



## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

### Law of Sovereign Immunity

The Wisconsin Constitution establishes that the State of Wisconsin enjoys sovereign immunity, or protection from suit without its consent, in its own courts. Like other states, Wisconsin also enjoys sovereign immunity in federal courts, as expressed in the U.S. Constitution. Sovereign immunity's protections are not absolute, however, either in Wisconsin courts or federal courts. This Information Memorandum provides an overview of how sovereign immunity functions in the federal and Wisconsin court systems, and discusses the different exceptions to the doctrine that apply in both court systems.

#### ***BACKGROUND PRINCIPLES***

Sovereign immunity is a legal principle which holds that sovereigns, including states and the federal government, cannot be sued without their consent.<sup>1</sup> [*Alden v. Maine*, 527 U.S. 706, 755 (1999).] States generally enjoy sovereign immunity from suits in federal court, regardless of whether the plaintiffs are a state's own citizens or citizens of another state. [*Hans v. Louisiana*, 134 U.S. 1, 15 (1890).] Sovereign immunity in federal courts is embodied in the Eleventh Amendment of the U.S. Constitution, which reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."<sup>2</sup> States and arms of the state can invoke sovereign immunity from federal lawsuits, but political subdivisions of states, such as counties and other municipalities, cannot invoke sovereign immunity as a defense to federal lawsuits.<sup>3</sup> [*Northern Insurance Company v. Chatham County*, 547 U.S. 189, 193 (2006).]

Likewise, Wisconsin enjoys sovereign immunity from suits in Wisconsin courts under the Wisconsin Constitution, which provides: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state." [Wis. Const. art. IV, s. 27.] Sovereign immunity in Wisconsin courts extends to Wisconsin's arms or agencies, such as the Board of Regents of the University of Wisconsin (UW) System and the Department of Corrections. [*Lister*

<sup>1</sup> The doctrine derives from the age-old English legal maxim that "the King can do no wrong." [Jack Stark, *The Wisconsin State Constitution: A Reference Guide* 109 (1997).]

<sup>2</sup> "The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." [*Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Incorporated*, 506 U.S. 139, 146 (1993).]

<sup>3</sup> The federal government also can invoke sovereign immunity as a defense to lawsuits, with some exceptions. This Information Memorandum does not address the federal government's sovereign immunity.

*v. Board of Regents of University of Wisconsin System*, 72 Wis. 2d 282, 291 (1976); *Mayhugh v. State*, 2015 WI 77, ¶ 3.] As with federal lawsuits, Wisconsin’s counties and municipalities cannot invoke sovereign immunity as a defense to suits arising under Wisconsin law. [*Fiala v. Voight*, 93 Wis. 2d 337, 348 (1980).]

Although they cannot rely on sovereign immunity as a defense, Wisconsin’s counties, municipalities, and other political subdivisions have some protection from lawsuits in state courts. Sovereign immunity in Wisconsin is separate and distinct from local governmental immunity, which provides immunity from suit for intentional and discretionary acts to local governments, their officers, and their employees. The Wisconsin Legislature codified governmental immunity in s. 893.80, Stats. Wisconsin cannot raise governmental immunity as a defense to suits against the state.<sup>4</sup>

## **UNIFORM EXCEPTIONS TO SOVEREIGN IMMUNITY**

Sovereign immunity does not provide states with complete protection from suits. The following exceptions to sovereign immunity apply to all states. Most of the exceptions apply in federal courts, although one exception applies in state courts.

### ***WHEN PRIVATE INDIVIDUALS MAY SUE STATES***

#### ***States May Waive Sovereign Immunity***

Because sovereign immunity is a privilege that states enjoy, states may waive that privilege whenever they choose. [*Clark v. Barnard*, 108 U.S. 436, 447 (1883).] However, a state must voluntarily decide to waive sovereign immunity; therefore, federal courts apply a strict standard for determining when a valid waiver occurred. Generally, for a federal court to find that a state waived its sovereign immunity, the state must have voluntarily invoked the court’s jurisdiction and submitted its rights for determination, or the state must have unequivocally declared its intent to submit to the court’s jurisdiction. Federal courts will not find implied waivers of sovereign immunity, even if states consent to similar suits in their own state courts or declare that a state agency may “sue and be sued.” [*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 675-76 (1999).] Similarly, if Wisconsin chooses to waive its sovereign immunity by participating in a federal case, Wisconsin does not automatically waive its sovereign immunity in its own courts for state-law claims related to the federal case. [*Lister*, 72 Wis. 2d 282, 296.]

