

**Testimony of John H. Beisner<sup>1</sup>**  
**Before the Committee on the Judiciary**  
**Wisconsin Assembly**

**Public Hearing Regarding Assembly Bill 773**

Good morning Chairman Ott and Members of the Committee. Thank you for the opportunity to testify on behalf of the U.S. Chamber Institute for Legal Reform (“ILR”) regarding Assembly Bill 773. ILR is an affiliate of the U.S. Chamber of Commerce (“the Chamber”) dedicated to making our nation’s overall civil litigation system simpler, fairer, and faster for all participants. The Chamber is the world’s largest business federation, representing the interests of more than three million businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations, and it is dedicated to promoting, protecting and defending America’s free enterprise system.

For too many years, Wisconsin has lagged behind federal courts and other state civil justice systems when it comes to rules governing discovery and class action practice. Most notably, in contrast to the federal legal system and other state analogs, Wisconsin currently has few rules circumscribing any reasonable limits on discovery and only very recently enacted a comprehensive class action rule. With respect to discovery, there is no requirement that the information being sought be proportional to the claims or defenses at issue. As a result, attorneys are able to exploit Wisconsin’s liberal discovery process to gain leverage against corporate defendants by demanding excessive amounts of unnecessary, expensive discovery. The problem of discovery abuse has become particularly acute in recent years due to the advent of electronic data storage. Because technology allows corporations to store far more information in corporate records than they ever could in the past, corporations can now easily incur millions of dollars in discovery costs merely by responding to legitimate discovery requests. It is thus wholly unsurprising that discovery ranks as the top litigation concern for major corporate defendants. Assembly Bill 773 would largely align current discovery rules with those that govern federal proceedings by imposing a fundamental proportionality requirement and giving courts the discretion to shift the cost of responding to burdensome discovery from the responding party to the requesting party.

Assembly Bill 773 would also streamline the discovery process in ways that are not currently mandated in the federal system by automatically staying all discovery pending the resolution of early dispositive motions and limiting the type of electronic information that can be discovered. In addition, Assembly Bill 773 would shine much needed light on third-party litigation funding (“TPLF”) – the practice in which companies “invest” in litigation. There is a growing consensus that these arrangements should, at the very least, be disclosed at the outset of a civil action in order to avoid conflicts of interest and other ethical dilemmas. Notably, the federal judiciary’s Advisory Committee on Civil Rules is now actively considering a proposal

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that would require the disclosure of TPLF arrangements as a matter of course in federal proceedings, and the U.S. House of Representatives recently passed legislation that would require such disclosure in federal class actions.

Assembly Bill 773 would also cultivate a fairer and more efficient class action landscape for Wisconsin consumers and businesses, which, until just two weeks ago, was governed by a perfunctory one-sentence class action statute. Under a recent rule promulgated by the Wisconsin Supreme Court, that old statute has now been replaced by a comprehensive class action regime that largely mirrors the requirements applicable in federal court, providing much needed specificity, clarity and consistency for litigants and trial courts in Wisconsin. Certain provisions of Assembly Bill 773 would enhance that regime to further ensure that class action practice in the State is both fair and efficient. In particular, the legislation would preclude “no-injury” class actions by requiring the type and scope of injury of the representative class members to be typical of the type and scope of injury being alleged by the absent class members. The legislation would also codify an ascertainability requirement – i.e., that class members be objectively verifiable by reliable and feasible means – an implicit requirement recognized by a number of federal courts. And the legislation would provide for interlocutory appeal of class certification orders by both plaintiffs and defendants as of right (in contrast to the recently enacted rule which gives the Court of Appeals discretion on whether to hear class certification appeals), facilitating the prompt reversal of improvidently certified class actions.

Finally, Assembly Bill 773 would also usher in various other sensible reforms related to consumer lawsuit lending and statutes of limitations that should also become law. In the main, the provisions related to consumer lawsuit lending would ensure that consumers receiving loans to support their living expenses during the pendency of litigation are protected from usurious and unfair practices and receive basic information pertaining to their loans. And the statute of limitations provisions would shorten the maximum period that plaintiffs can sit on certain claims. These provisions, like those addressing discovery and class action practice, would make Wisconsin’s civil justice system more fair and less costly.

## **I. THE DISCOVERY PROVISIONS OF AB 773 WOULD MITIGATE VEXATIOUS AND BURDENSOME DISCOVERY IN WISCONSIN.**

In recent years, requests for electronic discovery have spiraled out of control, with some defendants having to pay hundreds of thousands – or even millions – of dollars to respond to discovery requests in civil litigation. As one report succinctly put it: “[o]ur discovery system is broken.”<sup>2</sup> Assembly Bill 773 would institute a series of discovery-related reforms that are aimed at reducing the costs and delays associated with unfettered discovery. Specifically, the legislation would bring Wisconsin’s discovery rules in line with those applicable in federal court by establishing cost-benefit and proportionality requirements for discovery, giving courts the discretion to shift discovery costs and imposing certain numerical limits on interrogatories and

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<sup>2</sup> Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and Civil Justice and the Institute for the Advancement of the American Legal System*, at 9 (revised April 15, 2009), [http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS\\_Final\\_Report\\_rev\\_8-4-10.pdf](http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf).

depositions. In addition to these important changes (which are already required in federal court), there are a variety of other sensible discovery-related reforms in the legislation, including an automatic stay of discovery during the pendency of early dispositive motions, limiting the kind of electronically stored information (“ESI”) that is subject to discovery and mandating the disclosure of TPLF arrangements in all civil actions.

**A. Proportionality, Cost-Shifting And Numerical Limits On Certain Discovery Will Improve Wisconsin’s Litigation Climate.**

**Proportionality.** Wisconsin law does not currently contain any express limitation on costly, burdensome discovery. Thus, unless a court intervenes, a party to civil litigation may force the opposing party to produce potentially massive amounts of electronic data, regardless of the cost or the need for the data.

The concept of proportionality has long existed under the Federal Rules of Civil Procedure, but was recently clarified in an amendment to Rule 26, which became effective December 1, 2015. That amendment deleted phrasing requiring discovery requests to be “reasonably calculated to lead to admissible evidence,” a standard that was often misapplied.<sup>3</sup> In its place, the amendment codified the concept of proportionality in the definition of the scope of permissible discovery, through the addition of language to Rule 26(b)(1), indicating that discovery is permissible where “proportional to the needs of the case.”<sup>4</sup> Factors a court must consider in conducting a proportionality analysis include: 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.<sup>5</sup> The proportionality requirement is substantively identical to the proportionality requirement proposed in the second part of Section 19 of Assembly Bill 773, and is intended to “encourage judges to be more aggressive in identifying and discouraging discovery overuse” by emphasizing the need to analyze proportionality before ordering production of relevant information.<sup>6</sup> Chief Justice John Roberts addressed the 2015 amendment to Rule 26 in his 2015 Year-End Report on the Federal Judiciary, explaining that the amendments to Rule 26(b)(1) “crystalize[] the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.”<sup>7</sup> He noted that these limits “eliminate unnecessary or wasteful discovery” through “careful and realistic assessment of actual need.”<sup>8</sup>

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<sup>3</sup> See Duke Law Center for Judicial Studies, *Revised Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality*, at 2 n.7, June 15, 2017, [https://law.duke.edu/sites/default/files/centers/judicialstudies/annotated\\_june.pdf](https://law.duke.edu/sites/default/files/centers/judicialstudies/annotated_june.pdf) (citing cases describing the misapplication of the phrase).

