going to start taking things outside the complaint and answer, that we should pursuant to 802.06 I think it is just convert this to a summary judgment hearing or treat it as such so that we can get all this stuff out such as the contract and such as the -- not contract. That's already part of the pleadings. That was an attachment to the complaint I believe.

MS. FORD: There was also an affidavit.

THE COURT: Affidavit from Mr. -- from the clerk here.

MS. FORD: May I speak to that?

THE COURT: You may.

MS. FORD: My understanding is that the motion -- the legal standard for judgment on the pleadings is still applied, but the motion for summary -- the motion is converted to procedurally a motion for summary judgment so the court is allowed to look at matters outside the scope of the actual complaint. So it's really a procedural issue as opposed to a substantive issue.

THE COURT: As opposed to a what issue?

MS. FORD: As opposed to a substantive issue.

THE COURT: And what's your thought on that, Mr. Connell?

MR. CONNELL: Well, Your Honor, I've treated this as a judgment on the pleadings and that the court would look at the complaint to determine its legal sufficiency.

You know, some of the things that the

defendant has brought up in this case like regarding the notice of injury and notice of claim, there are -- you know, the court -- if, in fact, the County had actual notice, that -- then that defense would not apply. That might be the type of thing that would be subject to discovery and --

THE COURT: Because you made reference in your brief that if that's the case, then you would want to present affidavits to show that they had actual notice. And --

MR. CONNELL: That's correct.

THE COURT: -- so as I'm reading this, it -- you're teasing me with all these tidbits of information that are out there that would be pertinent at a summary judgment motion. And I hate to waste the court's time and attorneys' time if we're gonna do this judgment on the pleadings and then six months from now have a summary judgment motion when a lot of these facts could be flushed out at a summary judgment motion.

Go ahead.

MS. FORD: The -- the actual notice defense was raised and is uncontested at this point. Once the -- that issue was raised in the principal brief, it -- and -- and also the

complaint had an attachment to it, so it was necessarily a summary judgment motion when it was filed, even though what we're -- we're maintaining -- our position is that legally the complaint fails to state a claim upon which relief may be granted. So we more appropriately thought it should be titled as a motion for judgment on the pleadings.

However, no matter how the court wants to treat it now, I think the record before the court requires dismissal, irrespective of what may be discovered in the future, because the complaint in and of itself and the failure to file the notice of claim, which is undisputed, prohibits the plaintiff from going forward at this point and requiring the municipality, Oneida County here, to defend against a complaint that fails to state a claim.

So I -- I -- I think that what -- it's effectively equivalent to a situation where we have someone -- I mean a municipality who's being sued for something for which they're absolutely immune. They're not required to undergo discovery and expenses and burden of discovery in order to assert an immunity defense for the protection of the

taxpayers, basically for the protection of the public purse.

So I would ask that the court -- and also I have to say that since the actual notice and prejudice --

THE COURT: Notice of claim you mean?

MS. FORD: Right, notice of claim. And then that defense, the actual notice and lack of prejudice, that burden rested on the plaintiffs. Had they elected to challenge that, they could have at the time of briefing either moved the court for leave to take depositions or secure affidavits to establish that burden, but they chose not to. They did -- they chose not to.

And I think that we've waited a number of months now and no such action has been taken, so I think it's fair to say that the affidavit offered regarding the actual notice being late is undisputed, and I think it would be unfair and prejudicial to the defendant at this point to require us to wait more months and undergo the expenses of additional discovery only to find that that issue is still unrebutted given plaintiff's failure to conduct a necessary challenge at the time this matter was briefed.

MR. CONNELL: Well, you know, Judge, I don't -- I don't want to raise issues that aren't issues. The -- the fact of the matter is is we filed a notice of injury and notice of claim and we don't dispute that. They're -- among the various charges made in this case are sufficiency of the notices, and I think that the prejudice to the County has to be established as a factual matter.

And, you know, the way the defendant has brought this up is by challenging the pleadings, and, as I've indicated in my brief, we didn't have to allege that we had given any notice in the pleadings. I'll stipulate that the notice was filed on the date that is contained in the affidavit and the court can decide that.

But I think the matter of prejudice is something that's a factual matter that shouldn't be decided on a motion -- motion for judgment on the pleadings, particularly since we didn't even have to allege that we complied with the notice requirement in our pleadings.

MS. FORD: Your Honor, I would simply stick to my original position. We -- this litigation has been pending for months. If actual notice and lack of prejudice became an issue, and

it did with the filing of the first brief, discovery should have been conducted then and evidence should have been submitted by plaintiff's counsel then to challenge that -- to raise that defense, because it is the plaintiff's burden to establish that that is not -- that was not done.

And we in no way denied plaintiff the right to discovery. We didn't refuse discovery. We were never asked to produce any -- anybody to allow them to conduct discovery necessary to mount that defense. So at this late stage in the game it seems to me to be a waste of judicial resources, a waste of the parties' resources to simply again --

And this -- this motion -- particular motion has now been adjourned five times. The original hearing was set for August 10th of 2007. The briefing was complete in May of 2007. To ask the defendant to wait and allow the plaintiff time to conduct discovery that should have been conducted months ago seems to me to be prejudicial in and of itself.

THE COURT: The particular -- I didn't know it was adjourned five times.

MS. FORD: That's correct.

THE COURT: Some -- some were at the

request of Mr. Connell.

MS. FORD: That's correct.

THE COURT: Some were at the request, however, of -- of the court. There was a -- there was a time when there wasn't a sitting judge and the one judge that was going to take it had a conflict.

MS. FORD: That is correct.

But -- and then the other issue is now we've -- we now have it as undisputed that the notice of claim was untimely.

MR. CONNELL: Well, no, that's -- that's not true, Judge.

MS. FORD: It was.

MR. CONNELL: The fact --

THE COURT: Both -- whoa. Whoa. Whoa. One at a time.

MR. CONNELL: Okay.

THE COURT: Go ahead, Mr. Connell.

MR. CONNELL: I just don't want the court to think that we're conceding that there's any untimeliness about any of our filings in this case.

MS. FORD: The -- the facts establish that the notice of claim was filed on -- and

plaintiff's counsel indicated on the date that we stated it was filed that was more than 120 days after the happening of the event forming the basis of the lawsuit.

THE COURT: All right. And I agree that's your position, but just by arguing that position isn't that going beyond the pleadings?

MS. FORD: No. That's taking the date the -- Oneida County entered into a contract with Waste Management or made a decision to do so which is the accrual date and taking that date and comparing it with the undisputed date that the notice of claim was served. To me, you know, those facts are undisputed. Those two facts are undisputed. Discovery's not going to assist in resolving those two issues.

THE COURT: And I think Mr. Connell's position is that it would, that actual notice is possible, or I think he mentioned in his brief actual notice was given through other witnesses.

MR. CONNELL: Sure. Sure.

I guess my position is twofold, Your Honor. One is that the notice is timely and that if it would be determined to be untimely, the County isn't prejudiced because they had actual

notice.

MS. FORD: Another issue is we have two additional defenses that essentially are without any -- we don't need any factual discovery. One of them is that because the County has home rule, the County -- the state antitrust law is applicable to -- businesses are not applicable to the county, and that's by virtue of the fact that number one --

THE COURT: Ma'am --

Who's that gal right there?

MS. FORD: Oh, I'm sorry.

MR. CONNELL: That's my client's wife, Your Honor --

THE COURT: Okay. The record should reflect --

MR. CONNELL: -- Paula Laddusire.

THE COURT: -- during comments she's shaking her head no while attorneys argue. We're not gonna have that. I don't need anybody in the background making nonverbal comments, okay? So just sit tight and listen. Thank you.

Go ahead, Ms. Ford.

MS. FORD: What we have here is a situation where the state legislature has decided

that antitrust is a bad thing, which we all know is true. However, when we're talking about a municipality, certain specific procedural mechanisms -- and particularly counties exist by virtue of the county's home rule. The legislature has designated and has specified how counties can compete and allow competition, through accepting the -- what is called the lowest qualified bidder or the lowest responsible bidder, and that's by virtue of Section 59.52(29) which states: "All public work, including any contract for the construction, repair, remodeling or improvement of any public work, building, or furnishing of supplies or material of any kind where the estimated cost of such work will exceed $25,000 shall be let by contract to the lowest responsible bidder."

The case law is clear that -- and this is a legal issue -- the antitrust laws generally apply except where a municipality has been vested with the responsibility of making sure that competition is fostered by virtue of statutes that require that they take the lowest responsible bid.

THE COURT: Was there a bid in this case?

MS. FORD: Yes, indeed. And it's undisputed that the plaintiff did not even bid for these, for the contract. Had the plaintiff bid --

THE COURT: First I read of a bid was actually in the briefs. I didn't know there was a bidding process.

MS. FORD: Well, I don't think it's disputed that there was a bidding process.

THE COURT: All right. Go ahead. Continue, Ms. Ford.

MS. FORD: So by virtue of the fact that the -- it's a legislative issue, what the court here has to determine is whether or not -- and irrespective of what occurred with regard to the plaintiff, whether or not the legislature of this state is going to allow municipalities like counties to be sued under anticompetition laws when the legislature has defined how they are to foster competition by virtue of statutes. And the federal law supplies that. The Town of Hallie case supports that.

The -- E-Z Roll Off doesn't contest that the Wisconsin legislature empowered Oneida County with home-rule authority, I mean, nor do they contest that we, Oneida County, and all

counties are required by the legislature to foster competition through bidding, through a statutory mechanism. In this way the case law states that when there is a specific mechanism to foster competition, municipalities are not held -- cannot be held liable under the antitrust laws.

THE COURT: But was there a bidding process here for both projects, that is the project where they drop off at the transfer station?

MS. FORD: It's my understanding -- it's my understanding that there was but --

THE COURT: Oh, I'm sorry. You're saying there's a bidding process for the stuff going from the transfer station to the landfill.

MS. FORD: Your Honor, I really actually can't speak to that because the -- the issue is not what happened in this case. The issue is whether or not the antitrust statute can be applied to the County because other statutes require them to go through different procedures.

The complaint in this lawsuit doesn't say that we did not set out a bidding process. The complaint in this lawsuit states that we entered into contracts with the -- with entities in such a manner as to restrict competition. But since E-Z

Roll Off never threw their hat in the ring, they never competed. They -- they -- they never offered a contract. So by virtue of just state law, the antitrust laws don't apply.

Irrespective of the background, irrespective of what happened, how the bidding process went forward, who was the lowest responsible bidder and why, the Wisconsin legislature has created a situation where counties cannot be sued under antitrust laws because they are responsible for following these statutes concerning awarding bids to the lowest responsible bidder as a matter of law, not as a matter of fact, as a matter of law.

THE COURT: What about AMT, that case?

MS. FORD: Well, in American Medical Transport the City of Milwaukee was managing a dispatch system and allocating resources to about half of the qualified ambulance service providers. The supreme court didn't find sufficient legislative intent to permit the City of Milwaukee to exempt its ambulance service from the antitrust law. This was because the statutes relied upon by Milwaukee authorizing provision of ambulance service were specifically directed to counties and

towns, not cities.

So in -- in the situation of -- if Oneida County were, for example, a city, Oneida County wouldn't have the lowest responsible bidder statute applicable to it and arguably an antitrust claim could be brought against it. But Oneida County is not a city, Oneida County is a county, and so American -- American Medical Transport is distinguishable on specifically that ground. Cities are not governed by the same anticompetitive procedural statutes that counties are.

And I would direct the court's attention to Page 149 and 150 of the American Medical Transport decision in which the court distinguished between counties and towns which do have that statutory mechanism and cities which do not.

THE COURT: And is that the only distinguishing fact from AMT to this case?

MS. FORD: I -- I think that it is the critical distinction, because the legislature has locked us up tight in terms of how we can ensure competition while at the same time providing for services for our citizens. They have not done so with regard to cities, and for that very reason

state antitrust laws arguably should be applied to cities because they're not so restricted.

THE COURT: Is there anything else you'd like to say on that particular issue, Ms. Ford, that is the immunity aspect of the briefs?

MS. FORD: I'm -- I'm sorry. The immunity aspect.

THE COURT: Or the fact that they would be exempt. Your arguments are that they're exempt from the antitrust laws.

MS. FORD: No. I think the legislature has spoken loud and clear. I think American Transport is actually in our favor and I think the Town of Hallie decision dictates the result in this case.

Other than reading my brief which I do not want to do obviously in the record, we feel that the -- the Wisconsin legislature has spoken and has spoken clearly on this issue as has the supreme court.

THE COURT: Can we talk about some of the other issues that were raised in the brief though?

MS. FORD: Absolutely, Your Honor.

THE COURT: And that was the notice of

claim issue.

MS. FORD: Well, I think I'm just going to reiterate we've had a notice of claim issue. That's typically oftentimes raised when a complaint is filed. But no-- but the notice of claim is -- is alleged to be untimely. In this particular situation that was raised in the principal brief. Nothing prohibited discovery. If -- nothing prohibited the plaintiff from converting this himself for a motion for summary judgment by conducting discovery necessary to mount the defense of lack of prejudice and actual notice. The plaintiff elected not to do so.

THE COURT: And it's -- I do want to address a little bit of it so that when I leave here today, I have everything that's gonna be out on the board.

But the contract was June '03 and that's -- you're submitting that that was the date -- the starting date of the 120 days; correct?

MS. FORD: Right.

Now without citation to any legal authority, the plaintiff has alleged a continuing violation theory. A continuing violation theory to my knowledge -- it's not surprising that no legal

authority was cited because the continuing violation theory to my knowledge has never been applied to statutory claims under Wisconsin law. The -- in fact, the Wisconsin -- the United States Supreme Court just came down with a decision that's not cited in the briefs -- it was approximately two, three weeks ago -- that stated that -- stated that even under the equal pay act previously where claims were -- would accrue every time someone was issued a paycheck, the continuing violation theory was just thrown out by the Wisconsin -- by the United States Supreme Court. It's the event forming the basis for the cause of action that commences the accrual of the 120-day period.

I'm unfamiliar -- and I'm not going to tell this court how many years I've been practicing municipal law or many other people, but I'm unfamiliar with any case that applies to the continuing violations theory, to the notice of claims statute, but there are certain circumstances certainly under which, for example, injunctions or public records requests where the notice of claim statute is inappropriately applied because the relief sought doesn't fit within the 120-day period.

But if we were to apply the continuing violations theory in this particular case, then it would have to be applied in every single case where something happened by virtue of a municipal decision and the plaintiff continued to suffer damages -- alleged damages as a result of it.

For example, if a municipal vehicle struck a -- a citizen's vehicle, the accrual would normally be the date of the auto accident. One hundred twenty days after that the plaintiff would be required to submit a notice of claim, notice -- notice of injury/notice of claim, slash. I'm using them as one word.

But as long as the plaintiff isn't paying -- and this is the same argument made by the plaintiff. As long as the plaintiff suffers continuing medical expenses or continuing loss, can the plaintiff legitimately argue that that's a continuing violation? No. There's no law at all cited in either plaintiff's brief or that I'm aware of that supports that theory.

THE COURT: And in that case I can understand your argument because the plaintiff -- in that case in an accident or where you fall on the playground of a municipality the plaintiff is

aware that that's the date of loss or the date of damage. And in this case though you have the signing of a contract as the date, and how is a plaintiff, unless they are involved in contract negotiations, to know that the contract was even signed and how would a plaintiff in this case know that he suffered any damages if he's not aware of the contract until, for instance, he starts to try and bid out some -- some garbage contracts and realizes that he can't get any contracts because this other guy's underbidding him. Then he starts to realize these damages.

So my question is: Then does it really start from the date of the signing of the contract or the date of knowing that you have suffered a damage?

MS. FORD: Well, that's -- the accrual of the cause of action under statutory claims is typically when the event forming the basis of the claim arises.

The -- the -- and, in fact, this -- this -- the complaint in this case, it makes clear that in June of 2003 Oneida County entered into an agreement, and that's the only date the plaintiff puts forward. The plaintiff has the burden of

establishing. The plaintiff did not have notice of the existence of this contract within the 120-day period. The plaintiff's failed to do so.

And as a -- as an attorney for Oneida County, I think that the -- the question really requires -- or contemplates a shift in the burden of proof to the County to establish that for some reason E-Z Roll Off wasn't made aware of or this contract was hidden from them until a date within the 120-day period of time.

THE COURT: And I'm not suggesting it was hidden.

MS. FORD: Right.

THE COURT: I'm just saying through the normal course of business those things are not posted or brought out.

Here's another thought. If I start today, I decide to move up to Rhinelander, Oneida County, and start a garbage hauling business and I'm not aware at all of what occurred back in '03, I just want to start the business up here, am I foreclosed? Do I have any relief at all if the 120 days starts at the date of June '03? And I naturally wouldn't have filed a notice of claim because I just decided to start this garbage

business. Am I foreclosed from any relief because I didn't do anything in those 120 days or do I now have a cause of action?

MS. FORD: It seems to me that it depends on what is alleged in the complaint. If, for example, you decide -- the court decides to move up and start a waste management business and learns that the city's already contracted with another entity, well, the day you start your business is the day you -- you -- your injury starts or the day you approach Oneida County and say, look, I want to do your business, another fact which is not alleged in the complaint. There's -- there's actually no indication that E-Z Roll Off ever approached Oneida County in the complaint to request provision of waste removal services.

What is really -- this case is really about is an attack on the way in which counties through the legislature are directed to enter into these kinds of contracts, and I think absent proof by the plaintiff, which it's their burden, the county -- the court must assume that the statutory provisions were complied with. The lowest responsible bidder was awarded the contract and E-Z Roll Off was not that person.

And, again, I don't think the fact that our pleadings were entitled motion for judgment on the pleadings should forgive a lack of discovery to determine if those procedures were actually followed, and nothing in the complaint alleges that they weren't. So if -- if -- if we -- if we are going to allow discovery or if it turns out that the motion will -- is going to be denied based upon an insufficient factual basis, then I would -- I would simply ask for a stay.

But we do have another ground for judgment on the pleadings, specifically the request that E-Z Roll Off has made for treble damages, actual attorneys fees, costs under Section 133.18, and that's described in -- it's described to cut to the chase in the reply brief, pages 6 to 8. It's the municipality's -- counties are specifically exempt from claims for treble damages, costs, and attorneys fees under Section 133.18. The legislature expressly excepted or removed counties from -- municipalities from -- entities from which those damages can be collected. Now that is true as a matter of law.

And in the response brief that -- that particular issue is not really argued. The only

thing that is argued by plaintiff's counsel is that at this point the court should not look at the available remedies, but if the request for remedies is not allowed to the plaintiff as a matter of law, then the complaint fails as a matter of law. Because if counties are automatically exempt from the kind of damages that the plaintiff is requesting, well, then that claim for damages has to be dismissed. What's left of the complaint then, injunctive relief possibly?

THE COURT: You're referring to 133.18(b)?

MS. FORD: That's correct.

THE COURT: Suggesting that no damages and interest on damages, costs or attorneys fees may be recovered. How do you -- under 133.18 though (6) it says "[i]n a civil action against a person or entity specified in 893.80," and under the statute I think person or entity includes municipality such as Oneida County.

MS. FORD: That's the antitrust provisions?

THE COURT: I was -- yes. 133.18(6) refers you to 893.80 which is claims against governmental bodies or officers, agents, notice of

injury, and limitation of damages which limits the damages at 50,000 under that statute. You're suggesting that it's zero and Mr. Connell's suggesting that it's treble damages.

MS. FORD: No. I'm -- no, I guess I'm not. What I'm saying is the remedies that any plaintiff under 133.18 can include remedies other than treble damages, costs, and attorneys fees. Sub six has to be read with (1)(a) which provides for recovery of treble damages, cost of the suit, and reasonable attorneys fees subject to (b). That subsection provides that "[n]o damages, interest on damages, costs or attorney fees may be recovered under this chapter from any local governmental unit or against any official or employee of a local governmental unit who acted in an official capacity."

Oneida County is alleged in the complaint to be a governmental unit. I don't -- I don't think that's in dispute. As such, those items of damages are not available. Now injunctive relief, perhaps mandamus, other forms of relief are available, but the specific remedies available -- or requested in the complaint to the extent that they fall within the provision of 133.18(1)(b) are

not available.

Even assuming Oneida County could be sued under this statutory provision, which as I indicate -- as I indicated earlier it's Oneida County's position that because of the Wisconsin legislature we cannot be sued.

