

STATE OF WISCONSIN
SUPREME COURT

In re:

PROPOSED AMENDMENT TO
WISCONSIN STATUTES §§ 803.08 and 426.110

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

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ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

March 16, 2017

For the reasons set forth in the accompanying supporting memorandum, the Wisconsin Judicial Council respectfully petitions the Wisconsin Supreme Court to repeal and recreate WIS. STAT. § 803.08, create WIS. STAT. § 426.110 (4m), repeal WIS. STAT. § 426.110 (5) through (13), and amend WIS. STAT. § 426.110 (16). This petition is directed to the Supreme Court's rule-making authority under WIS. STAT. § 751.12.

PETITION

The Judicial Council respectfully requests that the Supreme Court adopt the following rule:

SECTION 1. 803.08 of the statutes is repealed and recreated to read:

803.08. Class actions.

Judicial Council Committee Note:

Recreated s. 803.08 is based on Rule 23 of the Federal Rules of Civil Procedure. Federal Rule 23 was adopted in its modern form in 1966, and it has been the subject of decades of careful review by the federal Advisory Committee on Civil Rules.

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

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

Sub. (10), Disposition of residual funds, and sub. (14), Prohibition against certain class actions, are the only provisions in recreated s. 803.08 that depart from the federal rule. Federal Rule 23 does not contain a provision comparable to sub. (10), which was originally adopted by the Wisconsin Supreme Court as s. 803.08 (2), effective

January 1, 2017. Federal Rule 23 also does not contain a provision comparable to sub. (14), which was added by 2011 Wis. Act 68 to prohibit class action suits against the state seeking tax refunds, effective March 1, 2012.

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

- (a) The class is so numerous that joinder of all members is impracticable.
- (b) There are questions of law or fact common to the class.
- (c) The claims or defenses of the representative parties are typical of the claims or defenses of the class.
- (d) The representative parties will fairly and adequately protect the interests of the class.

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

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

- 1. Inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class.
- 2. Adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

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

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

- 1. The class members' interests in individually controlling the prosecution or defense of separate actions.
- 2. The extent and nature of any litigation concerning the controversy already begun by or against class members.

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

4. The likely difficulties in managing a class action.

(3) CERTIFICATION ORDER.

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

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

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

(4) NOTICE.

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

(b) *For (2) (c) classes.* For any class certified under sub. (2) (c), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language, all of the following:

1. The nature of the action.
2. The definition of the class certified.
3. The class claims, issues, or defenses.
4. That a class member may enter an appearance through an attorney if the member so desires.
5. That the court will exclude from the class any member who requests exclusion.
6. The time and manner for requesting exclusion.
7. The binding effect of a class judgment on members under sub. (5).

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

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

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

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

Judicial Council Committee Note:

In *Waters ex rel. Skow v. Pertzborn*, 243 Wis.2d 703 (2001), the Wisconsin Supreme Court held that the circuit court was barred by statute from ordering separate trials before different juries on the issues of liability and damages arising from the same claim. The court's holding was based on Wis. Stats. §§ 805.05 (2) and 805.09 (2).

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

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

(8) CONDUCTING THE ACTION.

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

1. Determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument.
2. Require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of any of the following:

- a. Any step in the action.
 - b. The proposed extent of the judgment.
 - c. The members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action.
3. Impose conditions on the representative parties or on intervenors.
 4. Require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly.
 5. Deal with similar procedural matters.

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

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

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

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

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

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

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

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

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

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

(b) 1. Any order entering a judgment or approving a proposed compromise of a class action that establishes a process for identifying and compensating members of the class shall provide for disbursement of any residual funds. In class actions in which residual funds remain, not less than fifty percent of the residual funds shall be disbursed to WisTAF to support direct delivery of legal services to persons of limited means in non-criminal matters. The circuit court may disburse the balance of any residual funds beyond the minimum percentage to WisTAF for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.

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

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

Judicial Council Committee Note:

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

(12) CLASS COUNSEL.

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

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

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

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

c. Counsel's knowledge of the applicable law.

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

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

- a. Consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.
- b. Order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs.
- c. Include in the appointing order provisions about the award of attorney's fees or nontaxable costs under sub. (13).
- d. Make further orders in connection with the appointment.

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

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

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

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

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

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

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

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

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

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

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

Judicial Council Committee Note:

Repealed subsections (5) through (13) were procedural rules modeled on a previous version of Rule 23 of the Federal Rules of Civil Procedure. Recreated s. 803.08 is modeled on the current version of Rule 23. The procedural provisions in s. 426.110 were repealed and replaced with the new procedures in s. 803.08 to maintain consistency in the statutes and to reflect current law.

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

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

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

The Wisconsin Judicial Council respectfully requests that the Court publish the Judicial Council Committee Notes to proposed WIS. STATS. §§ 803.08 and 426.110.

Dated March 16, 2017.

RESPECTFULLY SUBMITTED,

WISCONSIN JUDICIAL COUNCIL

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