

**SUPREME COURT OF WISCONSIN**

## NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 17-03

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**In re proposed amendments to Wisconsin  
Statutes §§ 803.08 and 426.110**

**FILED****DEC 21, 2017**

Diane M. Fremgen  
Clerk of Supreme Court  
Madison, WI

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On March 16, 2017, Attorney April M. Southwick filed a rule petition on behalf of the Wisconsin Judicial Council asking this court to repeal and replace Wis. Stat. § 803.08, (Class Actions), create Wis. Stat. § 426.110 (4m), (Class actions; injunctions; declaratory relief), repeal Wis. Stat. § 426.110(5) through 13, and amend Wis. Stat. § 426.110(16). The proposed amendments are intended to align Wis. Stats. §§ 803.08 and 426.110 with the federal class action rule, Fed. R. Civ. P. 23.

The court discussed this petition at open administrative rules conference on April 20, 2017 and voted to schedule a public hearing and request additional information from the Judicial Council.

On June 27, 2017, the court asked the Judicial Council to describe the concerns relating to class actions that the 2003 amendments to Fed. R. Civ. P. 23 were intended to address and provide

relevant federal Advisory Committee notes. The Judicial Council responded by letter dated August 18, 2017.

On August 21, 2017, a letter was sent to interested persons seeking input. The court received a memo in support of the petition from Robert Fassbender, Executive Director of the Wisconsin Civil Justice Council, Inc., dated September 2, 2016, which he previously provided to the Judicial Council's Evidence & Civil Procedure Committee.

The court conducted a public hearing on October 30, 2017. Attorney Thomas L. Shriner, Chair of the Judicial Council's Evidence and Civil Procedure Committee, presented the petition to the court on behalf of the Judicial Council. The Honorable Michael R. Fitzpatrick, Court of Appeals District IV, and Attorney William C. Gleisner, III, representative of the Judicial Council, also appeared and spoke in favor of the petition.

At the ensuing closed rules conference, the court discussed the petition and voted unanimously to grant the petition and revise the rules as requested by the petitioner.

IT IS ORDERED that:

**SECTION 1.** 803.08 of the statutes is repealed and recreated to read:

**803.08. Class actions.**

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

(a) The class is so numerous that joinder of all members is impracticable.

(b) There are questions of law or fact common to the class.

(c) The claims or defenses of the representative parties are typical of the claims or defenses of the class.

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

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

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

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

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

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

(c) The court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the

controversy. The matters pertinent to these findings include all of the following:

1. The class members' interests in individually controlling the prosecution or defense of separate actions.

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

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

4. The likely difficulties in managing a class action.

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

(b) *For sub. (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.

**(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 50 percent of the residual funds shall be disbursed to WisTAF to support direct delivery of legal

services to persons of limited means in non-criminal matters. The circuit court may disburse the balance of any residual funds beyond the minimum percentage to WisTAF for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.

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

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

**(12) CLASS COUNSEL.**

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

(b) 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 fees and nontaxable costs.

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

d. Make further orders in connection with the appointment.

(c) *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.

(d) *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.

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

**(13) ATTORNEY FEES AND NONTAXABLE COSTS.** In a certified class action, the court may award reasonable attorney 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.

#### **Judicial Council Committee Notes**

By S. Ct. Order 17-03, 2017 WI 108 (issued Dec. 21, 2017, eff. July 1, 2018) the supreme court repealed and recreated s. 803.08. 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.

Subsection (6), Particular issues. 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. ss. 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.)

Subsection (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.

Subsection (11), Appeals. Subsection (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.

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

**426.110 (4m)** Actions commenced under this section shall be conducted under the procedures set forth in s. 803.08.

#### Judicial Council Committee Note

Repealed subs. (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)~~.

IT IS FURTHER ORDERED that these amendments to Wis. Stats. §§ 803.08 and 426.110 are effective July 1, 2018.

IT IS FURTHER ORDERED that the rule adopted pursuant to this order shall apply to court proceedings commenced after the effective date of this rule and to any proceedings within a court proceeding then pending, except insofar as, in the opinion of the circuit court, application of the rule change would not be feasible or would work injustice, in which event the former rule applies.

IT IS FURTHER ORDERED that the Judicial Council Committee Notes above are not adopted, but will be published and may be consulted for guidance in interpreting and applying these rules.

IT IS FURTHER ORDERED that notice of the above amendments be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 21st day of December, 2017.

BY THE COURT:

Diane M. Fremgen  
Clerk of Supreme Court

