

www.kmksc.com

Washington Building
Barnabas Business Center
4650 N. Port Washington Road
Milwaukee, WI 53212
Telephone: 414-962-5110
Facsimile: 414-962-8725

On October 1, 2005, Wisconsin Act 442 went into effect. The Act, among other things, returns the time period for answering complaints to 20 days (except that 45 days remains the time period for answering if (i) a tort claim is alleged, (ii) one of the defendants is an insurance company, or (iii) the party answering is the state or a state agent or agency).

Justice Delayed, Justice Denied: Support Act 442

By Alexander "Sandie" Pendleton of Kohner, Mann & Kailas, S.C.

Delaying justice constitutes a fundamental denial of justice; that is why the *Magna Carta* promises "to no one will we refuse or **delay** right or **justice**." That is why the Attorney's Oath we all took ends with the words "I will never . . . **delay any person's cause** for lucre or malice. So help me God." Recently enacted Act 442 reduces unnecessary delay, and brings the time period for answering civil complaints in Wisconsin into line with the Federal rules and the rules in most other states. Act 442 merits the Bar's support, not its opposition.

I represent both plaintiffs and defendants, and litigated cases both prior to 1998 (when the standard answer time was 20 days) and since then. I never found the 20 day time limit to be a problem, or getting or giving extensions to be a problem. In those rare instances in which plaintiffs' attorneys declined to grant an extension, I've found that judges have liberally granted extensions, often chastising plaintiffs' counsel for not agreeing to an extension. In addition, Wis. Stat. § 802.09 gives defendants the right to amend or correct answers within six months of a lawsuit's commencement. While I can understand why an insurance company (especially an out-of-state one) in some instances may need more than 20 days to gather evidence and answer, I have never understood why 45 days is needed to prepare a response to the vast majority of non-tort complaints that are filed.

"Delaying justice constitutes a fundamental denial of justice ... 'to no one will we refuse or delay right or justice.'"

The standard time to answer in the federal courts is 20 days, and no other state gives defendants 45 days to answer in suits between private parties (although some states do allow up to 30 days to respond to certain types of claims). What is it about Wisconsin, or Wisconsin lawyers, that we would need 45 days to answer all private lawsuits? My personal experience has been that clients (especially out-of-state clients) were often appalled when they learned that Wisconsin gave defendants a leisurely 45 days to respond.

Non-lawyers understand that improvements in communications and computing technologies have enabled other sectors of the economy to do things *much faster, with a higher level of quality* than before. There is no reason why Wisconsin lawyers should be saying that we as lawyers need to be doing things *much slower* than before.

Wisconsin now competes in a global economy. Perceptions about the efficiency, costs and the fairness of a state's legal system affect where companies choose to do business. Wisconsin lawyers should support reasonable procedural rules that promote efficiency, not rules that are inconsistent with rules in other states, and which unduly support delay. Act 442 brought Wisconsin law back into line with the Federal Rules of Civil Procedure and the rules in most other states.

Many of my firm's clients are businesses that are owed money by others. I know how creditor clients feel about this issue. Time is money; businesses that provide goods and services on credit know that the value of almost all debts decreases each day that invoices go unpaid. The 45 day answer period enacted in 1998 worked a hardship on those businesses, which is why their organizations have worked for several years to repeal the extension to 45 days. They strongly believe that the change to 45 days was bad for the Wisconsin economy as a whole, and that the restoration of the 20 day period will help make credit more available and affordable, thus improving the competitiveness and vigor of the Wisconsin economy.

From the Bar's standpoint, we will lose credibility with legislators if we now rush to them requesting that they repeal a law that they just enacted. This is especially true in a situation in which other organizations proposed the change for years, while the Bar remained completely silent on the issue. The proposal to return the deadline to 20 days for most non-tort claims was included in 2005 Senate Bill 99, which ultimately became Act 442. SB 99 was introduced by Senator Ted Kanavas in March of 2005, and the Senate and Assembly held two public hearings on the bill prior to its passage in April of 2006. At the public hearings on SB 99, no one from the State Bar, or any private lawyer, expressed any objections to the bill. WATL officially took the position that it was neutral on SB 99, and the State Bar and CTCW took no position on the bill. Given this history, if the Bar is going to do anything about Act 442, my suggestion would be that the bar study what effect, if any, Act 442 has over the next two years. Then, only if the study shows the Act has a deleterious effect on our justice system and our state's economy as a whole, should the Bar consider approaching the legislature with a proposed modification.

Act 442 is not confusing. Lawyers are capable of determining whether a case involves the state, an insurance company or a tort. Lawyers already knew before Act 442 was enacted that some defendants had more time to answer and some had less (for instance, defendants in foreclosure actions had 20 days, the State had 45 days, and the federal government had 60 days). Lawyers also are often called upon to determine what is and is not a tort (for example, when resolving statutes of limitation or economic loss doctrine issues). Act 442 implements a workable compromise regarding the time to answer, and precipitously attempting to modify Chapter 801 yet again will only create confusion.

Who are we? Are we the diligent, hard working Atticus Finch of *To Kill a Mocking Bird*, or are we the self-interested and forever delaying lawyers of the *Jarndyce and Jarndyce* case in *Bleak House*? We as the Bar need to ensure that the civil procedure rules we support are balanced and beneficial for society as a whole, and not designed primarily to benefit the dilatory litigant or (the more rare) dilatory lawyer. I urge the Bar not to seek to repeal Act 442.

Reprinted as originally published in the Wisconsin Lawyer

About Kohner, Mann & Kailas, S.C.

Founded in 1937, KMKSC is a business and commercial law firm listed in Martindale-Hubbell's Bar Register of Preeminent Lawyers. KMKSC provides quality legal expertise across the areas of law encountered by businesses in the normal course of their operations and growth. Our services range from high-profile appellate representation and international business issues to ensuring that critical everyday needs, such as debt recovery, are fulfilled efficiently and expertly. Our purpose is to deliver excellent results for our clients, whether the issue is advice on the avoidance of legal disputes, closing a deal, protecting assets or winning in court. KMKSC is continually advancing the interests of its clients in negotiations, transactions, litigation and alternative dispute forums across North American and beyond. We help U.S. companies address the legal issues raised by trading across international borders and provide legal support and advice to foreign companies operating in American markets.

www.kmksc.com