



WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

2003 Assembly Bill 651

**Assembly Substitute
Amendment 1 and Assembly
Amendment 1 to the Substitute
Amendment**

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ASSEMBLY SUBSTITUTE AMENDMENT 1

The provisions of Assembly Substitute Amendment 1 are described below.

- ***Earnings Garnishment***

Earnings Exempt From Garnishment (SECTIONS 4 to 7, 9, and 10)

Under current earnings garnishment law, 80% of the debtor's disposable earnings is generally exempt from garnishment. [s. 812.34 (2) (a), Stats.] A debtor's earnings are totally exempt from garnishment if the debtor's household income is below the federally established poverty line or if the garnishment would result in the debtor's household income being below the poverty line. [s. 812.34 (2) (b) 1., Stats.] Under the substitute amendment, if the garnishment of 20% of the debtor's disposable income would result in the debtor's household income being below the poverty line, there is no total earnings exemption but, rather, the amount of the garnishment is limited to the debtor's household income that is in excess of the poverty line.

Petition by Debtor for Relief From Garnishment (SECTION 8)

Currently, a debtor may file with the court a written petition for relief from an earnings garnishment if the general 80%-of-disposable-earnings exemption is insufficient to acquire the necessities of life for the debtor and his or her dependents. [s. 812.38 (1) (b), Stats.] The substitute amendment requires the petition to state with reasonable specificity the grounds for the relief requested and to include any additional information necessary to support the petition.

- ***Consolidation of Creditor Accounts for Collection Purposes (SECTION 3)***

The substitute amendment authorizes a collection agency (or collector or solicitor employed by an agency) licensed by the Department of Financial Institutions, with the creditor's permission, to consolidate the creditor's accounts relating to a particular debtor with those of any other creditor or creditors relating to that debtor and to bring suit on behalf of the creditor or creditors.

To avoid unauthorized practice of law issues (see *State ex rel. State Bar v. Bonded Collections*, 36 Wis. 2d 648, 154 NW.2d 250 (1967)), the substitute amendment requires for these consolidated account actions:

1. The summons and complaint be prepared by an attorney or at the direction of an attorney.
2. The name of the creditor(s) appear in the pleadings and case caption as the real party in interest.
3. The creditor(s) be given the opportunity either to select an attorney to commence the action or to designate, as part of the authorization process, the collection agency as the agent of the creditor to retain an attorney and forward the claim to the attorney on behalf of the creditor.

The substitute amendment expressly provides that in such a consolidated account action, the collection agency may not appear on behalf of any creditor or creditors before any court.

- ***Depository Accounts Exempt From Execution (SECTION 15)***

Under current law, a debtor's interest in depository accounts in the aggregate value of \$1,000 is generally exempt from execution to satisfy a debt. [s. 815.18 (3) (k), Stats.] Assembly Bill 651 qualifies the exemption by providing that depository accounts in the aggregate value of \$1,000 are generally exempt from execution only to the extent the account is for the debtor's personal use and is not used as a business account.

- ***Recovery of Certain Costs in Civil Proceedings***

Statutory Attorney Fees (SECTIONS 11 and 12)

Under current law [s. 814.04 (1) (a), Stats.], the prevailing party in a civil action involving money damages or property may recover statutorily established attorney fees as follows:

<u>Amount Recovered/Value of Property</u>	<u>Fee</u>
Under \$200	\$15
\$200 to \$499.99	\$25
\$500 to \$999.99	\$50
\$1,000 or more	\$100

The substitute amendment revises the amount of recoverable attorney fees in these cases as follows:

<u>Amount Recovered/Value of Property</u>	<u>Fee</u>
Under \$1,000	\$100
\$1,000 to \$5,000	\$300
Greater than \$5,000	\$500

Current law also provides for recovery of statutory attorney fees when no money judgment is demanded and no specific property is involved or when it is not practical to ascertain the money value of the rights involved. [s. 814.04 (1) (b), Stats.] The court establishes the fee in these cases, which may not be less than \$15 nor more than \$100. Under the substitute amendment, the statutory fee in these cases is \$300.

Costs for Various Disbursements; Expert Witness Fees (SECTION 13)

Under current law, certain disbursement costs in civil cases, such as those made for certified copies of public papers or records, postage, telephoning, and plats and photographs, are recoverable by a successful litigant but the amount recoverable is limited to \$50 for each item. [s. 814.04 (2), Stats.] The substitute amendment expands the list of disbursements that are recoverable to include photocopying, electronic communications, facsimile transmissions, and overnight delivery. In addition, the substitute amendment increases the maximum amount recoverable for each item from \$50 to \$100.

