

CLASS ACTION UPDATE



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Wisconsin's new tort reform law provides tools to combat class action lawsuits filed in state court.

By: Brian Spahn

On Apr. 3, 2018, Governor Walker signed tort reform legislation into law which will significantly impact civil litigation in Wisconsin. The law makes numerous changes to Wisconsin's rules of civil procedure: addressing the rules governing the scope of discovery; creating mandatory disclosures of third-party litigation financing; putting into place an automatic stay of discovery while motions to dismiss are pending; impacting discovery rules related to electronically stored information; and placing limits on the number of depositions and interrogatories allowed during lawsuits. In addition, the new law changes the statute of limitations for fraud claims, the statute of repose, and interest rates on untimely payments of insurance claims. While each of these changes will impact litigation in Wisconsin, this alert addresses the specific aspects of the law related to class actions in Wisconsin.

The law will bring Wisconsin's class action rules in line with both federal and other states' class action rules. The changes to the class action rules take effect on Jul. 1, 2018. On Dec. 21, 2017, in response to the Judicial Council's Evidence and Civil Procedure Subcommittee's evaluation of Wisconsin class action practice, the Wisconsin Supreme Court unanimously adopted the Council's version of Federal Rule of Civil Procedure 23. (Supreme Court of Wisconsin Order No. 17-03; see also 2017 WI 108.) The Supreme Court's order replaced the state's previous one-sentence class action statute, Wis. Stat. § 803.08, with language that generally aligns the state's class action procedures with Federal Rule of Civil Procedure 23. The state's previous class action statute was 168 years old and provided little guidance on the rules applicable to class actions in state court.

Wisconsin's class action statute now sets forth the prerequisites for filing a class action, requirements that courts must follow in order to certify a class, and describes how and when a class action may be appealed. The new rule adopts the numerosity, commonality, adequacy of representation, and predominance requirements contained in Federal Rule of Civil Procedure 23. In addition, notice of the class must be given to potential class members, and the law makes explicit that any class action settlement must receive court approval.

Arguably the most notable aspect of the class action rule change, however, relates to the right to an interlocutory appeal of a class certification determination. Following the Wisconsin Supreme Court's action in December 2017, the proposed legislation had initially included three additional provisions impacting class actions. Specifically, the bill sought to address "no injury" class actions which are cases in which a named plaintiff seeks to represent a class that includes individuals that have suffered no injury; sought to add an explicit requirement that class members be objectively verifiable; and sought to provide for interlocutory appeals of class certification decisions. Only the interlocutory appeal provision made it into the final version of the bill that was signed into law.

Prior to the bill becoming law, appeals of class certification rulings were permissive — meaning that a party unhappy with a court's class certification determination needed to seek leave from the court of appeals to challenge that ruling while the case was still pending in the trial court. Petitions for leave to appeal are traditionally granted only in rare circumstances. At the same time, a class certification decision is one of the most important aspects of the case.



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All too often, a class certification order forces a defendant to settle the lawsuit rather than incur the cost of defending and running the risk of enormous liability. With passage of the new law, parties have an automatic right to appeal class certification rulings. Equally important, during the pendency of an interlocutory appeal, all discovery and other proceedings must be stayed.

Moreover, it is notable that the automatic stay of discovery provision in the new law, while not specific to class action litigation, will also provide defendants with a tool to combat meritless class action claims. Under the new law, upon the filing of a motion to dismiss, a motion for judgment on the pleadings, or a motion for more definite statement, all discovery and other proceedings shall be stayed for a period of 180 days after the filing of the motion or the ruling of the court on the

motion, whichever is sooner. Discovery in a class action lawsuit is often extremely expensive and burdensome. With the new automatic stay provision in place, defendants confronted with a deficient class action complaint will no longer be throttled with significant discovery costs while the court decides defendants' dispositive motion.

In sum, Wisconsin's new tort reform law provides additional tools to class action defendants faced with meritless claims and/or carelessly certified classes that will ease, although not eliminate, the difficult decision as to whether to fight or settle class action claims.

The information contained herein is based on a summary of legal principles. It is not to be construed as legal advice. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.



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