#### ***Congress May Abrogate State Sovereign Immunity***

Congress may abrogate, or nullify, state sovereign immunity. A congressional abrogation must satisfy two conditions: (1) Congress must be “unmistakably clear” in expressing its intent to abrogate sovereign immunity; and (2) Congress must act pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment, described below. [*Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003).] Because the principles of sovereign immunity are essential to the United States’ constitutional structure, federal courts are unwilling to infer that Congress intended to abrogate sovereign immunity. Accordingly, rather than

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<sup>4</sup> For more information on local governmental immunity, see the Legislative Council’s 2015 Information Memorandum, *Local Governmental Immunity in Wisconsin*, available at [http://docs.legis.wisconsin.gov/misc/lc/information\\_memos/2015/im\\_2015\\_12.pdf](http://docs.legis.wisconsin.gov/misc/lc/information_memos/2015/im_2015_12.pdf).

allowing Congress to abrogate state sovereign immunity based on a “general authorization for suit in federal court,” courts require a “clear legislative statement” from Congress. [*Seminole Tribe v. Florida*, 517 U.S. 44, 56 (1996) (internal quotations omitted).] A statute that merely grants jurisdiction for federal courts to hear a type of claim would not meet the strict standard for abrogation because it does not unequivocally remove the defense of sovereign immunity. However, the U.S. Supreme Court has held that a law that granted jurisdiction and repeatedly referred to “the State” as the defendant in that type of claim was sufficiently specific in abrogating the defense of sovereign immunity. [*Id.* at 56-57.]

In issuing the “clear legislative statement” of intent to abrogate, Congress must also act pursuant to a valid exercise of its powers under Section 5 of the Fourteenth Amendment. The Fourteenth Amendment, ratified after the Civil War, expressly prohibits the states from treating private individuals in certain ways. Section 1 of the Fourteenth Amendment provides: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” [U.S. Const. amend. XIV, s. 1.] While the substantive provisions of the Fourteenth Amendment are expressly directed at the states, Section 5 provides: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” The Fourteenth Amendment shifted the balance of state and federal power in the United States, and gave Congress the authority to subject the states to suits by private individuals to enforce Section 1’s substantive guarantees. [*Fitzpatrick v. Bizer*, 427 U.S. 445, 455-56 (1976).]

In *Seminole Tribe v. Florida*, the U.S. Supreme Court also overruled an earlier case and held that Congress could not abrogate state sovereign immunity in federal courts pursuant to its power to regulate interstate commerce under Article I of the U.S. Constitution. [517 U.S. 44, 66.] Just as Congress does not have the power to abrogate state sovereign immunity in federal court using its Article I powers, Congress also does not have authority under Article I to force nonconsenting states to participate in private suits for damages in their own state courts, even when the litigants are suing to enforce federal rights. [*Alden*, 527 U.S. 706, 759.]

### ***State Officers May Be Sued For Violating Federal Law***

Although state officers typically act on the state’s authority while carrying out their official duties, private individuals can sue state officers to stop them from violating federal law. In *Ex parte Young*, the U.S. Supreme Court held that the Eleventh Amendment did not bar suits alleging that a state official’s actions to enforce state law violated the U.S. Constitution, because such suits are against the officer rather than the state. [209 U.S. 123, 159-60 (1908).] The Court reasoned that an unconstitutional state statute is void, and therefore a state officer enforcing an unconstitutional act “comes into conflict with the superiority of the [U.S.] Constitution, and is in that case stripped of his official or representative character and is subjected . . . to the consequences of his individual conduct.” [*Id.*] Accordingly, a private individual could sue the Wisconsin Attorney General in federal court to stop the Attorney General from enforcing an allegedly unconstitutional Wisconsin statute, and the Attorney General would not be able to rely on Wisconsin’s sovereign immunity as a defense.