Under current law, a successful litigant in a civil action may recover expert witness fees not exceeding \$100 for each expert who testifies. [s. 814.04 (2), Stats.] The substitute amendment increases the maximum recoverable expert witness fee from \$100 to \$300.

Recoverable Costs on a Motion (SECTION 14)

Under current law, costs may be allowed on a motion in a civil action, in the discretion of the court, not exceeding \$50. [s. 814.07, Stats.] The substitute amendment increases the maximum allowable amount to \$300.

• ***Civil Action for Loss Resulting From Certain Criminal Conduct (SECTIONS 19 to 25)***

Under current law, a person who suffers damage or loss resulting from intentional conduct prohibited under specified criminal statutes has a civil cause of action against the person who caused the damage or loss. [s. 895.80, Stats.] The civil cause of action currently applies to intentional conduct prohibited under the following criminal statutes: damage to property [s. 943.01, Stats.]; theft [s. 943.20, Stats.]; identity theft [ss. 943.201 and 943.203, Stats.]; fraud on a hotel or restaurant keeper or taxicab operator [s. 943.21, Stats.]; issuing worthless checks [s. 943.24, Stats.]; removing or damaging encumbered real property [s. 943.26, Stats.]; receiving stolen property [s. 943.34, Stats.]; fraudulent insurance and employee benefit program claims [s. 943.395, Stats.]; financial transaction card crimes [s.

943.41, Stats.]; retail theft [s. 943.50, Stats.]; theft of library material [s. 943.61, Stats.]; theft of farm-raised fish [s. 943.74, Stats.]; and infecting animals with a contagious disease [s. 943.76, Stats.].

Current law provides that the burden of proof in a civil action under s. 895.80 is with the person who suffers damage or loss to prove his or her case by a preponderance of the credible evidence. [s. 895.80 (2), Stats.] If the plaintiff prevails, current law allows the plaintiff to recover: (1) treble damages; and (2) all costs of investigation and litigation reasonably incurred. [s. 895.80 (3), Stats.] Finally, current law expressly provides that a person may bring a civil action under s. 895.80 regardless of whether there has been a criminal action related to the loss or damage and regardless of the outcome of the criminal action. [s. 895.80 (4), Stats.]

The substitute amendment makes the following changes to the civil cause of action provided under current s. 895.80:

1. Expands the intentional conduct to which a cause of action applies to include intentional conduct that is prohibited under s. 943.011, Stats. (damage or threat to property of a witness); s. 943.012, Stats. (criminal damage to or graffiti on religious and other property); and s. 943.017, Stats. (graffiti).
2. Replaces recovery of “treble damages” with recovery of actual damages, including the retail or replacement value of damaged, used, or lost property, plus recovery of exemplary (punitive) damages of not more than three times the amount of actual damages awarded. (No additional proof is required for an award of exemplary damages.)
3. Specifies that recoverable costs of investigation and litigation include the value of the time spent by any employee or agent of the victim.
4. Expressly provides that any recovery under s. 895.80 is reduced by the amount recovered as restitution ordered by a municipal, criminal, or juvenile court.
5. Expressly provides that a person is not criminally liable under s. 943.30 (threats to injure or accuse of crime) for any action brought in good faith under s. 895.80.

- ***Joint and Several Liability of Parents for Civil Damages Resulting From Retail Theft by Child (SECTIONS 16 and 17)***

Under current law, the parent or parents with custody of their minor child are jointly and severally liable with the child for civil damages imposed under s. 943.51, Stats., for their child’s violation of the shoplifting statute. [s. 895.035 (2), Stats.] Under the substitute amendment, if a parent is jointly and severally liable for his or her child’s civil damages for shoplifting and the parent has physical placement of the child, the parent’s liability is limited to that percentage representing the time the child actually spends with that parent. Further, notwithstanding the definition of custody under the current statute, a parent does not have custody of the child for purposes of the joint and several liability provision if at the time of the violation the child has been freed from the care, custody, and control of the parent through marriage or emancipation or if at the time of the violation the parent does not reasonably have the ability to exercise supervision and control of the child because the child is uncontrollable or another person has interfered with that parent’s exercise of supervision and control.