<sup>4</sup> Fed. R. Civ. P. 26(b)(1).

<sup>5</sup> See *id.*

<sup>6</sup> Fed. R. Civ. P. 26(b)(1) advisory committee’s notes to 2015 amendment.

<sup>7</sup> Chief Justice John Roberts, *2015 Year-End Report on the Federal Judiciary*, at 6 (Dec. 31, 2015), <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

<sup>8</sup> *Id.* at 7.

Analysis published in the April 2017 issue of the Federal Litigator found that the proportionality doctrine has gained significant momentum since the 2015 amendment, and that courts are narrowing or restricting discovery more than four times as often after the amendment as they did before.<sup>9</sup> As a result, courts have been more careful to conduct a full proportionality analysis, utilizing the factors enumerated in the amended version of Rule 26(b)(1) as guideposts.<sup>10</sup> Courts have also done a better job under the amendment of requiring parties to provide evidence to support their proportionality positions, which has led to appropriate denials of burdensome discovery requests.<sup>11</sup>

Assembly Bill 773 would incorporate the proportionality standard, including the considerations for the court to weigh in applying that test, from Federal Rule 26(b). It would also properly limit discovery requests for information that is “cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.”<sup>12</sup>

**Cost-shifting.** Wisconsin law currently does not contain any express authorization for the shifting of discovery costs. One of the gravest problems with the American discovery system is that it incentivizes parties to seek overbroad and burdensome discovery at the opposing party’s expense.<sup>13</sup> Attorneys often seek large numbers of documents and, especially, electronic data that bear only tangentially on the claims or defenses at issue, simply to burden the other side and improve the prospect of an early, favorable settlement. As Professor Martin Redish has explained, “the fact that a party’s opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests, and the

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<sup>9</sup> *Tracking the 2015 Discovery Amendments*, 32 No. 4 Fed. Litigator NL 8 (April 2017).

<sup>10</sup> *See, e.g., N.U. v. Wal-Mart Stores, Inc.*, No. 15-4885-KHV, 2016 WL 3654759, at \*7 (D. Kan. July 8, 2016) (“And while Wal-Mart cites to the amendments to Rule 26(b) and raises proportionality concerns, Wal-Mart fails to address a number of factors considered when addressing proportionality, among them: the importance of the issues at stake in this action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, or the importance of the discovery in resolving the issues.”).

<sup>11</sup> *Id.*; *see also, e.g., Smith v. Toyota Motor Corp.*, No. 2:16-CV-00024-ERW, 2017 WL 1425993, at \*6 (E.D. Mo. Apr. 21, 2017) (finding plaintiffs’ need for certain requested discovery “is surpassed by the onerous, and expensive, burden on Defendants to produce” it); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2016 WL 6779901, at \*4 (S.D.N.Y. Nov. 16, 2016) (denying motion to compel in putative class action on “relevance, proportionality, and overbreadth grounds” and finding that “production of all of the requested documents would be unduly burdensome”); *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562, 566 (D. Ariz. 2016) (finding burden of discovering ESI held by the defendant’s foreign subsidiaries outweighed the benefit of such discovery under the factors enumerated in Rule 26(b)(1)); *Hankinson v. Class Action R.T.G. Furniture Corp.*, No. 15-81139, 2016 WL 1182768, at \*1 (S.D. Fla. Mar. 28, 2016) (finding several of plaintiffs’ discovery requests in putative class action were “not proportional to the needs of the case”); *Adair v. EQT Prod. Co.*, No. 10-37, 2015 WL 505650, at \*6 (W.D. Va. Feb. 6, 2015) (granting motion for protective order in class action where “burden and expense of any further discovery outweighs its likely benefits”).

<sup>12</sup> AB 773, § 19.

<sup>13</sup> Peggy E. Bruggman, *Reducing the Costs of Civil Litigation: Discovery Reform*, Pub. Law Research Inst. (1995), <https://gov.uchastings.edu/public-law/docs/plri/discov.pdf> (describing several factors that incentivize discovery abuse).

bigger the expense to be borne by the opponent, the bigger the incentive to make the request.”<sup>14</sup> Even the U.S. Supreme Court has recognized this problem, lamenting that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching” trial.<sup>15</sup>

The drafters of the federal rules have already begun to address this issue by permitting courts to shift discovery costs from the party responding to the discovery request to the party requesting the information.<sup>16</sup> As one federal court explained, when class action plaintiffs request “very extensive discovery, compliance with which will be very expensive,” plaintiffs typically should share the defendant’s discovery costs – at least until plaintiffs’ certification motion has been filed and decided.<sup>17</sup> Similarly, cost-shifting may be appropriate where the ESI sought is beneficial to both parties.<sup>18</sup>

Section 26 of Assembly Bill 773 would modify Wis. Stat. § 804.401 by giving courts the discretion when granting protective orders concerning discovery to allocate the expenses of the discovery to the requesting party. Authorizing cost-shifting would place the onus of burdensome discovery requests on the party making the requests and encourage requests that are more narrowly tailored to obtaining relevant evidence. While cost-shifting has largely been guided by a checkerboard of nebulous standards that vary from court to court, there is a growing consensus that the seven factors enunciated by Judge Shira Scheindlin in *Zubulake v. UBS Warburg LLC*, are a sensible starting point. These include: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information. The American Bar Association has articulated sixteen factors a court should apply when considering cost-shifting.<sup>19</sup> Incorporating a combination of the *Zubulake* and ABA factors – several of which

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<sup>14</sup> Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 603 (2001).

<sup>15</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

<sup>16</sup> *See* Fed. R. Civ. P. 26(c)(1)(B).

<sup>17</sup> *Boey-naems v. LA Fitness Int’l, LLC*, 285 F.R.D. 331, 341 (E.D. Pa. 2012).

<sup>18</sup> *See Zeller v. S. Cent. Emergency Med. Servs., Inc.*, No. 1:13-CV-2584, 2014 WL 2094340, at \*10 (M.D. Pa. May 20, 2014).

<sup>19</sup> *See* ABA Section of Litig., *Civil Discovery Standards* (revised 2004), <http://www.americanbar.org/content/dam/aba/administrative/litigation/litigation-aba-2004-civil-discovery-standards.authcheckdam.pdf>. These factors include: “A. The burden and expense of the discovery, considering among other factors the total cost of production . . . compared to the amount in controversy; B. The need for the discovery, including the benefit to the requesting party and the availability of the information from other sources; C. The complexity of the case and the importance of the issues; D. The need to protect the attorney-client privilege or attorney work product . . . ; E. The need to protect trade secrets, and proprietary or confidential information; F. Whether the information or the software needed to access it is proprietary or constitutes confidential business information; G. The breadth of the discovery request; H. Whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data; . . . J. Whether the requesting party has offered to pay some or all of the discovery expenses; K. The relative ability of each party to control costs and its incentive to do so; L. The resources of each party as

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overlap – into the Wisconsin discovery rules could provide helpful guidance to courts tasked with adjudicating requests for cost-shifting.

