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THE NEW WISCONSIN RULES OF CIVIL PROCEDURE
CHAPTERS 801 - 803

CHARLES D. CLAUSEN* and DAVID P. LOWE**

INTRODUCTION

In his introduction to Jerome Frank's *Courts on Trial*, Edmond Cahn suggests, not ungraciously, that lawyers are better at remembering than at learning and that, accordingly, innovation is as welcome to lawyers as a wrinkle is to a woman. If the resistance to change on the part of lawyers was culpable at the time Cahn's introduction was written (1963), or at the time Frank's book was written (1949), the resistance is at least easy to sympathize with (if no less culpable) today. Since Cahn wrote his note, Wisconsin lawyers have had to learn to operate with major statutory revisions (and, one hopes, reforms) in criminal procedure, probate law, consumer law, property law, commercial law, small claims practice, and, of course, hundreds of changes wrought by case law—both federal and state. Pending before the legislature as this preface is written are extensive revisions in the automobile reparations system, a system that—until a short time ago—we seldom thought of in terms of "system" at least not as a system distinct from the "judicial system." And now Wisconsin lawyers and judges are faced with rather complete revision (dare I say "reform"?) of the most basic rules of civil procedure. One can hardly blame those who say "enough already."

Nonetheless, it is probably accurate to say that a revision of the civil procedure rules has long been overdue. Our current

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"rules" consist basically of Field Code provisions written in the 1840's and adopted in Wisconsin in 1856. The Field Code was, of course, a tremendous step forward in the development of modern civil procedure. It did away with "technicalism" as the animating spirit of procedure and in this respect, it represented a step away from the "sporting" or "fight" theory of litigation and a step toward the "truth" theory. Good as it has been, however, the Code has not been without its deficiencies. Its pleading rules, for example, lent themselves to fairly extensive motion practice, and its discovery rules were terribly inadequate, at least as viewed from the modern perspective. In order to correct the deficiencies, the Code has been rather extensively patched up over the 118 years that it has governed Wisconsin litigation. Not a small number of the patches applied to the Code have been cut from the Federal Rules of Civil Procedure.

Since its adoption in 1936, many have argued that the Federal Rules are as superior to the Field Code as the Field Code was to common law procedure. The new "Wisconsin Rules of Civil Procedure" is the result of a lengthy study of both the Federal Rules and our patched-up Field Code by members of the judiciary, the bar, and the state's two law schools. It will be apparent to all who study the new rules that, although they are comprised of many Federal Rule provisions, the Wisconsin Rules do not represent a complete adoption of the Federal Rules, or even of a patched-up version of the Federal Rules. Although most of the provisions governing pleading, parties, and discovery are derived from the Federal Rules, the provisions on commencement of actions, trials, and to a lesser degree, judgments, are different from both the Code provisions and the Federal Rules. Regardless of the sources of the new rules, however, it is hoped that each of their provisions reflects the study and effort devoted to them by the Judicial Council Civil Rules Committee.

CHAPTER 801
COMMENCEMENT OF ACTION AND VENUE

801.01 Kinds of proceedings; scope of Title XLII-A. (1) KINDS. Proceedings in the courts are divided into actions and special proceedings. "Action," as used in this title, includes "special proceeding" unless a specific provision of procedure in special proceedings exists.
(2) **Scope.** The sections in this title govern procedure and practice in circuit and county courts of the state of Wisconsin in all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin except where different procedure is prescribed by statute or rule. They shall be construed to secure the just, speedy and inexpensive determination of every action.

(3) **Effective Dates.** (a) Chapters 801 to 803 shall apply to all actions commenced on or after January 1, 1976.

(b) Chapters 804 to 807 shall apply to all actions pending or commenced on or after January 1, 1976 except those actions in which trial has commenced prior to January 1, 1976, as to which the statutes and rules in effect prior to January 1, 1976 shall continue to apply.

(c) Amendments and repeals of sections outside of chs. 801 to 807 shall be effective as follows:

1. Amendments and repeals effected in order to conform with provisions in chs. 801 to 803 shall apply to all actions commenced on or after January 1, 1976.

2. Amendments and repeals other than those effected in order to conform with provisions in chs. 801 to 803 shall take effect on January 1, 1976 as to all actions then pending or thereafter commenced, except as provided in par. (b).

This rule replaces former sections 260.01, 260.02, 260.03, 260.05 and 260.08. The first sentence of subsection (1) is substantially equivalent to section 260.02. The second sentence of subsection (1) obviates the necessity of repeating throughout the rules "actions and special proceedings," even when it is clear that a provision is to apply to both. The first sentence of subsection (2) serves the same function as section 260.01 formerly did, i.e., limiting the scope of the Title. The last sentence of subsection (2) should be read with section 802.02 (6), "Construction of Pleadings," and with section 805.19, "Mistakes and Omissions, Harmless Error." These provisions provide a mandate for the construction of these rules. Many of the rules are adaptations of various rules of the Federal Rules of Civil Procedure to state practice. The guiding principle of the Federal Rules is the guiding principle of these rules: the elimination of delay, of technicality and of unnecessary cost.

Under Wisconsin law, statutes which have received judicial construction in another state and then have been adopted by Wisconsin, are taken with the construction which has been given to them; the same rule applies when Wisconsin adopts language of federal statutes which have been construed by the
United States Supreme Court. Presumably the same result should obtain with respect to rules of procedure promulgated by the United States Supreme Court. Most of the judicial construction of the Federal Rules, however, is found in decisions of the United States District Courts and courts of appeal. As might be expected, those decisions are not always consistent and, by virtue of their origin in inferior courts, are of lesser precedential value than decisions of the United States Supreme Court. Nevertheless, the decisions of the federal lower courts, to the extent that they show a pattern of construction, should be considered persuasive authority in construing the rules in this Title which are based on them.

Former section 260.03 has been repealed. No significant advantage was seen in retaining the statutory definitions of actions and special proceedings. Section 260.03 was lifted from sections 7 and 8 of the Field Code. It was useful at the time of the adoption of the Field Code because of the Code's abolition of the "forms of action" in favor of the unitary "civil action." The definitions are no longer very useful. Moreover, the definition of "action" in section 260.03 is not even successful in defining, that is, precisely delimiting, that which it purports to define. Proceedings in which extraordinary relief is sought, for example, would not appear to be "ordinary court proceedings" so as to be classified as "actions." Nevertheless, it is clear that in Wisconsin, such proceedings are indeed "actions" and not "special proceedings."

Former section 260.05 which stated the distinction between civil actions and criminal actions has also been repealed. Insofar as it purported to define criminal actions, it was inconsistent with the scope provisions of section 260.01 which limited all the provisions of Title XXV to civil matters.

Former section 260.08, which purported to abolish not only the forms of action but also the distinction between actions at law and suits in equity and which also defines "plaintiff" and "defendant," has been repealed. The forms of action having been abolished at least as far back as 1856, it was not felt necessary or desirable to retain any references to them in a modern procedural code. To the extent that section 260.08 pur-

1. In re Adams Machinery, Inc., 20 Wis. 2d 607, 123 N.W.2d 558 (1963); Pomeroy v. Pomeroy, 93 Wis. 262, 67 N.W. 430 (1896).
2. See State ex rel. Durner v. Huegin, 110 Wis. 189, 85 N.W. 1046 (1901); State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N.W. 500 (1906).
ported to abolish all distinctions between actions at law and suits in equity, it suffered from overbreadth. The distinction between law and equity was not rendered entirely meaningless by the abolition of the forms of action. For example, the distinction may be quite important in determining the appropriate statute of limitations. The distinction is also important, of course, in determining whether a constitutional right to a trial by jury exists.

801.02 Commencement of action. (1) A civil action in which a personal judgment is sought, other than certiorari, habeas corpus, mandamus or prohibition, is commenced as to any defendant when a summons and a complaint naming him as defendant are filed with the court, provided service of an authenticated copy of the summons and of the complaint is made upon him under this chapter within 60 days after filing.

(2) A civil action in which only an in rem or quasi in rem judgment is sought is commenced as to any defendant when a summons and a complaint are filed with the court, provided service of an authenticated copy of the complaint and of either the complaint or a notice of object of action under s. 801.12 is made upon him under this chapter within 60 days after filing.

(3) The original summons and complaint shall be filed together. The authenticated copies shall be served together except:

(a) In actions in which a personal judgment is sought, if the summons is served by publication, only the summons need be published, but a copy of the complaint shall be mailed with a copy of the summons as required by s. 801.11, and;

(b) In actions in which only an in rem or quasi in rem judgment is sought, the summons may be accompanied by a notice of object of action pursuant to s. 801.12 in lieu of a copy of the complaint and, when the summons is served by publication, only the summons need be published, but a copy of the complaint or notice of object of action shall be mailed with the copy of the summons as required by s. 801.12.

(4) No service shall be made under sub. (3) until the action has been commenced in accordance with sub. (1) or (2).

4. See Wis. Const., Art. I, § 5; Schneider v. Fromm Laboratories, 262 Wis. 21, 53 N.W.2d 737 (1952); Wilson v. Johnson, 74 Wis. 337, 43 N.W. 148 (1889).
An action of certiorari, habeas corpus, mandamus or prohibition is commenced by service of an appropriate original writ on the defendant named in the writ. A copy of the writ shall be filed forthwith.

In all civil actions, the clerk's fee and suit tax, if applicable, shall be paid at the time of filing.

This rule abolishes the mode of commencement of action by service of summons. It should be read together with section 893.39, "Action, when commenced."

Under the new rule, actions are commenced by filing the summons and the complaint. Since the complaint must be filed to commence the action, pre-pleading discovery, formerly permitted by section 887.12(6), will not be permitted under the new rules. The Judicial Council Committee's decision to abolish pre-pleading discovery was based in large part on the notions that: (a) there was little difference between the affidavit required for pre-pleading discovery and the type of complaint required by the new section 802.02(1); and (b) the court should be able to ascertain the nature of the action early on to determine whether a scheduling conference will be necessary or whether a standard scheduling order should be used. With respect to the similarity between the section 887.12(6) affidavit and the section 802.02(1) complaint, it should be noted that there is at least one significant difference between the two; the pre-pleading discovery affidavit was not required to reveal any legal theory of the case, whereas the complaint should be sustainable against a motion to dismiss for failure to state a claim upon which relief can be granted. That is to say, the facts alleged in the complaint must show that the pleader is entitled to relief under some theory of liability, but the facts recited in the pre-pleading affidavit were required to only identify the occurrence out of which the action arose. There will be cases under the new rules where plaintiffs will lose a tactical advantage because of the abolition of pre-pleading discovery. It will occur whenever early disclosure of the theory of liability is undesirable. It may not be unreasonable, however, to expect that any plaintiff's counsel who perceives a substantial disadvantage to early disclosure of the true theory of his lawsuit will discover available means to keep the theory undisclosed until such time as disclosure becomes prudent. The liberal right to

5. See Wis. Stat. § 802.06(2)(f).
amend pleadings under section 802.09(1) should be noted.

This rule relating to commencement of action is of truly critical significance only in the statutes of limitation context. Section 893.40 of the former statutes provided a safety-valve for the plaintiff whose claim was approaching the bar-date of the statute of limitations by providing that an action was deemed commenced on the date the summons was delivered to the sheriff for service, provided service was effected within sixty days thereafter. The sixty day period within which service must be accomplished under this new rule corresponds to the safety-valve provision of section 893.40, which was repealed effective January 1, 1976.

The sixty day proviso in this new rule may create problems. At least two important questions come immediately to mind. First, may the sixty day period be enlarged by motion under paragraph (2)(a) of section 801.15? By its terms, paragraph (2)(a) would seem to permit enlargement. Where the effect of enlargement, however, would be to extend the statutory period of limitation, a real question arises concerning the effect of court-made procedural rules affecting substantive rights. The writer has not encountered any case in which the sixty day grace period in section 893.40 was sought to be enlarged under the provisions of former section 269.45, the predecessor of section 801.15(2). In any event, it would seem to be desirable to amend either section 801.02 or section 801.15(2) to provide that the sixty day service period may not be enlarged if the effect of such enlargement is to further extend the period of limitation.