THE COURT: Don't worry, Mr. Connell. I'll let you speak in a second.

MR. CONNELL: Okay.

MS. FORD: And I -- what's more, the claim for damages has to be brought within two years. There's a two-year limitation period.

THE COURT: I was just getting to that. And you both apparently concede that it's two years or have argued or used the two-year statute of limitations time frame. I'm not binding you to that. Just a second. But -- and I'm not sure where we got the two years from. There's reference to the Open Pantry Foods case.

MS. FORD: The case is State ex rel. Lueng versus Lake Geneva in which the court stated the Wisconsin Supreme Court has held the two-year statute of limitations applies where the action by a private party upon a statutory penalty is for the benefit of the public.

THE COURT: What year is that case?

MS. FORD: The -- the state case is a 2003 case and it refers back to a 1994 case, Erdman versus Jovoco, Inc., 181 Wis. 2d 736. So the Wisconsin Supreme Court has stated that "'[a]nti-trust statutes are designed to benefit the public'" in Erdman. So taking the -- the Erdman case, it states that an action by a private party, here E-Z Roll Off, against -- upon a statutory penalty for the benefit of the public is two years. I think that that two year statute of limitations is established by case law.

Theoretically, Your Honor --

THE COURT: Let me ask you this though. In the antitrust statute itself, 133.18(2) says "[a] civil action for damages or recovery of payments under this chapter is barred unless commenced within 6 years after the cause of action accrued." And if we use the date of the signing of the contract as the accrual date, they are well within that six year statute of limitations.

MS. FORD: Then we fall back on the argument that that statute does not apply to counties.

THE COURT: But you want that statute to apply to counties because that's the same statute that says you don't have to pay treble damages.

MS. FORD: Well, actually the plaintiff wants that statute to apply to counties. These arguments are offered in the alternative, because we want to make sure that if the court does accept the argument that the County is a person within the meaning of the antitrust laws, we have other defenses available to us.

It seems to me that theoretically if the plaintiff wanted to challenge the issue of whether or not the County did use the bidding process or did not publicly in a public hearing approve the contract which is typically for municipalities and somehow challenged the County's use of the competitive bidding statute to say that the County had waived its right to argue that statute, that that discovery should have been done long ago.

THE COURT: Is there anything further you wanted to say, Ms. Ford, on these particular issues? And I realize we've covered a spectrum.

MS. FORD: Other than what has been

stated in the brief and what has been stated in oral argument, no, Your Honor.

THE COURT: All right.

And, Mr. Connell, did you have anything to say?

MR. CONNELL: Well, yes, Judge, and I'll -- I'll be brief.

I've always thought that the -- the reason that the County filed this motion is to bring this issue, perhaps the issue of law to the attention of the court, and that is they claim that they're immune from antitrust lawsuits because -- apparently they raise two things. One, the home rule. Two, the competitive bidding statute.

With regard to home rule, I think the Town of Hallie case which is cited in both briefs and which -- and the AMT case which is cited in the briefs stands for the proposition that home -- the home-rule statute alone doesn't provide immunity to governmental bodies. The -- the -- the -- my reading of the case law would indicate that the County has to establish that its activities are authorized by the state and pursuant to a policy that displaces competition with a monopoly of public service.

And I don't think that the State of Wisconsin has a clearly articulated, affirmatively expressed policy that there will be no competition in a situation like this. The legislature has not authorized the County to allow -- to enter into contracts where Waste Management, this multinational corporation, pays a $5.25 tipping fee and my client's small, locally-owned business pays $54 a ton tipping fee. That's the anticompetitive contract in this case. That's what is anticompetitive. And I don't believe that any -- that the cases cited or any legislative authorization exists for that kind of -- of procedure.

The Town of Hallie case specifically says that municipal bodies cannot ignore the state's antitrust laws in all cases by merely relying on its own power rule -- home-rule power. And in the American Medical Transport case the supreme court held in relating to statutes that provide the authority of in that case cities to contract, they said "`[w]hile these statutes clearly authorize local government units to contract for ambulance service. . . we cannot conclude that these statutes authorize

anticompetitive, monopolistic regulation.'"

And that's what this contract that Oneida County has entered into with Waste Management does. They put people like Todd Laddusire and other small haulers of waste at a tremendously (sic) dis-- disadvantage in competition in this community. The difference is nearly $50 a ton.

Chapter 133, antitrust law, expresses the legislative intent encouraging competition, and there is no specific statute authorizing anticompetitive contracts in Wisconsin. There's no specific statute authorizing counties or any other municipality body to have immunity when they enter into contracts like this.

With regard to the statute of limitations, I think everybody agrees that the statute of limitations for antitrust is six years. I -- I contend that -- and I -- and I cite case law. I guess counsel hasn't read it. But there is case law -- a lot of case law in the federal area of the antitrust law that says that antitrust violations are continuing violations. Every single day that Todd Laddusire goes out to the waste site and pays $54 a ton to -- to -- to show as a tipping

fee there he is damaged and I think every single day theoretically could be a new cause of action.

THE COURT: So why do they bother having a statute of limitations?

MR. CONNELL: Well, I think the -- and, Judge, you know that they -- that they are for cases like the case cited by the court and counsel where there's an injury on this date and the statute of limitation begins to run from there. In this case we have a continuing injury, a continuing injury every day. And that's why the government can break up AT&T after it's been in existence for a hundred years. It's because they continually violated the law during that period of time.

The case that I cite in my brief, Curtis versus Campbell Taggart, says that the cause of action for continuing violations accrues when a business is permanently destroyed, and thankfully Mr. Laddusire's business is still operating, even though at a tremendous competitive disadvantage.

With regard to the -- you also asked about discovery, and I can tell the court that what -- 118 -- or 133.18 also had -- adopts a discovery rule as well in one of the subsections.

With regard to the -- the notice of

injury and notice claim in this case, there are two distinct notices that are required -- that are required in certain cases. It's our contention, first, that it's not required in this case because Chapter 133 sets forth a specific statutory scheme intended to provide prompt relief for violation of antitrust statutes and that --

THE COURT: What statute is that?

MR. CONNELL: 133.16, for instance.

THE COURT: All right.

MR. CONNELL: Which -- and which we are in this case asking for injunctive relief, among other potential relief.

And there -- there's a body of case law that says that you don't have to provide -- provide notice if the requirements -- if there is such a scheme.

And counsel has correctly cited that, for instance, to bring an action against a municipal body for violation of the open records law -- that's a case that's cited in our brief -- doesn't require notice of injury, notice of claim. The notice of injury, Judge, assuming that that's a requirement, the -- the notice of injury is 120 days from the date that the person knows that he or

she is injured, and the municipality can't rely on that statute if there is no prejudice to it.

The notice of claim, there is no statutory limitation for filing it. The requirement is that the lawsuit be filed within six months of the denial of the claim and that was done in this case. We were just trying to cover all the bases so we wouldn't have to come into court and argue all of this procedural stuff before we get to the merits of the case.

And the merits of the case are this -- this procedure that Oneida County has adopted, first, tying in the disposal of waste from its transfer station to the -- to the -- to the cost of delivering waste to the transfer station is terribly anticompetitive. It puts people like Todd Laddisure and other small contractors basically at a -- at a -- at a disadvantage that they can't effectively compete with a company that is being charged $5.25 a time and they're being charged 54 a time.

And the competitive disadvantage is a substantial one. It's the type of injury that Chapter 133 is designed to address. And I don't think that the County has any immunity which I

think is the basic issue that we have here today for that kind of injury. This is the -- the County cannot choose a method of -- of operation or choose a contractual method of eliminating competition in this county and that's what they've done.

THE COURT: Let me ask you though your position on the damages. You plead treble damages.

MR. CONNELL: Yes.

THE COURT: But under 133.18, what's your reading of that?

MR. CONNELL: I -- I guess I -- again, I think it's probably an inappropriate method to raise the issue in some -- about judgment on the pleadings because the prayer for relief -- according to the rules, the pleadings that we have in this state is not part of the complaint. But I -- it says what it says, and I would argue that treble damages and attorneys fees are gonna be proper for the plaintiffs in this case.

THE COURT: And your theory today then is so what, it doesn't matter what we ask for, we could ask for ten million dollars --

MR. CONNELL: Yes.

THE COURT: -- as long as there's a claim that's allowed.

MR. CONNELL: Yes. Judge, you know, again, and if you want to look at our complaint to see what we're asking for, it's a lot more than treble damages. We're asking, Your Honor, for injunctive relief so this method of operation stops and stops immediately.

THE COURT: See, I didn't read your complaint as asking for injunctive relief, but perhaps I missed that.

MR. CONNELL: Let me find it. Well, maybe it would be better stated as to -- as declaratory relief, that is declaring the contract be illegal I think is the way I phrased it in my complaint.

MS. FORD: I have the page if the court would like --

THE COURT: You have a what?

MS. FORD: I have the wherefore clause if the court would like me to read it. It's on -- the complaint's unpaginated, but it's on the final page of the complaint. There is an order -- it's requesting an order declaring the agreement to be an illegal restraint of trade, for an award of compensatory damages for past and future loss of profits, an award of treble damages pursuant to

133.18, for an award of the costs and disbursements of this action and reasonable attorneys fees pursuant to Section 133.18, and for such other and further relief as this court may deem just and equitable.

THE COURT: No specific request for injunctive or declaratory judgment.

MR. CONNELL: Well, I don't know how you read paragraph one other than asking that the court declare this contract null and void and that's what we're asking for.

THE COURT: So it's your position, Mr. Connell, that paragraph A under the wherefore clause where it says, quote, "[f]or an Order declaring the Agreement described in paragraphs 3, 4 and 8 an illegal restraint of trade under Section 133," is a request for injunctive relief?

MR. CONNELL: Well, I guess if the court declares the contract null and void, we'll be happy. I guess I assume that if you do so, Oneida County cannot -- can no longer collect $54 from my client and five and a quarter from Waste Management.

THE COURT: And, Ms. Ford, did you have four minutes in response?

MS. FORD: I do, even less.

I think that the plaintiff's counsel's argument really boils down the issues very well. Specifically with regard to the notice of defense -- I mean the notice defense, if the municipality's going to enter into a contract, I think actual -- I think notice is even more critical, timely notice, because if we are going to sign a contract with one waste hauler and another one has a specific complaint about that or sees that as an illegal restraint of trade, then we should know about it so that we don't sign a contract that is going to be declared null and void. It's for the benefit of the taxpayers.

Also what I do want to say with all respect to plaintiff's counsel and in no way in derogation of him, what you've heard is not evidence, it's argument. The complaint does not substantiate what plaintiff's counsel has just said regarding the facts. The plaintiff's counsel -- the plaintiff has not offered any evidence regarding the facts even though the plaintiff could have and failed to do so.

The continuing violations theory that plaintiff's counsel acknowledged applies only where

a business is permanently destroyed, and it is now undisputed that E-Z Roll Off was not permanently destroyed by virtue of this particular contract, so the continuing violations theory does not apply to the 120-day limitation period.

THE COURT: It's not undisputed because, as you said, it's just argument. There's been no evidence that says it was or it wasn't.

MS. FORD: Certainly. But counsel can make admissions that -- on behalf of their clients that are binding. They're traditional admissions essentially.

We're not asking for immunity. We're simply asking for a recognition that the Wisconsin legislature in this case did, in fact, give us provisions that required us to be anticompetitive and those are the lowest responsible bidder provisions of the statute. The plaintiff's counsel I think really boiled it down. There's no immunity and we're not asking for immunity to governmental bodies unless that immunity is granted by the state and is pursuant to anticompetitive provisions of the statute.

I don't think there's any dispute about the existence of the lowest responsible

bidder statute which, again, is the public work provision of Section 59.52 which is (29)(a). The legislature's required us to ensure competition by allowing bids. By virtue of that I don't know how the legislature could have more tightly controlled our requirement of fostering competition within our county.

THE COURT: And, again, the bidding that -- it's my understanding is for the -- what the County was willing to pay a company to transfer garbage from the transfer station to the -- the -- I forgot the name for it -- transfer station to the --

MR. LADDUSIRE: Landfill.

THE COURT: -- the end result.

MS. FORD: Well, actually any contract over 20-- worth over $25,000 is subject to this bidding statute.

THE COURT: I agree, and they're bidding on that. And I don't think Mr. Connell takes issue with the fact that, okay, Waste Management got that. All right. They got that bid, lowest or otherwise.

I think what he's taking issue with is somewhere there was some backhanded agreement that,

yeah, we'll give you that and -- but then we're gonna charge you less, $50 less, for people that bring the garbage to the transfer station. In other words, did -- was that part of the bidding process, was -- that agreement that there was going to be a lower charge?

MS. FORD: I'm not -- I'm not entirely sure if we're talking about two separate contracts here. It could be that that second contract was also subject to the bidding statutes.

THE COURT: Well, who would -- now I don't know if there couldn't be a second contract because who's gonna contract to pay 54 and then who's gonna contract to pay 5?

MS. FORD: Well --

THE COURT: I think the -- they got a deal -- the County got a deal with Waste Management. We will give you the contract to get rid of the stuff from the transfer station to the end result and in return for that we will charge you less when you bring the stuff to the transfer station.

MS. FORD: Now that's an allegation. The -- there's -- there's also -- just -- but, see, that still falls within the rubric of competition

or lack thereof and -- because of what the legislature has says -- has said about the bidding statutes.

Say -- say the -- the latter situation is a situation where the contract doesn't have to go through the bidding process because the transfer fee itself is less than $25,000 and the statute requires only bidding for contracts over 25,000. Well, the legislature has decided that there's a dollar cutoff. But does it make sense to read into that words that the legislature didn't put in which would effectively be words at the end of the public works statute that says all work paid for services provided less than $25,000 are subject to the anticompetitive laws? I don't think that's a fair conclusion and I don't think that can fairly be interpreted from the case law.

We've got a situation where we're tightly required to compete. The fact that the legislature decided to put a dollar -- a lower dollar limit on it doesn't change that fact. And unless the legislature speaks on whether or not counties as opposed to cities, which is the Medical Transport case, on whether counties themselves can be held responsible given how tightly controlled

they are, I don't think we can assume the legislature intended that services under $25,000 are subject to suit.

What we're really talking about --

THE COURT: Now I don't take issue with the fact that if it's over 25,000 they have to bid it out and that was probably a fair bidding process and Waste Management got that, but perhaps unbeknownst to E-Z roller (sic) they didn't know -- and I'm not making argument for Connell here -- but maybe they didn't know that that agreement included with it a lesser fee on the front end of this -- this garbage trail. And I've learned more about the garbage industry than I care to know but -- do you know what I'm saying? Perhaps they bid on that -- they bid on that contract and lost it and -- but now they're being I guess in a way punished because now they can't compete.

MS. FORD: All right. I think that looking at the contract will assist in answering that question because the contract is attached to the complaint.

Paragraph nine dictates the cost of transport and disposal of the County's MSW at $24.50 per ton from the date of execution of this

agreement through December 31st of 2004 and then it also raises it thereafter. And I believe we have paragraph -- it looks like 12 talks about the $5.25 for each ton loaded from execution of this contract.

Is that the -- the activity the court's referring to?

THE COURT: Yes.

MS. FORD: So actually that fee was negotiated as part of the bidding process or we must assume that's the case because this contract is worth more than $25,000 so we don't need a second contract. We're talking about a situation where the County said, hey, Waste Managers, give me your best bid on what you can do on both ends.

Now -- and all -- as far as I know, if Waste Managers are interested in getting municipal business, they keep up with whether or not contracts are being sought, whether or not lowest responsible bidders are being sought. To the extent that the plaintiff did not do so in this case is not the fault of the County, it's the fault of the bidder -- or it's the fault -- it's the fault of the plaintiff.

And, again, I think we're talking

about a situation where we can hold this open and we can conduct discovery and we can determine whether or not the process was adequately followed, but the process itself is not under attack in this particular complaint. What's under -- or the actual process that the County underwent is not in attack -- under attack in this complaint. What's under attack is the entire system of competitive bidding by counties dictated by the legislature.

What the plaintiff would have this court do is have the County be penalized for following the lowest responsible bidder statute, for complying with its legal obligations, and until they establish that there's some sort of backdoor deal going on -- and they have had time to do that and they have not submitted evidence to the court that that's the case -- then this complaint must be dismissed.

The question then becomes if we -- if the complaint standing on its own fails to state a claim upon which relief may be granted, is that with or without prejudice.

THE COURT: That last sentence again was dismissed without prejudice?

MS. FORD: Is that with or without,

right.

It seems to me that we've -- it's my understanding, correct me if I'm wrong, that there's an argument to be made on plaintiff's part that if the complaint fails to state a claim as is currently before the court, then that arguably might be without -- actually it would have to be with prejudice, wouldn't it, because the complaint itself would have to be dismissed with prejudice as failing to state a claim.

What I'm -- it seems to me that what we're arguing is we're not -- based upon the record we're entitled to dismissal whether you consider this to be a motion on the pleadings or a motion for summary judgment because it's -- as the seventh circuit has said, it's put up or shut up time for the party -- the nonmovant and months have gone by now.

THE COURT: Mr. Connell.

MR. CONNELL: Put up or shut up what? You know, I guess I -- I thought that we were talking about the sufficiency of the complaint in this case. And maybe I'm mistaken. Maybe we should have had a trial instead here today instead of this motion.

THE COURT: The motion itself is very simple.

MR. CONNELL: Yes.

THE COURT: And then the briefs started coming in and it became a little more convoluted -- well, not convoluted, a little more confusing about what actually is gonna be taking place today. A lot of collateral information started coming in. And that's helpful, I guess, but it --

MS. FORD: My concern is I think every -- every attorney who has been practicing for any number of years already knows that once something outside the context of the complaint is introduced as part -- even as part of a motion for judgment on the pleadings that the motion becomes a motion for summary judgment and it triggers an obligation to come up with some proof, and we came up with our proof in terms of the date we received the notice. We submitted an affidavit. I see no excusable -- I see no excuse for plaintiff's counsel if they wanted to mount a defense or any of these defenses that they're now legally arguing which really doesn't help without evidence.

THE COURT: So you're saying once you

did that, that was the triggering mechanism to make this a motion for summary judgment.

MS. FORD: Absolutely. Once we alleged in our --

THE COURT: I think the statute says though once it's accepted by the court, once those facts are accepted by the court, then it's deemed to be a summary judgment. Otherwise anybody could trigger that summary judgment -- we wouldn't have motions on the pleadings because anybody could just send in any document and once it's sent in it becomes a summary judgment motion.

MS. FORD: Well, my understanding is that that's really a procedural issue. If we -- if the court would necessarily have had to treat this -- even if an affidavit had not been submitted, it would have had to treat this as a motion for summary judgment because the complaint is attached to the -- I mean, the complaint attaches the contract. The court wouldn't be permitted to allow that into the record unless the summary judgment mechanism wasn't followed.

But I guess my -- my problem is that we've waited months and months for something to happen and it's not our burden to prove this case.

MR. CONNELL: Well, you know, the practical thing, Judge, is if you dismiss this case, we -- say -- say that they have immunity. I represent a small business and I -- they can't do all of the discovery if the case is gonna be dismissed on -- on -- because our complaint is insufficient. It just doesn't make any sense for them to proceed in that fashion. It doesn't make any sense for the County, who apparently ought to be concerned about economics, to proceed in that fashion either.

You know, the -- I think the -- the problem with the County's deal with Waste Management is that by tying in that tipping fee with the other type of hauling to the landfill, they've made it impossible for small -- and this may be something that we'll get into during the facts of the case -- small haulers to compete.

Mr. Laddusire doesn't own a landfill in Upper Michigan. He isn't in the business of hauling the kind of waste that we're talking about that Oneida County would have from the -- from its station here and -- here in Rhinelander to the Upper Peninsula. By tying that in they effectively have shut out E-Z Roll Off and others in the

competitive market. And I don't think we have to wait until he goes completely out of business before we start our lawsuit, and if the statute of limitations would require that, it wouldn't make any sense.

THE COURT: We are gonna take about a five-minute break. I have to make a phone call. And I'll come back. I don't intend to rule today though. But stay in the courtroom here. Stand up anyway and walk around.

(At 11:51 a.m. a recess was taken; at 11:58 a.m. the proceedings resumed on the record.)

THE COURT: And I just have two questions, three questions or so, and then I have to go.