*Ex parte Young* created an exception to state sovereign immunity that itself has exceptions, however. While federal courts may grant injunctive relief under *Ex parte Young* to prevent an ongoing violation of federal law, they cannot grant retrospective relief in the form of monetary

damages that would be paid with state funds.<sup>5</sup> [*Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)).] For example, a federal court could not order a Wisconsin official to pay public benefits that were wrongly withheld. Additionally, private individuals cannot rely on *Ex parte Young* to force state officers to perform their portion of a contract between the private individual and the state. As the U.S. Supreme Court has reasoned, such a suit really seeks to make the state perform the contract and violates the state's sovereign immunity. [*In re Ayers*, 123 U.S. 443, 504-05 (1887).] Finally, where Congress created a remedial scheme to enforce a federal statute, courts cannot use *Ex parte Young* to craft their own remedies (in the form of injunctions) for violations of that statute. [*Seminole Tribe*, 517 U.S. 44, 76.]

### ***States May be Sued in Other States' Courts***

States are sovereign only within their own borders for state-law claims. In *Nevada v. Hall*, the U.S. Supreme Court ruled that states do not have sovereign immunity from a private citizen's suit in another state's courts.<sup>6</sup> [440 U.S. 410, 427 (1979).] Thus, an aggrieved Illinois citizen could sue the State of Wisconsin in an Illinois court without Wisconsin consenting to the suit. However, the Full Faith and Credit Clause of the U.S. Constitution<sup>7</sup> prohibits a state from expressing hostility toward its sister states by applying special rules of law (laws that are inapplicable to the state itself) that discriminate against the sister states. [*Franchise Tax Board of California*, 136 S. Ct. 1277, 1281.] Consequently, for example, an Illinois court could not award an aggrieved Illinois citizen \$2 million in damages against a Wisconsin state agency if Illinois law would cap damages against an Illinois state agency for similar actions at \$200,000.

### ***WHEN OTHER SOVEREIGNS MAY SUE STATES***

#### ***States May be Sued by Other States or by the United States***

Sovereign immunity does not protect states from suits by co-equal or greater sovereigns. When the states adopted the U.S. Constitution, they agreed to waive sovereign immunity for legal disputes between states to preserve "the peace of the Union." [*Principality of Monaco v. Mississippi*, 292 U.S. 313, 328-29 (1934).] The U.S. Supreme Court has original and exclusive jurisdiction over all cases in which one state sues another state. [U.S. Const. art. III, s. 2, c. 2; 28 U.S.C. s. 1251 (a).] For instance, if Wisconsin sued Minnesota over a boundary dispute, the case

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<sup>5</sup> Courts have noted that prospective injunctions may have an "ancillary effect" on state treasuries, but the fact that an order impacts a state's finances does not violate *Ex parte Young* as long as the order is truly forward-looking and spending state funds is necessary to comply with federal law. [*Edelman*, 415 U.S. 651, 667-68; see also *Milliken v. Bradley*, 433 U.S. 267 (1977) (holding that a prospective injunction could require a state to expend state funds as part of an ongoing desegregation effort for its public schools).]

<sup>6</sup> Following the death of Justice Antonin Scalia, a divided U.S. Supreme Court upheld *Nevada v. Hall* by splitting 4-4 on a California state agency's request for the Court to overrule *Nevada v. Hall* and hold that Nevada courts lacked jurisdiction to hear a suit by a former California resident, now living in Nevada, against the California state agency. [*Franchise Tax Board of California v. Hyatt*, 136 S. Ct. 1277 (2016).]

