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Subrogation & Recovery Alert
News Concerning Recent Subrogation and Recovery Issues

COZEN O'CONNOR

# Wisconsin Modifies Civil Procedure, Limits Discovery, and Reduces Repose Period for Improvements to Realty

Typically, the Wisconsin Supreme Court proposes new rules of civil procedure and submits them to the Wisconsin Judicial Council for review and comment. After receipt of comments from the Judicial Council, the Supreme Court is required to hold a public hearing before changes are approved. This spring, in a significant departure from customary procedure, the legislature exercised its power under Wis. Stat. 751.12 to make changes to Wisconsin procedural law on its own initiative. (2017 Wis. Act 235 (hereafter Act 235))

## Limitations on Discovery

Several of the new changes mirror the 2015 amendments to the Federal Rules of Civil Procedure. The revised Wis. Stat. 804.01(2)(a) requires that a party's request for relevant discovery must be proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

The Act created a new provision that requires the trial court, upon motion of either party, to limit the frequency or extent of discovery if it finds that:

1. The discovery sought is cumulative or duplicative or can be obtained from some other source that is more convenient, less burdensome, or less expensive; or
2. The burden or expense of the proposed discovery outweighs its likely benefit or is not proportional to the claims and defenses at issue considering the needs of the case, the amount in controversy, the parties' resources, the complexity and importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Also new is the provision that a party is not required to provide discovery of any of the following categories of electronically stored information absent a showing by the moving party of substantial need and good cause and subject to a proportionality assessment, as above:

1. Data that cannot be retrieved without substantial additional programming or without transferring it into another form before search and retrieval can be achieved.
2. Backup data that are substantially duplicative of data that are more accessible elsewhere.
3. Legacy data remaining from obsolete systems that are unintelligible on successor systems.
4. Any other data that are not available to the producing party in the ordinary course of business and that the party identifies as not reasonably accessible because of undue burden or cost. In response to a motion to compel discovery or for a protective order, the party from whom discovery is sought is required to show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from such sources only if the requesting party shows good cause, considering the proportionality limitations discussed above.

In addition, unless otherwise stipulated or ordered by the court, each party is limited to a reasonable number of depositions, not to exceed 10, none of which may exceed seven hours in length. And, a party shall be limited, unless otherwise stipulated or ordered by the court, to a reasonable number of interrogatories, not to exceed 25, inclusive of subparts. A request for production may not seek documents dating to more than five years prior to the accrual of the cause of action, with the exception of patient health care records, vocational records, education records, and the like.

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**The foregoing discovery procedures take effect as to actions filed on or after July 1, 2018.**

## Statute of Repose for Improvements to Real Property

The former Wisconsin statute of repose for damage to improvements to real property required that the action is commenced within the 10-year "exposure period" immediately following the date of substantial completion of the improvements. Act 235 changed the "exposure period" to just seven years. However, if the damage is sustained within the fifth through the seventh year following substantial completion, the time for commencing the action is extended for three years after the date on which the damage occurred.

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**Please contact Kevin Caraher at (312) 382-3192 or kcaraher@cozen.com if you have any questions regarding the laws discussed in this Alert.**