But, Mr. Connell, under 133.18(1)(b) which says, no damages, interest on damages or costs, etcetera, may be recovered under this chapter from any local government, etcetera. Now I take that to mean not only treble damages but any damages.

MR. CONNELL: Well, I don't. It's under the treble damage section of the statute. And that's why I think that that's the position that the defendant took, too, that the treble

damages are not allowed, but that -- that doesn't refer to any damages.

MS. FORD: Your Honor, no, that's not the case. We stand by the provisions of the statute -- the clear language of the statute, no damages. We think injunctive relief is the only thing they could have sought.

THE COURT: Against a governmental body.

MS. FORD: Well, yes, because it's not specifically excluded from that -- from -- by the legislature.

THE COURT: And 59.52(29) talks about the bidding requirements and it requires -- or does that statute require the County to bid out the amount it charges for the tipping fee? And that is the garbage coming into the transfer station. Do you understand that?

MS. FORD: Yes. And my answer -- I'm sorry.

THE COURT: I'm asking Ms. Ford, yes.

MS. FORD: Oh. My answer would be yes because the legislature states "[a]ll public work, including any contract" -- and I'll cut to the chase -- for the -- or -- "including any contract

for the. . . furnishing of supplies or material of any kind where the estimated cost of such work will exceed $25,000 shall be let by contract to the lowest responsible bidder," not --

THE COURT: But that tipping fee is the amount that the County pays to these people to bring in garbage.

MS. FORD: Right.

THE COURT: Why would they bid that out?

MR. CONNELL: Why would they award it to the lowest bidder rather than the highest?

THE COURT: Yeah. They would want --

MS. FORD: Oh, we have to.

THE COURT: I'm sorry.

MR. CONNELL: They're setting fees and they're doing it in an anticompetitive fashion.

MS. FORD: I think we should look -- let's re-- I think we should start with what we're required to do on a step-by-step basis.

Oneida County is empowered by the legislature to take actions through Section 59.70(2) and which provides that the County may establish and operate a solid waste management system or participate in such system jointly with

other counties or municipalities. Within the statutory framework counties are empowered to contract with private collectors, transporters, or municipalities to receive and dispose of wastes.

The legislature contemplated that counties would exercise powers including acquiring equipment and land for use in managing solid waste, accepting grant and assistance funds, and entering into the necessary contracts and agreements, charging fees.

THE COURT: But if the County's got a requirement under that statute to take the lowest bidder for the transport of the stuff away, wouldn't there be an equal demand under the statute under the bidding process to take the highest payer?

MS. FORD: No, because the lowest responsible bidder -- that term has been defined by the courts to mean the individual who's bidder -- who is determined to be responsible from the perspective of being able to actually do the job. And I've had cases where the lowest bidder was not accepted because they had a sketchy work record. But as long as that bidder is responsible, you got to take the lowest price. That's why --

THE COURT: I don't disagree with that.

MS. FORD: -- that's been established.

THE COURT: But why would they take $50 less on the front end for the garbage being brought in? When they could have got 54, they decided to take $4. Why would they do that?

MS. FORD: Why would the County take more money or --

THE COURT: Why would --

MS. FORD: -- spend more?

THE COURT: Why wouldn't the County take --

MS. FORD: We can't.

THE COURT: -- more money?

MS. FORD: We can't. As long as Waste Management was the lowest bidder and was not determined to be a nonresponsible bidder, which is a whole 'nother statutory procedure that requires that they be notified and that really puts a black mark on their record actually. As long as they bid low, they get the job.

The problem here really is that E-Z Roll Off didn't throw their hat into the ring on the contract. Had they done so, we wouldn't have a

problem here. That's their competition. That's their competition guarantee. The real problem is that --

THE COURT: Well, we got a lot of things to think about here. And I got to be honest with you. One of the options may be to rule just on the pleadings. Another option is not necessarily outloud discovery. Summary judgments can be by affidavits rather than depositions which certainly cost more than affidavits and take some of that kind of discovery.

MS. FORD: Your Honor --

THE COURT: And --

MS. FORD: Your Honor, may I speak to that?

THE COURT: You may.

MS. FORD: I can't see how that would be possible given my people can't be contacted directly because they're represented by me in order to obtain affidavits from them. The only way those affidavits could be secured is through me.

And by the same token, if -- if we're going to go into the merits, I -- I feel like I would be ethically bound at a minimum in terms of representing my client adequately to depose their

witnesses. I'm not ad-- I'm not adverse to that if the court deems that to be appropriate.

MR. CONNELL: It seems to me, Judge -- I'm sorry to interrupt.

THE COURT: Go ahead.

MR. CONNELL: It just seems to me that perhaps the court ought to have more background on this bidding process and so forth -- that apparently is the crux of the defense in this case -- and if we can do that by documents. And my clients have made public record requests and have those documents, and that I guess would then turn this proceeding more into a summary judgment than a motion on the pleadings.

MS. FORD: And then we'd obviously want the opportunity to conduct discovery to challenge the use of the documents which puts us full blown into the rules of civil procedure in terms of -- or the procedural rules regarding discovery. We -- to allow the plaintiff to offer documents and say this is what these documents mean.

MR. CONNELL: Well, I'm not suggesting that. I'm not foreclosing the defendants from taking whatever actions they think is necessary,

MS. FORD: I just don't -- I have an ethical obligation to adequately represent my client. I can't say what I would recommend.

If there's any doubt about the motion and additional factual background, I would not object to holding the motion open pending a period of discovery and then allow us the discovery that is available under the Wisconsin statutes so that we can fully defend against this case.

THE COURT: And I'm sure Mr. Connell is of the opinion that if I am limited in my damages, I may not want to pursue this --

MR. CONNELL: Well --

THE COURT: -- if I'm not entitled to any money.

MR. CONNELL: -- I, frankly, was worried more about the immunity.

But, on the other hand, I don't want the court to make a ruling based upon half the information that it ought to have. That's what concerns me today. Both of us are sitting here telling you all about what our case is going to be when we -- and when we're here on whether my complaint is sufficient.

THE COURT: I'll either do a written

opinion here or write you as to how we should proceed. And there won't be any need to make an appearance again. We can do that by telephone if -- you can certainly drive up if you want or drive up from Wausau even if you want. But I just want to think a little bit more about how to proceed and how much more I want to open the pandora's box of discovery.

So my judicial assistant will get ahold of your people and will set a date within 30 days or so, okay?

MR. CONNELL: Fine. Thank you, Your Honor.

MS. FORD: Thank you, Your Honor.

THE COURT: And we stand adjourned.

(At 12:08 p.m. the proceedings adjourned.)

* * *

STATE OF WISCONSIN)

)

ONEIDA COUNTY)

I, JEAN M. WOOD, R.M.R., C.R.R., do hereby certify that I have carefully compared the foregoing transcript with the stenograph notes taken by me at the time of the above-entitled action and find the same to be a full, true, and correct transcript of said notes containing all the testimony given and proceedings had in the above-entitled matter on the 20th day of December, 2007.

Jean M. Wood

R.M.R., C.R.R.

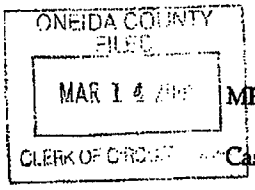
Dated this 10th day of January, 2008

Rhinelander, Wisconsin.

STATE OF WISCONSIN CIRCUIT COURT ONEIDA COUNTY

E-Z ROLL OFF LLC,
Plaintiff,

v.



MEMORANDUM DECISION

Case No. 06-CV-124

COUNTY OF ONEIDA,
Defendant.

FACTS

In June 2003, the Defendant, Oneida County ("the County"), entered into an agreement with Waste Management, Wisconsin, Inc. ("WM"). Pursuant to this agreement, titled "Agreement for the Transport and Disposal of Municipal Solid Waste from the Oneida County Solid Waste Department," the County pays WM $24.50 per ton to transport solid waste from the County transfer station to a landfill. The agreement also provides that WM pay the County $5.25 per ton for waste it brings to the transfer station. The County charges all other local waste haulers, including the Plaintiff E-Z Roll Off LLC ("E-Z"), $54 per ton for waste brought to the transfer station. E-Z has also alleged that WM agreed to purchase two tractors and three trailers at a cost of $243,000 as part of the consideration for this contract.

E-Z asserts that the County has unreasonably restrained trade, in violation of Wis. Stat. § 133.03(1), by charging WM a substantially lower rate for waste deposited at the transfer station, thereby allowing WM to under-price other local haulers and drive

out competition.[1] Further, E-Z argues that the County has restrained trade by tying the purchase of equipment to the agreement to receive and dispose of waste thus eliminating all locally owned potential bidders.

The County has moved for judgment on the pleadings, pursuant to Wis. Stat. § 802.06(3), on the following grounds: (1) the complaint fails to state a claim for a restraint of trade because the County is exempt from antitrust liability; (2) the complaint fails to state a claim for treble damages, costs, and attorney fees and such claims are time-barred; and (3) E-Z has failed to comply with the notice of claims requirements under § 893.80 and §59.07.

DECISION

I. JUDGMENT ON THE PLEADINGS METHODOLOGY

A motion for judgment on the pleadings is essentially a summary judgment motion minus affidavits and other supporting documents. Commercial Mortgage and Fin. Co. v. Clerk of the Circuit Court, 276 Wis. 2d 846, 855, 689 N.W.2d 74 (Ct. App. 2004). To determine whether judgment on the pleadings is proper, the Court must first examine the complaint to determine whether it states a cause of action. Id. If a cause of action is stated, the Court then looks to the responsive pleadings to determine whether material factual issues exist. Id.

[1] E-Z does not appear to take issue with the portion of the agreement whereby the County *pays* WM $24.50 per ton to transfer waste *from* the transfer station, but it does dispute the substantially lower tipping fee that the County *charges* WM, as compared to all other waste haulers.

II. EXEMPTION FROM ANTITRUST LAW

The Wisconsin antitrust statute prohibits contracts and conspiracies that unreasonably restrain trade. Wis. Stat. § 133.03. The County asserts that it is exempt from this antitrust law by virtue of the home rule authority granted to counties. The county home rule statute allows counties to "exercise any organizational or administrative power, *subject only* to the constitution and *to any enactment of the legislature which is of statewide concern* . . . ." Wis. Stat. § 59.03(1) (emphasis added). The Wisconsin Supreme Court has held that § 133.03, the Wisconsin antitrust law, is legislation of statewide concern. American Med. Transp. of Wisconsin, Inc. v. Curtis-Universal, Inc., 154 Wis. 2d 135, 148, 152, 452 N.W.2d 575 (1990) (hereinafter "AMT"). Thus, a county's home rule power is still subject to state antitrust law. See id.; Wis. Stat. § 59.03.

While a county's home rule authority does not, by itself, exempt a county from antitrust law, counties and other municipalities are exempt where there is clear legislative intent to allow a municipality to engage in the type of anticompetitive conduct at issue.[2] AMT, 154 Wis. 2d at 148. In essence, a municipality is exempt where it is clear that the legislature did not intend for antitrust law to apply to certain municipal actions. See id. In determining whether the legislature intended to permit a municipality to engage in anticompetitive conduct, the Court must view the proffered statutes through the lens of promoting competition. See id., 154 Wis. 2d at 151; § 133.01.

[2] Such intent need not be explicit, but the legislation need at least imply authority to engage in anticompetitive conduct. AMT, 154 Wis. 2d at 148.

In so doing, the Court "should not lightly reach the conclusion that . . . restraint of trade is authorized by extraneous statutes that do not quite clearly indicate" such intent. AMT, 154 Wis. 2d at 151-52.

For example, in Town of Hallie, the Wisconsin Supreme Court concluded that the legislature did intend to permit a city to engage in certain anticompetitive conduct. Town of Hallie v. City of Chippewa Falls, 105 Wis. 2d 533, 314 N.W.2d 321 (1982). The town proposed to construct its own sewage collection system and connect that system to the city's treatment system. Id., 105 Wis. 2d at 534, 314 N.W.2d 321. The city rejected the proposed plan but, in turn, offered to allow the town to use the treatment facility only if the town agreed to allow the city to provide other municipal services. Id. The town refused, and a portion of the town was then annexed to the city. The town sued the city alleging that the city's conduct violated Wisconsin antitrust law because it prevented the town from competing against the city for the provision of sewage collection and transportation services in the town. Id., 105 Wis. 2d at 535, 314 N.W.2d 321.

Relying on Wis. Stat. § 66.069(2)(c) and § 144.07(1m), the court held that the legislature views "annexation as an appropriate prerequisite to the provision of sewage service outside the limits of a city." Id., 105 Wis. 2d 541-42, 314 N.W.2d 321. The court observed that § 66.069(2)(c) provides that a city can affix the area outside its boundaries for which it will provide sewer service and it need not serve beyond that area. Id., 105 Wis. 2d at 541, 314 N.W.2d 321. Further, the Court noted that § 144.07(1m) provides that the DNR can order a city to connect sewer service to adjoining unincorporated

areas under certain circumstances. Id. However, when faced with such an order, the statute allows the city to commence a proceeding to annex the area to which it was required to provide service. Id. Because the statutes expressly provide for annexation as an option, the court concluded that there is clear legislative intent to permit a city to tie in the provision of sewer services with a proceeding to annex the areas to be served. See id., 105 Wis. 2d at 541-42, 314 N.W.2d 321.

It is insufficient to show that the legislature grants a municipality the general authority to engage in the particular conduct at issue; rather, the municipality must show clear intent to displace competition. See AMT, 154 Wis. 2d at 150-51, 452 N.W.2d 575. For example, the AMT court concluded that statutory language allowing towns and counties to "contract for" ambulance services did not establish a legislative intent to contract in a way that leads to a monopoly or a restraint of trade. Id., 154 Wis. 2d at 152, 452 N.W.2d 575. In AMT, three private ambulance companies alleged that the City of Milwaukee violated Wisconsin antitrust law by assigning four other local ambulance companies primary responsibility for the city's ambulance services, thereby relegating the three plaintiff companies to be used only as backups. Id., 154 Wis. 2d at 139-41, 452 N.W.2d 575.

In analyzing whether the city was exempt from antitrust liability, the court examined Wis. Stats. § 59.07(41) and § 60.565, which authorize counties and towns to "contract for" ambulance services. Id., 154 Wis. 2d at 151-52, 452 N.W.2d 575. The court held that while the statutes did authorize counties and towns to contract for ambulance services, the statutes did not evince "a legislative intent to contract in a way

that" restrains competition. Id., 154 Wis. 2d at 152, 452 N.W.2d 575. The court further held that municipalities are still required to provide such services in the most competitive manner feasible. Id., 154 Wis. 2d at 151-52, 452 N.W.2d 575. Although the court refused to precisely decide whether such contracts entered into by *counties and towns* would violate antitrust law, since the court was not faced with this issue, the thrust of the court's decision was nonetheless grounded in the absence of any legislative intent to authorize anticompetitive conduct.[3] Id., 154 Wis. 2d at 151-53, 452 N.W.2d 575.

The County argues that it is exempt from antitrust liability because the legislature has empowered counties to enter into contracts to receive and dispose of wastes, under § 59.70(2)(i). Further, the County asserts that the legislature *requires* the County to engage in the alleged anticompetitive conduct at issue in this case by virtue of Wis. Stat. § 59.52(29), which mandates that all counties must bid out all public work where the cost exceeds $25,000.

In analyzing these statutes, the Court cannot find that the County has shown a clear legislative intent to authorize the anticompetitive behavior at issue. As an initial matter, the County appears to misinterpret the case law on this issue. The County asserted at oral argument that "the antitrust laws generally apply except where a municipality has been vested with the responsibility of making sure that *competition is fostered* . . . ." (Trans., 14)(emphasis added). However, the antitrust laws are intended to

[3] At oral argument, the County asserted that the primary reason the AMT court concluded that the city was not exempt from antitrust liability was that the statutes applied only to towns and counties, and thus not cities. (Trans., 18-19). While this was one of the reasons for the court's conclusions, the court gave considerably more attention to the issue of whether these statutes contained the legislative intent to allow anticompetitive conduct.

prohibit *unfair* competition (§ 133.01); thus, it is illogical that the legislature would *exempt* municipalities from laws *prohibiting* unfair competition by requiring them to *facilitate* competition. If the municipality's conduct fosters competition, there is no need to exempt it from laws prohibiting anticompetitive conduct. To the contrary, the case law requires that the legislature grant the municipality the authority to engage in conduct that *restrains* competition. AMT, 154 Wis. 2d at 148, 452 N.W.2d 575.

The general authority granted under § 59.70(2)(i), to enter into contracts to receive and dispose of wastes, evinces no legislative intent to do so in an anticompetitive manner. Under the court's reasoning in AMT, where the legislature gives a municipality the authority to "contract for" services, the municipality must do so in the most competitive manner feasible, absent a contrary legislative directive. See id., 154 Wis. 2d at 150-51, 452 N.W.2d 575. The County asserts that the bidding statute, § 59.52(29), provides such directive and thus exempts it from antitrust liability.

The bidding statute, however, is insufficient to establish the requisite legislative intent to displace competition. First, this statute has no anticompetitive implications. To the contrary, the bidding statute *promotes* competition by encouraging contractors to vie against each other to secure lowest bidder status. The County itself even asserts that the bidding process facilitates competition. (Reply Brief at 2). A statute that operates to foster competition cannot evince the requisite legislative intent to permit anticompetitive conduct.

Second, the bidding statute relied upon by the County does not address the particular conduct challenged in this case, as this statute applies to work only "where

the estimated *cost* of such work will exceed $25,000 . . . ." § 59.52(29)(emphasis added). The conduct challenged in this case does not *cost* the County anything; rather, the conduct challenged creates *revenue* for the County. The crux of this issue turns upon the function of the transfer station and the distinction between the receiving of waste and the disposing of waste. The transfer station essentially operates as a temporary holding ground for local waste where individuals and waste hauling companies dump their garbage.[4] The County *charges* these individuals and companies a per-ton "tipping fee" for waste they dispose of at the transfer station. This waste is then consolidated, compacted, or otherwise processed and is transported in mass quantities to a landfill in Michigan. The County *pays* WM for this transportation service. While E-Z does not take issue with the amount the County *pays* WM for transporting the waste to the landfill, it does challenge the tipping fee the County *charges* WM ($5.25 per ton) versus the fee charged to all other haulers ($54 per ton).

The bidding statute, § 59.52(29), probably requires the County to solicit bids and accept the lowest bid for the transportation of waste *from* the transfer station to a landfill because this is a "cost" paid by the County, likely exceeding $25,000. While the bidding statute might require the County to bid out costs it incurs exceeding $25,000, it does not require the County to solicit bids for revenue it receives. Not only is such a requirement neither explicit in, nor implied by, § 59.52(29), but such a requirement defies logic and prescribes an absurd result. The bidding statute impliedly acts to limit County

[4] While these facts do not appear in the pleadings, they can be inferred from the complaint and the documents incorporated therein.

expenses thereby ultimately reducing the financial burden on taxpayers. To the contrary, accepting the *lowest fee* would *decrease revenue* and could thus ultimately increase taxpayer burden.

The Court cannot find that § 59.52(29) contains the requisite legislative intent to permit the County to engage in the anticompetitive behavior *at issue*, that is, to permit the County to charge haulers a disparate tipping fee for waste brought to the transfer station. Thus, the County has not established that it is exempt from antitrust laws, and E-Z's cause of action for an unreasonable restraint of trade survives.

III. TREBLE DAMAGES, COSTS, & ATTORNEY FEES

In the prayer for relief, E-Z requests treble damages, court costs, and attorney fees pursuant to Wis. Stat. § 133.18. While § 133.18(1)(a) does provide for such damages and costs generally, there is an exception to this rule under (1)(b), which states "[n]o damages, interest on damages, costs or attorney fees may be recovered under this chapter from any local governmental unit . . . ." It is undisputed that the County is a municipal body. Because of this exception, the County asks the Court to dismiss E-Z's "claim" for treble damages, costs, and attorneys fees. E-Z does not contest the merit of this argument, but rather asserts that it is improper for the Court to consider the relief requested to determine whether a cause of action exists, citing In re Estate of Mayer, 26 Wis. 2d 671, 133 N.W.2d 322 (1965).