<sup>7</sup> The Full Faith and Credit Clause requires that: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." [U.S. Const. art. IV, s. 1.]

would go directly to the U.S. Supreme Court, and no other court would have authority to decide the case.<sup>8</sup>

Based on similar concerns about protecting “the permanence of the Union,” states cannot claim sovereign immunity as a defense to a suit by the United States. [*Principality of Monaco*, 292 U.S. 313, 329.] In ratifying the U.S. Constitution, the states consented to suits brought by the federal government. [*Alden*, 527 U.S. 706, 755.] Although the U.S. Supreme Court has original jurisdiction over suits by the United States against one of the states, that jurisdiction is shared with the lower federal courts rather than being exclusive. [*Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992); 28 U.S.C. s. 1251 (b) (2).] Accordingly, if the United States sued Wisconsin over a state law that allegedly violated federal law, the case would most likely begin in a federal district court.

### **SOVEREIGN IMMUNITY IN WISCONSIN’S STATE COURTS**

Wisconsin courts interpret Article IV, Section 27 of the Wisconsin Constitution to mean that the state has sovereign immunity in state actions except when the Legislature consents to suits against the state. [*Fiala*, 93 Wis. 2d 337, 342; see also *Cords v. State*, 62 Wis. 2d. 42, 49-50 (1973); *Forseth v. Sweet*, 38 Wis. 2d 676, 689 (1968).] The power to consent to suits against the state belongs exclusively to the Legislature, and the Legislature must give its consent clearly and expressly. [*State v. P.G. Miron Construction Company*, 181 Wis. 2d 1045, 1052-53 (1994).] In other words, because sovereign immunity derives from the Wisconsin Constitution, courts cannot recognize other exceptions to allow suits against the state. If the Legislature has not consented to a suit against Wisconsin and the state properly raises sovereign immunity as a defense, a court has no personal jurisdiction<sup>9</sup> over the state. [*Lister*, 72 Wis. 2d 282, 291.] Consequently, if the state fails to raise sovereign immunity as a defense, then courts will find that the state waived its sovereign immunity. [*Cords*, 62 Wis. 2d. 42, 46.]

Generally, suing a state agency or board is considered an action against the state; thus, sovereign immunity usually protects state entities from suit. [*Mayhugh*, 2015 WI 77 at ¶ 13.] As an extension of that principle, a plaintiff cannot avoid sovereign immunity by declining to name the state as a defendant to a lawsuit. Instead of looking to which parties are named in an action to determine whether the action is against the state, courts look to the nature of the relief that the plaintiff seeks. Regardless of whether a suit only names an agency as the defendant or only names individual officials as defendants, the state “is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit” if the suit ultimately seeks money from the state. In *Lister*, discussed above, the plaintiffs named the Board of Regents of the UW System and the Registrar of the UW-Madison as defendants, but did not name the state. The plaintiffs sought a tuition refund that the State Treasurer would have had to distribute from state funds; the Board of Regents and the Registrar had no authority to distribute the money. Accordingly,

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<sup>8</sup> Before a state can sue another state, it must receive permission from the U.S. Supreme Court. [U.S. Supreme Court Rule 17.3.]

<sup>9</sup> Personal jurisdiction refers to a court’s power over the parties in a case, as opposed to the legal claims and the type of case. [Black’s Law Dictionary (10th ed. 2014).]

the Wisconsin Supreme Court held that the lawsuit was really against the state, which was therefore entitled to assert sovereign immunity as a defense. [*Lister*, 72 Wis. 2d 282, 288-92.]

Some plaintiffs have argued that Article I, Section 9 of the Wisconsin Constitution waives Wisconsin's sovereign immunity. Section 9 states that "[e]very person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character." However, the Wisconsin Supreme Court has consistently rejected arguments that Wisconsin citizens have a "right" to sue the state. [See *Mayhugh*, 2015 WI 77 at ¶ 44 (collecting cases).] Rather, immunity from suit is a privilege that the state may waive or refuse to waive as it chooses without violating any of its citizens' constitutional rights. [*Apfelbacher v. State*, 160 Wis. 565, 577 (1915).]