***Numerical limits on interrogatories and depositions.*** Assembly Bill 773 would also place reasonable limitations on the number of interrogatories (25) each party may propound on the other; the number of depositions (10) per party, and the length of each deposition (seven hours). These are exactly the same limitations that already apply in federal court and that have made discovery in the federal system more efficient and less abusive.<sup>20</sup> As one leading treatise explains, a limit of 25 interrogatories “is large enough to reveal relevant information in most cases, and reasonable enough to eliminate the harassment of another party.”<sup>21</sup> Similarly, the 10-deposition limit reflects the basic precept that “counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case.”<sup>22</sup> And limiting depositions to seven hours is necessary to avoid “overlong depositions” that “result in undue costs and delays.”<sup>23</sup> Other states have adopted similar numerical limitations.<sup>24</sup> Of course, the parties may stipulate to additional interrogatories or more and longer depositions, and the court may adjust by court order the amount of permitted discovery, since some cases may require more extensive discovery.<sup>25</sup>

**B. Staying Discovery Pending Resolution Of Dispositive Motions And Limiting Discovery Of Certain Kinds Of Unnecessary ESI Will Promote More Efficient And Proportional Discovery.**

Assembly Bill 773 would also institute a couple of other significant reforms – staying discovery during the pendency of early dispositive motions and limiting discovery of certain

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compared to the total cost of production; M. Whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information; . . . O. Whether the responding party stores electronic information in a manner that is designed to make discovery impracticable or needlessly costly or burdensome in pending or future litigation, and [is] not justified by any legitimate personal, business, or other non-litigation-related reasons; and P. Whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable[.]” *Id.* at Standards 29b.iv.A-P.

<sup>20</sup> See Fed. R. Civ. P. 33(a)(1) (limit of 25 interrogatories); Fed. R. Civ. P. 30 (limit of 10 depositions per party and seven-hour limit for each deposition).

<sup>21</sup> Roger S. Haydock & David F. Herr, *Discovery Practice* §22.02[B] (8th ed. 2017).

<sup>22</sup> Fed. R. Civ. P. 30(a) advisory committee’s note to 1993 amendment.

<sup>23</sup> Fed. R. Civ. P. 30(d) advisory committee’s note to 2000 amendment.

<sup>24</sup> See e.g., Paul Michael Lisnek & Michael J. Kaufman, *Depositions: Procedure, Strategy & Technique* § 4:3 (3d ed. 2017).

<sup>25</sup> See *id.* (“Some critics argue that this is a detriment to the discovery process because it limits counsel’s ability to obtain proper information from deponents . . . . However, these concerns are addressed in the many exceptions allowed in the rule and by the available discretion of the court and stipulation by the parties.”).

types of burdensome ESI – that would promote the just, speedy and inexpensive resolution of litigation.

***Automatic stay of discovery during early pretrial dispositive rulings.*** Under current law, when an early dispositive or partially dispositive motion is filed – i.e., a motion to dismiss, for judgment on the pleadings, or for a more definite statement – the parties generally continue with costly discovery, even though the motion may end or substantially narrow the action. This is bad policy. Forcing defendants to undertake burdensome discovery before a case has even withstood a motion to dismiss is contrary to Wisconsin case law making clear that a “complaint stands or falls by virtue of its own allegations, not by virtue of whatever facts [a plaintiff] might learn of during discovery.”<sup>26</sup> It is also contrary to the U.S. Supreme Court’s pronouncement that courts must carefully scrutinize motions to dismiss because “before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct.”<sup>27</sup>

In light of these concerns, many federal courts (including those in Wisconsin) routinely stay discovery and other pre-trial proceedings pending the resolution of a potentially dispositive motion to dismiss.<sup>28</sup> In addition, at least one Wisconsin circuit court has stayed discovery during the pendency of a motion to dismiss, although the reasoning for the court’s ruling granting the stay was not reported.<sup>29</sup> Assembly Bill 773 addresses these concerns definitively by providing for an automatic stay of discovery upon the filing of a motion to dismiss, a motion for judgment on the pleadings, or a motion for more definite statement.

***Limiting discovery of certain kinds of unnecessary ESI.*** Section 22 of Assembly Bill 773 would facilitate the just, speedy and inexpensive resolution of civil litigation by limiting discovery of ESI that is extremely difficult or burdensome for the responding party to access “absent a showing by the moving party of substantial need and good cause, subject to a proportionality assessment[.]”<sup>30</sup> Relatedly, under Section 28 of Assembly Bill 773, a party

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<sup>26</sup> *Thomas v. Johnson*, 198 Wis. 2d 390, 542 N.W.2d 239 (Wis. Ct. App. 1995).

<sup>27</sup> *Twombly*, 550 U.S. at 588 n.8; see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (“Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions”).

<sup>28</sup> See, e.g., *Thompson v. Ret. Plan for Employees of S.C. Johnson & Sons, Inc.*, No. 07-CV-1047, 2008 U.S. Dist. LEXIS 96902, at \*31 (E.D. Wis. Nov. 14, 2008) (staying discovery in putative class action, reasoning that “any discovery conducted prior to issuance of [] order [dismissing the complaint] would constitute needless expense and a waste of attorney time and energy”); *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, No. 05-4294 (DRH) (ETB), 2006 U.S. Dist. LEXIS 94944, at \*4-6 (E.D.N.Y. Mar. 31, 2006) (staying discovery where “the defendants raise substantial issues with regard to the viability of plaintiffs’ complaint as against defendants CRH and Tilcon, Inc., and defendants’ arguments do not appear to be frivolous or unfounded”); *In re Graphics Processing Units Antitrust Litig.*, MDL No. 1826, 2007 U.S. Dist. LEXIS 57982, at \*15-16, \*24 (N.D. Cal. July 24, 2007) (granting motion to stay discovery in putative class action and other cases pending resolution of motion to dismiss because “[i]f . . . the complaint proves to be so weak that any discovery at all would be a mere fishing expedition, then discovery likely will be denied”); *Dresser v. MEBA Med. & Benefits Plan*, No. 08-2662 SECTION “A” (3), 2008 U.S. Dist. LEXIS 55356, at \*5 (E.D. La. July 10, 2008) (staying discovery because if motion to dismiss is granted, the “discovery . . . would be . . . for naught”).

<sup>29</sup> *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 8, 303 Wis. 2d 94, 103 (noting that circuit court granted Harley’s motion to stay discovery and later dismissed the entire complaint for failure to state a claim).

<sup>30</sup> AB 773, § 22.

would not be required to preserve the same kinds of ESI absent a court order finding that the requesting party has a substantial need for the information.<sup>31</sup> As previously discussed, under current law, there is no limit on the amount or types of electronic data a party may request – irrespective of the cost or burden to the other side. Under AB 773, a party would not be required to preserve – much less produce – electronic data that would require substantial “additional programming or without transforming it into another form before” searching; “[b]ackup data that are substantially duplicative of data that are more accessible elsewhere”; “[l]egacy data remaining from obsolete systems that are unintelligible on successor systems”; or “[a]ny other data that are not available to the producing party in the ordinary course of business[.]”<sup>32</sup>

That certain categories of ESI should generally be deemed undiscoverable is not a new concept.<sup>33</sup> In 2014, the Illinois Supreme Court formally adopted rules relating to the discovery of ESI that included a proportionality requirement. The Committee Comments to the proportionality rule enumerated substantially similar categories of burdensome ESI that the proportionality balancing test “often may indicate . . . should not be discoverable,” including “information whose retrieval cannot be accomplished without substantial additional programming or without transforming it into another form before search and retrieval can be achieved”; “backup data that is substantially duplicative of data that is more accessible elsewhere”; “legacy data”; or “other forms of ESI whose preservation or production requires extraordinary affirmative measures.”<sup>34</sup> As one court explained, these types of ESI are “presumptively nondiscoverable, shifting the burden to the requesting party to justify the making of an exception based on the particular circumstances of the case,” “because the burden of producing such ESI generally is high.”<sup>35</sup>

While there is no comparable provision in the Federal Rules, Rule 26(b)(2)(B) does prohibit discovery of ESI “from sources that the party identifies as not reasonably accessible because of undue burden or cost.” According to the Civil Rules Advisory Committee, sources that might be considered not reasonably accessible sources include: backup tapes intended for disaster recovery purposes; legacy data remaining from obsolete systems that is unintelligible on successor systems; deleted electronically stored information that remains in a fragmented form requiring a forensics to restore and retrieve; and electronically stored information in a database that was designed to create information in ways such that it would lose its significance when produced outside the database.<sup>36</sup>

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<sup>31</sup> *Id.*, § 28.