In this case, there is no independent "claim" for treble damages, costs, and attorney fees; rather, these items are simply the relief requested *predicated* on a claim for

antitrust. Because no claim exists for treble damages, costs, and attorney's fees, there is no such claim for the Court to dismiss. Nonetheless, the statute unequivocally precludes recovery of, at a minimum[5], treble damages, costs, and attorney fees from the County. The Court will thus, on its own motion, strike from the complaint the prayer for treble damages, costs, and attorneys fees requested pursuant to § 133.18.

The County further asserts that E-Z's request for treble damages, costs, and attorney fees is time-barred. Because the Court has stricken these remedies from the complaint, there is no need to address whether this relief is time-barred.

IV. NOTICE OF CLAIMS

The County's final argument is that the complaint should be dismissed because E-Z has failed to comply with the notice of claims requirements of Wis. Stats. § 893.80 and § 59.07. To analyze whether the notice of claims requirements have been satisfied, the Court must first determine the date on which the notice was filed. This date is not contained within the pleadings but is rather found in the affidavit of Robert Bruso, Oneida County Clerk, which the County submitted in support of its motion.

A motion for judgment on the pleadings is limited to only the pleadings, and it is improper for the Court to consider matters outside the pleadings. Poeske v. Estreen, 55 Wis. 2d 238, 242, 198 N.W.2d 625 (1972) (stating that ". . . matters outside of the pleadings and not incorporated therein [are] not to be considered in ruling on [a motion

[5] The County argued in its brief that § 133.18(1)(b) precludes the recovery of only treble damages, costs, and attorney fees from a local government. Thus, the Court will not address whether the language "*[n]o* damages . . . may be recovered *under this chapter*" precludes recovery of *any* monetary damages against the County for violations alleged under any provision in Chapter 133.

for judgment on the pleadings]"). If the parties present documents outside the pleadings, and the Court does not exclude these documents, the Court must convert the motion into one for summary judgment. Wis. Stat. § 802.06(3). If the Court does exclude the extraneous documents, the motion will remain one for judgment on the pleadings, and the Court will consider only the pleadings in making its decision. See id. It is within the Court's discretion to determine whether to exclude documents outside the pleadings. See CTI of Northeast Wisconsin, LLC v. Herrell, 2003 WI APP 19, ¶ 6, 259 Wis. 2d 756, 656 N.W. 2d 794 (Ct. App. 2002)(analyzing § 802.06(2)(b), which provides language parallel to § 802.06(3)).

In this case, the Court will exclude the affidavit presented by the County, and this motion will remain one for judgment on the pleadings.[6] The determination as to whether E-Z is barred from bringing this action for failing to comply with the notice of claims requirements is a complex issue that would likely necessitate extensive factual support. Specifically, failing to comply with the time limits in § 893.80 does not serve as an automatic bar to an action. Even if a plaintiff fails to satisfy these time requirements, an action still survives if the plaintiff can show that the defendant had actual notice of the claim and that the defendant was not prejudiced by a delay of, or failure to provide, the requisite notice. § 893.80(1)(a). The determinations of whether the County had actual notice of the claim and whether any prejudice exists are intensive factual issues that will likely require extensive discovery.

[6] The contract is not extraneous to the pleadings because it was attached to the complaint and was incorporated by reference, thereby making it part of the pleadings. Continental Bank & Trust Co. v. Akwa, 58 Wis. 2d 376, 387, n. 11, 206 N.W.2d 174 (1973)(stating that "[p]apers attached to the complaint and incorporated [therein] must be considered part of the pleadings . . . .").

In addition, converting this motion to one for summary judgment would frustrate judicial efficiency. This motion involves three separate issues and only one of those issues, the notice of claim issue, requires factual support. The other two issues are purely issues of law, and the Court will not delay ruling on the two legal issues. Further, the Court's decision with respect to the two issues of law could affect how the parties will proceed and the scope of discovery. The Court will thus limit the issues on the table by ruling on the issues of law and declining to rule on the notice of claims issue, which is more appropriately suited for a later summary judgment motion. The Court recognizes that the County filed this motion several months ago and might have assumed that the Court would convert this motion into one for summary judgment. At this point, the time limit for filing a motion for summary judgment has passed, and the Court will thus exercise its inherent authority and will extend the prescribed time period for filing a motion for summary judgment. The Court will allow the parties to file such a motion until July 14, 2008. See Lentz v. Young, 195 Wis. 2d 457, 465-66, 536 N.W.2d 451 (Ct. App. 1995).

CONCLUSION

E-Z's antitrust claim against the County will not be dismissed because the County has not established any legislative intent to exempt the County from antitrust liability. E-Z's prayer for treble damages, costs, and attorney fees will be stricken from the complaint because Wis. Stat. § 133.18(1)(b) specifically precludes recovery of such relief from a local government unit. Finally, the Court is excluding the Bruso affidavit submitted to support the County's notice of claims argument. Because this document is

excluded, the Court has no basis to determine whether E-Z complied with the notice of claims requirements.

Dated this 14 day of March, 2008.

BY THE COURT

Honorable Patrick F. O'Melia
Oneida County Circuit Court
Branch I

STATE OF WISCONSIN : CIRCUIT COURT : ONEIDA COUNTY

****

E-Z ROLL OFF, LLC,

Plaintiff,

COPY

vs. Case No. 06-CV-124

COUNTY OF ONEIDA,

Defendant.

****

MOTION HEARING

BEFORE: PATRICK F. O'MELIA
Circuit Judge, Branch I

RHINELANDER, WISCONSIN
DECEMBER 11, 2008

JEAN M. WOOD, R.M.R., C.R.R.
Official Circuit Court Reporter
Oneida County Circuit Court, Branch I,
Rhinelander, Wisconsin 54501

A P P E A R A N C E S

CROOKS, LOW & CONNELL, S.C., by JAMES B. CONNELL, 531 Washington Street, P.O. Box 1184, Wausau, WI, 54402-1184, appeared telephonically on behalf of the Plaintiff, E-Z Roll Off, LLC.

CRIVELLO CARLSON, S.C., by JOHN T. JUETTNER, 710 North Plankinton Avenue, Milwaukee, WI, 53203, appeared telephonically on behalf of the Defendant, County of Oneida.

ALSO PRESENT: Todd Laddisure, one of the principals of E-Z Roll Off, LLC, and Paula Laddisure, his wife.

E X H I B I T S

NONE.

PROCEEDINGS

THE COURT: This matter is 06-CV-124, E-Z Roll Off, LLC, versus Oneida County, Wisconsin, Municipal Body. E-Z Roll Off and the Laddusires appear by counsel Mr. Connell by telephone and Oneida County appears by Attorney Juettner and by telephone, both with leave of the court.

Motions for summary judgment were previously filed. And I have reviewed the briefs and the law submitted, and if there's nothing further, I'm going to rule.

And, as I said, this case is before the court for a summary judgment motion brought by the Defendant, Oneida County. The Defendant asserts that the case should be dismissed because the Plaintiff failed to comply with the notice of claims statute, Wisconsin Statute 893.80. On March 14th, 2008, the court denied the Defendant's motion for judgment on the pleadings and struck the prayer for treble damages, costs, and attorney's fees from the complaint. The issue currently before the court was left open because the determination of the issue required necessary evidentiary support by way of depositions or affidavits or other discovery methods.

In any event, on June 25th, 2003, the Defendant, Oneida County, entered into an agreement with Waste Management, and pursuant to this agreement the County pays Waste Management $24.50 per ton to transport solid waste from the County transfer station to a landfill. The agreement also provided that Waste Management pay the County $5.25 per ton for waste it brings to the transfer station. The County charges all other local waste haulers, including the Plaintiff, E-Z Roll Off, $54 per ton.

E-Z Roll Off has also alleged that Waste Management agreed to purchase two tractors and three trailers at a cost of approximately $243,000 as part of the consideration for this contract.

In addition, E-Z Roll Off asserts that the County has entered into the business of dumpster delivery for waste removal. E-Z Roll Off claims that the agreement and the County's dumpster delivery activities unreasonably and illegally restrain trade.

On February 17th, '04, Bart Sexton, the Oneida County solid waste director, met with Todd and Paula Laddusire who were principals and

owners of E-Z Roll Off to address their concerns regarding the agreement, and around April 2004 Paula Laddusire filed a complaint dated April 21st, 2004, with the Department of Agriculture, Trade, and Consumer Protection alleging that the agreement is illegal. On September 28th, 2005, the Plaintiff filed a Notice of Injury and Statement of Claim with the Oneida County clerk.

The County has moved for summary judgment on the basis that the Plaintiff failed to comply with Wisconsin Statute 893.80, that is the notice of claims statute. And the Plaintiff responds with several arguments including the following: One, that it was not required to comply with 893.80; two, that the notice was timely; and, three, that the County had actual notice and was not prejudiced if it was not timely.

Now we'll address the first one first, that is whether or not they're subject to 893.80. That statute provides that before bringing an action against a governmental subdivision, one must first file within 120 days of the happening of the event giving rise to the claim a written notice of the circumstances of the claim. And the Plaintiffs assert that it need not comply with 893.80 because

Chapter 133 provides a specific enforcement scheme. The Plaintiff cites a litany of cases containing exceptions to 893.80. However, none of these cases specifically excepts antitrust claims or claims brought under Chapter 133.

The notice of claims statute itself contains several specific exceptions. Not several. It contains specific exceptions including the following: 19.3 section -- 19.37 sections -- or open records; 19.97, open meetings; Section 281.99 which is a safe drinking water violation code, and, in addition, the courts have carved out several other exceptions through case law and that was -- there's a lengthy list here, but I'm not going to go through these at this time because none of them are directly on point with these cases but I think do carve out exceptions. But, again, they do not include Chapter 133. And in all of those cases the courts found that the statutes under which the claims were brought contained specific statutory schemes that conflict with 893.80.

So to determine whether a statute exempts compliance with notice requirements under 893, the courts have applied the following tests: And that consists of, one, whether there's a

specific statutory scheme for which the plaintiff seeks exemption; two, whether enforcement of 893.80 would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and, three, whether the purpose for which 893 was enacted would be furthered by requiring that a notice of claim be filed. And that test is specifically set out in the Oak Creek Citizen's Action Committee case. That's a 2007 Wisconsin appellate decision.

Starting with the first, that is whether or not there's a specific statutory scheme. And, again, for example, in Oak Creek the court analyzed the direct legislation statute, that is Wisconsin Statute 9.20, which contains specific time periods and very specific procedures. The Plaintiff contends that Chapter 133 contains a similar specific statutory scheme intended to provide relief for violation of the antitrust statute. However, the Plaintiff does not explain precisely what those procedures are.

The Plaintiff goes on to state that it has requested declaratory relief and that such relief is authorized by 133.16. This statute, that is 133.16, provides very basic information relating

to the pleading and practices for actions under Chapter 133. In addition, it gives the court the authority to enjoin violations of the chapter. So unlike in Oak Creek, 133.16 does not contain any specific time limits and it does not contain any specific procedural requirements that substantially differ from general rules of pleading and practice. In short, the court does not believe that -- strike that. In short, the court does not believe that Section 133.16 contains a specific statutory scheme.

We next weigh whether or not it promotes prompt resolution. The majority of section -- exceptions carved out to 893.80 involve situations where applying that statute would operate to expand the statutory time limits. When 893.80 is applied, it can add as much as 240 days to a statutory scheme, that is 120 days for claimant to file and an additional 120 for the municipality to disallow.

And as I stated earlier -- or by way of example, the statute at issue in Oak Creek, that is 9.20, contains a list of procedures that must be followed within very short time periods. And specifically that statute, 9.20, that was addressed

in that case, the language -- and I won't read the entire statute, but it talks about within 15 days after the petition is filed a clerk shall do certain actions and then there's 30 days following the date the clerk files that affidavit and then you -- there's further specific time frames that have to be dealt with. And the court held that these time limits showed a legislative intent for prompt action and that adding as much as 240 days under 893 would contradict that intent.

Wisconsin Statute 133.18(5) provides that, quote, "[e]very civil action under this chapter . . . shall be expedited in every way and shall be heard at the earliest practicable date." Therefore, one can infer that the legislature prefers that the courts resolve actions under Chapter 133 promptly, and applying 893 in this case would promote that prompt resolution as it would require a claim be filed within 120 days. Without applying it one would have a six-year statute of limitations. Therefore applying 893.80 would not hinder the legislature's preference for prompt resolution of Chapter 133 claims but instead promote prompt resolution.

Next we deal with the purpose. The

purpose of 893.80 is to notify the municipality of a potential claim so that it can investigate and evaluate and afford the municipality -- municipality rather an opportunity to compromise without suit and to allow the municipality to budget for settlement or litigation. This purpose would be furthered in this case because it would notify the County of a claim within 120 days of the event as opposed to the 6 years under the statute of limitations thereby affording it an opportunity to promptly investigate, offer settlement, and budget for the litigation.

So in applying the above test, it's clear to this court that the requirements of 893.80 should not give way to any provision of Chapter 133 and, accordingly, the Plaintiff would be required to comply with 893.80.

Next we get to whether or not the Plaintiff timely filed a notice of claim. Wisconsin Statute 893.80 requires one to file notice of a claim within 120 days, quote, "after the happening of the event giving rise to the claim," close quote, period. In this case the dispositive question is on what date did the event happen, in other words when does the clock start.

And the County suggests that that date -- or asserts that the date of the event is the date the contract was signed and executed and that's June 25th, 2003. The Plaintiff asserts that antitrust violations are continuing and antitrust actions do not begin to accrue until a business is permanently destroyed.

The rule cited by the Plaintiff, however, applies only to continuing antitrust violations. And both parties refer to Segall versus Hurwitz, S-E-G-A-L-L, Hurwitz, H-U-R-W-I-T-Z, 114 Wis. 2d 471. Not all antitrust violations are continuing. An antitrust claim that does not involve a continuing violation accrues at the time the defendant commits -- commits the act. And I believe it was the County that cited Klehr versus A.O. Smith Corporation at 521 U.S. 179.

In the Zenith Radio Corporation case, an antitrust cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. In the context of a continuing conspiracy to violate the antitrust laws this has usually been understood to mean that each time a plaintiff is injured by an

act of the defendant's a cause of action accrues to him to recover the damages.

In this case the Plaintiff has not alleged a continuing violation. Rather the complaint alleges that the agreement signed in June of '03 is illegal. Now to the extent the Plaintiff asserts or has asserted that the conduct alleged in paragraph nine of the complaint, that is the delivery of dumpsters, is a continuing violation, the notice of claim filed in September '05 does not address that conduct. In addition, the Plaintiff has not submitted any evidence that it has otherwise complied with the notice of claims statute for its claim regarding the delivery of dumpsters.

Accordingly, the action began to accrue in the court's opinion on June 25th, 2003, and the Plaintiff was required to file a notice of claim with 120 days -- within 120 days of that date. The Plaintiff filed its notice of claim in September '05, over two years later. Thus the claim was not filed timely. That, however, does not end the inquiry.

Did the County have actual notice of the Plaintiff's claim? A claimant who fails to

comply with the provisions of 893 is not barred from beginning an action in court if the municipality had actual notice of the claim and the claimant -- claimant rather can show that the municipality has not been prejudiced by the delay or failure to give the required notice.

And the term under that statute, actual notice, is equivalent -- strike that. The term, quote, "actual notice," close quote, in the statute is equivalent to actual knowledge and, therefore, the municipality must not only have knowledge about the events for which it may be liable but also the identity and type of damage alleged to have been suffered. And that language is from Markweise, M-A-R-K-W-E-I-S-E, v. Peck Foods, 205 Wis. 2d 208. The court reasoned that unless the municipality had actual notice of both the claimant and the claim, the investigation and evaluation envisioned by the statute is impossible.

The Plaintiff argues that the County had actual notice of its claim. First, the Plaintiff asserts that in February of '04 Todd and Paula Laddusire scheduled a meeting with Mr. Sexton and they told Sexton they could no longer continue business with the County unless they were given a

more favorable rate. The Plaintiff does not cite any evidentiary support for that proposition.

During his deposition, which was the only evidentiary support provided by the Plaintiff, Mr. Sexton testified only that the Laddusires were quite upset about the contract with Waste Management and that they threatened to take their garbage elsewhere if the County did not lower its tipping fee. The Plaintiff has not shown that the County was aware that it could not continue business without a lower rate.

Second, the Plaintiff asserts that the complaint filed in April of '04 with the Department of Agriculture, Trade and Consumer Protection gave the County actual notice of the claim. This document displays the Plaintiff's discontent and disagreement with the original contract and desire to be reimbursed but it does not show that the Plaintiff sustained any damages. In addition, that document was filed approximately ten months after the agreement was executed and approximately six months after the deadline for filing a notice of claim.

While the actual notice provision of 893.80 does not contain any specific time period,

it stands to reason that the more time that does pass, the greater the likelihood of prejudice. Therefore, the County did not have actual notice of claim.

Now the claimant -- regarding the lack of prejudice, the claimant bears the burden of establishing that the delay or failure to file a notice has not prejudiced the Defendant. In this case the Plaintiff makes the assertion -- and I take this from the brief of the Plaintiff -- that "any delay or failure to give notice did not prejudice Oneida County." The Plaintiff states that the County has been given eight years to remedy its conduct and, quote, "[i]t is clear from the moment the contract was entered that Oneida County maintained that its conduct did not violate the law and that it intends to take no action to provide a remedy for those damaged by its anticompetitive practices." Again that's taken from the Plaintiff's brief.

However, the Plaintiff provides no evidentiary citation for that argument. That argument would apply in any case where compliance of notice of claims was at issue. If the case is being litigated, the defendant is most likely not

taking action to remedy its original conduct. Without more support I don't think the Plaintiff has satisfied its burden of proving lack of prejudice.

Now because I originally concluded in this that the Plaintiff has not complied with 893.80, we're not going to address the issue of whether the notice itself was deficient.

So, in conclusion, because the Plaintiff was required to comply with 893.80, because the 120-time period began to accrue on June 25th, 2003, and the Plaintiff's September 2005 filing of a notice of claim was untimely and because the Plaintiff has not established that the County had actual knowledge of the claim or that the County was not prejudiced, I conclude that 893.80 bars the Plaintiff's action and for that reason would dismiss the action.

MR. CONNELL: Thank you, Your Honor.

MR. JUETTNER: Thank you, Your Honor.

THE COURT: Are you guys still there?

MR. CONNELL: Yes, Your Honor.

THE COURT: All right. Is there anything further, Mr. Connell?

MR. CONNELL: I have nothing further.

THE COURT: All right. Mr. Juettner?

MR. JUETTNER: No, I don't have anything further. Thank you, Your Honor.

THE COURT: And --

MR. JUETTNER: You prepared a written memorandum?

THE COURT: I read from some typed notes, but I will -- I will sign an order when you present it.

MR. JUETTNER: All right. Thank you, Your Honor.

THE COURT: Very good. We'll let you go.

Thanks, Jim. Have a happy holiday.

MR. CONNELL: Thank you. Bye.

THE COURT: And we're adjourned.

(At 2:32 p.m. the proceedings adjourned.)

* * *

STATE OF WISCONSIN)

)

ONEIDA COUNTY)

I, JEAN M. WOOD, R.M.R., C.R.R., do hereby certify that I have carefully compared the foregoing transcript with the stenograph notes taken by me at the time of the above-entitled action and find the same to be a full, true, and correct transcript of said notes containing all the testimony given and proceedings had in the above-entitled matter on the 11th day of December, 2008.

Jean M. Wood

R.M.R., C.R.R.

Dated this 17th day of April, 2009

Rhinelander, Wisconsin.

RECEIVED DEC 2 3 2008

STATE OF WISCONSIN CIRCUIT COURT ONEIDA COUNTY

E-Z ROLL OFF LLC,

Plaintiff,

v.

COUNTY OF ONEIDA,
a Wisconsin municipal body,

Defendant.

Case No. 06-CV-124
Case Code 30303

ONEIDA COUNTY
FILED
DEC 22 2008
CLERK OF CIRCUIT COURT

ORDER FOR JUDGMENT AND JUDGMENT

The above-entitled matter having come on for hearing on December 11, 2008, pursuant to the Motion for Summary Judgment of the Defendant, County of Oneida, by its attorneys, Crivello Carlson, S. C., and based upon the Court's decision on that Motion rendered that day and on file herein;

NOW, THEREFORE, on Motion of Crivello Carlson, S.C., attorneys for County of Oneida, seeking dismissal of all claims filed against said Defendant,

IT IS HEREBY ADJUDGED AND DECREED that the Complaint of the Plaintiff, E-Z Roll Off LLC, including all claims, against the Defendant, County of Oneida, is hereby dismissed upon its merits with prejudice and without cost.