### **WISCONSIN-SPECIFIC EXCEPTIONS TO SOVEREIGN IMMUNITY**

In federal court, Wisconsin is subject to the same exceptions to sovereign immunity as every other state. In Wisconsin's own courts, however, the circumstances in which the state cannot rely on sovereign immunity as a defense differ from the federal exceptions. The Wisconsin-specific exceptions fall into two main categories.

#### ***JUDICIALLY RECOGNIZED WAIVERS OF SOVEREIGN IMMUNITY***

The first category of Wisconsin-specific exceptions to sovereign immunity includes situations in which Wisconsin courts have recognized pre-existing waivers of sovereign immunity within statutes and within the Wisconsin Constitution.

##### ***Independent Going Concerns***

Wisconsin waives its sovereign immunity when it creates an agency as an "independent going concern" by giving the agency "independent proprietary powers and functions." [*Lister*, 72 Wis. 2d 282, 292.] To determine whether an agency is an independent going concern, Wisconsin courts analyze the statutes that establish the agency's powers. [*Bahr v. State Investment Board*, 186 Wis. 2d 379, 388 (Ct. App. 1994) (citing *Lister*, 72 Wis. 2d 282, 292-93).] In *Bahr v. State Investment Board*, the Wisconsin Supreme Court held that the State of Wisconsin Investment Board (SWIB) was an independent going concern and therefore unable to raise sovereign immunity as a defense, because the Legislature expressly authorized SWIB to "sue and be sued" and expressly stated its intent for SWIB to "be an independent agency of the state." [*Id.* at 399 (quoting ss. 25.17 and 25.15, Stats.).] Also, SWIB had broad powers to invest funds, collect income from state agencies, employ outside counsel and contractors, and manage real estate without the Department of Administration (DOA) participating in the process.<sup>10</sup> [*Id.*]

The independent going concern exception to sovereign immunity is narrow. To date, the Wisconsin Supreme Court has only applied it to three state entities: the State Armory Board, the State Housing Finance Authority, and SWIB. [*Majerus v. Milwaukee County*, 39 Wis. 2d 311 (1968); *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391 (1973); *Bahr*, 186 Wis. 2d 379.] Most

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<sup>10</sup> Compare *Bahr* with *Lister*, in which the Wisconsin Supreme Court found that the Board of Regents of the UW System was not an independent going concern. In *Lister*, the plaintiff law school graduates sued to recover the difference between nonresident and resident tuition for two academic years. The Court found that the Board of Regents was not an independent going concern because the State Treasurer controlled all money belonging to the UW or its endowment, and the State Treasurer in turn needed approval from DOA to distribute any money. [*Lister*, 72 Wis. 2d 282, 288, 293.]

recently, in *Mayhugh v. State*, the Wisconsin Supreme Court declined to find that the Department of Corrections (DOC) was an independent going concern and cautioned that reviewing an entity's statutory powers "is a totality of the circumstances analysis" in which "no one factor is determinative." [2015 WI 77 at ¶ 22.]

Because no one factor is determinative, the fact that an agency's authorizing statute allows for the agency to "sue and be sued" does not automatically establish the agency as an independent going concern. Entities with "sue and be sued" provisions in their authorizing statutes, like DOC, can be named in lawsuits. But the "sue and be sued" language itself does not waive sovereign immunity; rather, the phrase clarifies that the entity has the capacity to sue and be sued after sovereign immunity has been waived. [*Mayhugh*, 2015 WI 77 at ¶ 40-41.]

Not every entity has the capacity to sue and be sued. [See, e.g., s. 802.06 (2) (a) (1.), Stats.] Accordingly, some entities cannot be made parties to a lawsuit even if sovereign immunity has been waived. [*Mayhugh*, 2015 WI 77 at ¶ 40.] For example, the Division of Student Life at the UW is merely a unit of the University that is not capable of being sued.