Second, what is the legal effect of a later service, that is, one accomplished after the sixty day period has passed? Consider a rather horrible example. On January 5, 1976, X's attorney files a summons and complaint with the clerk of court, naming X as plaintiff and Y and Z as defendants. X effects proper service on Y on January 10, but does not properly serve Z until March 12, more than sixty days after the date of filing. Both Y and Z file and serve notices of appearance and retainer and serve and file answers. On April 1, the statute of limitation runs on X's claim against Y and Z. Prior to the scheduling conference, Z appears by his attorney at all depositions noticed by X or Y and responds fully and promptly to all interrogatories served on him by X or Y. On April 5, at the scheduling conference, Z's attorney serves an amended answer asserting as new
defenses: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person of Z; (3) insufficiency of summons; (4) insufficiency of service of summons; and, of course, (5) statute of limitations. Both X and Y object and move the court to forbid the filing of the amended answer. Z’s attorney moves for dismissal on the grounds newly asserted in the amended answer as well as on the ground of X’s failure to comply with the rules (section 805.03). Who wins?

The problem is plausible because of: (1) the failure of section 801.02 to state the legal effect of late service; (2) the rules respecting preservation of jurisdictional defenses found in section 802.06(8)(a); and (3) the very liberal amendment of pleading rule found in section 802.09(1). The reader is invited to study the rules cited, as well as section 802.06(2), in order to see clearly that the hypothetical problem above became a nonhypothetical problem on the effective date of the new rules.

The central question, of course, is whether a late service gives rise to a jurisdictional defense. If it does, the jurisdictional defense is not waived by appearance, by participation in discovery, or otherwise than by failing to assert it in accordance with section 802.06(8)(a), which permits the defense to be raised by answer or by amendment to the answer permitted as a matter of course under section 802.09(1). Since one amendment is permitted as a matter of course under section 802.09(1) at any time prior to the entry of the scheduling order, the potential for "sand-bagging" illustrated in the hypothetical is very real.

It may be, of course, (and the writer would argue that it should be) that the supreme court will, if presented with the issue, hold that a late service does not create jurisdictional defenses, but rather constitutes simply a failure to comply with the rules giving rise to such sanctions as are appropriate under section 805.03. Unfortunately, unless and until the issue is raised in a proper case, the bench and bar will be subject to a regrettable uncertainty about the legal effect of a late service. A clarifying amendment to section 801.02 providing that late service does not impair either the subject matter jurisdiction or personal jurisdiction of the court, but is subject to section 805.03, would be preferable to awaiting resolution of the issue by case law.

On the other hand, service of a summons on a defendant before the action is commenced by filing should be held to be
ineffective to acquire jurisdiction over the person of the defendant. Subsection (4) of section 801.02 expressly forbids pre-filing service and any deviation from this rule by recognizing a pre-filing service as effective for any purpose, could lead to a continuous vitality for "hip pocket actions" (those which are not a matter of public record and on which no suit tax is paid) which this rule was intended to abolish.

801.03 Jurisdiction; definitions. In this chapter, the following words have the designated meanings:

(1) "Person" means any natural person, partnership, association, and body politic and corporate.
(2) "Plaintiff" means the person named as plaintiff in a civil action, and where in this chapter acts of the plaintiff are referred to, the reference attributes to the plaintiff the acts of his agent within the scope of his authority.
(3) "Defendant" means the person named as defendant in a civil action, and where in this chapter acts of the defendant are referred to, the reference attributes to the defendant any person's acts for which acts the defendant is legally responsible. In determining for jurisdiction purposes the defendant's legal responsibility for the acts of another, the substantive liability of the defendant to the plaintiff is irrelevant.

The Judicial Council Committee made no substantial changes in the jurisdiction statutes formerly found in Chapter 260, not only because those statutes were considered to be satisfactory, but also because changes in them would require legislative action. Section 801.03 is former section 262.03 renumbered.

801.04 Jurisdictional requirements for judgments against persons, status and things. (1) Jurisdiction of subject matter required for all civil actions. A court of this state may entertain a civil action only when the court has power to hear the kind of action brought. The power of the court to hear the kind of action brought is called "jurisdiction of the subject matter." Jurisdiction of the subject matter is conferred by the constitution and statutes of this state and by statutes of the United States; it cannot be conferred by consent of the parties. Nothing in this title affects the subject matter jurisdiction of any court of this state.
(2) Personal jurisdiction. A court of this state having jurisdiction of the subject matter may render a judgment
against a party personally only if there exists one or more of the jurisdictional grounds set forth in s. 801.05 or 801.06 and in addition either:

(a) A summons is served upon the person pursuant to s. 801.11; or

(b) Service of a summons is dispensed with under the conditions in s. 801.06.

(3) JURISDICTION IN REM OR QUASI IN REM. A court of this state having jurisdiction of the subject matter may render a judgment in rem or quasi in rem upon a status or upon a property or other thing pursuant to s. 801.07 and the judgment in such action may affect the interests in the status, property or thing of all persons served pursuant to s. 801.12 with a summons and complaint or notice of object of action as the case requires.

This section is former section 262.04 renumbered.

801.05 Personal jurisdiction, grounds for generally. A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s. 801.11 under any of the following circumstances:

(1) LOCAL PRESENCE OR STATUS. In any action whether arising within or without this state, against a defendant who when the action is commenced:

(a) Is a natural person present within this state when served; or

(b) Is a natural person domiciled within this state; or

(c) Is a domestic corporation; or

(d) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

(2) SPECIAL JURISDICTION STATUTES. In any action which may be brought under statutes of this state that specifically confer grounds for personal jurisdiction over the defendant.

(3) LOCAL ACT OR OMISSION. In any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant.

(4) LOCAL INJURY; FOREIGN ACT. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

(a) Solicitation or service activities were carried on within this state by or on behalf of the defendant; or

(b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.
(5) **Local Services, Goods or Contracts.** In any action which:

(a) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff; or

(b) Arises out of services actually performed for the plaintiff by the defendant within this state, or services actually performed for the defendant by the plaintiff within this state if such performance within this state was authorized or ratified by the defendant; or

(c) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to ship from this state goods, documents of title, or other things of value; or

(d) Relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on his order or direction; or

(e) Relates to goods, documents of title, or other things of value actually received by the plaintiff in this state from the defendant without regard to where delivery to carrier occurred.

(6) **Local Property.** In any action which arises out of:

(a) A promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this state; or

(b) A claim to recover any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this state either at the time of the first use, ownership, control or possession or at the time the action is commenced; or

(c) A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this state at the time the defendant acquired possession or control over it.

(7) **Deficiency Judgment on Local Foreclosure or Resale.** In any action to recover a deficiency judgment upon a mortgage note or conditional sales contract or other security agreement executed by the defendant or his predecessor to whose obligation the defendant has succeeded and the deficiency is claimed either:

(a) In an action in this state to foreclose upon real property situated in this state; or
(b) Following sale of real property in this state by the plaintiff under ch. 846; or

(c) Following resale of tangible property in this state by the plaintiff under ch. 409.

(8) DIRECTOR OR OFFICER OF A DOMESTIC CORPORATION. In any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office as a director or officer.

(9) TAXES OR ASSESSMENTS. In any action for the collection of taxes or assessments levied, assessed or otherwise imposed by a taxing authority of this state after July 1, 1960.

(10) INSURANCE OR INSURERS. In any action which arises out of a promise made anywhere to the plaintiff or some third party by the defendant to insure upon or against the happening of an event and in addition either:

(a) The person insured was a resident of this state when the event out of which the cause of action is claimed to arise occurred; or

(b) The event out of which the cause of action is claimed to arise occurred within this state, regardless of where the person insured resided.

(11) CERTAIN MARITAL ACTIONS. In any action to determine a question of status under s. 247.05 (1), (2) and (3), or in an independent action for support, alimony or property division commenced in the county in which the plaintiff resides at the commencement of the action when the defendant resided in this state in marital relationship with the plaintiff for not less than six consecutive months within the six years next preceding the commencement of the action, and after the defendant left the state the plaintiff continued to reside in this state, and the defendant cannot be served under s. 247.06 but is served under s. 247.062 (1).

(12) PERSONAL REPRESENTATIVE. In any action against a personal representative to enforce a claim against the deceased person represented where one or more of the grounds stated in subs. (2) to (11) would have furnished a basis for jurisdiction over the deceased had he been living and it is immaterial under this subsection whether the action had been commenced during the lifetime of the deceased.

(13) JOINER OF CLAIMS IN THE SAME ACTION. In any action brought in reliance upon jurisdictional grounds stated in subs. (2) to (11) there cannot be joined in the same action any other claim or cause against the defendant unless grounds exist under this section for personal jurisdiction over the de-
fendant as to the claim or cause to be joined.

(14) ENERGY SUPPLIES. In any action under ss. 125.03 to 125.06 to obtain information from any energy supplier as provided therein.

This section is former section 262.05 renumbered.

801.06 Personal jurisdiction, grounds for without service of summons. A court of this state having jurisdiction of the subject matter may, without a summons having been served upon him, exercise jurisdiction in an action over a person with respect to any counterclaim asserted against that person in an action which he has commenced in this state and also over any person who appears in the action and waives the defense of lack of jurisdiction over his person as provided in s. 802.06 (8). An appearance to contest the basis for in rem or quasi in rem jurisdiction under s. 802.06 (2) (c) without seeking any other relief does not constitute an appearance within the meaning of this section.

The first sentence of this rule is nothing more than former section 262.07 adapted to conform with the new procedure for asserting law defenses under section 802.06.

The second sentence gives a limited protection to out of state defendants whose property is attached or garnisheed. It permits such a defendant to appear for the sole purpose of contesting the jurisdiction of the court over his property without becoming subject to personal jurisdiction. This sentence does not permit him to defend the claim on the merits without being subject to personal jurisdiction. The limited appearance concept approved in the Restatement of Judgments, section 40 is not authorized by this provision. Assuming that there exists a valid basis for the assertion of jurisdiction over the res, the effect of this provision is to force the out-of-state defendant to exercise an unenviable choice between declining to defend on the merits, in which case a default judgment against the res will be rendered, and defending the claim on the merits, in which event a personal judgment may be rendered against him in an amount greater than the value of the res he wished to defend.

801.07 Jurisdiction in rem or quasi in rem, grounds for generally. A court of this state having jurisdiction of the

subject matter may exercise jurisdiction in rem or quasi in rem on the grounds stated in this section. A judgment in rem or quasi in rem may affect the interests of a defendant in the status, property or thing acted upon only if a summons has been served upon the defendant pursuant to s. 801.12. Jurisdiction in rem or quasi in rem may be invoked in any of the following cases:

(1) When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein. This subsection shall apply when any such defendant is unknown.

(2) When the action is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real estate within this state.

(3) When the defendant has property within this state which has been attached or has a debtor within the state who has been garnished. Jurisdiction under this subsection may be independent of or supplementary to jurisdiction acquired under subs. (1) and (2).

This section is former section 262.08 renumbered.

801.08 Objection to personal jurisdiction. (1) All issues of fact and law raised by an objection to the court's jurisdiction over the person or res as provided by s. 802.06 (2) shall be heard by the court without a jury in advance of any issue going to the merits of the case. If, after such a hearing on the objection, the court decides that it has jurisdiction, the case may proceed on the merits; if the court decides that it lacks jurisdiction, the defendant shall be given the relief required by such decision. Such decision upon a question of jurisdiction shall be by order which is appealable.

(2) Factual determinations made by the court in determining the question of personal jurisdiction over the defendant shall not be binding on the parties in the trial of the action on the merits.

(3) No guardian or guardian ad litem may, except as provided in this subsection, waive objection to jurisdiction over the person of the ward. If no objection to the jurisdiction of the court over the person of the ward is raised pursuant to s. 802.06 (2), the service of an answer or motion by a guardian or guardian ad litem followed by a hearing or trial shall be equivalent to an appearance and waiver of the defense of lack of jurisdiction over the person of the ward.
Under the former statutes, section 262.16 governed the raising and hearing of objections to the court's jurisdiction over the person. The experience under this section has not been completely felicitous. See, for example, *Pavalon v. Thomas Holmes Corp.*, where the defendant wished both to object to the court's jurisdiction over its person on the basis of nonamenability and to demur to the complaint on the grounds of failure to state a cause of action. Section 262.16, by its terms, required the jurisdictional defense to be raised by answer. If the defendant had answered the complaint, it would not have been entitled to demur later; if it had simply interposed a general demurrer, it would have constituted a waiver of the jurisdictional defense. The supreme court removed the defendant from the horns of this dilemma by ruling, contrary to the language of section 262.16(2), that the defendant could raise his jurisdictional defense by motion served with his demurrer.