Judgment entered and docketed this 22 day of December, 2008.

BY THE COURT:

Honorable Patrick F. O'Melia
Oneida County Circuit Court Judge

Court of Appeals of Wisconsin.
E-Z ROLL OFF, LLC, Plaintiff-Appellant,
v.
COUNTY OF ONEIDA, Defendant-Respondent.[FN†]

FN† Petition for Review Filed.

No. 2009AP775.

Submitted on Briefs Jan. 12, 2010.
Opinion Filed May 11, 2010.

Background: Waste hauling company filed notice of injury with county alleging violations of statute prohibiting trusts and monopolies after county executed agreement with another waste hauling company. The Circuit Court, Oneida County, Patrick F. O'Melia, J., dismissed complaint for failure to provide county with timely notice of injury. Waste hauling company appealed.

Holdings: The Court of Appeals, Hoover, P.J., held that:
(1) there was specific statutory scheme for which company sought exemption from statutory notice requirements;
(2) enforcement of notice requirements would have hindered legislative preference for prompt resolution; and
(3) enforcement of requirements would not have furthered the purposes for which they were enacted.

Reversed and remanded.

West Headnotes

[1] Municipal Corporations 268 ⚿1021

268 Municipal Corporations
268XVI Actions
268k1019 Conditions Precedent
268k1021 k. Notice, demand or presentation of claim. Most Cited Cases
Purpose of the notice of injury requirement for bringing an action against a governmental entity is to notify the entity of the potential claim so that it might investigate and evaluate. W.S.A. 893.80(1)(a).

[2] Municipal Corporations 268 ⚿1021

268 Municipal Corporations
268XVI Actions
268k1019 Conditions Precedent
268k1021 k. Notice, demand or presentation of claim. Most Cited Cases
The notice of claim, as opposed to notice of injury, against a governmental entity is not subject to any filing deadline. W.S.A. 893.80(1)(b).

[3] Municipal Corporations 268 ⚿1021

268 Municipal Corporations
268XVI Actions
268k1019 Conditions Precedent
268k1021 k. Notice, demand or presentation of claim. Most Cited Cases
Purpose of the notice of claim requirement for bringing an action against a governmental entity is to afford the governmental entity an opportunity to effect compromise without suit, and to budget for settlement or litigation. W.S.A. 893.80(1)(b).

[4] Municipal Corporations 268 ⚿1021

268 Municipal Corporations
268XVI Actions
268k1019 Conditions Precedent
268k1021 k. Notice, demand or presentation of claim. Most Cited Cases
Supreme Court applies the following three-factor test to determine on a case-by-case basis whether a particular statutory claim against a governmental entity is excepted from statutory notice requirements: (1) whether there is a specific statutory scheme for which the plaintiff seeks exemption; (2) whether enforcement of statutory notice requirements would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and (3) whether the purposes for which the notice requirements were enacted would be furthered by requiring that a notice of claim be filed. W.S.A. 893.80.

[5] Appeal and Error 30 ⚿842(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) k. In general. Most Cited Cases
Whether the statutory notice provisions apply to specific statutory actions against governmental entities is a question of statutory interpretation and presents a question of law that the Court of Appeals determines independently of the circuit court. W.S.A. 893.80(1).

[6] Counties 104 ⚿213.5(1)

104 Counties
104XII Actions
104k211 Conditions Precedent
104k213.5 Notice, Demand, or Presentation of Claim
104k213.5(1) k. In general. Most Cited Cases
There was a specific statutory scheme for which the waste hauling company plaintiff sought exemption from statutory notice requirements in actions against governmental entities, supporting exception from notice requirements in action against county pursuant to antitrust statute; statute's mention of injunctive relief and provision for enforcement of injunctions by "actions or proceedings" was sufficient to constitute a specific statutory scheme. W.S.A. 133.16, 893.80(1).

[7] Counties 104 ⚿213.5(1)

104 Counties
104XII Actions
104k211 Conditions Precedent
104k213.5 Notice, Demand, or Presentation of Claim
104k213.5(1) k. In general. Most Cited Cases
Enforcement of statutory notice requirements for actions against governmental entities would have hindered legislative preference for prompt resolution of type of claim under consideration in action by waste hauling company against county pursuant to antitrust statute, supporting exception from notice requirements; legislature used strong language by using the term "shall," and twice set forth requirements for prompt resolution in antitrust statute. W.S.A. 133.16, 893.80(1).

[8] Counties 104 ⚿213.5(1)

104 Counties
104XII Actions
104k211 Conditions Precedent
104k213.5 Notice, Demand, or Presentation of Claim
104k213.5(1) k. In general. Most Cited Cases
Purposes for which statutory notice requirements for actions against governmental entities were enacted would not have been furthered by requiring that a notice of claim be filed in action by waste hauling company against county pursuant to antitrust statute, supporting exception from notice requirements; there was little need for prompt investigation into the circumstances giving rise to the claim, as the parties partaking in the alleged prohibited deals would be aware of their conduct, and legislature had expressed its intent for antitrust actions to be swiftly decided. W.S.A. 893.80(1); W.S.A. 133.16.
****646** On behalf of the plaintiff-appellant, the cause was submitted on the briefs of James B. Connell of Crooks, Low & Connell, S.C. of Wausau.

On behalf of the defendant-respondent, the cause was submitted on the brief of John T. Juettner of Crivello Carlson, S.C. of Milwaukee.

Before HOOVER, P.J., PETERSON and BRUNNER, JJ.

HOOVER, P.J.

426** ¶ 1 **E-Z Roll Off**, LLC, appeals a judgment dismissing its complaint for failure to provide Oneida County a timely notice of injury and claim as required by WIS. STAT. § 893.80(1).[FN1] **E-Z Roll Off** primarily argues its WIS. STAT. ch. 133 antitrust claim was exempt from the statutory notice requirements. If not exempt, then **E-Z Roll Off** contends its notice was timely*647** because there was a continuing violation. As its final alternative, **E-Z Roll Off** asserts Oneida County had actual notice and was not prejudiced by the failure to give the statutory notice. We agree ch. 133 antitrust claims are exempt from § 893.80(1)'s notice requirements and, therefore, reverse the judgment and remand.

FN1. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

BACKGROUND

¶ 2 **E-Z Roll Off** was in the solid waste hauling business, providing dumpsters to its customers. In June 2003, Oneida County executed an agreement with another waste hauling company, Waste Management, Wisconsin,*427 Inc. As part of that agreement, Waste Management was charged a preferential $5.25 per ton rate for waste it delivered to the County's transfer station. Other waste haulers, including **E-Z Roll Off**, were charged $44 or $54 per ton, depending on whether the hauler delivered enough waste to the County annually to earn a rebate.

¶ 3 **E-Z Roll Off's** owners, Todd and Paula Laddusire, were unaware of the Waste Management contract until February 2004, when one of their employees inadvertently saw a scale ticket showing Waste Management's rate.[FN2] The Laddusires promptly requested a meeting with the County's solid waste director, Bart Sexton. At a February 17, 2004 meeting, the Laddusires expressed their concerns with the Waste Management contract, opining it created a monopoly and stating they would take their waste elsewhere unless the County reduced **E-Z Roll Off's** disposal rate. Sexton refused to reduce **E-Z Roll Off's** rate.

FN2. The County disputes this fact, asserting the Laddusires were aware of the contract when it was created. However, because summary judgment was granted to the County, the facts must be construed in **E-Z Roll Off's** favor. *See Kuehl v. Sentry Select Ins. Co.*, 2009 WI App 38, ¶ 5, 316 Wis.2d 506, 765 N.W.2d 860. Regardless, the fact is not critical to our decision.

¶ 4 The Laddusires then filed complaints with various governmental entities, including the Wisconsin Department of Agriculture, Trade, and Consumer Protection. As a remedy, the complaint requested reimbursement of "the amount ... paid over [$]5.25/ton, ... which is about [$]98,000," and that "the monopoly ... be broken [and] criminal charges filed against all parties involved." The Department forwarded a copy of the complaint to the County landfill, but took no further *428 action. The Department's cover letter indicated the County had the option to provide a response, which the Department would place in its file. Sexton replied to the complaint, which he had received May 8, 2004, in a letter to the Department and the Laddusires. Sexton asserted the Laddusires were always aware of the contract terms, and stressed the contract resulted from an open bidding process. He also denied the Laddusires' claim that payments had been made "under the table."

¶ 5 On September 28, 2005, **E-Z Roll Off** filed with the County a notice of injury alleging violations of WIS. STAT. ch. 133, and a statement of claim indicating a loss of $1,199,100.45 in past and future lost earnings. The claim was disallowed and **E-Z Roll Off** filed the present action on April 20, 2006. Ultimately, the circuit court granted the County's motion for summary judgment, dismissing the case. The court concluded WIS. STAT. § 893.80(1)'s notice requirements applied, **E-Z Roll Off's** notice was not timely, and **E-Z Roll Off** failed to demonstrate actual notice and lack of prejudice.

DISCUSSION

[1] ¶ 6 WISCONSIN STAT. § 893.80(1) sets forth two prerequisites to bringing an action**648 against a governmental body such as Oneida County, a notice of injury, § 893.80(1)(a), and a notice of claim, § 893.80(1)(b).[FN3] The notice of injury must be given "[w]ithin 120 days after the happening of the event giving rise to the claim," and supply "written notice of the circumstances of the claim." WIS. STAT. § 893.80(1)(a). However, "[f]ailure*429 to give the requisite notice shall not bar action on the claim if the [county] had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the [county]." *Id.* The purpose of the para. (1)(a) notice of injury is to notify the governmental entity of the potential claim so that it might investigate and evaluate. *Griffin v. Milwaukee Transp. Servs., Inc.*, 2001 WI App 125, ¶¶ 14-15, 246 Wis.2d 433, 630 N.W.2d 536.

FN3. WISCONSIN STAT. § 893.80(1)(a) actually uses the word "claim," not "injury." The case law, however, recognizes this component of the statute as the notice of in-

jury. *Vanstone v. Town of Delafield*, 191 Wis.2d 586, 591 n. 5, 530 N.W.2d 16 (Ct.App.1995).

[2][3] ¶ 7 The notice of claim, on the other hand, is not subject to any filing deadline. *Vanstone v. Town of Delafield*, 191 Wis.2d 586, 593, 530 N.W.2d 16 (Ct.App.1995); *see also Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 28, 235 Wis.2d 610, 612 N.W.2d 59. That notice is to contain the claimant's address and "an itemized statement of the relief sought," and no action may be brought until the claim has been disallowed. WIS. STAT. § 893.80(1)(b). A claim is deemed disallowed if the county fails to respond within 120 days. WIS. STAT. § 893.80(1g). The purpose of the para. (1)(b) notice of claim is to afford the governmental entity an opportunity to effect compromise without suit, and to budget for settlement or litigation. *Griffin*, 246 Wis.2d 433, ¶¶ 14-15, 630 N.W.2d 536.

¶ 8 Our supreme court has held WIS. STAT. § 893.80(1)'s notice provisions apply generally to all actions, not just those in tort or those for money damages. *See DNR v. City of Waukesha*, 184 Wis.2d 178, 191, 515 N.W.2d 888 (1994), *overruled in part by State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis.2d 585, 597, 547 N.W.2d 587 (1996) (holding the "all actions" language was overbroad). However, the court held substantial compliance with the statute was sufficient. *Id.* at 198, 515 N.W.2d 888.

**430 ¶ 9 Two years later, in *Auchinleck*, 200 Wis.2d at 596, 547 N.W.2d 587, the supreme court nonetheless held WIS. STAT. § 893.80(1)'s notice requirements do not apply to open records and open meetings actions because the statutes were conflicting, primarily because the open records and meetings laws specify procedures for immediate relief. The court also rejected the Town's argument that effect must be given to the notice statute's intent to afford a municipality an opportunity to settle the claim without litigation. *Id.* at 593, 595-96, 547 N.W.2d 587. It reasoned that "allowing a municipality an additional 120 days to contemplate how to respond to an open records or open meetings enforcement action in large part duplicates the process in which it already engaged prior to its initial response [denying the records request or deciding to hold a closed meeting]." [FN4] *Id.* at 596, 547 N.W.2d 587.

FN4. In *State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis.2d 585, 596, 547 N.W.2d 587 (1996), the court also observed: "Further, Wis. Stat. § 893.80(5) expressly states that specific rights and remedies provided by other statutes take precedence over the provisions of § 893.80." This effectively overruled the court's prior holding in *DNR v. City of Waukesha*, 184 Wis.2d 178, 191-93, 515 N.W.2d 888 (1994), where the court had concluded subsec. (5) only applied to subsec. (3)'s damage caps, not subsec. (1)'s notice provisions. *Id.* at 192, 515 N.W.2d 888.

**649 ¶ 10 Subsequently, in *Gillen v. City of Neenah*, 219 Wis.2d 806, 821-22, 826-27, 580 N.W.2d 628 (1998), the supreme court held WIS. STAT. § 893.80(1)(b) does not apply to public trust doctrine cases, primarily because the relevant statute specifically mentions injunctive relief. The statute at issue there states in its entirety: "Every violation of this chapter is declared to be a public nuisance and may be *431 prohibited by injunction and may be abated by legal action brought by any person." WIS. STAT. § 30.294. The court explained:

> Wisconsin Stat. § 30.294 expressly allows a plaintiff to seek immediate injunctive relief to prevent injury. The enforcement procedures provided in § 30.294, are inconsistent with Wis. Stat. § 893.80(1)(b), which requires a plaintiff to provide a governmental body with a notice of claim, and to wait 120 days or until the claim is disallowed before filing an action. Therefore, the general application of § 893.80(1)(b) in this case frustrates the plaintiffs' specific right to injunctive relief under § 30.294.

Gillen, 219 Wis.2d at 822, 580 N.W.2d 628. The court also relied in part on the nature of public trust doctrine cases, which are enforced on behalf of the state. *Id.* at 827, 580 N.W.2d 628.

¶ 11 Suffice it to say, since the *City of Waukesha* decision, Wisconsin courts "have identified [at least eight] statutes which provide specific procedures for bringing actions in which municipal entities are defendants or respondents, but to which the notice ... requirement[s] of WIS. STAT. § 893.80(1) do[ ] *not* apply." *Oak Creek Citizen's Action Comm. v. City of Oak Creek*, 2007 WI App 196, ¶ 6, 304 Wis.2d 702,

738 N.W.2d 168 (collecting six cases, and recognizing a seventh exception); *see also Kapischke v. Walworth County*, 226 Wis.2d 320, 326-27, 595 N.W.2d 42 (Ct.App.1999) (an eighth statutory exception recognized, not collected in *Oak Creek*).

[4][5] ¶ 12 We apply the following three-factor "test," first set forth in *Town of Burke v. City of Madison*, 225 Wis.2d 615, 625, 593 N.W.2d 822 (Ct.App.1999), to determine on a case-by-case basis whether a particular *432 statutory claim is excepted from WIS. STAT. § 893.80's notice requirements: [FN5]

> FN5. In *Town of Burke v. City of Madison*, 225 Wis.2d 615, 625, 593 N.W.2d 822 (Ct.App.1999), we merely observed that prior decisions had focused on three factors. In *Nesbitt Farms, LLC v. City of Madison*, 2003 WI App 122, ¶ 9, 265 Wis.2d 422, 665 N.W.2d 379, we noted *Town of Burke* had identified three factors "which shed light on the question." Eventually, we referred to the three factors as a "test." *See Oak Creek Citizen's Action Comm. v. City of Oak Creek*, 2007 WI App 196, ¶ 7, 304 Wis.2d 702, 738 N.W.2d 168.

(1) whether there is a specific statutory scheme for which the plaintiff seeks exemption;

(2) whether enforcement of § 893.80(1) would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and

(3) whether the purposes for which § 893.80(1) was enacted would be furthered by requiring that a notice of claim be filed.

Oak Creek, 304 Wis.2d 702, ¶ 7, 738 N.W.2d 168. Whether the notice provisions of WIS. STAT. § 893.80(1) apply to specific statutory actions is a question of statutory interpretation and presents a question of law that we determine independently of the circuit court. *Nesbitt Farms, LLC v. City of Madison*, 2003 WI App 122, ¶ 4, 265 Wis.2d 422, 665 N.W.2d 379.

650 ¶ 13 **E-Z Roll Off, relying heavily on *Gillen*, argues for an exception to WIS. STAT. § 893.80(1)'s notice requirements for its WIS. STAT. ch. 133 anti-trust claim. The primary focus here is on WIS. STAT. § 133.16, injunction; pleading; practice.[FN6] That section consists of a single, lengthy paragraph. In relevant part, it states:

> FN6. Although titles are not part of statutes, WIS. STAT. § 990.001(6), they may be helpful in interpretation. *Aiello v. Village of Pleasant Prairie*, 206 Wis.2d 68, 73, 556 N.W.2d 697 (1996). As the issue here is one of statutory interpretation, we recite the title to provide context.

*433 Any circuit court may prevent or restrain, by *injunction* or otherwise, any violation of this chapter. The department of justice, any district attorney or any person by complaint may institute actions or proceedings to prevent or restrain a violation of this chapter, setting forth the cause and grounds for the intervention of the court and praying that such violation, whether intended or continuing be enjoined or prohibited. When the parties informed against or complained of have been served with a copy of the information or complaint and cited to answer it, the court *shall proceed, as soon as may be in accordance with its rules,* to the hearing and determination of the case; and pending the filing of the answer to such information or complaint may, *at any time, upon proper notice, make such temporary restraining order or prohibition* as is just. Whenever it appears to the court that the ends of justice require that other persons be made parties to the action or proceeding the court may cause them to be made parties in such manner as it directs. The party commencing or maintaining the action or proceeding may demand and recover the cost of suit including reasonable attorney fees.... Copies of all pleadings filed under this section shall be served on the department of justice.
WIS. STAT. § 133.16 (emphasis added). Also relevant to the statutory scheme here are two provisions of WIS. STAT. § 133.18:

(4) A cause of action arising under this chapter does not accrue until the discovery, by the aggrieved person, of the facts constituting the cause of action.

(5) Each civil action under this chapter and each motion or other proceeding in such action *shall be expedited in every way and shall be heard at the*

earliest practicable date. (Emphasis added.)

***434 I. Whether there is a specific statutory scheme for which the plaintiff seeks exemption.**

[6] ¶ 14 We first address whether there is a specific statutory enforcement scheme. As noted, the statutory scheme addressed in *Gillen* consisted of a single sentence recognizing the availability of injunctive relief. Here, the County concedes WIS. STAT. § 133.16's mention of injunctive relief, alone, might thus satisfy the first factor of the test. Nonetheless, it argues the WIS. STAT. ch. 133 scheme is not specific enough to qualify. Specifically, the County contends § 133.16 is too vague because it uses terms in addition to injunction, allowing a court to prevent or restrain any violations by "injunction or otherwise," and permitting parties to accomplish this through "actions or proceedings."

¶ 15 The County misunderstands the "specific" requirement. "Specific" merely recognizes that the *enforcement* of a claim must be explicitly provided for by statute to qualify for an exception to WIS. STAT. § 893.80(1). *See Gillen*, 219 Wis.2d at 823, 826-27, 580 N.W.2d 628. When we first recognized the three-factor analysis in *Burke*, we cited ****651***City of Racine v. Waste Facility Siting Board*, 216 Wis.2d 616, 575 N.W.2d 712 (1998), for the "specific statutory scheme" factor. *See Burke*, 225 Wis.2d at 625 n. 3, 593 N.W.2d 822. The supreme court held the factor had not been satisfied in *City of Racine* because of "the lack of specific statutory provisions for enforcement of the claim." *Burke*, 225 Wis.2d at 625 n. 3, 593 N.W.2d 822. Indeed, the plaintiffs in *City of Racine*, 216 Wis.2d at 626-27, 575 N.W.2d 712, conceded there were no enforcement provisions for violations of the statute at issue there.

¶ 16 The County also argues WIS. STAT. § 133.16's references to a "complaint" and to "actions or proceedings"***435** suggest that WIS. STAT. ch. 133 claims are brought as traditional actions pursuant to the rules of civil procedure and, therefore, are subject to WIS. STAT. § 893.80(1)'s notice requirements.[FN7] This argument, however, does not account for the *Gillen* or *Nesbitt Farms* decisions.