- ***Worthless Checks***

Crime of Issuing Worthless Checks; Prima Facie Evidence of Intent Not to Buy (SECTIONS 30 and 31)

For purposes of the worthless check criminal statute, s. 943.24, Stats., current law provides that proof of certain facts is prima facie evidence that the defendant, at the time of issuing the check or other order for the payment of money, intended that it should not be paid. In theory, establishing a prima facie case in a criminal case may assist the prosecution by allowing the jury to make a permissive inference; however, the state still must prove the elements of the crime beyond a reasonable doubt. Among the facts that constitute such prima facie evidence under s. 943.24 are:

1. Proof that, at the time of issuance, the defendant did not have sufficient funds or credit with the drawee and failed within five days after receiving notice of nonpayment or dishonor to pay the check or other order. [s. 943.24 (3) (b), Stats.]
2. Proof that, when presentment was made within a reasonable time, the defendant did not have sufficient funds or credit with the drawee and failed within five days after receiving notice of nonpayment or dishonor to pay the check or other order. [s. 943.24 (3) (c), Stats.]

The substitute amendment modifies both the above provisions by requiring receipt by the defendant of “written” notice of nonpayment or dishonor, “delivered by regular mail to either the [defendant’s] last-known address or to the address provided on the check or other order.”

Civil Liability for Worthless Checks: Maximum Award for Certain Damages; Notice to Defendant of Intent to Sue (SECTIONS 33 and 34)

In a civil action for worthless checks under current s. 943.245, Stats., the total amount awarded for exemplary damages and reasonable attorney fees may not exceed \$500. [s. 943.245 (3), Stats.] (Exemplary damages may not exceed three times the sum of the face value of the checks or orders involved plus other actual damages; s. 943.245 (2) (c) 1., Stats.) Under the substitute amendment, the \$500 maximum expressly applies to “each violation.”

Under current law, at least 20 days prior to commencing a civil action under s. 943.245 for worthless checks, the plaintiff is required to notify the defendant by mail of the plaintiff’s intent to bring the action. [s. 943.245 (4), Stats.] Notice of nonpayment or dishonor must be sent by the payee or holder of the check or order to the defendant by regular mail, supported by an affidavit of service of mailing or by a certificate of mailing obtained from the U.S. Post Office from which the mailing was made. The substitute amendment deletes the option that notice of nonpayment or dishonor be sent by mail supported “by a certificate of mailing obtained from the U.S. Post Office from which the mailing was made;” thus, the notice is sent by “regular mail supported by an affidavit of service of mailing.”

Department of Natural Resources (DNR) Fish and Game Approvals: Payment With Worthless Checks (SECTION 2)

The substitute amendment authorizes certain issuing agents (typically, retailers) appointed by the DNR to report to the DNR persons who pay for fishing and game licenses, stamps, and other approvals with worthless checks. The agent may make a report after making an effort to receive payment from the

person who tendered the check or other payment. If an agent gives such notice, the DNR must revoke the approval and send the revocation notice to the holder of the approval. The holder of the approval must then return the approval to the DNR within seven days after receiving the revocation notice.

- ***Civil Liability for Retail Theft; Maximum Award for Certain Damages (SECTIONS 34 and 35)***

Currently, in a civil cause of action for retail theft under s 943.51, Stats., the total amount awarded for exemplary damages and reasonable attorney fees generally may not exceed \$500. [s. 943.51 (3), Stats.] (Exemplary damages may not exceed three times the sum of the retail value of the stolen merchandise, unless returned undamaged and unused, plus other actual damages; s. 943.51 (2) (a) 1., Stats.) Under the substitute amendment, the \$500 maximum for exemplary damages and reasonable attorney fees applies to “each violation.”

Current law limits to \$300 the total amount that may be awarded for exemplary damages and reasonable attorney fees in a civil action for retail theft if the action is brought against a minor or against the parent who has custody of a minor. [s. 943.51 (3m), Stats.] Under the substitute amendment, the \$300 maximum applies to “each violation.”

- ***Other Provisions***

As originally introduced, Assembly Bill 651 increased the general monetary jurisdictional limit in small claims actions from \$5,000 to \$10,000 (with the exception of negligence actions). That provision is not included in the substitute amendment. However, the substitute amendment does include provisions of the original bill that sever the link in certain statutes to the general monetary jurisdictional amount for small claims actions. Monetary amounts in those statutes are pegged to the current \$5,000 limit by cross-reference. The substitute amendment deletes the cross-reference and substitutes “\$5,000” in these statutes; thus, any future changes in the small claims jurisdictional limit will not affect the monetary amounts included in those statutes. See SECTIONS 18 and 26 to 29.