<sup>32</sup> *Id.*, §§ 22, 28.

<sup>33</sup> See Seventh Circuit’s Electronic Discovery Pilot Program Principles, [http://www.discoverypilot.com/sites/default/files/Principles8\\_10.pdf](http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf).

<sup>34</sup> See Ill. S. Ct. Rule 201(c)(3), Committee Comments (adopted May 29, 2014) (West Supp. 2017).

<sup>35</sup> See *Carlson v. Jerousek*, 68 N.E.3d 520, 533 (Ill. App. Ct. 2016).

<sup>36</sup> Committee on the Rules of Practice & Procedure of the Judicial Conference of the United States, Report of the Civil Rules Advisory Committee 42 (May 27, 2005).



Fed. R. Civ. P. 26(b)(2)(B) creates what is often referred to as a “two-tier” system. A party is not required to provide discovery of electronically stored information from sources the party identifies as not reasonably accessible because of undue burden or cost; however, a court may nonetheless order discovery from sources identified as not reasonably accessible if the requesting party shows good cause.<sup>37</sup> Sections 22 and 28 of Assembly Bill 773 would likewise create a two-tier system by permitting discovery of these types of electronic data with a showing of substantial need and good cause, striking precisely the kind of a reasonable balance that should undergird the State’s discovery system.

**C. Automatic Disclosure Of TPLF Arrangements Would Ensure Ethical And Transparent Litigation Practices.**

Assembly Bill 773 would also mandate disclosure of TPLF arrangements. TPLF is a rapidly growing business model in which third parties pay money to a litigant or his/her counsel in a lawsuit in exchange for a contingent interest in any proceeds from the litigation. While TPLF usage has increased substantially in recent years, many courts are unaware of this phenomenon, largely because TPLF arrangements need not be disclosed and often are never revealed to the court in a particular case.<sup>38</sup> The growth of TPLF has raised concerns that it adversely affects the U.S. civil justice system by increasing the filing of questionable claims, changing the way traditional litigation-related decisions are made, deterring and prolonging settlement, and compromising the sanctity of the attorney-client relationship. However, because TPLF comes in many different forms and applications, it is difficult to surmise whether these concerns are implicated to the same degree in every instance in which TPLF is being used in a given case. Making the practice more transparent would equip the opposing party and the court with the necessary information to assess whether such arrangements are unlawful.

***First, disclosure of TPLF arrangements will mitigate violations of ethical rules prohibiting the sharing of attorney fees with nonlawyers.*** Under the Rules of Professional Conduct for Attorneys, an attorney or law firm may not share legal fees with a nonlawyer except in limited circumstances.<sup>39</sup> As stated in the comments to Rule 5.4, this prohibition is intended “to protect the lawyer’s professional independence of judgment.”<sup>40</sup> “Fee splitting is [also] viewed as running the risk of granting nonlawyers control over the practice of law or potentially

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<sup>37</sup> See, e.g., *Takeda Pharm. Co. v. Teva Pharm. USA, Inc.*, No. 09-841-SLR-LPS, 2010 WL 2640492 (D. Del. June 21, 2010) (finding that information was not reasonably accessible, but finding requesting party had shown good cause to compel requested production).

<sup>38</sup> Tripp Haston, *The Missing Key To 3rd-Party Litigation Funding*, Law360, Feb. 7, 2017.

<sup>39</sup> Wisconsin Rules of Prof’l Conduct For Att’ys, SCR 20:5.4; see also SCR 20:1.8 (lawyer may accept compensation from a third party as long as there is no interference with the lawyer’s independent professional judgment and the client gives informed consent); Model Rules of Prof’l Conduct, R.5.4(a).

<sup>40</sup> Wisconsin Rules of Prof’l Conduct For Att’ys, SCR 20:5.4 cmt. [1]; Earl H. Munson, *The Case Against MDPs*, Wis. Law., April 2001, at 22, 54; see also Timothy J. Pierce, *Dual Practice: Combining the Practice of Law with Other Occupations in Certain Circumstances, and with Certain Restrictions, Ethics Rules Permit Wisconsin Lawyers to Engage in the Practice of Law and A Second Occupation.*, Wis. Law., April 2006, at 20, 23 (“A lawyer must at all times be mindful of SCR 20:5.4 and maintain her professional independence as a lawyer and avoid impermissible fee-sharing.”).

enabling lay persons to practice law without authorization.”<sup>41</sup> While “[f]unders may . . . insist upon contracting directly with the client in order to circumvent the prohibition,”<sup>42</sup> some of them appear to be giving only lip service to this important precept.

For example, in *Gbarabe v. Chevron Corp.*,<sup>43</sup> the plaintiffs brought a putative class action arising out of an explosion on an oil drilling rig off the coast of Nigeria. Under the agreement entered into by plaintiffs’ counsel and the funder, counsel agreed that the funder would be repaid its \$1.7 million investment in the case by way of a “success fee” of six times that amount (\$10.2 million), to be paid from attorneys’ fees – *plus* 2% of the total amount recovered by the putative class members.<sup>44</sup> In other words, the agreement required the class members to share part of their recovery with the funder without their knowledge – much less express approval.<sup>45</sup> While provisions like these blur the line separating the lawyer from the non-lawyer funder, they rarely see the light of day. If TPLF agreements are disclosed as a matter of course early on in the life of a civil case, the parties and the court can determine whether any provisions purport to commingle lawyer and non-lawyer funds in contravention of Rule 5.4.

***Second, disclosure of TPLF arrangements will minimize the risks of conflicts of interest between the plaintiff, the attorney and the funder.*** “Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”<sup>46</sup> However, these twin principles can be in tension with the contractual duties the attorney may have with his or her funder.<sup>47</sup> Moreover, because both third-party funders and attorneys are repeat players in the litigation market, it can be expected that relationships among them will develop over time. Attorneys might “steer” clients to favored financing firms, even if the client’s particular circumstances suggest a different firm may be more appropriate, and *vice versa*.

TPLF arrangements also raise the possibility of judicial conflicts of interest. “As some TPLF entities are multibillion- and multimillion-dollar publicly traded entities, requiring disclosure of their role will allow judges to determine whether they have a conflict of interest in

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<sup>41</sup> Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1291-1292 (2011).

<sup>42</sup> Jasminka Kalajdzic, Peter Cashman & Alana Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian & U.S. Third Party litigation Funding*, 61 Am. J. Comp. L. 93, 135 (2013).