FN7. The County also asserts the "actions and proceedings" language suggests other remedies, in addition to injunctions, are also appropriate in WIS. STAT. ch 133 actions. However, WIS. STAT. § 133.16 and 133.18 *specifically* provide for the recovery of costs, attorney fees, and treble damages. This serves to strengthen, not weaken, the conclusion that there is a specific statutory enforcement scheme.

¶ 17 The statute in *Gillen*, WIS. STAT. § 30.294, similarly provides for enforcement of injunctions generally by "legal action," without providing any specific mechanisms. Thus, WIS. STAT. ch. 30 actions must also be brought by complaint and prosecuted in the usual manner. *See Gillen*, 219 Wis.2d at 837, 580 N.W.2d 628 (C.J. Abrahamson, concurring). Similarly, WIS. STAT. § 32.05(11), at issue in *Nesbitt Farms*, provides that appeals brought under it "shall proceed as an action in [circuit] court subject to all the provisions of law relating to actions originally brought therein." That statute does, however, set forth procedural guidance, analogous to that found here in WIS. STAT. §§ 133.16 and 133.18. *See Nesbitt Farms*, 265 Wis.2d 422, ¶¶ 5, 10, 665 N.W.2d 379.

¶ 18 WISCONSIN STAT. § 30.294 constitutes a specific statutory enforcement scheme even though it consists of a single, vague sentence mentioning "injunction" and "legal action" and providing no further enforcement mechanism, procedural guidance, or deadlines. *See Gillen*, 219 Wis.2d at 821-22, 580 N.W.2d 628. If that section constitutes a specific statutory enforcement scheme, then so too must the much more specific provisions of ***436** WIS. STAT. §§ 133.16 and 133.18, which are comparable to those found sufficient in *Nesbitt Farms*.[FN8] Therefore, the first factor is satisfied in this case.

FN8. In addition to the provisions of WIS. STAT. §§ 133.16 and 133.18 recited in this decision, those sections also specify a statute of limitations, tolling provisions, an allowance for treble damages, and state enforcement procedures. Additionally, like WIS. STAT. § 30.294, the statute at issue in *Gillen v. City of Neenah*, 219 Wis.2d 806, 580 N.W.2d 628 (1998), both sections apply only to the specific violations provided for by the chapter in which they are set forth. *See* WIS. STAT. §§ 133.16, 133.18; *Gerol v. Arena*, 127 Wis.2d 1, 12, 377 N.W.2d 618

(Ct.App.1985) (WIS. STAT. ch. 133 remedies are "confined to violations under ch. 133").

II. Whether enforcement of WIS. STAT. § 893.80(1) would hinder a legislative preference for a prompt resolution of the type of claim under consideration.

[7] ¶ 19 We next address whether enforcement of WIS. STAT. § 893.80(1) would hinder a legislative preference for a prompt resolution of WIS. STAT. ch. 133 claims. In the past, courts have often found this second factor satisfied where a specific statutory enforcement scheme established precise procedural time limits **652 that conflicted with the 120-day timelines of §§ 893.80(1) and (1g). *See Oak Creek*, 304 Wis.2d 702, ¶¶ 5, 9, 738 N.W.2d 168; *Burke*, 225 Wis.2d at 620, 625-26, 593 N.W.2d 822; *Gamroth v. Village of Jackson*, 215 Wis.2d 251, 258-59, 571 N.W.2d 917 (Ct.App.1997). However, specific time limits are not the sole indicator of a legislative preference for prompt resolution.

¶ 20 Rather, prior decisions have also focused on statutory statements indicating such a preference. *See* *437 *Auchinleck*, 200 Wis.2d at 592, 547 N.W.2d 587 (response required "as soon as practicable and without delay"); *Nesbitt Farms*, 265 Wis.2d 422, ¶ 11, 665 N.W.2d 379 (condemnation appeals "shall have precedence over all other actions not then on trial"); *Burke*, 225 Wis.2d at 620, 625-26, 593 N.W.2d 822 ("An action contesting an annexation shall be given preference in the circuit court."). There are similar statutory statements in this instance. WISCONSIN STAT. § 133.16 provides that "the [circuit] court shall proceed, as soon as may be in accordance with its rules, to the hearing and determination of the case." Further, WIS. STAT. § 133.18(5) requires, "Each civil action under this chapter and each motion or other proceeding in such action shall be expedited in every way and shall be heard at the earliest practicable date." That the legislature used such strong language, i.e., shall, and twice set forth requirements for prompt resolution, supports a conclusion that the second factor is satisfied.

¶ 21 Additionally, in *Gillen*, the supreme court relied solely on the mere suggestion of a preference for prompt resolution, based on the statute's allowance for injunctions, holding:

> Wisconsin Stat. § 30.294 expressly allows a plaintiff to seek immediate injunctive relief to prevent injury. The enforcement procedures provided in § 30.294, are inconsistent with Wis. Stat. § 893.80(1)(b), which requires a plaintiff to provide a governmental body with a notice of claim, and to wait 120 days or until the claim is disallowed before filing an action.

Gillen, 219 Wis.2d at 822, 580 N.W.2d 628. The concurrence in that case criticized this immediacy rationale, observing that it "obfuscates the differences between a preliminary injunction and a permanent injunction." *Id.* at 837, 580 N.W.2d 628 (C.J. Abrahamson, concurring). Here, on the other hand, WIS. STAT. § 133.16 provides not only for injunctive *438 relief generally, but also specifies that a court, "pending the filing of the answer ... may, at any time, upon proper notice, make such temporary restraining order or prohibition as is just." This provides further indication that the legislature intended prompt relief for WIS. STAT. ch. 133 plaintiffs.

¶ 22 Finally, we have recognized "that hindering a legislative preference for 'promptness' is not the only way in which the requirements of WIS. STAT. § 893.80(1) might interfere with legislative purposes." *Nesbitt Farms*, 265 Wis.2d 422, ¶ 13, 665 N.W.2d 379. Rather, other significant conflicts may also support an exception to § 893.80(1) under the second factor of the analysis. *See id.*, ¶¶ 13-17 (applying § 893.80(1) to WIS. STAT. § 32.05(11) would limit ability of additional parties to join an appeal, thus conflicting with legislative preference "for efficiency and consistency in resolving compensation disputes").

¶ 23 Of importance here, WIS. STAT. § 133.18(4) provides, "A cause of action arising under this chapter does not accrue until the discovery, by the aggrieved person, of the facts constituting the cause of action." Yet, a claim might be extinguished before discovery of the facts underlying it by the application of § 893.80(1)(a), which requires that notice of the injury must be provided "[w]ithin 120 days after the happening of the event giving rise to the claim." Indeed, here the **653 circuit court concluded the "event" was the creation of the contract, rather than the Laddusires' subsequent discovery of its terms.

¶ 24 By hindering a party's ability to bring timely actions to enforce violations, applying the 120-day limitations period would be contrary to the legislature's intent that WIS. STAT. ch. 133 "be interpreted in a manner which gives the most liberal construction to *439 achieve the aim of competition." WIS. STAT. § 133.01. In light of the legislature's multiple indications of a preference for prompt resolution, and the conflict with WIS. STAT. § 133.18(4), we conclude the second factor is satisfied in this case.

III. Whether the purposes for which WIS. STAT. § 893.80(1) was enacted would be furthered by requiring that a notice of claim be filed.

[8] ¶ 25 Finally, we address whether the purposes for which WIS. STAT. § 893.80(1) was enacted would be furthered by requiring that a notice of claim be filed. In other words, should the notice requirements still apply despite the conflicts with WIS. STAT. § 133.16 and 133.18? *See Auchinleck*, 200 Wis.2d at 595-96, 547 N.W.2d 587; *Nesbitt Farms*, 265 Wis.2d 422, ¶¶ 21-23, 665 N.W.2d 379.

¶ 26 We first observe that the application of this third factor is a nebulous matter. When the first two factors of the analysis have been found to favor exemption from WIS. STAT. § 893.80(1), to our knowledge no court has concluded the third factor did not also favor exemption. Thus, neither has any court addressed how such a conclusion, that the third factor militated against exemption, would affect the outcome of the analysis.[FN9] In fact, the County concedes "no court has declared whether all of the prongs *must* be fulfilled for *440 the notice requirements of § 893.80 to give way." Further contributing to the **654 nebulosity of the third factor's application, it is unclear whether we should focus only on the statutes or also on the facts. In most cases courts *441 have addressed the third factor only by comparing the statutes at issue, rather than addressing the particular facts of the given case. However, in *Oak Creek*, 304 Wis.2d 702, ¶¶ 10-12, 738 N.W.2d 168, for example, we addressed both.

FN9. In both *Auchinleck*, 200 Wis.2d at 595-96, 547 N.W.2d 587 and *Gillen*, 219 Wis.2d at 822-24, 580 N.W.2d 628, the supreme court observed the conflicting, specific statutory schemes had to take precedence over the more general notice statute. Thus, it is unclear whether the third factor could outweigh the first two factors in any given case.

When first setting forth the three-factor analysis in *Burke*, 225 Wis.2d at 625 and nn. 3-5, 593 N.W.2d 822, we cited a different case for the existence of each factor. For the third factor, we cited *City of Waukesha*, 184 Wis.2d 178, 515 N.W.2d 888. Recall, however, that case was where the supreme court first recognized WIS. STAT. § 893.80(1) applied in all types of cases. *Id.* at 202, 515 N.W.2d 888. The court there did not engage in what is now our three-factor test. To the contrary, it refused to consider a claim that an exception existed for WIS. STAT. ch. 144 (1991-92) enforcement actions even though the chapter's enforcement provisions, WIS. STAT. §§ 144.98 and 144.99 (1991-92), explicitly provided that all violations of the chapter constituted public nuisances enforceable by injunction. Yet, that is precisely what the subsequent *Gillen* decision concluded was sufficient to create an exception, there, without consideration of the third *Burke* factor. *See Gillen*, 219 Wis.2d at 821-22, 826-27, 580 N.W.2d 628.

The court declined in *City of Waukesha*, 184 Wis.2d at 193 n. 10, 515 N.W.2d 888, to address whether there should be an exception because, although the DNR had requested an injunction, *id.* at 186, 515 N.W.2d 888, it had not requested immediate relief via a *temporary* injunction. In *Gillen*, the court abrogated *City of Waukesha*, explicitly rejecting any requirement that injunctive relief, in any form, even be requested to recognize an exception to WIS. STAT. § 893.80(1)'s notice requirements, relying instead on the enforcement scheme's provision for injunctive relief. *Gillen*, 219 Wis.2d at 826, 580 N.W.2d 628 (per curiam), 834-35 (C.J. Abrahamson, concurring) (criticizing the per curiam for failing to acknowledge it was overruling *City of Waukesha*). Thus, our reliance on the much maligned *City of*

Waukesha decision to recognize a third factor for the "exceptions test," may not have been the best choice. Despite our concerns with the third factor, we are obliged to apply it. *See* Cook v. Cook, 208 Wis.2d 166, 189-90, 560 N.W.2d 246 (1997) (court of appeals may not overrule, modify, or withdraw language from a prior published opinion). Perhaps the issue is ripe for review by our supreme court; it has yet to address our recognition of a three-factor test.

¶ 27 Aside from simply restating the purposes underlying the notice of injury and notice of claim provisions, the County provides no argument applying them in the context of WIS. STAT. ch. 133 claims, generally, or as they apply to the specific facts of this case. We may treat this failure to sufficiently address the issue as a concession. *See* State v. Flynn, 190 Wis.2d 31, 39 n. 2, 527 N.W.2d 343 (Ct.App.1994). **E-Z Roll Off** argues there was no need to provide notice for investigation purposes, because the County entered into the contract and therefore already knew its terms. It further argues antitrust actions will frequently involve continuing violations and, therefore, the need for prompt investigation will not exist.

¶ 28 By the very nature of WIS. STAT. ch. 133 antitrust claims, aggrieved parties often will not immediately know of the circumstances giving rise to a claim. The prohibited deals and conspiracies will be secret and, thus, the legislature has provided for tolling commencement of the limitations period for bringing claims until discovery of the conduct. *See* WIS. STAT. § 133.18(4). Such conduct will, however, be known to the parties partaking in it. Hence, **E-Z Roll Off** is correct that there is little need to provide for prompt investigation into the circumstances giving rise to the claim. "In short, a [ch. 133 antitrust action] is not like a suit to recover damages for injuries sustained in a slip-and-fall on municipal property, of which, absent notice under WIS. STAT. § 893.80(1), a municipality may know absolutely nothing prior to suit." *Nesbitt Farms*, 265 Wis.2d 422, ¶ 25, 665 N.W.2d 379.

***442** ¶ 29 We further agree with **E-Z Roll Off** that in the case of continuing violations, there is also a diminished need to provide an opportunity for prompt investigation. *See* WIS. STAT. § 133.01 (ch. 133 is intended "to safeguard the public against the creation or *perpetuation* of monopolies") (emphasis added). Additionally, here, **E-Z Roll Off** did promptly provide actual notice of the circumstances giving rise to its claim when it met with Sexton and expressed dissatisfaction with Waste Management's preferential pricing, and claimed that preference created a monopoly. Thus, in any event, the purposes of notice were honored here.

¶ 30 Neither party specifically addresses the WIS. STAT. § 893.80(1)(b) purpose of allowing the municipality an opportunity to effect compromise without suit, and to budget for settlement or litigation. However, in this case, **E-Z Roll Off** did eventually provide that notice and the claim was disallowed prior to filing the action.[FN10] Thus, again, the purposes of notice were honored here.

FN10. As noted *supra*, the WIS. STAT. § 893.80(1)(b) notice of claim is not subject to a filing deadline.

¶ 31 Regarding the interactions of the statutes generally, a defendant municipality may be unable to simply negotiate a compromise on a WIS. STAT. ch. 133 claim because, even if a private party plaintiff ****655** settles its claim, the State might nonetheless prosecute the conduct criminally. In fact, WIS. STAT. § 133.16 requires that copies of all ch. 133 pleadings be served on the department of justice. Thus, the opportunity-to-compromise purpose is less important in ch. 133 actions. Further, while WIS. STAT. § 893.80(1)(b)'s 120-day delay may allow municipalities some opportunity to budget for defending a claim, the legislature has strongly expressed its intent that ch. 133 actions be decided swiftly. ***443** The general notice statute cannot override WIS. STAT. §§ 133.16's and 113.18's specific provisions requiring prompt resolution. *See* Auchinleck, 200 Wis.2d at 595-96, 547 N.W.2d 587; Gillen, 219 Wis.2d at 822-24, 580 N.W.2d 628. "Further, Wis. Stat. § 893.80(5) expressly states that specific rights and remedies provided by other statutes take precedence over the provisions of § 893.80." Auchinleck, 200 Wis.2d at 596, 547 N.W.2d 587.

¶ 32 Finally, in Gillen, which preceded our recognition of a three-factor test, the supreme court recognized an exception to WIS. STAT. § 893.80(1) without any discussion of the third factor.[FN11] Rather, it

relied on a conflicting statutory scheme (factors one and two) and the fact that the statutory claims at issue there could be enforced by private citizens on behalf of the public interest. *Gillen*, 219 Wis.2d at 820-21, 826-27, 580 N.W.2d 628. WISCONSIN STAT. ch. 133 claims are likewise brought in the public interest:

> FN11. Thus, we reject the County's bald assertion, lacking citation, that the *Gillen* court proceeded to examine all three factors.

> The Wisconsin legislature determined that private, civil antitrust suits are important methods of enforcing chapter 133. To encourage private enforcement, the legislature built incentives into the statute. These include tolling the statute of limitations under certain circumstances, allowing the cost of the suit, including reasonable attorney fees to prevailing claimants, awarding treble damages, and granting expedited treatment to civil antitrust actions in the courts. Under this legislative scheme, a private party "performs the office of a private attorney general," when bringing a civil antitrust action and significantly supplements the government's limited resources for enforcing antitrust law. ***444** *Carlson & Erickson Bldrs., Inc. v. Lampert Yards, Inc.*, 190 Wis.2d 650, 663-64, 529 N.W.2d 905 (1995) (internal citations omitted). While not comfortably fitting within the third-or any other-factor of the analysis, this "private attorney general" similarity provides further support for recognizing an exception pursuant to *Gillen*.[FN12]

> FN12. Because we conclude WIS. STAT. ch. 133 claims are exempt from WIS. STAT. § 893.80(1)'s notice requirements, we need not resolve **E-Z Roll Off's** remaining arguments regarding continuing violations and actual notice with lack of prejudice. *See State v. Castillo*, 213 Wis.2d 488, 492, 570 N.W.2d 44 (1997) (cases should be decided on the narrowest possible grounds).

Judgment reversed and cause remanded.

Wis.App.,2010.
E-Z Roll Off, LLC v. County of Oneida
325 Wis.2d 423, 785 N.W.2d 645, 2010-1 Trade Cases P 77,015, 2010 WI App 76

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STATE OF WISCONSIN

IN SUPREME COURT

Appeal Number 2009AP000775

E-Z ROLL OFF, LLC,

Plaintiff-Appellant

vs.

COUNTY OF ONEIDA,

Defendant-Respondent-Petitioner

APPEAL OF THE DECISION ENTERED ON DECEMBER 22, 2008,
IN THE ONEIDA COUNTY CIRCUIT COURT CASE NO.06-CV-124
THE HONORABLE PATRICK F. O'MELIA PRESIDING

BRIEF OF PLAINTIFF-APPELLANT-RESPONDENT, E-Z ROLL OFF, LLC

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STATEMENT AS TO ORAL ARGUMENT

Oral argument is scheduled before this Court on February 2, 2011. Because this case involves significant competing public policies, oral argument will be useful in fully presenting and meeting the issues on appeal and in fully developing the theories and legal authorities on each side.

STATEMENT AS TO PUBLICATION

Publication is requested. The issues involved in this case are of substantial and continuing public interest. The decision in this case will clarify existing law with regard to the application of Wisconsin's Notice of Claim statute, Wis. Stat. § 893.80(1).

STATEMENT OF ISSUES

1. Do the notice requirements of Section 893.80(1) of the Wisconsin Statutes apply to antitrust actions filed under Chapter 133 of the Wisconsin Statutes?

   The trial court answered in the affirmative.

   The Court of Appeals answered in the negative.

2. Was E-Z Roll Off's, LLC, notice of injury timely?

   The trial court answered in the negative.

   The Court of Appeals did not address this issue.

3. Did Oneida County have actual notice of the claim and did any delay or failure to give notice prejudice it?

   The trial court answered in the negative.

   The Court of Appeals did not address this issue.

4. Does the continuing violation doctrine apply?

   The trial court answered in the negative.

   The Court of Appeals did not address this issue.

STATEMENT OF THE CASE

E-Z Roll Off, LLC, filed a complaint against the County of Oneida with the circuit court for Oneida County on April 20, 2006. The complaint alleged the County entered into an illegal contract with Waste Management, Wisconsin, Inc. E-Z Roll Off alleged that the contract unreasonably restrained trade and negatively impacted competition. As a result, E-Z Roll Off alleged that it suffered damages in loss of business and in loss in past and future profits.

Defendant Oneida County filed a motion for summary judgment on the grounds that E-Z Roll Off had not complied with Wisconsin's notice of claims statute, § 893.80(1), Wis. Stats., and that the Oneida County did not have actual notice of the claim.

On December 11, 2008, after briefing and a hearing on the motion for summary judgment, the court granted summary judgment in the Oneida County's favor on the basis that E-Z Roll Off had failed to comply with Wisconsin's notice of claim statute prior to instituting the civil suit. An order dismissing with prejudice all claims against the County was entered on December 22, 2008. Notice of Appeal was filed March 20, 2009.

The Court of Appeals reversed. The appellate court applied the Town of Burke v. City of Madison, 225 Wis. 2d 615,

625, 593 N.W.2d 822 (Ct. App. 1999), test and held that Wisconsin Statutes Chapter 133 antitrust claims are excepted from § 893.80(1)'s notice requirements. The court did not address the actual notice and continuing violation arguments.

This Court granted Oneida County's petition for review.

STATEMENT OF FACTS

The Plaintiff-Appellant, E-Z Roll Off, LLC, went out of business in May, 2008.