Under the new practice, the jurisdictional defense and all other law defenses may be raised by either a motion to dismiss or an answer, at the option of the defendant. Thus, the *Pavalon* dilemma should not arise.

801.09 Summons, contents of. The summons shall contain:

(1) The title of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial, and the names of the parties to the action, plaintiff and defendant.

(2) A direction to the defendant summoning and requiring him to serve upon the plaintiff's attorney, whose address shall be stated in the summons, either an answer to the complaint if a copy of the complaint is served with the summons or a demand for a copy of the complaint. The summons shall further direct the defendant to serve the answer or demand for a copy of the complaint:

(a) Within 20 days, or within 45 days if the defendant is the state or an officer or agency of the state, exclusive of the day of service, after the summons has been served personally upon the defendant or served by substitution personally upon another authorized to accept service of the summons for him; or

(b) Within 40 days after a date stated in the summons,

8. 25 Wis. 2d 540, 131 N.W.2d 331 (1964).
9. See Wis. Stats. § 802.06(2) and (8).
exclusive of such date, if no such personal or substituted personal service has been made, and service is made by publication. The date so stated in the summons shall be the date of the first required publication.

(3) A notice that in case of failure to serve an answer or demand for a copy of the complaint within the time fixed by sub. (2), judgment will be rendered against the defendant according to the demand of the complaint. The summons shall be subscribed with the handwritten signature of the plaintiff or his attorney with the addition of his post-office address, at which papers in the action may be served on him by mail. If the plaintiff is represented by a law firm, the summons shall contain the name and address of the firm and shall be subscribed with the handwritten signature of one attorney who is a member or associate of such firm. When the complaint is not served with the summons and the only relief sought is the recovery of money, whether upon tort or contract, there may, at the option of the plaintiff, be added at the foot a brief note specifying the sum to be demanded by the complaint.

(4) There may be as many authenticated copies of the summons and the complaint issued to the plaintiff or his counsel as are needed for the purpose of effecting service on the defendant. Authentication shall be accomplished by the clerk's placing his filing stamp indicating the case number on each copy of the summons and the complaint.

Subsections (1), (2) and (3) are virtually identical to former section 262.10 except that the new rule requires that the original summons be signed with a handwritten signature rather than be simply "subscribed," and, under subsection (2), the state is given forty-five days to answer rather than the normal twenty.10

Subsection (4) is new. The original summons stays with the file. Authenticated copies are used for service. The copies are not required to contain a handwritten signature; that is to say, "conformed" copies, properly authenticated, are adequate. The preparation of the original summons, as well as the copies, is the responsibility of the person effecting the filing or seeking authentication. The clerk's role is limited to authentication, not preparation.

801.10 Summons, by whom served. (1) Who may

10. See commentary to Wis. Stat. § 802.06(1), infra p. 51.
serve. An authenticated copy of the summons may be served by any adult resident of the state where service is made who is not a party to the action. Service shall be made with reasonable diligence.

(2) ENDORSEMENT. At the time of service, the person who serves a copy of the summons shall sign his name thereto and shall indicate thereon the time, place and manner of service and upon whom service was made. If the server is a sheriff or deputy sheriff, he shall add his official title. Failure to make the endorsement shall not invalidate a service but the server shall not collect his fees for the service.

(3) PROOF OF SERVICE. The person making service shall make and deliver proof of service to the person on whose behalf service was made who shall promptly file such proof of service. Failure to make, deliver, or file proof of service shall not affect the validity of the service.

(4) PROOF IF SERVICE CHALLENGED. If the defendant appears in the action and challenges the service of summons upon him, proof of service shall be as follows:

(a) Personal or substituted personal service shall be proved by the affidavit of the server indicating the time, place and manner of service, that the server is an adult resident of the state of service not a party to the action, that he knew the person served to be the defendant named in the summons and that he delivered to and left with him an authenticated copy of the summons. If the defendant is not personally served, the server shall state in his affidavit when, where and with whom the copy was left, and shall state such facts as show reasonable diligence in attempting to effect personal service on the defendant. If the copy of the summons is served by a sheriff or deputy sheriff of the county in this state where the defendant was found, proof may be by the sheriff's or deputy's certificate of service indicating time, place, manner of service and, if the defendant is not personally served, the information required in the preceding sentence. The affidavit or certificate constituting proof of service under this paragraph may be made on an authenticated copy of the summons or as a separate document.

(b) Service by publication shall be proved by the affidavit of the publisher or printer, or his foremen or principal clerk, stating that the summons was published and specifying the date of each insertion, and by an affidavit of mailing of an authenticated copy of the summons, with the complaint or notice of the object of the action, as the case may require, made by the person who mailed the same.
(c) The written admission of the defendant, whose signature or the subscription of whose name to such admission shall be presumptive evidence of genuineness.

Former section 262.14 purported to express the qualifications of the person effecting service of the summons. While that section did not by its terms require the server to be an adult, former section 262.17 did require an affidavit of adulthood, inter alia, for proof of personal or substituted personal service. Subsection (1) of the new rule makes the qualifications of the server required by the substantive statute conform to the qualifications required for proof of service.

Subsection (2) requires the person who serves the summons to endorse on the copy served not only his name (and title, if any) but also the time, place and manner of service and upon whom service was made. This additional information should be useful to attorneys in deciding whether to raise jurisdictional or statute of limitations defenses. (It should be noted that the official Judicial Council Committee's Note to this rule contains a patent misstatement for which the author of those notes must take the blame. The committee note indicates that the endorsement should recite such facts as show reasonable diligence in attempting to effect personal service on the defendant. As the rule itself clearly shows, the recitals respecting reasonable diligence are required only on the proof of service, not on the endorsement on the copy served.)

Unlike the provisions of former section 262.14, which did not require the filing of proof of service, subsection (3) of the new rule requires the person who causes service to be made to file the proof of service promptly. This filing will cause the court file to reflect the fact that personal jurisdiction over the defendant has been obtained.

Subsection (4) replaced former section 262.17, which required that, if substituted personal service was made by the sheriff or a deputy, his certificate of service needed to indicate only place, time and manner of service. If substituted personal service was made by anyone other than the sheriff or his deputy, the server had to indicate when, where and with whom the summons was left. Subsection (4) requires the sheriff's certificate to provide the same information respecting substituted personal service as the non-sheriff's proof of service contains.

It is important to note the added requirement when substituted personal service is made that the proof recite such facts as show
reasonable diligence in attempting personal service. In the absence of reasonable diligence to effect personal service, substituted personal service is constitutionally defective.\footnote{11. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).}

801.11 Personal jurisdiction, manner of serving summons for. A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in s. 801.05 may exercise personal jurisdiction over a defendant by service of a summons as follows:

(1) **Natural person.** Except as provided in sub. (2) upon a natural person:

(a) By personally serving the summons upon the defendant either within or without this state.

(b) If with reasonable diligence the defendant cannot be served under par. (a), then by leaving a copy of the summons at the defendant's usual place of abode within this state in the presence of some competent member of the family at least 14 years of age, who shall be informed of the contents thereof.

(c) If with reasonable diligence the defendant cannot be served under par. (a) or (b), service may be made by publication of the summons as a class 3 notice, under ch. 985, and by mailing. If the defendant's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the defendant, at or immediately prior to the first publication, a copy of the summons and a copy of the complaint. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence.

(d) In any case, by serving the summons in a manner specified by any other statute upon the defendant or upon an agent authorized by appointment or by law to accept service of the summons for the defendant.

(2) **Natural person under disability.** Upon a natural person under disability by serving the summons in any manner prescribed in sub. (1) upon such person under disability and, in addition, where required by par. (a) or (b), upon a person therein designated. A minor 14 years of age or older who is not mentally incompetent and not otherwise under guardianship is not a person under disability for purposes of this subsection. (a) Where the person under disability is a minor under the age of 14 years, summons shall be served separately in any manner prescribed in sub. (1) upon a parent or guardian having custody of the child, or if there is none, upon any other person having the care and control of the
child. If there is no parent, guardian or other person having care and control of the child when service is made upon the child, then service of the summons shall also be made upon the guardian ad litem after he has been appointed pursuant to s. 803.01.

(b) Where the person under disability is known by the plaintiff to be under guardianship of any kind, a summons shall be served separately upon his guardian in any manner prescribed in sub. (1), (5), (6) or (7). If no guardian has been appointed when service is made upon a person known to the plaintiff to be incompetent to have charge of his affairs, then service of the summons shall be made upon the guardian ad litem after he has been appointed pursuant to s. 803.01.

(3) STATE. Upon the state, by delivering a copy of the summons and of the complaint to the attorney general or leaving them at his office in the capitol with his assistant or clerk.

(4) OTHER POLITICAL CORPORATIONS OF BODIES POLITICO. (a) Upon a political corporation or other body politic, by personally serving any of the specified officers, directors, or agents:

1. If the action is against a county, the chairman of the county board or the county clerk;
2. If against a town, the chairman or clerk thereof;
3. If against a city, the mayor, city manager or clerk thereof;
4. If against a village, the president or clerk thereof;
5. If against a vocational, technical and adult education district, the district board chairman or secretary thereof;
6. If against a school district, school board, the president, secretary or clerk thereof; and
7. If against any other body politic, an officer, director, or managing agent thereof.

(b) In lieu of delivering the copy of the summons to the person specified, the copy may be left in the office of such officer, director or managing agent with the person who is apparently in charge of the office.

(5) DOMESTIC OR FOREIGN CORPORATIONS, GENERALLY.

Upon a domestic or foreign corporation:

(a) By personally serving the summons upon an officer, director or managing agent of the corporation either within or without this state. In lieu of delivering the copy of the summons to the officer specified, the copy may be left in the office of such officer, director or managing agent with the person who is apparently in charge of the office.

(b) If with reasonable diligence the defendant cannot be served under par. (a), then the summons may be served upon
an officer, director or managing agent of the corporation by publication and mailing as provided in sub. (1).

(c) By serving the summons in a manner specified by any other statute upon the defendant or upon an agent authorized by appointment or by law to accept service of the summons for the defendant.

(d) If against any domestic or foreign insurance corporation, to any agent of such corporation as defined by the insurance laws of this state. Service upon such agent of a domestic or foreign insurance corporation is not valid unless a copy of the summons and proof of service is sent by registered mail to the principal place of business of such corporation within five days after service upon the agent. Service upon any domestic or foreign insurance corporation may also be made under par. (a).

(6) **PARTNERS AND PARTNERSHIPS.** A summons shall be served individually upon each general partner known to the plaintiff by service in any manner prescribed in sub. (1), (2) or (5) where the claim sued upon arises out of or relates to partnership activities within this state sufficient to subject a defendant to personal jurisdiction under s. 801.05 (2) to (10). A judgment rendered under such circumstances is a binding adjudication individually against each partner so served and is a binding adjudication against the partnership as to its assets anywhere.

(7) **OTHER UNINCORPORATED ASSOCIATIONS AND THEIR OFFICERS.** A summons may be served individually upon any officer or director known to the plaintiff of an unincorporated association other than a partnership by service in the manner prescribed in sub. (1), (2), (5) or (6) where the claim sued upon arises out of or relates to association activities within this state sufficient to subject a defendant to personal jurisdiction under s. 801.05 (2) to (10). A judgment rendered under such circumstances is a binding adjudication against the association as to its assets anywhere.

This section is identical to former section 262.06 except that section 262.06(2)(c) relating to commencement of actions against minors was stricken as inconsistent with the mode of commencement under the new section 801.02(1), and the terms "board of education" and "director" in section 262.06(4)(a)6 were stricken to conform with recent changes in school law found in Wisconsin statutes Chapters 117 through 121.