<sup>43</sup> *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 U.S. Dist. LEXIS 103594, at \*6 (N.D. Cal. Aug. 5, 2016).

<sup>44</sup> Litigation Funding Agreement § 1.1, *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, ECF No. 1864 (N.D. Cal. filed Sept. 16, 2016).

<sup>45</sup> Class certification was denied in *Gbarabe* for reasons unrelated to the presence of a TPLF funder in the case. See *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2017 U.S. Dist. LEXIS 35810 (N.D. Cal. Mar. 13, 2017). However, the case provides a window to one of the few publicly available TPLF arrangements, the terms of which are deeply problematic and should be eschewed in other cases.

<sup>46</sup> Wisconsin Rules of Prof’l Conduct For Att’ys, SCR 20:1.7 cmt. [1]; Model Rules of Prof’l Conduct, R. 1.7 cmt. [1].

<sup>47</sup> See, e.g., Wisconsin Rules of Prof’l Conduct For Att’ys, SCR 20:1.7(a) (providing that a “concurrent conflict of interest exists if” “there is a significant risk that the representation . . . will be materially limited by the lawyer’s responsibilities to . . . a third person”).

administering a case. And for privately held TPLF entities, the web of personal relationships judges have could be impacted as well, leading to unintentional appearances of impropriety.”<sup>48</sup>

This problem came to light during a racketeering suit arising out of a plaintiffs’ lawyer’s fraudulent prosecution of a class action filed against Chevron and funded by Burford Capital.<sup>49</sup> During a deposition in that proceeding, lead plaintiffs’ lawyer Steven Donziger was asked to identify the company that had helped finance the underlying suit against Chevron.<sup>50</sup> Upon being ordered to answer the question by the special master assigned to the case, Donziger disclosed that the funder was in fact Burford.<sup>51</sup> The special master then disclosed that he was former co-counsel with the founder of Burford, who at one time sent the special master a brochure about funding one of Burford’s cases.<sup>52</sup> The special master also disclosed that he was friends with Burford’s former general counsel.<sup>53</sup> The special master did not recuse himself from the racketeering litigation, and the parties did not insist that he do so.<sup>54</sup> Nonetheless, as the special master recognized, the deposition “prove[d] . . . that it is *imperative for lawyers to insist that clients disclose who the investors are.*”<sup>55</sup>

“The Donziger deposition demonstrates how frequently conflicts of interest may arise as a result of third-party funding.”<sup>56</sup> “Without disclosure,” courts will “be subject to unknown conflicts of interest,”<sup>57</sup> tainting the neutrality of judicial proceedings. “Requiring routine TPLF disclosure” in civil cases “will ensure courts are conflict-free”<sup>58</sup> – which is essential to the proper functioning of our civil justice system.

***Third, disclosure of TPLF arrangements will help ensure that plaintiffs have control over the litigation.*** TPLF companies repeatedly assert that they do *not* control litigation strategy. But one of the largest funder’s own “best practices” guide tells a different story. The “best practices” guide of Bentham IMF (one of the largest TPLF companies) notes the importance of setting forth specific terms in litigation funding agreements that address the extent to which the TPLF entity is permitted to: “[m]anage a litigant’s litigation expenses”; “[r]eceive notice of and provide input on any settlement demand and/or offer, and any response”; and participate in

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<sup>48</sup> Haston, *supra* note 38.

<sup>49</sup> Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 *Geo. L.J.* 1649, 1658 (2013).

<sup>50</sup> *Id.* at 1650.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* (citation omitted) (emphasis added).

<sup>56</sup> *Id.*

<sup>57</sup> Haston, *supra* note 38.

<sup>58</sup> *Id.*

settlement decisions.<sup>59</sup> Whether TPLF companies are employing litigation-control tactics similar to those set forth in Bentham’s best practices guide is a closely kept secret given that TPLF agreements need not be disclosed.

The few instances in which TPLF agreements have been made public belie the repeated representations by funders that they are not seeking to influence the cases they fund. One illustrative example was the elaborate funding agreement utilized by Burford in the Chevron litigation discussed above. Specifically, the funding agreement at issue in that case “provide[d] control to the Funders” through the “installment of ‘Nominated Lawyers’” – lawyers “selected by the Claimants with the *Funder’s approval*.”<sup>60</sup> The law firm of Patton Boggs LLP had been selected to serve in that capacity, and the execution of engagement agreements between the claimants and Patton Boggs, “a firm with close ties to the Funder, [was] a condition precedent to the funding.”<sup>61</sup> “In addition to exerting control, it [was] clear that the Nominated Lawyers, who among other things control[led] the purse strings and serve[d] as monitors, supervise[d] the costs and course of the litigation.”<sup>62</sup>

These kinds of provisions exacerbate the natural tendency of TPLF to subordinate the plaintiff’s own interests in the resolution of the litigation to the interests of the TPLF investor. Adopting the disclosure requirement in Assembly Bill 773 could curb this problem and restore the primacy of the attorney-client relationship in driving key litigation decisions. After all, if TPLF disclosure becomes the law, funders will likely think twice before inserting these controversial provisions into their agreements. And if they do not, courts will have the information necessary to invalidate such provisions as impermissibly threatening the attorney-client relationship.

***Fourth, disclosure of TPLF can facilitate effective settlement efforts.*** A party that must pay a TPLF entity a percentage of the proceeds of any recovery may be inclined to reject what might otherwise be a fair settlement offer in the hopes of securing a larger sum of money. In other words, the party will naturally seek extra money to make up at least some of the amount (likely substantial) that will have to be paid to the TPLF entity. As one state court invalidating a funding agreement warned, the ““plaintiff could feel compelled to try the case and ultimately run the risk of receiving no recovery for his or her injuries.””<sup>63</sup>

In addition, some TPLF agreements that have become public reveal that TPLF entities often structure their agreements to maximize their take of the first dollars of any recovery,

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<sup>59</sup> Bentham IMF, Code of Best Practices (last updated Jan. 9, 2017), [https://www.benthamimf.ca/docs/default-source/default-document-library/bentham-imf-codes-of-best-practices.pdf?sfvrsn=c08ad463\\_10](https://www.benthamimf.ca/docs/default-source/default-document-library/bentham-imf-codes-of-best-practices.pdf?sfvrsn=c08ad463_10).

<sup>60</sup> Maya Steinitz, *The Litigation Finance Contract*, 54 Wm. & Mary L. Rev. 455, 472 (2012) (emphasis added) (citation omitted).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 473.

<sup>63</sup> Jonathan Friedland, Elizabeth Vandesteeg & Jeffrey Goldberg, *Litigation Risk Mitigation Through The Use of Third-Party Litigation Funding*, Law Journal Newsletters, Aug. 1, 2017 (quoting *Boling v. Prospect Funding Holdings, LLC*, No. 14-cv-00081, 2017 WL 1193064, at \*4 (W.D. Ky. Mar. 30, 2017)).

thereby deterring reasonable settlements. The funding agreement at issue in the Chevron class action litigation discussed above was structured along these lines. The investment agreement included a “waterfall” repayment provision, which provided for a heightened percentage of recovery on the first dollars of any award.<sup>64</sup> Under the agreement, Burford would receive approximately 5.5% of any award, or about \$55 million, on any amount starting at \$1 billion. But, if the plaintiffs settled for less than \$1 billion, the investor’s percentage would actually go up.