### ***Claims for Unconstitutional Takings of Private Property***

Sovereign immunity is not a defense to a claim for just compensation based on an unconstitutional taking of private property, because the Just Compensation Clause of the Wisconsin Constitution acts as a waiver to sovereign immunity. [*Zinn v. State*, 112 Wis. 2d 417, 436 (1983).] The Just Compensation Clause, contained in Article I, Section 13 of the Wisconsin Constitution, provides: "The property of no person shall be taken for public use without just compensation therefore." The Wisconsin Supreme Court has held that, although the Wisconsin Legislature ordinarily has the exclusive right to consent to suits against Wisconsin, the Just Compensation Clause is a self-executing waiver to sovereign immunity that does not require an express statutory provision to be enforceable. [*Id.* at 434-36.]

Just compensation after a taking "is a constitutional necessity rather than a legislative dole." [*Id.* at 436 (quoting *Luber v. Milwaukee County*, 47 Wis. 2d 271, 277 (1970)).] In *Zinn v. State*, the Wisconsin Supreme Court stated that if the Legislature used its authority under Article IV, Section 27 of the Wisconsin Constitution to enact specific procedures governing how to receive just compensation from the state after a taking, property owners would have to follow those procedures. [*Id.* at 438.] The absence of such legislation meant that the *Zinn* plaintiff and other property owners could recover directly under the Just Compensation Clause.<sup>11</sup> [*Id.*]

### ***LEGISLATIVE CONSENT TO SUIT***

The second category of Wisconsin-specific exceptions to sovereign immunity refers to situations in which the Legislature expressly consents to certain suits against the state, as outlined in the Wisconsin Statutes.

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<sup>11</sup> In *Zinn*, the plaintiff landowner sued the state for damages after a Department of Natural Resources (DNR) ruling on a lake's high water mark temporarily titled 200 acres of her property to the state for public use. [112 Wis. 2d 417, 421.] The plaintiff landowner alleged that the DNR ruling was an unconstitutional taking of her property for public use without just compensation, violating the Just Compensation Clause. [*Id.* at 421-22.]

### ***Suits Brought Before the State Claims Board***

Section 775.01, Stats., reads: “Upon the refusal of the legislature to allow a claim against the state the claimant may commence an action against the state.” By enacting this statute, the Legislature consented to suits against Wisconsin under certain circumstances, but only after the Legislature itself refuses to allow a claim. Wisconsin courts have interpreted the statute to require a person with a claim against the state to present that claim to the Legislature in the form of a bill; if the Legislature rejects the bill, the person may then sue the state in circuit court. [*Brown v. State*, 230 Wis. 2d 355, 365-66 (Ct. App. 1999).]

Before presenting a claim to the Legislature, a potential litigant must first file a claim with the state Claims Board,<sup>12</sup> which is housed within DOA. [s. 16.007, Stats.] The Claims Board, composed of five total members from the Department of Justice, DOA, the Governor’s Office, the State Senate, and the State Assembly, considers money claims made against state agencies. On its own, the Claims Board has authority to pay claims of up to \$10,000, but the Legislature must pass a bill approving larger payments. [s. 16.007 (6) (a), Stats.] When the Claims Board determines that a claim greater than \$10,000 is one that the state should pay,<sup>13</sup> the Claims Board drafts a bill containing its findings and recommendations and submits that draft bill to the Joint Committee on Finance. [s. 16.007 (5), Stats.] If the Claims Board reports that it lacks the necessary findings to recommend paying a claim, a legislator may still introduce a bill to pay the claim despite the Claims Board’s findings.<sup>14</sup> [*Brown*, 230 Wis. 2d 355, 368.]

Before a Wisconsin court may hear a claim under s. 775.01, Stats., the Legislature has to refuse to allow the claim against the state.<sup>15</sup> That “refusal” can take two forms. First, the Legislature may simply vote to reject the draft bill related to the claim. Second, the Legislature can fail to act on a claims bill before the date near the end of a legislative session when bills that have not been passed by both the Senate and the Assembly are deemed to have “failed to pass.” [*Cleansoils Wisconsin, Inc. v. Department of Transportation*, 229 Wis. 2d 600, 608 (Ct. App. 1999) (internal quotations omitted).]