801.12 Jurisdiction in rem or quasi in rem, manner of serving summons for; notice of object of action. (1) A court
of this state exercising jurisdiction in rem or quasi in rem pursuant to s. 801.07 may affect the interests of a defendant in such action only if a summons and either a copy of the complaint or a notice of the object of the action under sub. (2) have been served upon the defendant as follows:

(a) If the defendant is known, he may be served in the manner prescribed for service of a summons in s. 801.11, but service in such a case shall not bind the defendant personally to the jurisdiction of the court unless some ground for the exercise of personal jurisdiction exists.

(b) If the defendant is unknown the summons may be served by publication thereof as a class 3 notice, under ch. 985.

(2) The notice of object of action shall be subscribed by the plaintiff or his attorney and shall state the general object of the action, a brief description of all the property affected by it, if it affects specific real or personal property, the fact that no personal claim is made against such defendant, and that a copy of the complaint will be delivered personally or by mail to such defendant upon his request made within the time fixed in s. 801.09(2). If a defendant upon whom such notice is served unreasonably defends the action he shall pay costs to the plaintiff.

This section is virtually identical to former section 262.09 except that the word “verified” has been removed from the phrase “verified complaint.” The new section abolishes verification of pleadings. Subsection (2) is taken from former section 262.12(2).

801.13 Summons; when deemed served. A summons is deemed served as follows:

(1) A summons served personally upon the defendant or by substituted personal service upon another authorized to accept service of the summons for the defendant is deemed served on the day of service.

(2) A summons served by publication is deemed served on the first day of required publication.

This section is former section 262.15 renumbered.

801.14 Service and filing of pleadings and other papers. (1) Every order required by its terms to be served, every pleading unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be
heard ex parte, and every written notice, appearance, demand, offer of judgment, undertaking, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in s. 801.11.

(2) Whenever under these statutes, service of pleadings and other papers is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address, or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this section means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing. The first sentence of this subsection shall not apply to service of a summons or of any process of court or of any paper to bring a party into contempt of court.

(3) In any action in which there are unusually large numbers of defendants, the court, upon motion or on its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(4) All papers after the summons required to be served upon a party shall be filed with the court within a reasonable time after service. The filing of any paper required to be served constitutes a certification by the party or attorney effecting the filing that a copy of such paper has been timely served on all parties required to be served, except as the person effecting the filing may otherwise stipulate in writing.

(5) The filing of pleadings and other papers with the court as required by these statutes shall be made by filing them with the clerk of the court, except that the judge may
permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

This section is substantially the same as Federal Rule 5. It requires that a copy of all pleadings, written motions, and other important papers be served upon other parties, unless the court orders otherwise under subsection (3) because the parties are too numerous.

The service requirement is somewhat broader under this section than under the Wisconsin statutes which it has replaced. Section 262.12 provided for the service of the complaint either with the summons or upon demand by the defendant. Section 269.32(2) required that copies of all records and papers upon which a motion or order to show cause is grounded except such as had previously been filed or served in the same action or proceeding, be served with the notice of motion or order to show cause. Section 263.10 required that amended complaints be served. Section 263.15(1) required that a defendant or a person interpleaded or intervening who sought affirmative relief by way of cross-complaint or counterclaim, serve an appropriate pleading upon the party against whom the relief is asked or "upon such person, not a party, upon his being brought in." Subsection (2) of section 263.15 provided that the court may make such orders for the service of the pleadings as are just. Section 260.185 provided for the service of the complaint or notice of object of action upon new defendants and existing parties whenever new defendants were added by the plaintiff. Section 260.19(1) provided for service of the third-party summons, third-party complaint and a copy of all prior pleadings when new parties were added by the defendant. Section 260.205 provided that if the court granted a motion to intervene, it was required to indicate in its order the existing parties on whom the pleading should be served, and the time within which it should be served. Section 269.02 provided that an offer of judgment was to be served upon the plaintiff and the notice of acceptance thereof should be served upon the offeror (but not on other parties).

Subsection (1) is comprehensive: all important papers are to be served on all parties (except those in default for failure to appear) unless the court orders otherwise. Not just motions and pleadings are included, but also "every written notice, appearance, demand, offer of judgment, designation of record
on appeal and similar paper.” The rule is designed to provide fair notice to all parties and to relieve attorneys of the time-wasting necessity of checking the file in the clerk’s office to determine whether an important paper has been filed.

Because rigid rules tend to promote unnecessary technicality, the court is given discretionary power to modify the requirements of subsection (1) if justice or good sense requires it. This power is restricted, however, to limiting the parties or papers that must be served. The court does not have the power to alter the methods of service under subsection (2) or the methods of filing under subsections (4) and (5).

Although the papers required to be served are enumerated in the subsection, inclusion of the words “similar paper” is intended to make it clear that this enumeration is not exhaustive.

Subsection (2) is virtually identical to Federal Rule 5(b) and replaced section 269.34. Section 269.34(1) gave to the person required to serve a paper the option of serving the party himself or his attorney. Subsection (2) makes service on the attorney mandatory unless the court orders service on the party himself. The mandatory nature of the federal rule is considered superior because: (1) it comports with the actual practice by attorneys; and, (2) it provides for greater efficiency inasmuch as a party served with a paper or pleading would deliver it to his attorney anyway.

The provisions of former section 269.34(2) dealing with service on an attorney and former section 269.34(3) dealing with service on a party were somewhat more specific than the provisions of the new section 801.14(2). For example, section 269.34(3) provided that service on a party could be made by leaving a copy of the paper at the party’s residence between the hours of six in the morning and nine in the evening with some person of suitable age and discretion. Subsection (2) does not limit the hours within which service may be made but only requires that the paper be left at the party’s dwelling or usual abode with some person of suitable age and discretion then residing therein. Aside from the deletion of the hour limitation in section 269.34(3), however, the provisions of that former statute and subsection (2) are substantially identical.

Subsection (3) is based on Federal Rule 5(c) and gives the court considerable discretion in cases involving numerous defendants. Subsection (3) is the only instance in which the pro-
visions of section 802.01(1) respecting required pleadings are permitted to be relaxed. The relaxation goes only to the extent of permitting the court to make an order dispensing with the necessities of replies to counterclaims and answers to cross claims in an action in which there are unusually large numbers of defendants.

Subsection (4) is based on Federal Rule 5(d) and should be read in conjunction with section 801.02(1) requiring that the summons be filed before it or the complaint is served. Under this section, it is service that must be made within the times prescribed in the various rules; filing is permitted to be made within a reasonable time thereafter. It should be remembered, however, that when the court orders that pleadings among defendants need not be served under subsection (3), such pleadings must be filed within the prescribed period of time. Under subsection (3), it is the act of filing rather than service which is considered notice to the parties.

The second sentence of subsection (4) is designed to reduce the unnecessary paperwork generated by a lawsuit. Proof of service of papers (other than the summons) unnecessarily clutters the court files and can be avoided simply by requiring the attorney who files any paper to certify (by virtue of this sentence) that all parties required to be served have been served.

Subsection (5) is identical to Federal Rule 5(e) and defines the act of filing pleadings and other papers. This subsection provides two alternative methods of filing. Delivery to the clerk has long been used and needs little explanation. Filing with the judge would be expedient when it is necessary for the party to obtain immediate court action which would be delayed by first filing papers with the clerk, for example, when a party needs a restraining order.

801.15 Time. (1) Notwithstanding ss. 985.09 and 990.001 (4), in computing any period of time prescribed or allowed by sections within this title, by any other statute governing actions and special proceedings, or by order of court, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this section “legal holiday” means any statewide legal holiday provided in s. 256.17.
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(2) (a) When an act is required to be done at or within a specified time, the court may order the period enlarged but only on motion for cause shown and upon just terms. If the motion is made after the expiration of the specified time, it shall not be granted unless the court finds that the failure to act was the result of excusable neglect. The order of enlargement shall recite by its terms or by reference to an affidavit in the record the grounds for granting the motion.

(b) The time within which a motion challenging the sufficiency of the evidence or for new trial must be decided shall not be enlarged except for good cause. The order of extension must be made prior to the expiration of the initial decision period.

(c) The time for appeal under s. 817.01, for motions after verdict under s. 805.16, and for motions for relief from judgment or order under s. 806.07 may not be extended, except as provided in par. (b).

(3) The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(4) A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by statute or by order of the court. Such an order may for cause shown be made on ex parte motion. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time. All written motions shall be heard on notice unless a statute or rule permits the motion to be heard ex parte.

(5) Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

Subsection (1) is based on Federal Rule 6(a) and comports more realistically with the working hours of attorneys and judges than does section 990.001(4) of the former statutes. Both the former statute and the new rule provide that in computing time periods within which some actions must be taken, the first
day of the period is excluded and the last day is included. However, subsection (1) is more flexible than section 990.001(4) insofar as it excludes from the computation, Saturdays, Sundays and legal holidays which happen to coincide with the last day of the period computed. Section 990.001(4) excludes Saturdays only if the place at which the action was to occur is a governmental office which, under “the duly established official office hours,” is closed on Saturdays. There appears to be no good reason for distinguishing between lawyers’ offices which are closed on Saturdays and clerks’ offices which are closed on Saturdays. Also, the method of computation found in subsection 990.001(4) contains no provision for excluding Saturdays, Sundays and legal holidays when they fall within a prescribed time period that may already be quite limited. Subsection (1) provides for exclusion when the prescribed period is less than seven days.

Paragraph (2)(a) replaces section 269.45 which required the motion for enlargement of time to be accompanied by an affidavit showing cause, even when the motion was interposed prior to the expiration of the time period sought to be enlarged. The new rule does not require an affidavit in such circumstances since the affidavit would only say in writing what the attorney would ordinarily say to the court. To require a sworn, written statement in such circumstances seems to be needless formalism leading to unnecessary paperwork. It should also be noted that the proposed rule does not permit ex parte enlargements under any circumstances. In this respect it differs from former section 269.45.

No motion for enlargement which is interposed after the expiration of the specified time may be granted under the new rule unless the court finds that the failure to act was the result of excusable neglect. The term “excusable neglect” is an imprecise one which has led to rather variant holdings in the federal courts and in the state courts. It seems clear that neither inadvertence nor oversight is a sufficient grounds for enlargement of time,12 but the distinction between “inadvertence” and “excusable neglect” can be a tenuous one.13

In *Giese v. Giese*, the Wisconsin Supreme Court said "'excusable neglect' is not synonymous with neglect, carelessness or inattentiveness, but rather is that neglect which might have been the acts of a reasonably prudent person under the same circumstances."\(^{16}\)

Attorneys should note that the Wisconsin Supreme Court has held in *Millis v. Raye*,\(^{15}\) that an enlargement of time will be allowed after the time has run only when the initial failure to do the act was the result of excusable neglect and there has been no inexcusable delay in moving for enlargement. Thus, the excusable neglect provision, by interpretation, has been made to apply to the time within which the motion for enlargement of time is made.\(^{17}\)

Paragraph (2)(b) as it now reads is quite different from the committee's original version. In January of 1974, a tentative draft of the proposed rules was published in a special edition of the *Wisconsin Law Review*.\(^{18}\) The tentative draft of paragraph (2)(b) provided that the time within which motions challenging the sufficiency of evidence or for new trial had to be decided could not be enlarged except for disability of the judge before whom the motion was pending, in which event the period might be extended for one additional thirty day period. The philosophy underlying the tentative draft was that it does little good to get cases tried reasonably soon after commencement of action if one must wait an inordinate length of time after trial for decisions on motions after verdict. The tentative draft received rather substantial opposition from both the bench and the bar. Although some judges and lawyers were of the fixed opinion that post-verdict motions would be better decided if they were "called from the bench" when the evidence is freshest in the judge's mind, more were of the opinion that the ninety days provided by section 805.16 for decisions on motions after verdict might be insufficient in many cases. The strict provisions of the tentative draft were abandoned and the final draft permits enlargement of time for decisions on motion after verdict "for good cause."