The disclosure of TPLF agreements would likely counteract the pressures described above by revealing who is actually on the other side of a particular case. The introduction of such basic information would facilitate more accurate and realistic settlement negotiations between the parties. Further, it would allow courts to structure settlement protocols with greater potential to succeed. For example, if a litigation funder controls settlement decisions (in whole or in part), the court may wish to require that funder to attend any mediation. Absent disclosure, the funder’s presence as a player in the settlement process likely will remain hidden.

## **II. ASSEMBLY BILL 773 WOULD STRENGTHEN WISCONSIN’S RECENTLY REVAMPED CLASS ACTION STATUTE.**

Just two weeks ago, the Wisconsin Supreme Court replaced the State’s prior one-sentence class action rule, Wis. Stat. 803-08, with a more comprehensive rule “intended to align [Wisconsin’s standards] with the federal class action rule, Fed. R. Civ. P. 23.”<sup>65</sup> Importantly, the new rule adopts the vast majority of the class action provisions of Assembly Bill 773. For example, the new rule adopts the numerosity, commonality, adequacy-of-representation and predominance requirements contained in Assembly Bill 773. The new rule also sets forth certain other basic class action requirements that have long been the law in federal court – for example, that notice of the class be given to potential class members, and that any class settlement receive approval by the trial court. The notice requirement safeguards the due process rights of class members, who will be bound by any resulting judgment unless they opt out of the class. And involving the court in the settlement process will facilitate fairer and more reasonable agreements that compensate those supposedly aggrieved by a defendant’s alleged misconduct rather than simply provide a windfall for class counsel who filed the putative class action in the first instance.

There is no question that the recent amendments promulgated by the Wisconsin Supreme Court will substantially improve the State’s civil justice system, providing much needed specificity, clarity and consistency with regard to class certification standards. But more can be done to make Wisconsin’s class action regime even fairer and more efficient. In particular, the Wisconsin Legislature should enact the other class action provisions of Assembly Bill 773 that did not make their way into the Wisconsin Supreme Court’s recent order. These provisions

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<sup>64</sup> See Funding Agreement Between Treca Financial Solutions and Claimants, *Chevron Corp. v. Donziger*, No. 11-cv-0691 (S.D.N.Y. filed Nov. 29, 2011), ECF No. 356, Ex. B.

<sup>65</sup> See Supreme Ct. of Wis., In re Proposed amendments to Wisconsin Statutes §§ 803.08 and 426.110, Pet. No. 170-03 (filed Dec. 21, 2017), <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=206145>.

would eliminate “no-injury” class actions, require class membership to be ascertainable by objective means, and provide a nondiscretionary right to an interlocutory appeal of class certification orders by both plaintiffs and defendants.

***No-injury class actions.*** Courts throughout the country continue to certify “no injury” classes – lawsuits brought by named plaintiffs who allegedly experienced a problem with a product or service and then seek to represent every other individual who purchased the product or paid for the service, ***regardless of whether they experienced any problems with it.*** The most notorious of these cases have been the “moldy washer” cases in which a few plaintiffs who claim their front-load washing machines exhibited odors have sought to bring class actions on behalf of all owners of the machines at issue, even though most consumers who purchase these machines never experience the supposed problem.

For example, in *Glazer v. Whirlpool Corp.*, purchasers of the defendant’s front-load washing machine, the Duet, alleged that the washing machine’s design led to the growth of mold and mildew in the machine.<sup>66</sup> The defendant argued that the class was overbroad, as the definition included Duet owners who had not experienced a mold problem and other purchasers who were pleased with their Duets, unlike the named plaintiffs. Indeed, a majority of the class members did not have a mold problem with their washing machines. The Sixth Circuit issued two decisions in the case, both times holding that all class members, including those who had not experienced a mold problem, could recover economic damages as a class for allegedly paying an inflated price for their washing machines.

Likewise, in *Butler v. Sears, Roebuck & Co.*, the plaintiffs, purchasers of washing machines sold by Sears, brought a class action alleging that defects in their front-load washing machines caused mold growth and sudden stoppages.<sup>67</sup> The Seventh Circuit held that the defendant’s argument that “most members of the plaintiff class did not experience a mold problem” was not an argument against certification, but rather an argument in favor of certifying the class and then “entering a judgment that will largely exonerate Sears.”<sup>68</sup> Essentially, the court concluded that whether large swaths of the absent class members experienced any problems with their allegedly defective washing machines was irrelevant to class certification. And the court’s cavalier suggestion that the defendant roll the dice on a class trial is simply not realistic for many companies that cannot afford to risk bankruptcy in a class trial on principle.

As these and other cases illustrate, named plaintiffs whose products malfunctioned or exhibited an alleged defect are proposing – and some courts are certifying – class actions encompassing a bevy of class members whose products performed as intended. These overbroad class actions are problematic for a variety of reasons. First, they threaten the due process rights of defendants who are forced to defend against hundreds of thousands of claims based on the unique experiences of a handful of people. Second, they undermine the proper administration of

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<sup>66</sup> *Glazer v. Whirlpool Corp.*, 722 F.3d 838, 844 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014).

<sup>67</sup> *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 360-61 (7th Cir. 2012), *cert. granted, judgment vacated*, 569 U.S. 1015 (2013), *judgment reinstated*, 727 F.3d 796 (7th Cir. 2013) and *cert. denied*, 134 S. Ct. 1277 (2014).

<sup>68</sup> *Id.* at 362.

justice by creating a mechanism whereby absent class members can recover in a lawsuit, even though they would never recover if they brought a similar lawsuit as individuals. And third, these suits almost always settle because of the exorbitant costs to defendants of litigating these massive lawsuits. And because the great majority of class members are perfectly satisfied with the product or service that is being challenged, there are almost no takers for these class action settlements. Thus, the only people who benefit are the lawyers who brought them. In short, overbroad class action lawsuits undermine justice and put a strain on our economy, on productivity and on innovation.

Assembly Bill 773 seeks to eliminate these kinds of unfair and abusive class actions by requiring that the “claims or defenses *and type and scope of injury* of the representative parties are typical of the claims or defenses *and type and scope of injury* of the class.”<sup>69</sup> Applying the federal typicality requirement – which does not contain the specific type and scope language – certain courts have already recognized that a named plaintiff in a class action cannot be “typical” of absent class members if he or she experienced a problem that the absent class members did not.<sup>70</sup> But many others have not, underscoring the need for the language contained in Assembly Bill 773, which would clearly foreclose these unwieldy class actions in Wisconsin state courts.

***Express ascertainability requirement.*** Assembly Bill 773 would also impose an express ascertainability requirement in class actions: “[t]he members of the class [must be] objectively verifiable by reliable and feasible means without individual testimony from putative class members and without substantial administrative burden.”<sup>71</sup> In recent years, a number of courts have recognized that “ascertainability” is an implicit prerequisite to class certification that requires the proponent of certification to prove that membership in the putative class can be easily determined using objective criteria.

In *Carrera v. Bayer Corp.*, for example, the U.S. Court of Appeals for the Third Circuit reversed the district court’s order certifying a class of Florida purchasers of Bayer’s One-A-Day WeightSmart multivitamin who alleged consumer fraud claims.<sup>72</sup> According to the Third Circuit, the class was not viable because “‘extensive and individualized fact-finding or mini-trials’” would be required to determine who purchased the specific product at issue, and therefore the class was not ascertainable.<sup>73</sup> As the Third Circuit explained, ascertainability serves three essential purposes at the class certification stage: “[1] at the commencement of a class action, ascertainability and a clear class definition allow potential class members to identify

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<sup>69</sup> AB 773, § 14 (emphases added).