However, not all claims that the Legislature refuses through this process can convert into suits against the state, because case law limits the definition of a “claim” under s. 775.01, Stats. To

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<sup>12</sup> There is no filing fee for these claims, according to the Claims Board’s website. Also, claimants do not have to be Wisconsin residents.

<sup>13</sup> The Claims Board could decide that Wisconsin should pay a claim because the state is legally liable; the claim involves causal negligence on the part of state officers, agents, or employees; or the state should pay based on equitable principles. [s. 16.007 (5), Stats.]

<sup>14</sup> Through a process similar to the procedures discussed above, the Claims Board also hears petitions for monetary relief under s. 775.05, Stats., from innocent people who have been convicted of crimes and imprisoned as a result. If the Claims Board finds clear and convincing evidence that the petitioner was innocent, the Claims Board may award the petitioner up to \$25,000 at a rate of compensation not exceeding \$5,000 per year for the petitioner’s imprisonment. [s. 775.05 (4), Stats.] However, if the Claims Board finds the maximum allowable award to be inadequate, the Claims Board submits a report to the Legislature specifying an award that it considers adequate compensation for the petitioner. [*Id.*] Wisconsin courts can review the Claims Board’s findings and awards, pursuant to ch. 227, Stats.

<sup>15</sup> This requirement applies even when the Claims Board already effectively denied a claim by reporting to the Legislature that it could not recommend paying the claim. “These procedural steps are [not] optional.” [*Brown*, 230 Wis. 2d 355, 368-69.]



proceed under s. 775.01, Stats., a claim must, “if valid, render the state a debtor to the claimant.” [*Koshick v. State*, 2005 WI App 232, ¶ 8 (quoting *Milwaukee & St. Paul Railway Company v. State*, 53 Wis. 509 (1881)).] The statute does not authorize a claim seeking equitable relief or tort claims against the state. [*Id.*]

Additionally, not all claims for money qualify as claims that would render the state a debtor to the claimant. [*Id.* at ¶ 10.] A qualifying action must be for a fixed sum of money, or one that could readily be made fixed. [*Id.* at ¶ 11 (quoting 26 Corpus Juris Secundum *Debt* § 1 (2001)).] For example, the value of a truckload of new computers could readily be made fixed by determining the fair market value of those computers in the area where they were to be sold. In contrast, the alleged lost profits from a planned summer festival that never took place could not readily be made fixed unless the terms of a contract specified how to calculate the lost profits.

### ***Wage Claims Against the State***

The Legislature has waived sovereign immunity for wage claims brought under ch. 109, Stats. [*German v. Wisconsin Department of Transportation*, 2000 WI 62, ¶ 20.] Chapter 109 governs how Wisconsin employers must pay their employees, and establishes procedures for employees who allege wage claims against their employers. Chapter 109 expressly includes “the state and its political subdivisions” within the definition of “employer.” [s. 109.01 (2), Stats.] Additionally, ch. 109 authorizes employees to sue their employers for wages “in any court of competent jurisdiction.” [s. 109.03 (5), Stats.] Read in conjunction, those statutory provisions demonstrate the Legislature’s express consent for wage-related suits against the state.

In *German v. Wisconsin Department of Transportation*, the Wisconsin Supreme Court held that if the Legislature wanted to protect the state from wage suits brought by employees, it could have expressly excluded the state from the definition of “employer,” which it has done in numerous statutes. [2000 WI 62 at ¶ 20 (quoting s. 111.02 (7), Stats. (“The term ‘employer’ . . . shall not include the state or any political subdivision thereof”); s. 111.51 (5) (a), Stats. (“Public utility employer’ means any employer, other than the state or any political subdivision thereof”)).] Thus, the Court held that, by including the state within the parameters of an employer under Ch. 109, Stats., the Legislature expressed its intent for state employees to be able to bring wage claims against Wisconsin.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Lauren Weber, Legislative Intern, under the supervision of Anna Henning, Senior Staff Attorney, on August 4, 2016.

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