Paragraph (2)(c) permits extension of the time for appeal,

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14. 43 Wis. 2d 456, 168 N.W.2d 832 (1969).
15. Accord, Stryker v. Town of La Pointe, 52 Wis. 2d 228, 190 N.W.2d 178 (1971).
16. 16 Wis. 2d 79, 113 N.W.2d 820 (1962).
17. See also Briggson v. City of Viroqua, 264 Wis. 40, 58 N.W.2d 543 (1953).
18. 1973 Wis. L. Rev. 3.
for motions after verdict, and for motions for relief from judgment or order, but only for good cause. In the first published tentative draft of this paragraph, in January, 1974, no extensions were permitted, regardless of cause. In the second draft, the first tentative draft was modified in a way which the writer can neither explain nor understand. The second draft provided that extensions could not be had "except as provided in par. (b)." Paragraph (b) at that time still provided that the time within which motions after verdict must be decided could not be extended except for disability of the judge before whom the motion was pending. The meaning of paragraph (c) thus appeared to be that the time for appeal and for making certain post-verdict and post-judgment motions could be extended if the trial judge was disabled. Such a rule, of course, makes little if any sense and the writer has not been able to ascertain from the records of the Judicial Council Committee the source of that cryptic clause "except as provided in par. (b)."

Furthermore, in the third and final draft of section 801.15 appearing in the Wisconsin Reports,\textsuperscript{19} paragraph (b) had been amended to provide that the time for decision of post-verdict motions could be extended "for cause shown," but the mysterious clause tagged onto the tail of paragraph (c) remains. As a result, under the rule as it presently appears, upon a proper showing of good cause, one is presumably entitled to an extension of the time for appeal, for motions after verdict under section 805.16, and for motions for relief from judgment on order under section 806.07. The effect of such a rule will be to impair substantially the finality of judgments. It is suggested that the mysterious clause of unknown origin which has created this problem should be stricken by amendment as soon as practicable. Unless and until such amendment occurs, however, one might reasonably expect that one moving for an extension of time under this paragraph will bear a heavy burden in attempting to show "good cause."

Subsection (3) is taken directly from Federal Rule 6(c). It should be noted that the Judicial Council has recommended to the supreme court that terms of court be abolished. If the recommendation is accepted by the supreme court, this subsection will be stricken.

Subsection (4) is based on Federal Rule 6(d). Formerly

\textsuperscript{19} 67 Wis. 2d at 610-11.
under section 269.31, a notice of motion, when required, had to be served eight days before the time appointed for the hearing, unless, of course, a shorter time was prescribed by order to show cause. Subsection (4) reduces the time period to five days. This subsection, however, must be read in conjunction with subsection (1) which provides that when a time period prescribed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded from the time computation. Also, under subsection (1), the first day from which the designated period begins to run is excluded. Thus, if a notice of motion is served on a Monday, the five-day period will not elapse until the following Monday, Saturday and Sunday having been excluded from the computation. The five-day notice of motion is thus effectively a seven-day notice, one day less than under section 269.31.

Subsection (4) also provides that a different period may be fixed by order of court for cause shown on ex parte application. Thus the flexibility of the order to show cause is retained.

Subsection (5) is based on Federal Rule 6(e). It changes the law by reducing the additional time added after service by mail from five days to three days. The Field Code allowed an increase of one day for every fifty miles in cases of service by mail. When the Wisconsin legislature adopted the Code in 1856, it declined to adopt the one day per fifty mile formula but instead provided that mail service simply doubled the time required when personal service was used. In 1956, by supreme court rule, section 269.36 was amended by deleting the time-doubling language and substituting therefor a provision that mail service increased by five days the time required or allowed to do an act. The three day period provided by the new rule seemed to the Judicial Council Committee to be an adequate allowance of additional time after mail service.

Chapter 802
PLEADINGS, MOTIONS AND PRETRIAL PRACTICE

802.01 Pleadings allowed; form of motions. (1)
PLEADINGS. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross

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20. Wis. Laws, 1856, ch. 120, § 315.
claim, if the answer contains a cross claim; a third-party complaint, if a person who was not an original party is summoned under s. 803.05, and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a further pleading to a reply or to any answer and a party who contests a claim for contribution shall answer or reply to the pleading in which the claim is asserted.

(2) MOTIONS. (a) How made. An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. Unless specifically authorized by statute, orders to show cause shall not be used.

(b) Supporting papers. Copies of all records and papers upon which a motion is founded, except those which have been previously filed or served in the same action or proceeding, shall be served with the notice of motion and shall be plainly referred to therein. Papers already filed or served shall be referred to as papers theretofore filed or served in the action. The moving party may be allowed to present upon the hearing, records, affidavits or other papers, but only upon condition that opposing counsel be given reasonable time in which to meet such additional proofs should request therefor be made.

(c) Recitals in orders. All orders, unless they otherwise provide, shall be deemed to be based on the records and papers used on the motion and the proceedings theretofore had and shall recite the nature of the motion, the appearances, the dates on which the motion was heard and decided, and the order signed. No other formal recitals are necessary.

(d) Formal requirements. The rules applicable to captions, signing and other matters of form of pleadings apply to all motions and other papers in an action, except that affidavits in support of a motion need not be separately captioned if served and filed with the motion.

(e) When deemed made. In computing any period of time prescribed or allowed by the statutes governing procedure in civil actions and special proceedings, a motion which requires notice under s. 801.15 (4) shall be deemed made when it is served with its notice of motion.

(3) DEMURRERS AND PLEAS ABOLISHED. Demurrers and pleas shall not be used.
Subsection (1) is similar to Federal Rule 7(a) and enumerates the only pleadings permitted under the new rules. The most significant feature of this subsection is that it excludes the demurrer. The demurrer is not mentioned as a permissible pleading in subsection (1) and is expressly abolished by subsection (3). Its procedural function is picked up by the motion to dismiss under section 802.06(2). The other change is found in the last sentence which changed the rule under former sections 263.20(1) and 263.15(3) that a party need not respond to a pleading seeking only contribution of him.

Subsection (1) must be read together with sections 802.02, 802.03 and 802.06 to understand the modified function of pleadings under these rules. The former Wisconsin pleading statutes were based on the Field Code under which the pleadings carried virtually the entire burden of issue-formulation. The parties were expected to define the issues by countering written pleadings with answers, replies, demurrers and motions. The new rules, like the Federal Rules on which they are based, emphasize the notice function of pleading and relieve pleading of some, though certainly not all, of its issue-formulating function.

Under these rules, the pleadings may simply identify the general nature of the dispute. Discovery will then identify the full factual background of the dispute and the version of the facts relied upon by each party. Finally, the pretrial conference will frame the issues. The trial should then center on the true controversy between the parties instead of an artificial one produced by pleadings drafted before discovery was completed, or indeed even started.

Since development and formulation of the issues occurs during discovery and pretrial, the complaint and answer serve only to give the opposing party general notice of the claim or defense. A reply (other than to a counterclaim denominated as such) should not often be needed, but in exceptional circumstances the rule provides for one.

Only those pleadings permitted by subsection (1) are authorized. Unauthorized pleadings may be treated as superfluous, or may be dismissed upon motion. Even when so treated, unauthorized pleadings may be harmful to a client’s

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cause since they may constitute admissions against interest.\textsuperscript{23}

Federal Rule 7(a), on which subsection (1) is based, is ambiguous on the question of whether an answer is "required" within the meaning of Federal Rule 8(d), the federal counterpart of section 802.02(4), to an intervention complaint in an interpleader action. The question arose in \textit{Youngstown Sheet \& Tube Company v. Lucey Prodcuts Co.},\textsuperscript{24} and the court simply declined to answer the question. Even though there was no response to the intervention complaint, the court concluded that, since all parties had acted in good faith, it would be too harsh to treat the allegations in the intervention complaint as admitted pursuant to Federal Rule 8(d).

Subsection (1) could, by an overly technical and restrictive construction, be interpreted as forbidding a reply to a counterclaim in a cross claim answer or third-party answer. It is not the committee's intent that the rule be so interpreted. A cross claim or third-party complaint should be treated as a "new" complaint which would permit both an answer and a reply to a counterclaim denominated as such.

Subsection (2) is based on Federal Rule 7(b). It expressly requires that any motion "shall state with particularity the grounds therefor." The amount of particularity required will vary, of course, depending on the kind of motion made. For example, in federal practice, motions to dismiss for failure to state a claim upon which relief can be granted rarely detail the grounds on which the movant relies. Nonetheless, such motions have been upheld as not impermissibly non-particularized.\textsuperscript{25} It is not intended that a different result should obtain in Wisconsin under the new rule. On the other hand, a motion for a new trial merely asserting that the "verdict is not sustained by the evidence" or the "verdict is contrary to law" has been held insufficient to meet the particularity requirements of Rule 7(b)(1).\textsuperscript{26} The same result would obtain under this rule. In general, the question should be whether the motion contains enough information for the court to deal fairly and adequately with it. Attorneys would be well advised to make reasonable

\textsuperscript{23} Middle West Const. Inc. v. Metropolitan District, 2 F.R.D. 117 (D. Conn. 1941).
\textsuperscript{24} 403 F.2d 135 (5th Cir. 1968).
\textsuperscript{26} Chicago & N.W. Ry. Co. v. Britten, 301 F.2d 400 (8th Cir. 1962).
efforts to achieve particularity, at least where motions other than a motion to dismiss for failure to state a claim upon which relief can be granted are involved.

Orders to show cause are not provided for in either the Federal Rules or in these rules. Such orders are too often used simply as substitutes for motions when for any reason, valid or not, a party wishes to avoid the time limitation on a notice of motion. Under these rules, a party with a legitimate reason for bringing a motion on for hearing sooner than five days after notice may move the court under section 801.16(4) for cause and ex parte, for an order shortening the notice time allowed on a motion. It is hoped that this change will curtail the widespread disregard of notice of motion rules while retaining the functional equivalent of the order to show cause.

The penultimate sentence of paragraph (2)(a) is designed to do away with the unnecessary practice of putting the notice of motion and the motion itself on separate papers. It is sufficient if the motion is stated in the written notice of motion.

Paragraph (2)(b) is derived from former subsection 269.32(2).

Paragraph (2)(c) is new. It is designed to reduce formalistic recitals in orders. It also requires that written orders recite not only the date on which the order was signed, but also the dates on which the motion was argued and decided. Not infrequently, of course, the motion will be decided from the bench, with the written order not signed until sometime thereafter.\(^{27}\)

Paragraph (2)(d) requires that motions and other papers be captioned and signed as are pleadings, with an exception for affidavits in support of motions which are served and filed with the motion.

The former statutes do not define the time at which a motion is considered "made." The question can, of course, be of critical significance. For example, section 806.07 permits a party to "make" a motion for relief from a judgment, order or stipulation on certain specific grounds only within one year after the judgment was entered or the order or stipulation was made. Is a motion "made" when served or when filed or when heard? Under paragraph (2)(e) of this section, the answer is clear.

Subsection (3) is derived from Federal Rule 7(c) which

\(^{27}\) See Wis. Stat. § 807.11.
reads: "(c) Demurrers, Pleas, Etc. Abolished. Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used." Since the "exception for insufficiency of a pleading" is not presently an accepted pleading in Wisconsin, its inclusion in subsection (3) would have added nothing useful but could have served to obfuscate the simple "message" of this part of section 802.01. Accordingly, this part of the rule is identical to the Federal Rule except for the reference to "exceptions for insufficiency of a pleading."

The function presently served by the demurrer will be served by the motion to dismiss under section 802.06(2) and the motion to strike an insufficient defense under section 802.06(6). A motion to dismiss for failure to state a claim upon which relief may be granted may receive broader treatment than a demurrer, however, in that if affidavits are presented to the court, the motion may be treated as one for summary judgment under section 802.08.

802.02 General rules of pleading. (1) Claims for relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third-party claim, shall contain (a) a short and plain statement of the claim, identifying the transaction, occurrence or event out of which the claim arises and showing that the pleader is entitled to relief and (b) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(2) Defenses; form of denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. The pleader shall make his denials as specific denials of designated averments or paragraphs, but if a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder.

(3) Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively any matter constituting an avoidance or affirmative defense including but not limited to the following: accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of a condi-
tion subsequent, failure or want of consideration, failure to mitigate damages, fraud, illegality, immunity, incompetence, injury by fellow servants, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, superseding cause, and waiver. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall permit amendment of the pleading to conform to a proper designation. If an affirmative defense permitted to be raised by motion under s. 802.06 (2) is so raised, it need not be set forth in a subsequent pleading.