- ***Effective Date; Initial Applicability (SECTIONS 36 and 37)***

If enacted, the proposal would take effect on the first day of the fourth month beginning after its official publication. The act generally would first apply to actions commenced on its effective date; for those provisions treated by the proposal that involve violations of criminal statutes, it would first apply to violations committed on the effective date.

ASSEMBLY AMENDMENT 1 TO THE SUBSTITUTE AMENDMENT (REOPENING SMALL CLAIMS DEFAULT JUDGMENT)

Under current law, notice of motion to reopen a default judgment in a small claims action must generally be made within six months after entry of judgment. Section 799.29 (1) (c), Stats. (Note that in small claims proceedings, s. 799.29 is the exclusive procedure for reopening default judgments; s. 806.07, Stats., does not apply to small claims proceedings. See *King v. Moore*, 95 Wis. 2d 686, 291 N.W.2d 304 (Ct. App. 1980).)

Assembly Amendment 1 to the substitute amendment expands the current six-month period for reopening a small claims default judgment to 12 months.

HOW THE AMENDED PROPOSAL DIFFERS FROM THE ORIGINAL

Briefly summarized below are the differences between Assembly Bill 651 as introduced and as amended by Assembly Substitute Amendment 1 and Assembly Amendment 1 to the substitute amendment.

The amended version:

1. Deletes the provisions of the original bill that increase the general monetary jurisdictional limit in small claims actions from \$5,000 to \$10,000.
2. Deletes the following provisions of the original bill relating to earnings garnishment:
 - a. The requirement that the debtor who is claiming an exemption or a limit to the garnishment also deliver or mail to the garnishee the schedules and worksheets that are made available to assist debtors in computing their eligibility for an earnings exemption and any other documents supporting the debtor's answer. (Also deleted is the requirement that the garnishee mail these additional documents to the creditor).
 - b. The requirement that the court award the creditor costs in an amount not less than \$50 if, in connection with a motion for a judicial hearing on an earnings garnishment, the debtor fails to produce schedules and worksheets or other documents necessary to support a claim for exemptions or other defenses.
3. Deletes the original bill's expansion of the circumstances under which the parent or parents with custody of their minor child are jointly and severally liable with the child for civil damages imposed by statute for their child's violation of specified criminal statutes.
4. Adds the limitations, described previously, on a parent's joint and several liability with his or her child for civil damages imposed for the child's violation of the shoplifting statute.
5. Revises the debt consolidation provisions of the original bill to address concerns that those provisions may result in the unauthorized practice of law.
6. Includes technical changes made by Assembly Amendment 11.*

* The substitute amendment inserts cross-references inadvertently left out of the original bill's treatment of s. 895.80, Stats. (civil liability for violation of certain crimes). See SECTIONS 19 to 21. Three references are added by the amendment where appropriate: reference to s. 943.203, Stats. (identity theft involving an entity; created by 2003 Wisconsin Act 36); reference to s. 943.74, Stats. (theft of farm-raised fish; created by 2001 Wisconsin Act 91); and reference to s. 943.76, Stats. (infecting animals with a contagious disease; created by 2001 Wisconsin Act 16). These three references, plus reference to several other statutes, are already included in s. 895.80 (1), Stats. (reference to s. 943.203 is added by 2003 Wisconsin Act 36). The references currently included in s. 895.80 (1) are intended to be included in their entirety in ss. 895.80 (2) and (3) (a) and 895.035 (4), Stats., as treated by the bill. The amendment's addition of the three cross-references to the latter sections accomplishes this intent.

The substitute amendment addresses part of the bill's treatment of s. 895.035 (4), Stats., by deleting the striking of "reasonable attorney fees" and deleting the underscored "under s. 814.04" (taxable costs, including statutory attorney fees), restoring the provision to current law. It was not the intent of the authors to delete the reference to attorney fees for purposes of this provision. For consistency, the amendment deletes another, unnecessary added cross-reference to s. 814.04 from that subsection. See SECTION 18.

LEGISLATIVE HISTORY

Assembly Substitute Amendment 1 was offered by Representative Montgomery. Assembly Amendment 1 to the substitute amendment was offered by Representatives Montgomery and Hebl. Both amendments were adopted by the Assembly by voice vote.

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