<sup>70</sup> See, e.g., *Kachi v. Natrol, Inc.*, No. 13cv0412 JM(MDD), 2014 U.S. Dist. LEXIS 90987, at \*14 n.2 (S.D. Cal. June 19, 2014) (concluding that the proposed class was “woefully overbroad and c[ould not] be maintained as proposed because it incorporate[d] class members who suffered injury and those that did not”); *Burton v. Chrysler Grp. LLC*, No. 8:10-00209-MGL, 2012 U.S. Dist. LEXIS 186720, at \*19-21 (D.S.C. Dec. 21, 2012) (proposed nationwide class “would . . . include those persons and entities who never experienced problems” with their vehicles; this “problem . . . highlights the lack of . . . typicality among putative class members”).

<sup>71</sup> See AB 773, § 14.

<sup>72</sup> *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

<sup>73</sup> *Id.* at 305 (citation omitted).

themselves for purposes of opting out of a class[; (2)] it ensures that a defendant’s rights are protected by the class action mechanism[; and (3)] it ensures that the parties can identify class members in a manner consistent with the efficiencies of a class action.<sup>74</sup>

Wisconsin state courts have not expressly recognized or rejected an ascertainability requirement. However, some Wisconsin cases appear to have implicitly recognized that difficulties pertaining to class identification are relevant to the potential manageability of the case as a class action. For example, in *In re Wal Mart Employee Litigation*, the plaintiffs alleged that the members of the proposed class were denied promised compensation for working when they were entitled to a break.<sup>75</sup> “But whether an employee was on a break or working through, either wholly or partially, the break to which he or she was entitled was . . . determined by that employee’s own time-clock entries.”<sup>76</sup> As the Court of Appeals explained in affirming the denial of class certification, such a determination “would require not only the examination of each and every member of the proposed class, but, also, their co-workers and supervisors, and, in some or many cases, their friends and family.”<sup>77</sup>

Section 14 of Assembly Bill 773 would essentially codify the *Carrera* approach and guarantee a defendant’s fundamental due process right to challenge class membership at the certification stage, thereby ensuring that the Wisconsin class action statute – a purely procedural device – is not converted into a private attorney general remedial scheme.

***Automatic right to interlocutory appeal.*** The recently updated class action statute recognizes the high stakes of class certification rulings by authorizing interlocutory review of such orders at the discretion of the Court of Appeals. While this is an important first step in promoting the correctness and uniformity of class certification decisions, Assembly Bill 773 takes a better approach – allowing appeals as of right of class certification rulings. In 1998, subdivision (f) was added to Federal Rule 23, which allows for permissive interlocutory appeal of orders denying or granting class certification.<sup>78</sup> A driving impetus behind this amendment was to alleviate the coercive effect of class certification rulings on defendants. As the Advisory Committee’s notes accompanying this provision make clear, “[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.”<sup>79</sup> That is why judges consistently characterize class certification as “in effect, the whole case.”<sup>80</sup> As one commentator put it,

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<sup>74</sup> *Id.* at 307.

<sup>75</sup> *In re Wal Mart Emp. Litig.*, 290 Wis. 2d 225, 229-30, 233 (Ct. App. 2006).

<sup>76</sup> *Id.* at 230.

<sup>77</sup> *Id.* at 233; *see also Derzon v. Appleton Papers, Inc.*, No. 96-CV-3678, 1998 WL 1031504, at \*7 (Wis. July 7, 1998) (“The inclusion of consumers of fax paper, and the variety of routes by which fax paper might travel from converter to end user, ma[d]e it imperative that the plaintiff describe and demonstrate a means by which this can be fairly and efficiently organized for proof by common evidence.”).

<sup>78</sup> *See* Fed. R. Civ. P. 23.

<sup>79</sup> Fed. R. Civ. P. 23 advisory committee’s note to 1998 amendments.



“certification is the whole shooting match” in most cases, and defendants faced with carelessly certified, meritless lawsuits are often pressured into settling claims regardless of their merit.<sup>81</sup> Thus, meaningful interlocutory review of improvidently certified class actions is an essential safeguard against unwarranted class settlements.

Notably, the available data reveal that federal courts are growing increasingly reluctant to grant 23(f) review. A study of class certification appeals filed over seven years (from October 31, 2006 through December 31, 2013) found that *less than 25%* of the petitions for leave to appeal were granted – a one-third decline in the grant rate from the prior eight-year period.<sup>82</sup> There is little reason to predict that a different trend will take hold in Wisconsin, especially considering that petitions for leave to appeal outside the class action context “are granted only in rare circumstances.”<sup>83</sup>

Promoting correctness and uniformity of class certification decisions is essential given the critical role of certification in these lawsuits. Unless class certification decisions are made automatically appealable (or at least appealable with greater frequency), erroneous decisions granting and denying class certification will most likely evade any appellate review. As a result, attorneys will be able to mount class actions of enormous scope and questionable merit in the hopes that Wisconsin judges sympathetic to their position will certify such actions, forcing defendants to settle before trial, and that lax class certification rulings will thereby evade judicial review.

### **III. OTHER PROVISIONS OF ASSEMBLY BILL 773 WOULD ALSO IMPROVE WISCONSIN’S CIVIL JUSTICE SYSTEM.**

Assembly Bill 773 would also improve the State’s civil justice system by regulating consumer lawsuit lending. Consumer lawsuit lending is a variant of TPLF that involves the payment of loans to plaintiffs to recover living and other expenses during a pending lawsuit. Consumer lawsuit lenders prey on vulnerable consumers – those who are injured and unable to work and who may have substantial medical bills, those who have no financial support, and those who are desperate for cash. The companies then offer to lend a portion of the expected settlement or judgment, usually up to 10% and capped at \$100,000, to the plaintiff. The lawsuit lenders charge interest on the loan, with rates often in the range of 3-5% *per month* – i.e., more than **60%** interest annually. Even when the plaintiff “wins” or settles the case, he or she may

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<sup>80</sup> Hon. Diane Wood, Circuit Judge, *Remarks at the FTC Workshop: Protecting Consumer Interests in Class Actions* (Sept. 13-14, 2004), in Panel 2: Tools for Ensuring that Settlements are “Fair, Reasonable, and Adequate,” 18 *Geo. J. Legal Ethics* 1197, 1213 (2005).

<sup>81</sup> See David L. Wallace, *A Litigator’s Guide to the ‘Siren Song’ of ‘Consumer Law’ Class Actions*, *LJN’S Product Liability Law & Strategy* (Feb. 2009).

<sup>82</sup> See John H. Beisner, Jessica D. Miller & Geoffrey M. Wyatt, Skadden, Arps, Slate, Meagher & Flom LLP, *Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings* at 1 (Apr. 2014), <https://www.skadden.com/insights/study-reveals-us-courts-appeal-are-less-receptive-reviewing-class-certification-rulings>.

<sup>83</sup> *State v. Hawley*, 2013 WI App 84, ¶ 9.

recover little or no money at all, because the entire amount of the award or settlement goes to pay the plaintiff's attorneys and to repay the lawsuit lender.