(4) **Effect of Failure to Deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the fact, nature and extent of injury and damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(5) **Pleadings to be Concise and Direct; Consistency.** (a) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(b) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one claim or defense or in separate claims or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in s. 802.05.

(6) **Construction of Pleadings.** All pleadings shall be so construed as to do substantial justice.

Sections 802.02, 802.10 and 804.01 are the keystones of the new procedural system. They create an issue-formulation procedure based on non-particularized pleading, liberal discovery and strong pretrial conferences and orders.

Subsection (1) is based on Federal Rule 8(a). Unlike the Federal Rule, however, this rule does not require a jurisdictional statement in the original pleading since Wisconsin state courts do not have the jurisdictional problems of minimum dollar amount or diversity of citizenship.

It is this subsection that discards the concept of "ultimate
fact" pleading. Pleadings have served at least four major functions: (1) giving notice of the nature of the claim or defense; (2) stating the facts each party believes to be true; (3) defining the issues that must be litigated; and (4) providing a means for speedy disposition of sham claims and insubstantial defenses. Under the Federal Rules and these new rules, it is the notice-giving function which is preeminent, the other functions being shifted to discovery, pretrial conferences and summary judgment.

This subsection will have a significant impact on Wisconsin practice. Under former section 263.03(2), a complaint had to contain a "plain and concise statement of the ultimate facts constituting each cause of action, without unnecessary repetition." The pleader was required to steer a narrow, often indefinable course between "conclusions of law" and "mere evidence" in order to escape a demurrer, a motion to strike or a motion to make more definite and certain, the form of the language being all important.28

The new rule requires only "a short and plain statement of the claim identifying the transaction, occurrence or event out of which the claim arises and showing that the pleader is entitled to relief." Thus, it is immaterial whether a pleading states "facts" or "conclusions" so long as fair notice is given, and the statement of the claim is short and plain.29 The complaint must still show a justifiable claim for relief, but it is not subject to dismissal unless it appears clearly that no relief could be granted under any set of facts which could be proved in support of its allegations.30

It should be emphasized that the rejection of ultimate fact pleading was not intended as an invitation to sloppy pleading. Although the new rule is intended to eliminate many technical requirements of pleading, it should be clear that it envisions a statement of circumstances, occurrences and events in support

28. See Pengra Bros. v. Peter Nelson & Sons, 256 Wis. 454, 41 N.W.2d 631 (1950) (allegation that a contract was entered into is a legal conclusion); Thauer v. Gaebler, 202 Wis. 296, 232 N.W. 561 (1930) (allegations that director's salary increases were "excessive and unreasonable," or "unlawful" were mixed conclusions of fact and law, and properly pleaded); Strohmaier v. Wisconsin Gas & Electric Co., 214 Wis. 564, 253 N.W. 798 (1934) (in action for damages from explosion resulting from contractor's severance of gas pipe in laying water main, allegations of prior breakage of other pipes were merely evidentiary).
of the claim presented. This is indicated not only by the requirement that the pleading identify the transaction, occurrence or event out of which the claim arises but also by section 802.06(5) which by implication forbids pleadings which are so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading. Thus a complaint which reads "Plaintiff says defendant owes him $1,000. Wherefore plaintiff demands judgment against defendant in the sum of $1,000 and costs" would be subject to a motion to dismiss for failure to state a claim on which relief can be granted.\(^{31}\)

**Particular Matters.** In pleading the existence of an express written contract, the plaintiff, at his election, may set it forth verbatim in the complaint, attach a copy as an exhibit, or plead it according to its legal effect.\(^{32}\) In an action based on a contract implied in law or fact, the allegations must show the facts and circumstances giving rise to the implied or quasi-contract.\(^{33}\)

In negligence actions, duty, breach, cause and damage should be alleged, as under present pleading, but the form of the statement may be quite simple. For example, Form 9 in the Appendix of Official Forms to the Federal Rules reads (absent its jurisdictional allegation):

2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against defendant in the sum of—dollars and costs.

Such a form, although quite brief, contains all the essential elements of a claim grounded in negligence. Indeed, a Form 9 complaint is sufficient as against a demurrer even under the

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31. See Wis. Stat. § 802.06(2).
33. Re v. Fullop, 22 F.R.D. 52 (E.D. Ill. 1958); Strauss v. Spiegal, Inc., 153 F.2d 268 (7th Cir. 1946); See the Appendix of Official Forms to the Federal Rules for illustrations of complaints on a promissory note, on an account, for goods sold and delivered, and for specific performance of a contract to convey land.
former pleading rules. However, under those pleading rules, a Form 9 complaint was subject to a motion to make more definite and certain. Under the new rule, a motion to make more definite will not lie; the defendant will have to obtain his information through discovery.

If a plaintiff’s claim is based upon ownership of property, it should be sufficient simply to allege the plaintiff’s ownership in the complaint without showing how title was acquired.

Subsection (2) is the basic provision governing defensive pleading, superseding section 263.13. There is a split of authorities in the federal courts on the question of whether denials containing conclusions of law are improper. It would seem that the best test for determining the adequacy of such a denial would be whether, in the words of subsection (2), it “fairly meet(s) the substance of the averments denied.”

It is the opinion of the Judicial Council Committee that the requirements that “all denials shall fairly meet the substance of the averments denied” renders improper the pleading of negative pregnant. However, eminent commentators on the Federal Rules have urged that negative pregnant should not be treated as defects in pleading, but rather as effective denials. Also, there appears to be only one reported decision since the promulgation of the Federal Rules that has adhered to the negative pregnant concept. Nevertheless, almost as a matter of definition, a negative pregnant does not “fairly meet the substance of the averments denied,” and hence should be subject to a motion to strike, with leave to replead.

Subsection (3) is based on Federal Rule 8(c) and supersedes section 263.03(2). It requires that a responsive pleading must set forth certain enumerated affirmative defenses and “any

34. See Weber v. Naas, 212 Wis. 537, 250 N.W. 436 (1933).
35. Rambo v. U.S., 2 F.R.D. 200 (N.D. Ga. 1942); Bobbricker v. Denebeim, 25 F. Supp. 208 (D. Mo. 1938). See also Wis. Stat. §§ 802.03(1) (capacity); Wis. Stat. § 802.03(2) (fraud, mistake, condition of mind); Wis. Stat. § 802.03(3) (conditions precedent) Wis. Stat. § 802.03(4) (official documents or acts) Wis. Stat. § 802.03(5) (judgments) Wis. Stat. § 802.03(6) (libel or slander) Wis. Stat. § 802.03(7) (sale and delivery of goods or performing of labor or services); and Wis. Stat. § 802.03(8) (time and place).
39. See Wauwatosa v. Milwaukee, 266 Wis. 59, 62 N.W. 2d 718 (1954); Prestin v. Baumgartner, 47 Wis. 2d 574, 177 N.W.2d 825 (1970).
other matter constituting an avoidance or affirmative defense.” The rule uses the term “affirmative defense” instead of “new matter” but the change is one of terminology rather than substance.

There are nineteen enumerated defenses in Federal Rule 8(c) which must be specially pleaded: accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver.

To the above-enumerated defenses, section 802.02(3) has added: failure of a condition subsequent (e.g., failure to provide proof of loss on an insurance claim), failure to mitigate damages, want of consideration, immunity, incompetence, and superseding cause.

The list of affirmative defenses is not exhaustive. Other defenses that have been required to be specially pleaded in federal courts include: apparent authority, good faith purchase, breach of warranty, election of remedies, prescription, and many others.

44. Personal Indus. Loan Corp. v. Forgay, 240 F.2d 18 (10th Cir. 1957).
52. There are no reported cases involving license under the federal rules.
56. Wineberg v. Park, 321 F.2d 214 (9th Cir. 1963).
64. For a discussion of affirmative defenses, see Note, 26 Marq. L. Rev. 198 (1942); Conway, Survey of Wisconsin Pleading, 1947-1954, 1955 Wis. L. Rev. 348, 349-50;
Subsection (4) on the effect of failure to deny, changes the former rule providing that it is not necessary to deny the fact, nature and extent of injury and damage in order to raise issues with respect thereto.\(^6\) Otherwise, subsection (4) preserves the rule on effect of failure to deny.\(^8\)

Subsection (5) is taken from Federal Rule 8(e). Paragraph (a) contains no substantial change from prior Wisconsin practice. Paragraph (b) permits the pleading of hypothetical and inconsistent defenses. Hypothetical pleading is permitted in Wisconsin by case law, but the statutes made no reference to the matter.\(^6\) Also, under the prior law, inconsistent defenses were permitted to be pleaded unless the defenses were so repugnant that proving one necessarily disproved the other.\(^8\) This rule contains no express provision forbidding repugnant defenses, but the rule is expressly made subject to section 802.05's certification of good faith. Thus, there may well be cases, under the new rule, where inconsistent allegations will be subject to a motion to strike. For example, in a battery action, defensive allegations that "(1) defendant did not strike the plaintiff, and (2) that even though defendant did hit the plaintiff, the act was privileged," could violate section 802.05, depending on whether the underlying circumstances of the alleged striking were such that defendant must know whether he struck plaintiff or not.

Subsection (6) is based on Federal Rule 8(f) and is substantially the same as former section 263.27.

802.03 Pleading special matters. (1) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. If a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowl-
(2) Fraud, mistake and condition of mind. In all aver-
ments of fraud or mistake, the circumstances constituting
fraud or mistake shall be stated with particularity. Malice,
intent, knowledge, and other condition of mind of a person
may be averred generally.

(3) Conditions precedent. In pleading the performance
or occurrence of condition precedent in a contract, it shall not
be necessary to state the facts showing such performance or
occurrence, but it may be stated generally that the party duly
performed all the conditions on his part or that the conditions
have otherwise occurred or both. A denial of performance or
occurrence shall be made specifically and with particularity.
If the averment of performance or occurrence is controverted,
the party pleading performance or occurrence shall be bound
to establish on the trial the facts showing such performance
or occurrence.

(4) Official document or act. In pleading an official
document or official act it is sufficient to aver that the docu-
ment was issued or the act done in compliance with the law.

(5) Judgment. In pleading a judgment or decision of a
domestic or foreign court, judicial or quasi-judicial tribunal,
or of a board or officer, it is sufficient to aver the judgment
or decision without setting forth matter showing jurisdiction
to render it.

(6) Libel or slander. In an action for libel or slander,
the particular words complained of shall be set forth in the
complaint, but their publication and their application to the
plaintiff may be stated generally.

(7) Sales of goods, etc. In an action involving the sale
and delivery of goods or the performing of labor or services,
or the furnishing of materials, the plaintiff may set forth and
number in his complaint the items of his claim and the rea-
sonable value or agreed price of each. The defendant by his
answer shall indicate specifically those items he disputes and
whether in respect to delivery or performance, reasonable
value or agreed price. If the plaintiff does not so plead the
items of his claim, he shall deliver to the defendant, within
10 days after service of a demand therefor in writing, a state-
ment of the items of his claim and the reasonable value or
agreed price of each.

(8) Time and place. For the purpose of testing the suffi-
ciency of a pleading, averments of time and place are mate-
rial and shall be considered like all other averments of mate-
rial matter.
Subsection (1) makes lack of capacity of a party to sue or be sued a matter of affirmative defense to be particularly pleaded and places the burden of proof upon the party challenging capacity. The reasoning behind the rule is that capacity is rarely an issue in lawsuits and thus it will usually serve no purpose to require detailed pleading of capacity. On the rare occasions when capacity is an issue, the defendant may raise the issue by specific negative averment. Defect incapacity may also be raised by motion under section 802.06(2). This option is not available under the Federal Rules, but the Judicial Council Committee thought it desirable to make it available to the party objecting.

The requirement of “specific negative averment” means that an issue of capacity cannot be raised by general denial or by a denial of knowledge or of information sufficient to form a belief, at least not when the information concerning capacity is a matter of record or is readily accessible to the party attempting to put the matter in issue.