From its formation to the day it closed its doors, E-Z Roll Off was in the business of providing roll off waste containers or dumpsters to residential, commercial and construction customers. The focus of its business was located in Oneida County and the company's offices were at 1810 River Street in Rhinelander.(R.24, P.11, Ex. 2.)

For many years preceding 2003, E-Z Roll Off hauled its solid waste to the Oneida County landfill. In that year, Oneida County entered into an agreement with Waste Management which provided that Waste Management would receive a favorable tipping fee at the land fill. The favorable tipping fee was part of a "load out" option contained in the agreement. (R.29, P.14.) As a result of the agreement, Waste Management was charged $5.25 for each ton of waste hauled to the landfill. (R.29, P.14.)

At the same time, the rate charged to E-Z Roll Off and other waste haulers was $54.00 per ton with the possibility of a $10.00 per ton rebate based upon the number of tons delivered. (R.29, P.15.) The owners of E-Z Roll Off, LLC, Todd and Paula Laddusire, contend that they were unaware of the

contract between Oneida County and Waste Management until February. (R.24, P.16, Ex. 2.)

Oneida County claims that it published a request for proposals to enter into the 2003 agreement. Although Bart Sexton, the Solid Waste Director of Oneida County, was not able to produce the published notice of request for proposals at the time of his deposition, the notice was attached to his affidavit. (R.25, Ex. 2.) The public notice gives no notice that favorable tipping rates were to be part of any contract for the hauling of Oneida County's solid waste. The notice refers only to "bids for the hauling of municipal solid waste." (R.25, Ex. 2.)

Mr. Sexton also claimed that Todd Laddusire, one of E-Z Roll Off's owners, attended a meeting at which terms of the proposed contract were discussed. (R.29, P.15.) Todd Laddusire denies attending any such meeting. (R.24, P.16, Ex. 2.) The Laddusires deny that they had any knowledge of the contract between Waste Management and Oneida County until February 2004, when one of their employees inadvertently saw a scale ticket which showed Waste Management's $5.25 per ton charge. (R.24, P.16, Ex. 2.) Almost immediately, the Laddusires expressed their dissatisfaction with the contract and the tipping fees to Mr. Sexton. (R.29, P.21.) The Laddusires filed complaints with the Wisconsin Department of Agriculture, Trade

and Consumer Protection, with the Oneida County District Attorney, and with the FBI. (R.24, P.20, Ex. 2.) In the complaint filed with Wisconsin's Department of Agriculture, Trade and Consumer Protection, the Laddusire's itemized the loss of income E-Z Roll Off, LLC had sustained to that date. (R.25, Ex. 7.) Although Oneida County's administrator responded to the complaint in writing, no action was taken and the discriminatory treatment under the contract continued. (R.29, PP.15-16.) Finally, in the fall of 2005, the Laddusires filed a notice of injury and notice of claim and served it upon the Clerk of Oneida County. (R.7, Ex. 1.) When the complaint was denied, the instant action was commenced. (R.1.)

In the interim, E-Z Roll Off, LLC, took steps to mitigate its damages by aggressive marketing and by entering into a contract with the Lincoln County landfill which charged a lesser rate for waste hauled to its site. (R.24, P.18, Ex. 2.) Nothing, however, stopped the loss of income caused by E-Z Roll Off's inability to meet the lower charges set by Waste Management to its customers and in May, 2008, E-Z Roll Off went out of business. (R.24, P.11, Ex. 2.)

ARGUMENT

I. STANDARD OF REVIEW

The court follows the same process as the circuit court in reviewing a grant of summary judgment. State ex rel. Auchinleck v. Town of LaGrange, 200 Wis. 2d 585, 591-592, 547 N.W.2d 587 (1996). Because there are no material facts in dispute, the court must determine whether summary judgment was correctly granted. Id. at 592. Whether the notice requirements of Section 893.80(1) of the Wisconsin Statutes apply to antitrust actions filed under Chapter 133 of the Wisconsin Statutes is a question of statutory interpretation.

Statutory interpretation is a question of law. Jungbluth v. Hometown, Inc., 201 Wis. 2d 320, 327, 548 N.W.2d 519 (1996). Because statutory interpretation is a question of law, the court applies the *de novo* standard of review in determining the legislature's intent. Id. The court first considers the plain meaning of the statute, but if the language is ambiguous, the court will construe the statute's meaning to "ascertain and carry out the legislative intent." Id. If two statutes conflict, the court attempts to harmonize them. State v. White, 2000 WI App 147, ¶ 7, 237 Wis. 2d 699, 615 N.W.2d 667.

Accordingly, the court reviews *de novo* whether the notice requirements of Section 893.80(1) of the Wisconsin Statutes

apply to antitrust actions filed under Chapter 133 of the Wisconsin Statutes.

II. WISCONSIN'S NOTICE OF CLAIM STATUTE DOES NOT APPLY TO ANTITRUST ACTIONS.

The Court of Appeals held, and E-Z Roll Off maintains, that Wisconsin's Notice of Claim statute is not applicable to actions brought by citizens against a municipality to enforce Wisconsin's antitrust laws.

Section 893.80(1) of the Wisconsin Statutes requires 1) a notice of injury and 2) a notice of claim for an action to be brought against a governmental body, e.g., Oneida County. Wis. Stat. § 893.80(1) (2007-08). However, despite the court's holding in DNR v. City of Waukesha, 184 Wis. 2d 178, 191, 515 N.W.2d 888 (1994) (that notice requirements of § 893.80(1) apply "generally to all actions, not just those in tort or those for money damages"), the notice requirements of § 893.80(1) do not always apply. In fact, the court has adopted a case-by-case approach and permitted many exceptions to the City of Waukesha rule. Gamroth v. Village of Jackson, 215 Wis. 2d 251, 258, 259, 571 N.W.2d 917, 919 (Ct. App. 1997) (holding § 893.80(1) does not apply to actions under Wis. Stat. § 66.60(12)(a) to appeal special assessments); State ex rel. Auchinleck v. Town of LaGrange, 200 Wis. 2d 585, 597, 547 N.W.2d 587 (1996) (section 893.80(1) does not apply to open records and open meeting actions); Gillen v. City of Neenah,

219 Wis. 2d 806, 821-22, 826-27, 580 N.W.2d 628 (1998) (section 893.80(1)(b) does not apply to public trust doctrine cases); Town of Burke v. City of Madison, 225 Wis. 2d 615, 617, 593 N.W.2d 822 (Ct. App. 1999) (section 893.80(1) does not apply to actions challenging a city's annexation of a town under Wis. Stat. § 66.021); Little Sissabagama Lakeshore Owner's Assoc. v. Town of Edgewater, 208 Wis. 2d 259, 265, 559 N.W.2d 914 (Ct. App. 1997) (section 893.80(1) does not apply to town board's denial of tax exempt status under Wis. Stat. § 70.11(20)(d)); Dixson v. Wisconsin Health Org., 237 Wis. 2d 149, 612 N.W.2d 721 (2000) (section 893.80(1) does not apply to a landlord's contribution claim against government subcontractors); Oak Creek Citizen's Action Comm. v. City of Oak Creek, 2007 WI App 196, ¶¶ 6-13, 304 Wis. 2d 702, 738 N.W.2d 168 (section 893.80(1) does not apply to action to compel city to comply with direct legislation statute); Kapischke v. Walworth County, 226 Wis. 2d 320, 595 N.W.2d 42 (Ct. App. 1999) (section 893.80(1) does not apply to certiorari actions brought pursuant to Wis. Stat. § 59.694(10)); Felder v. Casey, 487 U.S. 131, 151, 108 S. Ct. 2302 (1988) (section 893.80(1) preempted with respect to federal civil rights actions brought in state court under 42 U.S.C. § 1983).

The court uses the three-factor Town of Burke test to determine whether a statutory claim is excepted from the notice requirements of § 893.80. Those three factors are "1) whether there is a specific statutory scheme for which the plaintiff seeks exemption; 2) whether enforcement of § 893.80(1) would hinder a legislative preference for prompt resolution of the type of claim under consideration; and 3) whether the purposes of § 893.80(1) would be furthered by requiring notice." Oak Creek, 304 Wis. 2d 702, ¶ 7.

Under this three-factor test, antitrust actions brought against a municipality under Chapter 133 do not require notice pursuant to § 893.80(1), because Chapter 133 contains a specific statutory scheme, the statute contemplates prompt resolution of antitrust claims, and the legislative purposes behind the Notice of Claim statute would not be furthered by applying it to antitrust actions.

A. Chapter 133 of the Wisconsin Statutes contains a specific statutory scheme.

Chapter 133 of the Wisconsin Statutes sets out a specific statutory scheme for enforcing antitrust violations. A statutory scheme is sufficiently "specific" to qualify for an exception to § 893.80(1) when the statute explicitly provides for enforcement of a claim. Gillen, 219 Wis. 2d 806, ¶¶ 36-39.

In Gillen, the court found a specific statutory scheme. The statute, Wis. Stat. § 30.294, provided that "[e]very violation of this chapter is declared to be a public nuisance and may be prohibited by injunction and may be abated by legal action brought by any person." Id. at ¶ 26. The Gillen court stated that the statute "expressly allows a plaintiff to seek immediate injunctive relief to prevent injury." Id. at ¶ 29. As a result, the Gillen court found the enforcement procedures under § 30.294 inconsistent with § 893.80(1)(b) because § 893.80(1)(b) "frustrates the plaintiffs' specific right to injunctive relief" under § 30.294. Id. at ¶ 29.

The court in Gillen rested its conclusion "that there is an exception to § 893.80(1)(b) where the plaintiffs' claims are brought pursuant to the public trust doctrine under § 30.294, which provides injunctive relief as a specific enforcement remedy," on the fact that "the plaintiffs brought this action in the name of the State to stop a violation of the public trust doctrine, and that injunctive relief is a specific enforcement remedy under" the statute. Id., at ¶ 36.

The Gillen court found it "irrelevant" that the plaintiffs in Gillen "did not request a preliminary injunction." 219 Wis. 2d 806, ¶ 37. Hence, whether E-Z Roll Off applied for an injunction in this case is irrelevant. It should be noted, however, that E-Z Roll Off did in fact ask for injunctive relief. (R. 16, p. 39-40).

The court in Nesbitt Farms, LLC v. City of Madison, 2003 WI App 122, ¶ 10, 265 Wis. 2d 422, 665 N.W.2d 379, also found a specific statutory scheme existed. In Nesbitt Farms, the court held that the first factor of the Town of Burke test was easily met by Wis. Stat. § 32.05(11). Id. Section 32.05(11) provided a specific statutory scheme for landowners seeking court review of condemnation awards by "detail[ing] the procedure and deadline for commencing such actions, as well as specifying other matters, such as how other interested parties may join the appeal and what issues may be tried." Id.

Here, Chapter 133, when "interpreted in a manner which gives the most liberal construction to achieve the aim of competition," as required under Wis. Stat. § 133.01, establishes a statutory scheme exists for the enforcement of antitrust violations. Relevant parts of Chapter 133 provide:

> Any circuit court may prevent or restrain, **by injunction or otherwise**, any violation of this chapter. The department of justice, any district attorney or any person by complaint may institute actions or proceedings to prevent or restrain a violation of this chapter, setting forth the cause and grounds for the intervention of the court and praying that such violation, whether intended or continuing be enjoined or prohibited. When the parties informed against or complained of have been served with a copy of the information or complaint and cited to answer it, **the court shall proceed, as soon as may be in accordance with its rules**, to the hearing and determination of the case; and pending the filing of the answer to such information or complaint may, **at any time, upon proper notice, make such temporary restraining order or**

> **prohibition** as is just. Whenever it appears to the court that the ends of justice require that other persons be made parties to the action or proceeding the court may cause them to be made parties in such manner as it directs. The party commencing or maintaining the action or proceeding may demand and recover the cost of suit including reasonable attorney fees . . . Copies of all pleadings filed under this section shall be served on the department of justice.

Wis. Stat. § 133.16 (emphasis added).

> (4) A cause of action arising under this chapter does not accrue until the discovery, by the aggrieved person, of the facts constituting the cause of action.
>
> (5) Each civil action under this chapter and each motion or other proceeding in such action **shall be expedited in every way and shall be heard at the earliest practicable date.**

Wis. Stat. § 133.18 (emphasis added).

Indeed, the unique nature of actions brought under Chapter 133 was recognized by the court:

> The Wisconsin Legislature determined that private, civil antitrust suits are important methods of enforcing Chapter 133. To encourage private enforcement, the legislature built incentives into the statute. These include tolling the statute of limitations under certain circumstances, allowing the costs of the suit, including reasonable attorneys fees to prevailing plaintiffs, awarding treble damages, and granting expedited treatment to civil antitrust actions in the court. Under this **legislative scheme**, a private party "performs the office of private attorney general" when bringing a civil antitrust action, and significantly supplements the government's limited resources for enforcing antitrust law.

Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc., 190 Wis. 2d 650, 655, 529 N.W.2d 905 (1995) (emphasis added).

This "private attorney general" rationale is similar to the rationale behind the public trust doctrine in Gillen, in that both are brought by private plaintiffs as to benefit the general public. More importantly, like the public trust statute, the antitrust laws specify injunctive relief as a specific remedy to an antitrust violation. Section 133.16 provides that "any circuit court may prevent or restrain, by injunction or otherwise, any violation of this chapter." This specific provision is clearly in conflict with the general provision of § 893.80(1).

In denying that § 133.16 contained a specific statutory scheme, the circuit court in this case stated that the statute, "provides very basic information relating to the pleading practices for actions under Chapter 133. **In addition, it gives the court the authority to enjoin violations of the chapter.** So unlike in Oak Creek, § 133.16 does not contain any specific time limits and it does not contain any specific procedural requirements that substantially differ from general rules of pleading and practice." (Emphasis added) (R.35, PP.7-8).

Here, the circuit court ignored the court's conclusion in Gillen that, by giving the court the ability to enjoin violations, the legislature **was** enacting a specific statutory scheme, one which provides injunctive relief as a specific

enforcement remedy. The statute at issue in Gillen did not provide specific time limits or specific procedural requirements either, just that violations "may be prohibited by injunction." § 30.294.

Moreover, Chapter 133 is more specific than the specific statutory scheme found in Gillen. In its decision below, the Court of Appeals pointed out that although the Gillen statute merely "consists of a single, vague sentence mentioning 'injunction' and 'legal action' and providing no further enforcement mechanism, procedural guidance, or deadlines," a specific statutory scheme existed in Gillen. 2010 WI App 76, ¶ 18, 325 Wis. 2d 423, 785 N.W.2d 645. Thus, the appellate court correctly ruled that Chapter 133, which contains far more specific provisions than § 30.294, is a specific statutory scheme. Id. In fact, the statutory scheme in Chapter 133 is more like § 32.05(11) in Nesbitt Farms in that both statutory schemes specify more procedural options and guidance than the statutory scheme in Gillen did.

Therefore, the court should find that Chapter 133 satisfies the first factor of the Town of Burke test because Chapter 133 consists of a specific statutory scheme.

B. Enforcement of § 893.80(1) would hinder the legislative preference for a prompt resolution of antitrust claims.

Chapter 133 contains several provisions that establish a legislative preference for the prompt resolution of antitrust

claims, and the enforcement of § 893.80(1) would hinder that legislative preference.

The prompt resolution of antitrust claims can be found in the plain meaning of Chapter 133. Chapter 133 requires that every civil action, motion, or other proceeding "**shall be expedited in every way and shall be heard at the earliest practicable date.**" Wis. Stat. § 133.18(5) (emphasis added). Although not requiring a specific deadline, § 133.16 states that the "court shall proceed, **as soon as may be in accordance with its rules**, to the hearing and determination of the case." (Emphasis added). Section 133.16 also adds that the court may, "pending the filing of the answer . . . **at any time, upon proper notice, make such temporary restraining order or prohibition as is just.**" (Emphasis added).

Chapter 133's provisions for prompt resolution are similar to provisions in other excepted statutes requiring prompt resolution. For example, the "as soon as practicable and without delay" language from Wis. Stat. § 19.35(4) in Auchinleck indicated a legislative preference for the public's prompt access to public records -- access that would be stalled by § 893.80(1)'s 120-day time delay. 200 Wis. 2d at 592, 595. Because § 893.80(1)'s time delay frustrated the legislative purpose of granting prompt access to open records,

the Auchinleck court made an exception to § 893.80(1). Id. at 595, 597.

Here, the Court of Appeals was correct in creating an exception to § 893.80(1). The plain language alone of Chapter 133 indicates a legislative preference for the prompt resolution of claims. The language that the "court shall proceed, as soon as may be in accordance with its rules" and that proceedings "shall be expedited in every way and shall be heard at the earliest practicable date" is stronger than Auchinleck's language "as soon as practicable and without delay." Indeed, Chapter 133 uses "shall" and twice recommends prompt resolution, as the Court of Appeals noted. 325 Wis. 2d 423, ¶ 20.

In addition to hindering Chapter 133's provisions for prompt resolution, § 893.80(1)'s notice requirements may hinder other legislative purposes of Chapter 133. The court in Nesbitt Farms stated that the "inquiry is to determine whether some legislative goal, be it prompt resolution or another purpose, will be thwarted by requiring compliance with § 893.80(1) as a precondition to commencing an action under the statute." 265 Wis. 2d 422, ¶ 13.

The legislative goal of private enforcement of antitrust laws would be hindered by § 893.80(1)'s application. The United States Supreme Court has recognized that there is a

"longstanding policy of vigorously encouraging private enforcement of the antitrust laws." Illinois Brick Co. v. Illinois, 431 U.S. 720, 745, 97 S. Ct. 2061 (1979). In Wisconsin, along with providing for injunctive relief, Chapter 133, as noted in § 133.18(5), grants expedited treatment of civil antitrust actions in the court to further encourage private enforcement of the law.

This provision would clearly be frustrated by the requirements of § 893.80(1)(b). Plaintiffs injured by any unfair and discriminatory business practices employed by a municipality are entitled to prompt treatment and declaratory relief. Forcing them to file a notice of claim, and then wait 120 days or until the claim is disallowed, undermines plaintiffs' statutory right to immediate injunctive relief and expedited treatment, and would discourage private antitrust enforcement.

The circuit court's focus on the six-year statute of limitation for antitrust violations is misplaced. The mere fact that there is a six-year statute of limitation on antitrust actions does not justify forcing an injured party to delay for months the filing of a claim for which they are entitled to immediate statutory relief.

As a result, Chapter 133 not only provides for and indicates the prompt resolution of claims, but also it intends

for the private enforcement of antitrust laws. Because the enforcement of § 893.80(1) hinders these legislative preferences and goals, the court should find that the second Town of Burke factor is met.

C. No legislative purpose is advanced by the application of the notice of claim statute.

Applying § 893.80(1) in this Chapter 133 antitrust claim does not advance a legislative purpose.

The purpose of § 893.80(1)(b) is "to provide the governmental subdivision an opportunity to compromise and settle a claim without costly and time-consuming litigation." City of Racine v. Waste Facility Siting Bd., 216 Wis. 2d 616, 622, 575 N.W.2d 712 (1998). Indeed, the court in Gillen found it important that "[t]he record in this case shows that the reason the plaintiffs did not immediately file an action against the City of Neenah and Minergy is because they attempted to resolve the issue through other means." 219 Wis. 2d 806, ¶ 38.

Here, the Laddusires, owners of E-Z Roll Off, LLC, met with a representative from Oneida County to plead their case and to negotiate a compromise, in order that litigation would not be needed. They also attempted to resolve the issue through using other landfills. Oneida County refused to deal with the Laddusires. E-Z Roll Off, and others injured by anti-competitive conduct, should not be punished for attempting to

resolve issues with the municipalities before resorting to the judicial system.

In addition, it is recognized that unlike a tort claim for damages, a municipality has control over whether a suit will be filed based on its actions. Auchinleck, 200 Wis. 2d at 596. The decision in Auchinleck was based in part upon the fact that when there is an allegation of violation of an open meetings or open records law, the government is in total control of the facts and, therefore, the policies which underlie § 893.80 would not be furthered by the requirement of filing a claim prior to bringing suit.

In this case, Oneida County was in total control of the facts that comprised E-Z Roll Off's claim. Oneida County entered into the contract with Waste Management, and was aware of all its terms. There was little need for intensive investigation into the contract or its provisions.