What really separates consumer lawsuit lending – or “crash cash” – from other types of credit is that it is “non-recourse.” This means that if the plaintiff loses the case, he or she is not obligated to repay the loan. The lawsuit lending industry has gone to great lengths to tell regulators and the public that consumer lawsuit loans are not really loans but are instead “non-recourse financing.” This mantra has largely enabled consumer lawsuit lenders to skirt Wisconsin usury and fair-lending laws. What the lenders fail to explain is that consumer lawsuit lending dramatically reduces litigation recoveries, while increasing the cost of litigation. As a direct result of consumer lawsuit lending, defendants have to cough up more money to plaintiffs to settle lawsuits, and the plaintiffs then have to turn right around and pay that extra money to the lawsuit lenders. Both the allegedly injured plaintiffs and the defendants lose; the only winners are the consumer lawsuit lenders.

For example, Bloomberg News reported on a Brooklyn man named Elwin Francis who borrowed \$27,000 from consumer lawsuit lenders Law Bucks and Case Cash in connection with a trip-and-fall case.<sup>84</sup> When Francis's lawyers settled his case for \$150,000 the lawsuit lenders took almost \$100,000 – *nearly two-thirds of the settlement and more than three times what they had lent*. After Francis's lawyers took their cut for fees and expenses, Francis was left with \$111. Francis later claimed that his lawyers never told him that he would receive almost nothing from the \$150,000 settlement, and soon after receiving his settlement, he sued his lawyers for malpractice for not advising him of the consequences of his lawsuit loans.

Another problem caused by consumer lawsuit lending is that it drags out litigation and increases the length of time cases remain pending on court dockets. Because consumer lawsuit lending increases the costs of litigation – requiring more money to settle cases so plaintiffs can keep some of what they get – plaintiffs who have borrowed from lawsuit lenders tend to reject early settlement offers in hopes of holding out for more money. The result is that cases stay open longer, taking up valuable court time and judicial resources, as well as defendants' time and money. Importantly, the reason for this delay is not that cases involving consumer lawsuit lending are stronger than other cases, or that defendants in cases involving lawsuit lending are slow to offer reasonable settlements (indeed, defendants seldom even know that the plaintiffs have borrowed money in the first place because the loans are not disclosed). Rather, the reason is that plaintiffs who have borrowed money from lawsuit lenders must turn over to the lenders disproportionately large portions of anything they receive from the defendant. In a typical contingency-fee arrangement, a plaintiff stands to recover about 70% of any settlement reached with the defendant, with the rest going to the plaintiff's lawyer. But when a consumer lawsuit lender is involved, the plaintiff may owe so much money to the lender that he or she ends up with virtually nothing unless the settlement is exorbitant. Thus, the lenders' profit motive – not the underlying strength or weakness of the plaintiff's case – is what drives the litigation.

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<sup>84</sup> See Joan C. Rogers, *Law Firm Wins Dismissal of Suit by Client Whose Litigation Loans Ate Up Settlement*, Bloomberg BNA, Jan. 30, 2013, <https://www.bna.com/law-firm-wins-n17179872101/>; see also Ronen Avraham and Abraham L. Wickelgren, *Third-Party Litigation Funding: A Signaling Model*, The University of Texas School of Law, Law & Economics Research Paper No. 521, <https://law.utexas.edu/faculty/ravraham/3rd-party-litigation.pdf>.

For example, in a notable case from North Carolina, a woman sued the owner of the Charlotte Hornets basketball team for sexual harassment.<sup>85</sup> Unbeknownst to her lawyers, she had taken out a \$200,000 consumer lawsuit loan, which only obligated her to repay the lender if she prevailed. As her case progressed, the defendant offered her up to \$1 million to settle. The woman’s lawyers advised her to take the offer, but she refused to settle for anything less than \$1.2 million because the terms of her agreement meant that she would lose money if she won the suit but received less than \$1.2 million. The case then proceeded to trial, and because the plaintiff lost, she was able to keep the \$200,000 loan and not repay it. Later, when her lawyers learned what had happened, they sued the consumer lawsuit lender for interfering with their case – and won.<sup>86</sup> In its ruling denying the defendants’ motion to dismiss, the court stated: “In a twist perhaps unique in law, a court loss resulting in no award of damages was better for the client than a million-dollar settlement.”<sup>87</sup>

Enactment of Assembly Bill 773 would protect consumers and curb lending abuses by bringing lawsuit lending into alignment with existing state law governing other consumer loans. Most notably, in a consumer lawsuit lending transaction, the lender would not be permitted to charge interest at a rate of more than 18% per year (the maximum rate for other consumer loans),<sup>88</sup> and there would have to be a written agreement between the lender and the consumer that contains specified information, including the interest rate and the consumer’s right to receive a refund of interest charged if prepayment is made in full, as well as other basic information.<sup>89</sup> In short, the consumer lending provisions of Assembly Bill 773 largely aim to make consumer lawsuit lending in Wisconsin subject to the same fair-lending and usury laws already in force in the State, doing away with the fiction that consumer lawsuit loans are not “loans” within the meaning of Wisconsin law.

In addition, Assembly Bill 773 would require lawsuit lending arrangements to be disclosed to the court and the opposing party within ten days after the plaintiff has entered into a consumer lawsuit lending transaction.<sup>90</sup> This provision would protect consumers by ensuring that judges have an opportunity to assess the fairness of these contracts – and it would put defendants on notice that the presence of a consumer lawsuit loan might greatly influence the litigation, especially in settlement discussions, as happened in the Charlotte Hornets case.

In sum, Assembly Bill 773 would eliminate the cloak of immunity that has needlessly shielded consumer lawsuit lenders from generally applicable laws – a reform that is long overdue.

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<sup>85</sup> See *Weaver, Bennett & Bland, P.A. v. Speedy Bucks, Inc.*, 162 F. Supp. 2d 448, 451 (W.D.N.C. 2001).

<sup>86</sup> *Weaver, Bennett & Bland, P.A. v. Speedy Bucks, Inc.*, No. CIV 100CV249, 2007 WL 2344820, at \*1 (W.D.N.C. Aug. 14, 2007).

<sup>87</sup> *Weaver*, 162 F. Supp. 2d at 451.

<sup>88</sup> Wis. Stat. § 138.09 (“Before any person may do business under this section . . . or assess a finance charge on a consumer loan in excess of 18 percent per year, that person shall first obtain a license from the division.”).

<sup>89</sup> See AB 773, § 1.

<sup>90</sup> *Id.* § 25.

## CONCLUSION

The time is ripe for revamping Wisconsin's stale discovery rules and class action regime, which are imposing burdensome costs on consumers and businesses in the State. On the discovery front, Wisconsin's rules have long lagged behind the rules in effect in the federal system and other states, which have sought to streamline discovery by making discovery proportional to the claims or defenses at issue in the case. To be sure, the Wisconsin Supreme Court's recent amendment replacing the State's prior one-sentence class action rule with a far more robust regime that closely mirrors the federal one is welcome news and should be applauded. Nonetheless, certain aspects of Assembly Bill 773 – most notably, those pertaining to “no-injury” class actions, ascertainability and *nondiscretionary* appeal of class certification rulings – were not included in the amended rule and should be enacted. In addition, reasonable limits on consumer lawsuit lending and the shortening of the statutory periods for filing certain civil claims – which are also part of Assembly Bill 773 – are uncontroversial measures that should also be swiftly enacted.

I appreciate the Committee allowing me to testify today, and I look forward to answering any questions that the Members of the Committee may have.