Subsection (2) is identical to Federal Rule 9(b) which itself was based on common law and Field Code pleading rules. Wisconsin has long required that fraud be pleaded with particularity. A well-pleaded claim based on mistake should include averments of what was intended, what was done, and how the mistake came to be made. The second sentence of this subsection is based on a recognition that an attempt to require specificity in pleading a condition of mind would be unworkable and would violate the “short and plain statement of the claim” mandate of section 802.02(1).

Subsection (3) is based on Federal Rule 9(c) and is substantially the same as former section 263.34. It differs from its predecessor by expressly including within its scope conditions precedent which are not “performed” by an actor but simply “occur,” as for example by an act of God.

Subsection (4), identical to Federal Rule 9(d), is designed to obviate the necessity of a proponent’s setting forth in detail

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71. Prentice v. Madden, 3 Pin. 376, 4 Chand. 170 (1852); First Credit Corp. v. Myricks, 41 Wis. 2d 146, 163 N.W.2d 1 (1968).
the circumstances surrounding the execution of an official doc-
ument or the doing of an official act. Of course, the pleader
relying on such a document or act will be required to prove it
at the trial.

Subsection (5) is identical to Federal Rule 9(e) and is sub-
stantially the same as former section 263.33.74

Subsection (6) is based on Section 3016(a) of New York's
Civil Practice Law and Rules and replaces former sections
263.37 and 263.38. In requiring that the particular words com-
plained of be set forth in the complaint, the rule is simply
requiring in the first instance information that would be de-
demanded by interrogatory in virtually every case. The provision
that publication and application to the plaintiff may be stated
generally follows section 263.37.

Subsection (7) is based on Section 3016(f) of New York's
Civil Practice Law and Rules and replaces former section
263.32. In the case of Innis, P. & Co. v. G.H. Poppenberg, Inc.,75
the court said of this rule:

Where a complaint is properly framed under this section,
the effect is to take away from a defendant the right to
traverse by a general denial the allegations of delivery, rea-
sonable value or agreed price. If defendant desires to contro-
vert the items, or any of them, in respect to those matters, or
either of them, he must do so by specifically denying the
numbered item or items in the respect controverted. Not-
withstanding a general denial in the answer, any item not
specifically denied stands admitted in respect to delivery,
reasonable value, or agreed price as stated in the schedule.
No motion to strike or to compel amendment is necessary.

The word "items" as used in (this section) will generally
mean the particulars in such detail that the account may be
readily examined and its correctness tested entry by entry.

The numbering of the items in the schedule is an essential
part of the pleading. Without it there would inevitably be
prolixity and lack of clear definition in the answer, leading

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74. Although Rule 9(e), as is true of Rule 9(a), is intended to discourage unnec-
esary pleading and to provide for simplicity in allegations, good pleading still requires
that the court, body, or person rendering the judgment or decision be identified, the
date of the judgment or decision be given, the parties to the earlier proceeding be
named, and the character and effect on the judgment or decision be specified. How-
ever, no particular set of words or formula is necessary. 5 Wright and Miller, Federal
Practice and Procedure § 1306 at 436 (1969). See also, Waukesha Devel. Corp. v. City
of Waukesha, 10 Wis. 2d 621, 108 N.W.2d 668 (1960).
75. 213 A.D. 789, 210 N.Y.S. 761 (1925).
to doubt and confusion on the part of both court and counsel. The object of the section is to narrow and define the field of controverted facts, primarily for the benefit and convenience of plaintiff, and incidentally to save the time, of the courts. If plaintiff seeks the benefit of the section, he must comply with its provisions by numbering the items. By omitting to number, he fails to present his claim in the issuable form contemplated. The defendant is not then bound to attempt a specific denial.

Subsection (8) is identical to Federal Rule 9(f).

802.04 Form of pleadings. (1) Caption. Every pleading shall contain a caption setting forth the name of the court, the venue, the title of the action, the file number, and a designation as in s. 802.01 (1). In the complaint the title of the action shall include the names of all the parties, indicating the representative capacity, if any, in which they sue or are sued and, in actions by or against a corporation, the corporate existence and its domestic or foreign status shall be indicated. In pleadings other than the complaint, it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(2) Paragraphs; separate statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate claim or defense whenever a separation facilitates the clear presentation of the matters set forth. A counterclaim must be pleaded as such and the answer must demand the judgment to which the defendant supposes himself entitled upon his counterclaim.

(3) Adoption by reference; exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

Subsection (1) is substantially the same as Federal Rule 10(a). Unlike the Federal Rule, however, there is an express requirement that the caption indicate the representative capacity, if any, in which a party sues or is sued. This subsection simply sets forth standards of good form in pleading. These
standards are quite familiar to Wisconsin attorneys and do not represent a departure from prior practice.

Subsection (2) is substantially the same as Federal Rule 10(b). Like subsection (1), it is designed simply to codify requirements of good form and practice that have long been familiar to experienced Wisconsin attorneys. The numbering of the paragraphs within pleadings is for clarity and easy reference. Separate claims arising from separate transactions or occurrences should be set forth as separately designated claims. A violation of this paragraph would render a party subject to a motion to state separately and number. As a practical matter, such a motion should be granted only when confusion is caused by the failure to state separately and number, such that the opposing party cannot properly respond. The federal courts have not been overly technical about separately stating and numbering paragraphs and claims. The last sentence of subsection (2) restates former section 263.14(2).

Identical to Federal Rule 10(c), subsection (3), like the other paragraphs of this proposed rule, does not represent a change from prior practice.

802.05 Signing of pleadings. Every pleading of a party represented by an attorney shall contain the name and address of the attorney and the name of his law firm, if any, and shall be subscribed with the handwritten signature of at least one attorney of record in his individual name. A party who is not represented by an attorney shall subscribe his pleading with his handwritten signature and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he had read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this section an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

77. See Boek v. Wagner, 1 Wis. 2d 337, 83 N.W.2d 916 (1957); Olson v. Johnson, 267 Wis. 462, 66 N.W.2d 346 (1954).
All pleadings (and motions and other papers under subdivision 802.01(2)(d)) must be signed in the individual name of at least one attorney of record when the party responsible for the pleading, motion or other paper is represented by counsel. By force of this rule, "[t]he signature of the attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief, there is good ground to support it; and that it is not interposed for delay." The purpose and effect of this rule is simply to place a professional obligation on the attorney as an officer of the court to satisfy himself that there are grounds for the action, defense or motion.

The rule provides that "[f]or a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action." What the disciplinary action might be is not specified in the rule since attorney discipline is not properly a matter of civil procedure. Disciplinary actions in the federal courts have ranged from filing an official record in the court files adversely reflecting on the attorney to contempt and disbarment.

This rule abolishes verification with but few exceptions. An exception is found in section 804.02(1)(a) which requires that a petition for the perpetuation of testimony before an action is commenced must be verified. In the majority of cases, the burden for the truthfulness of pleadings is on the attorney as an officer of the court. In effect, his signature becomes the verification.

This rule requires that the attorney signing the pleading include the name and address of his firm, if he is a member of or associated with a firm. This requirement simply codifies the present practice among Wisconsin attorneys.

802.06 Defenses and objection; when and how presented; by pleading or motion; motion for judgment on the pleadings. (1) WHEN PRESENTED. A defendant shall serve his answer within 20 days after the service of the complaint upon him unless a different time is prescribed under s. 802.10 (1) by the judge to whom the case has been assigned. If a guardian ad litem is appointed for a defendant, the guardian ad litem shall have 20 days after his appointment to serve the answer. A party served with a pleading stating a cross claim

against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer. The state or an officer or agency of the state shall serve an answer to the complaint or to a cross claim or a reply to a counterclaim within 45 days after service of the pleading in which the claim is asserted. If any pleading is ordered by the court, it shall be served within 20 days after service of the order, unless the order otherwise directs. Any of the times prescribed herein may be modified in the scheduling order under s. 802.10 (1) by the judge to whom the case has been assigned. The service of a motion permitted under sub. (2) alters these periods of time as follows, unless a different time is fixed by order of the court: (a) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (b) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(2) **How presented.** Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third-party claim shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (a) lack of capacity to sue or be sued, (b) lack of jurisdiction over the subject matter, (c) lack of jurisdiction over the person or res, (d) insufficiency of summons or process, (e) insufficiency of service of summons or process, (f) failure to state a claim upon which relief can be granted, (g) failure to join a party under s. 803.03, (h) res judicata, (i) statute of limitations, (j) another action pending between the same parties for the same cause. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. Objection to venue shall be made in accordance with s. 801.53. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If on a motion asserting the defense described in (f) to dismiss for failure of the pleading to state a claim upon which relief can be granted, or on a motion asserting the defenses described in (h) or (i), matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given
reasonable opportunity to present all material made pertinent to such a motion by s. 802.08.

(3) **JUDGMENT ON THE PLEADINGS.** After issue is joined between all parties but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by s. 802.08.

(4) **PRELIMINARY HEARINGS.** The defenses specifically listed in sub. (2), whether made in a pleading or by motion, the motion for judgment under sub. (3) and the motion to strike under sub. (6) shall be heard and determined before trial on motion of any party, unless the judge to whom the case has been assigned orders that the hearings and determination thereof be deferred until the trial. The hearing on the defense of lack of jurisdiction over the person or res shall be conducted in accordance with s. 801.08.

(5) **MOTION FOR MORE DEFINITE STATEMENT.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(6) **MOTION TO STRIKE.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, scandalous or indecent matter.

(7) **CONSOLIDATION OF DEFENSES IN MOTIONS.** A party who makes a motion under this section may join with it any other motions herein provided for and then available to him. If a party makes a motion under this section but omits therefrom any defense or objection then available to him which this section permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted,
except a motion as provided in sub. (8) (b) through (d) on any of the grounds there stated.

(8) **Waiver or Preservation of Certain Defenses.**

(a) A defense of lack of jurisdiction over the person or the res, insufficiency of process, insufficiency of service of process or another action pending between the same parties for the same cause is waived only 1. if it is omitted from a motion in the circumstances described in sub. (7), or 2. if it is neither made by motion under this section nor included in a responsive pleading or an amendment thereof permitted by s. 802.09 (1) to be made as a matter of course.

(b) A defense of failure to join a party indispensable under s. 803.03 or of res judicata may be made in any pleading permitted or ordered under s. 802.01 (1), or by motion before entry of the final pretrial conference order. A defense of statute of limitations, failure to state a claim upon which relief can be granted, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under s. 802.01 (1), or by a motion for judgment on the pleadings, or otherwise by motion within the time limits established in the scheduling order under s. 802.10 (1).

(c) If it appears by motion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(d) A defense of lack of capacity may be raised within the time permitted under s. 803.01.

Subsection (1) is based on Federal Rule 12(a). It provides a simple, uniform twenty day standard for responsive pleadings by any party in any action. The twenty day period is already familiar to Wisconsin attorneys. 80

There is also a "safety valve" provision that allows the judge to modify the time schedules by scheduling order under section 802.10(1).

Subsection (2), when considered in conjunction with section 802.02, is one of the most significant changes introduced by the new rules. This subsection provides that every defense, whether of law or fact, with the exception of nine enumerated and specified defenses, must be raised by responsive pleading.
if a responsive pleading is required. The enumerated defenses which may be raised by motion are:

(a) lack of capacity to sue or be sued.\textsuperscript{81}

(b) lack of jurisdiction over the subject matter. Under the former practice, an attack addressed to the competence of the court to adjudicate the particular case before it was made by demurrer under section 263.03(1)(b). However, section 263.12 provided that a failure to raise the issue of subject matter jurisdiction did not constitute a waiver. In this regard, the statute simply restates long-standing case law on non-waiver of subject matter jurisdiction.\textsuperscript{82} Thus, after the time runs within which a demurrer may be entered, the defense of subject matter jurisdiction may be raised by motion to dismiss. Section 802.01 (3) abolishes the demurrer, thereby restricting the defendant to the motion to dismiss or answer. The non-waiver rule of former section 263.12 is retained by paragraph (8)(c).