The court should not apply § 893.80(1) to bar E-Z Roll Off's claim because the legislative purpose of § 893.80(1) was met: the government was given the opportunity to settle and avoid costly litigation. Oneida County simply refused to negotiate with E-Z Roll Off. Further, because Oneida County had control over the facts of E-Z Roll Off's claim, Oneida County had notice of what E-Z Roll Off's claim would likely include.

In conclusion, because E-Z Roll Off's Chapter 133 antitrust claim satisfies all three factors of the Town of Burke test, the court should create an exception to § 893.80(1) for Chapter 133 actions brought by citizens against a municipality to enforce Wisconsin's antitrust laws.

II. THE NOTICE OF CLAIM WAS TIMELY AND THEREFORE DISMISSAL WAS INAPPROPRIATE.

Even if the court does not find a Chapter 133 exception to § 893.80(1), the notice of claim was still timely. First, Oneida County had actual notice of the claim. Second, because Oneida County's illegal and anti-competitive conduct was continuing, the notice of injury and notice of claim in this case were timely.

In September 2005, notice of injury and notice of claim were served on Oneida County. The notice of injury complies with § 893.80(1)(a) which provides that "within 120 days after the happening which gives rise to a claim, notice of circumstances of the claim must be served upon the governmental entity."

The purpose of such notice is to afford governmental authorities an opportunity to promptly investigate the claim. The notice was in writing. It was signed by the parties' attorney. It was proper in form and substance.

Likewise, the claim for damages filed in September 2005 was proper in form and substance. The claim contained the

address and the claimant and the itemized statement of the relief sought. As required, it specified a specific dollar amount. Gutter v. Seamandel, 103 Wis. 2d 1, 308 N.W.2d 403 (1981). The claim was filed with the Clerk of Oneida County.

III. THE COUNTY OF ONEIDA HAD ACTUAL NOTICE OF THE CLAIM AND ANY DELAY OR FAILURE TO GIVE NOTICE DID NOT PREJUDICE IT.

The Order dismissing the complaint should be reversed because the Oneida County had actual notice of the claim, and Oneida County was not prejudiced by any delay or failure to give notice.

In February 2004, when Todd and Paula Laddusire inadvertently first learned that Oneida County had granted a favorable rate of $5.25 per ton to Waste Management, while the Laddusires were paying a rate between eight and ten times that amount, they immediately took action. The Laddusires scheduled a meeting with Oneida County and advised its Solid Waste Director that they could no longer continue business with Oneida County unless they were given a favorable rate for hauling. When their suggestion was rejected, Mrs. Laddusire contacted numerous federal agencies, one of which gave actual notice to Oneida County. Mr. Sexton answered Mrs. Laddusire's complaint to the Wisconsin Department of Agriculture, Trade and Consumer Protection in detail and with the response that Oneida County had done nothing illegal and would continue to charge E-Z Roll Off rates far in excess of those that it

charged to Waste Management. It is clear that Oneida County had not only knowledge about the events for which it is liable but also the identity and type of damage which E-Z Roll Off suffered.

The letters and complaints drafted by Paula Laddusire provided "written notice" of the circumstances of the claim. They also afforded the county the opportunity to investigate and evaluate the potential claim. In addition, the complaint to the department is not deficient as a notice of injury by its failure to itemize the dollar amount of the Plaintiff's loss because such is not required in a notice of injury. Mannino v. Davenport, 94 Wis. 2d 602, 299 N.W.2d 823 (1981).

Finally, any delay or failure to give notice did not prejudice Oneida County. Oneida County was made aware of the damage caused by its illegal contract, and had eight years to remedy that damage. Instead, Oneida County maintained its conduct did not violate the law, and made no attempts to investigate, mitigate, or provide a remedy for those damaged by its anti-competitive practices.

IV. THE CONTINUING VIOLATION DOCTRINE APPLIES.

The circuit court found that the happening of the event which gave rise to E-Z Roll Off's claim is the signing of the 2003 agreement, and that no notice of claim was given within 120 days of the agreement. This decision ignores the nature of antitrust actions.

The continuing violation doctrine is a federal doctrine; however, Chapter 133 is drawn "largely from federal antitrust law." Independent Milk Producers Co-op v. Stoffel, 102 Wis. 2d 1, 6, 298 N.W.2d 102 (Ct. App. 1980). Indeed, Wisconsin courts follow federal case law in interpreting Chapter 133's prohibition of "conspiracies in restraint of trade or commerce" and "look to the federal courts for guidance" on applying state antitrust law to intrastate commerce. Id. at 6-7.

The continuing violation doctrine was set out in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 339, 91 S. Ct. 795 (1971), where the United States Supreme Court concluded that "each time a plaintiff is injured by an act of the defendants, a cause of action accrues to him to recover the damages cause by that act." Therefore, "if the plaintiff feels the adverse impact of an antitrust conspiracy on a certain date, a cause of action immediately accrues to him." Id. at 340. This act must be new and independent, and must inflict new damages. DXS, Inc. v. Siemens Med. Sys., Inc., 100 F.3d 462, 467-68 (6th Cir. 1996).

Federal and state cases have adopted the continuing violation doctrine in applying limitation of action statutes in other cases of statutory violations. For instance, in Barry v Maple Bluff Country Club, Inc., 221 Wis. 2d 707, 586 N.W.2d 18 (Ct. App. 1998), the plaintiff brought claim that

she was the victim of discrimination because she, as a woman, was not allowed to play golf at certain times at her club and was, therefore, deprived of access to business and networking opportunities. The country club claimed that the statute of limitations barred the claim. The Court of Appeals found the county club's violations to be continuous and found it no defense that the discriminatory conduct had been "going on for a long time." Id. at 729.

In Segall v. Hurwitz, 114 Wis. 2d 471, 339 N.W.2d 333 (Ct. App. 1983), the Court of Appeals affirmed the dismissal of an antitrust action as barred by the statute of limitations. The appellate court found that a cause of action for continuing antitrust violations accrues when the business is immediately and permanently destroyed. In Segall, the plaintiff brought a state antitrust claim for damages caused by an unlawful conspiracy in restraint of trade under Chapter 133. The appellate court found that the two-year statute of limitations expired because the injury occurred and the claim accrued no later than when the conspiracy forced the plaintiff out of business.

In this case, E-Z Roll Off continued to operate until May 2008. In the preceding five years, it struggled to maintain its business in the face of the continuing conspiracy and overt acts of Oneida County and Waste Management. E-Z Roll Off was adversely impacted every time it was forced to

pay up to ten times as much as their competitor. E-Z Roll Off was adversely impacted when the County refused to mitigate or remedy the damages caused by its illegal policies. And E-Z Roll Off was adversely impacted when the conspiracy finally forced it out of business. The notice of injury would have been timely at any time during that period.

Therefore, the court should follow the federal courts in guidance and apply the continuing violation doctrine and find that the notice of injury and notice of claim in this case were timely because of Oneida County's continuing illegal and anti-competitive conduct.

CONCLUSION

For the reasons set forth above, E-Z Roll Off, LLC, requests that the Order of the circuit court granting Oneida County's Motion for Summary Judgment be reversed.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this Brief meets the form and length requirements of Rule 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this Brief is 28 pages.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding an appendix, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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APPEAL NO. 2009AP775

E-Z ROLL OFF, LLC,

Plaintiff-Appellant,

vs.

COUNTY OF ONEIDA,

Defendant-Respondent-Petitioner

APPEAL FROM THE ONEIDA COUNTY CIRCUIT COURT– THE HONORABLE PATRICK F. O'MELIA: CASE NO. 06CV124 ON REVIEW FROM THE DECISION OF THE COURT OF APPEALS, DISTRICT III

BRIEF OF DEFENDANT-RESPONDENT-PETITIONER COUNTY OF ONEIDA

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I. E-Z Roll Off's Failure to Sue for Injunctive Relief Under Wis. Stat. §133.16 Precludes Consideration of Whether Wis. Stat. §893.80(1) Applies to Such Claims

Summary: E-Z Roll Off cannot allege a claim for injunctive relief under Wis. Stat. §133.16 for the first time on appeal for purposes of arguing exemption from the notice requirements of Wis. Stat. §893.80(1).

E-Z Roll Off ("E-Z") acknowledges that claims under statutes containing specific provisions for injunctive relief have been held to be exempt from the notice provisions of Wis. Stat. §893.80(1). See, e.g. *Gillen v. City of Neenah,* 219 Wis. 2d 806, 580 N.W.2d 628 (1998) (public trust cases involving statutes providing for injunctions held exempt).

In fact, E-Z has until their response brief before this court steadfastly denied making a claim for injunctive relief. Rather, E-Z brought a civil action

for money damages under § 133.18[1]: E-Z demanded the following relief:

> A. For an Order declaring the Agreement described in paragraphs 3, 4 and 8 an illegal restraint of trade under Wis. Stat. § 133.03(1);
>
> B. For an award of compensatory damages for past and future loss of profits;
>
> C. For an award of treble damages pursuant to Wis. Stat. § 133.18;

[1] Wis. Stat. § 133.18 provides in relevant part:

(1) (a) Except as provided under par. (b), any person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue therefor and shall recover threefold the damages sustained by the person and the cost of the suit, including reasonable attorney fees. Any recovery of treble damages shall, after trebling, be reduced by any payments actually recovered under s. 133.14 for the same injury.

(2) A civil action for damages or recovery of payments under this chapter is barred unless commenced within 6 years after the cause of action accrued. When, in a civil class action, a class or subclass is decertified or a class or subclass certification is denied, the statute of limitations provided in this section is tolled as to those persons alleged to be members of the class or subclass for the period from the filing of the complaint first alleging the class or subclass until the decertification or denial.

(3) Whenever any civil or criminal action or proceeding is instituted by the state under this chapter, the running of the statute of limitations in respect of every other right of action based in whole or in part on any matter complained of in the state's action or proceeding shall be suspended during the pendency thereof and for one year thereafter. The pendency of any such action or proceeding instituted by the state shall not be grounds for staying any other action or discovery in such other action.

(4) A cause of action arising under this chapter does not accrue until the discovery, by the aggrieved person, of the facts constituting the cause of action.

(5) Each civil action under this chapter and each motion or other proceeding in such action shall be expedited in every way and shall be heard at the earliest practicable date.

(6) In a civil action against a person or entity specified in s. 893.80, the amount recovered may not exceed the amount specified in s. 893.80(3).

> D. For an award of the costs and disbursements of this action and reasonable attorneys fees pursuant to Wis. Stat. §133.18;
>
> E. For such other and further relief as the court may deem just and equitable.

(R.I., p. 3).

E-Z expressly stated that E-Z had not sought injunctive relief in this action in its brief submitted to the Court of Appeals. (*See* E-Z Ct. App. Brief, p. 13). E-Z criticized the district court's interpretation of the law as applicable to injunctions, and then acknowledged that "*there was no application for injunction in this case* . . ." (See E-Z Ct. App. Brief, p. 13)(emphasis supplied).

E-Z's reliance on *Gillen* is misplaced. In *Gillen*, this Court held that the test for determining whether the enforcement procedures provided in Wis. Stat. § 30.294 were inconsistent with Wis. Stat. § 893.80(1)(b) was whether Wis. Stat. § 30.294 contained specific procedures that were inconsistent

with the delay that would be caused should plaintiffs be required to comply with the general notice requirements of Wis. Stat. § 893.80(1)(b), observing: "Where general and specific statutory provisions are in conflict, the specific provisions take precedence." *Gillen,* 219 Wis. 2d 806, ¶29.

The availability of "immediate injunctive relief" as a remedy under Wis. Stat. § 30.294 was the determining factor in this Court's holding such claims to be exempt from notice requirements:

> Wisconsin Stat. § 30.294 expressly allows a plaintiff to seek immediate injunctive relief to prevent injury. The enforcement procedures provided in § 30.294, are inconsistent with Wis. Stat. § 893.80(1)(b), which requires a plaintiff to provide a governmental body with a notice of claim, and to wait 120 days or until the claim is disallowed before filing an action. Therefore, the general application of § 893.80(1)(b) in this case frustrates the plaintiffs' specific right to injunctive relief under § 30.294.

Gillen, 219 Wis. 2d 806, ¶29.

Gillen does not apply in this case because E-Z sued under Wis. Stat. § 133.18, which does not

provide for injunctive relief. In an effort to salvage its argument, E-Z claims, for the first time, that E-Z asked for injunctive relief at the district court level, and analyzes its right to an exemption as if a claim under Wis. Stat. § 133.16 had been pled. (Response Brief, pp. 13-23).

This is a mischaracterization of the record. The circuit court actually rejected E-Z's attempt to characterize its action to include a claim for injunctive relief just before judgment was entered. When E-Z made the eleventh hour claim that injunctive relief was being sought, the circuit court stated: "I didn't read your complaint as asking for injunctive relief, but perhaps I missed that." (R:16, p. 39). Counsel for E-Z conceded this point: "Well, maybe it would be better stated as to – as declaratory relief . . . " Counsel for Oneida County then paraphrased E-Z's wherefore clause for the court.

(R:16, p. 39-40). The court responded: "No specific request for injunctive or declaratory relief." (sic) (R:16, p. 40). The court then stated:

> So it is your position, Mr. Connell, that paragraph A under the wherefore clause where it says, quote, "[f]or an Order declaring the Agreement described in paragraphs 3, 4 and 8 an illegal restraint of trade under Section 133" is a request for injunctive relief?

(R:16, p. 40). Counsel for E-Z again conceded that declaratory and not injunctive relief was the remedy E-Z sought: "Well, I guess if the court declares the contract null and void, we'll be happy . . . " (R:16, p. 40).

In short, E-Z not only failed to allege a claim for injunctive relief under Wis. Stat. § 133.16 in its complaint; E-Z admitted as much before the circuit court. E-Z cannot now reverse course. "It is the often repeated rule in this State that issues not raised or considered in the trial court will not be considered for the first time on appeal." *In Re Estate of Wolf*, 2009

WI App 183, ¶12, 777 N.W.2d 119 (quoted source omitted).

E-Z does not argue that the claim it actually made - its claim under Wis. Stat. § 133.18 for monetary damages - should be exempt from the notice provisions of Wis. Stat. § 893.80(1). Instead, both E-Z and the Court of Appeals applied the three factor test to the whole of Chapter 133 as if invocation of a right to money damages under Wis. Stat. § 133.18 automatically implied that all forms of relief under Chapter 133 were implicated.

This argument fails to account for the fact that the statutory subsections provide for separate types of remedies and identify distinct procedures under which to obtain those remedies. This argument also fails to account for the fact that Wis. Stat. § 893.80(1) and Wis. Stat. § 133.18 are not inconsistent on their face. Rather than specifying inconsistent procedures,

the legislature chose to apply Wis. Stat. § 893.80 to claims brought under Wis. Stat. § 133.18 for monetary damages by expressly reincorporating Wis. Stat. § 893.80 by reference in Wis. Stat. § 133.18(6). Wis. Stat. § 133.18(6) provides:

> (6) In a civil action against a person or entity specified in s. 893.80, the amount recovered may not exceed the amount specified in s. 893.80(3).

The fact that the legislature chose to apply the Wis. Stat. § 893.80(3) damage cap to Wis. Stat. § 133.18 claims but did not expressly exempt these claims from Wis. Stat. § 893.80(1) alone dictates the conclusion that the legislature intended Wis. Stat. § 893.80(1) to apply. *Perra v. Menomonee Mut. Ins. Co.*, 2000 WI App 215, ¶ 12, 239 Wis. 2d 26, 619 N.W.2d 123 ("[T]he enumeration of specific alternatives in a statute is evidence of legislative intent that any alternative not specifically enumerated is to be excluded.")

Courts have clearly distinguished the way in which Wis. Stat. § 893.80(1) applies to claims allowing for differing remedies. Requests for declaratory judgment are subject to Wis. Stat. § 893.80(1). *Ecker Bros. v. Calumet County*, 2009 WI App 112, ¶ 5, 321 Wis. 2d 51, 772 N.W. 2d 240. Requests for money damages are also subject to Wis. Stat. § 893.80(1). *DNR v. City of Waukesha,* 184 Wis. 2d 178, 515 N.W. 2d 888 (1994). In drafting Chapter 133, the legislature carefully distinguished the remedy of injunctive relief from the remedy for monetary damages by creating different and distinct subsections defining different procedures for pursuing these remedies.

The remedy E-Z elected to pursue explicitly incorporates the provisions of Wis. Stat. § 893.80 without exception. E-Z cannot be allowed to avoid this evidence of the legislative intent that all of the

provisions of Wis. Stat. § 893.80 apply to E-Z's claim for monetary damages by recasting its complaint as containing a claim it never made.

II. Oneida County Had No Actual Notice of The Claimant and Claim and Has Failed To Offer Proof That Oneida County Was Not Prejudiced Because It Had No Actual Notice of The Claim

Summary: Oneida County had no actual notice of the claimant and claim and failed to offer proof that Oneida County was not prejudiced because it had no actual notice of the claim.

It is the plaintiff's burden to prove both actual notice and lack of prejudice. *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 597, 530 N.W. 2d 16 (Ct. App. 1995). As for actual notice, despite E-Z's arguments, this Court in *Markweise v. City of Milwaukee*, 205 Wis. 2d 207, 556 N.W. 2d 326 (Ct. App. 1996) stated that "actual notice" requires that a government entity not only have knowledge of that event for which it may be liable, but also the identity

and type of damage alleged to have been suffered by a potential claimant.

To fall under the actual notice exception, the claimant must also meet the requirements in Wis. Stat. § 893.80(1)(b) in that the claim (1) identified the claimant's address, (2) itemized the relief sought, (3) been submitted to the proper County representative, and (4) been disallowed by the County. *Waukesha*, 184 Wis. 2d at 197-98.

The circuit court properly determined that meetings involving threats by the Laddusires to terminate business with Oneida County did not constitute actual notice. (See Response Brief, p. 24). Nor did the complaints filed with the Department of Agriculture, Trade and Consumer Protection and the Oneida County District Attorney's office give notice of the fact that the Laddusire's intended to make a damage claim against the County. It is undisputed

that these complaints were made to entities other than "proper County representative[s]" and did not constitute relief sought directly against the County. While Sexton received a copy of the DATCP complaint, Sexton was the Oneida County Solid Waste Director, not the County Clerk, and neither the DATCP complaint nor complaints to the District Attorney were given credence sufficient to alert Sexton to notify the County Board of a possible claim.

The circuit court correctly found that E-Z had failed to offer evidence indicating lack of prejudice. E-Z argued, without citation to evidence, that "any delay or failure to give notice did not prejudice Oneida County" and that "[it] is clear . . . that Oneida County maintained that its conduct did not violate the law . . ." (R:17, p. 15). The court correctly noted: "That argument would apply in any case where compliance with notice of claims was at issue. If the

case is being litigated, the defendant is most likely not taking action to remedy its original conduct. Without more support I don't think the Plaintiff has satisfied its burden of proving lack of prejudice." (R:17, pp. 15-16).

The court rightly held E-Z to its obligation to come forward with some evidence indicating that the County's ability to budget for the settlement of a lawsuit was unimpaired. E-Z had offered only argument, not evidence, and effectively asked that lack of prejudice be assumed.

III. The Continuing Violation Doctrine Is Not Applicable To Bar § 893.80(1) Notice Requirements

Summary: There is no support in *Zenith Radio Corporation v. Hazeltine Research, Inc.,* that the continuing violation doctrine tolls any limitation period to that of the specific dissolution of a business and, therefore, bars application of § 893.80 notice requirements.

Zenith was brought under a federal anti-trust law, and the decision is very clear and limited in its

holding. As noted by the court in *Segall v. Hurwitz,* "Federal law will be applied to determine when a claim accrues under federal antitrust statutes." 114 Wis. 2d 471, 483, 339 N.W. 2d 333 (Ct. App. 1983). E-Z's claim arises under a state anti-trust statute, and EZ can cite no authority applying the continuing violations theory to Wis. Stat. § 893.80(1) under state law.

CONCLUSION

Based upon the foregoing arguments and authorities, it is respectfully requested that this Court reverse the Court of Appeals' decision in this case and affirm the decision of the Oneida County Circuit Court granting Summary Judgment to the Defendant-respondent-petitioner.

Submitted this 9th day of December, 2010.

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Certificate of Service

The undersigned, counsel of record for the Defendant-Respondent-Petitioner, County of Oneida, certifies that on December 9, 2010, three copies of the Brief of Defendant-Respondent-Petitioner County of Oneida were delivered via Federal Express to each of the following counsel:

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