(c) lack of jurisdiction over the person or res. The procedure for questioning jurisdiction over the person under former section 262.16 was rather technical and tended to be a trap for the unwary. Such a question could be raised only by entering a special appearance for the purpose of raising the question and filing: (1) a motion (when the defect was claimed in the service of the summons without a complaint, or when the defect appeared on the face of the record other than the complaint, or in the case of a judgment on cognovit or by default); or (2) a demurrer (when the defect appeared upon the face of the complaint); or (3) by answer (in all other cases). The defendant had to exercise great care in contesting personal jurisdiction since any failure to comply with section 263.16 constituted a waiver of the jurisdictional defense (except in the case of persons under disability).\textsuperscript{83}

The inadequacy of former section 262.16 was demonstrated in \textit{Pavalon v. Thomas Holmes Corp.}, where the defendant attempted to raise by demurrer two law issues: (1) lack of jurisdiction over the person; and (2) failure of the complaint to

\textsuperscript{81} See commentary on Wis. Stat. § 802.03(1) \textit{supra} p. 44.

\textsuperscript{82} See \textit{Damp v. Town of Dane}, 29 Wis. 419 (1972); \textit{Harrigan v. Gilchrist}, 121 Wis. 127, 99 N.W. 909 (1904).

\textsuperscript{83} See, \textit{e.g.}, \textit{Lees v. Department of Industry, Labor and Human Relations}, 49 Wis. 2d 491, 182 N.W.2d 245 (1971); \textit{Milwaukee County v. Schmidt, Garden & Erickson}, 35 Wis. 2d 33, 150 N.W.2d 354 (1967); 51 Marq. L. Rev. 113 (1967).

\textsuperscript{84} 25 Wis. 2d 540, 131 N.W.2d 331 (1963).
state a cause of action. Section 262.16(2)(b) provided that the demurrer could be used to raise the jurisdictional issue only when the jurisdictional defect appeared on the face of the complaint. The defect claimed by the defendant was insufficient minimal contacts to render it amenable to Wisconsin jurisdiction, a matter which was not (and would not normally be) the subject of allegations in the complaint. Hence, the demurrer was an inappropriate way to raise the jurisdictional defense. Unfortunately, the defendant’s fact situation did not bring it within the scope of section 262.16(2)(a) which would have allowed the jurisdictional issue to be raised by motion. Thus, it was restricted to section 262.16(2)(c): “By answer in all other cases.” But an answer, of course, follows disposition of a demurrer on the ground of failure to state a cause of action. Unfortunately, as the court pointed out:

If [defendant] were to wait until after disposition of the demurrer to raise the defense of lack of personal jurisdiction by answer, it would have waived its right to do so since a demurrer on the ground of failure to state a cause of action constitutes a general appearance.\(^{85}\)

Thus, under the statute as written the defendant was effectively precluded from joining his defense grounded on lack of personal jurisdiction with his demurrer for failure to state a cause of action. Fortunately, the court relieved the defendant from its dilemma by looking beyond the statutory language to the statute’s underlying purpose and ruling that the jurisdiction issue could be raised by motion, supported by an accompanying affidavit, served with the demurrer.\(^{85}\)

The problem of the Pavalon case will not arise under the new rule. Both law issues could be raised in either an answer or by motion and in any event the defendant would not have to be concerned with waiver of the jurisdictional defense.

\((d)\) insufficiency of summons or process. Under the former practice, there were three ways to raise an issue concerning the sufficiency of summons or process or the sufficiency of service of summons or process, all three of which were controlled by section 262.16. First, if the defect appeared on the face of the complaint (an extremely unusual occurrence) the issue had to be raised by demurrer, under sections 263.06(1)(a) and

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\(^{85}\) Id. at 546, 131 N.W.2d at 334.

\(^{86}\) See also Bazon v. Kux Machine Co., 52 Wis. 2d 325, 190 N.W.2d 521 (1971).
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262.16(2)(b). Secondly, if the defect was in the service of the summons without a complaint, or when the defect appeared upon the face of the record other than the complaint, the issue was to be raised by motion, under section 262.16(2)(a). In all other cases, section 262.16(2)(e) provided that the issue had to be raised by answer.

The new rule gives the defendant an unfettered option by allowing insufficiency of process and service of process to be raised by motion or, if no motion is filed, then by answer. The new rule thus eliminates the serious waiver problems of the former law under which the insufficiency had to be raised by a special appearance and in a particular way. The new rule also permits the court to allow evidence or affidavits to challenge the summons or process or service thereof on a motion to dismiss or it may be received at the trial if the issue is raised by answer.

(e) insufficiency of service of summons or process. 87

(f) failure to state a claim upon which relief can be granted. The motion to dismiss for failure to state a claim upon which relief can be granted serves basically the same function as the demurrer for failure to state ultimate facts constituting a cause of action under former section 263.06(6), that is, to test the legal sufficiency of the complaint. Unlike section 263.03(2), however, the new rules do not require that the complaint state all the "ultimate facts constituting each cause of action." Thus, the motion to dismiss usually will be granted only when it is quite clear that under no conditions can the plaintiff recover.

The new rule also allows the motion to dismiss for failure to state a claim upon which relief can be granted to be converted into a "speaking motion" which will, in effect, be treated as a motion for summary judgment.

(g) failure to join a party under section 803.03. Failure to join an indispensable party is a law defense that existed under the repealed statutes. Section 260.12 provided (rather cryptically), "of the parties to the action those who are united in interest must be joined as plaintiffs or defendants. . . ." The same statute allowed a plaintiff who refused to join voluntarily to be made a defendant. Under section 263.06(4) a defect in parties

87. See commentary on paragraph (d), supra p. 53.
was required to be raised by demurrer. Under the new rules, of
course, a "party defense" must be raised by motion to dismiss
or by answer.

(h) res judicata. Under section 802.02(3), res judicata and
statute of limitations are affirmative defenses which must be
specially pleaded in the answer. Section 802.06(2)(h) provides,
however, that these issues may also be raised by motion. Fur-
thermore, subsection (8) provides that the defense of res judi-
cata is waived only if not raised in a responsive pleading or by
motion prior to the entry of the final pretrial conference order.

(i) statute of limitations.88

Subsection (3) is essentially the same as Federal Rule 12(c),
the only change being that the federal rule provides that the
motion for judgment on the pleadings may be made "[a]fter
the pleadings are closed . . . ," whereas the new rule provides
that the motion may be made "[a]fter issue is joined between
all parties." The change is one of form rather than substance,
issue joinder being a more familiar concept in Wisconsin prac-
tice than is closing of the pleadings.

Judgment on the pleadings has long been an available pro-
cedure under Wisconsin case

law.89 Its use was expressly sanc-
tioned by the Wisconsin Supreme Court in 1968 when, by Su-
preme Court rule, it created former section 263.227.89

Unlike section 263.227, the new rule does not contain a
specific time limit within which the motion must be made. The
rule is clear, however, that the motion must be made "within
such time as not to delay the trial." Thus, a motion for judg-
ment on the pleadings made on the trial date immediately
before the jury was called, as in Buckley v. Park Building
Corp.,90 would be improper.

The motion for judgment on the pleadings is also tied to the
motion for summary judgment under section 802.08. Subsec-
tion (3) in effect recognizes that the two motions serve similar
purposes. That is, a judgment on the pleadings is, in reality, a

88. See commentary on paragraph (h), supra.
89. See, e.g., Kilbourn v. Pacific Bank, 11 Wis. 239 (*230) (1860).
90. 35 Wis. 2d vii. See generally, Madregano v. Wisconsin Gas & Elec. Co., 181
Wis. 611, 195 N.W. 861 (1923); All Electric Service, Inc. v. Matousek, 46 Wis. 2d 194,
174 N.W.2d 511 (1970). See also J. Conway, Wisconsin and Federal Civil Procedure,
91. 31 Wis. 2d 626, 143 N.W.2d 493 (1966).
summary judgment minus affidavits and other supporting documents.

Under subsection (4) the law defenses enumerated in subsection (2) will normally be heard before the trial. This procedure comports with the former practice.

Subsection (5) is identical to Federal Rule 12(e). Under former Wisconsin practice, the motion to make more definite and certain was authorized by section 263.43. The law also allowed a bill of particulars in cases involving accounts. There is no provision for a bill of particulars, so denominated, in these rules.

Attorneys and judges should keep in mind the limited function of pleading under these rules, i.e., general notice of the nature of the claim or defense. Since most factual information is to be obtained through discovery, the motion for a more definite statement should be sparingly granted.

Subsection (6) is identical to Federal Rule 12(f) and is quite similar to former sections 263.42 and 263.44. Section 263.43 provided that, on motion, the attorney who signed a pleading containing irrelevant, redundant or scandalous matter could be ordered to pay costs on the motion to strike. There is no sanction provided in the new rule. However, in appropriate cases, a sanction may be available under section 802.05.

Subsection (7) is derived from Federal Rule 12(g). When read in conjunction with subsection (2), it is quite similar to the practice under former sections 263.06, 263.11, and 263.12. The new rule, however, contains a broader range of defenses that must be included in the consolidated motion.

Subsection (8) governs the waiver and preservation of certain defenses. Paragraph (8)(a) contains the rule on waiver of jurisdictional defenses. It overturns decisions such as McLaughlin v. Chicago M., St. P. & P.R. Co., 92 and Milwaukee County v. Schmidt, Garden & Erickson, 93 which held respectively that simply serving a notice of retainer and appearance (McLaughlin) and asking in a letter for a copy of the complaint (Milwaukee County) constituted "appearances" subjecting the defendants to personal jurisdiction. The new rule gives to defendants and their attorneys fair opportunity to assess whether a jurisdictional defense may exist and to raise the defense in

92. 23 Wis. 2d 592, 127 N.W.2d 813 (1963).
93. 35 Wis. 2d 33, 150 N.W.2d 354 (1967).
due course as with other law defenses and without the worry that any act with respect to the action will be deemed a waiver of the defense. 94

Paragraph (8)(b) permits party defenses and the defense of res judicata available up to the entry of the final pretrial order since the existence of these defenses frequently will not become known until during the course of discovery proceedings.

Paragraph (8)(c) allows the defense of lack of subject matter jurisdiction to be raised at any time. It accords with the practice under former sections 263.06(1)(b) and 263.12.

802.07 Counterclaim and cross claim. (1) COUNTERCLAIM. A defendant may counterclaim any claim which he has against a plaintiff, upon which a judgment may be had in the action. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(2) COUNTERCLAIM MATURING OR ACQUIRED AFTER PLEADING. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(3) CROSS CLAIM. A pleading may state as a cross claim any claim by one party against a co-party if the cross claim is based on the same transaction, occurrence, or series of transactions or occurrences as is the claim in the original action or as is a counterclaim therein, or if the cross claim relates to any property that is involved in the original action. Such cross claim may include a claim that the party against whom it is asserted is or may be liable to the cross claimant for all or part of a claim asserted in the action against the cross claimant.

(4) JOINER OF ADDITIONAL PARTIES. Persons other than those made parties to the original action may be made parties to a counterclaim or cross claim in accordance with ss. 803.03 to 803.05.

(5) SEPARATE TRIALS; SEPARATE JUDGMENTS. If the court orders separate trials as provided in s. 805.05 (2), judgment on a counterclaim or cross claim may be rendered in accordance with s. 806.01 (2) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

94. See also Wis. Stat. § 801.06.
(6) **Contribution.** Any party who seeks contribution shall pray for contribution in his complaint, answer or reply, or in a counterclaim, cross claim, or third-party complaint; the party from whom contribution is sought shall file and serve an appropriate responsive pleading.

In a rather significant departure from its general acceptance of the policies underlying the Federal Rules governing pleading, the committee declined to recommend the compulsory counterclaim provided in Federal Rule 13(a). The reasoning behind the decision was that the absence of a compulsory counterclaim rule has not caused any significant problem in Wisconsin practice. The adoption of such a rule, it was felt, would surely cause some initial confusion without any significant concomitant benefit. Also, the purpose of compulsory counterclaims, i.e., disposing of all aspects of a single litigable transaction or occurrence in a single action, is promoted in Wisconsin law by the rules of collateral estoppel. Thus, the language of the first sentence of subsection (1) is identical to the language of section 263.14(1).

It should be noted in connection with the counterclaim rule, that the set-off statutes, sections 895.07 through 895.13 have been repealed. The reasoning of the Judicial Council Committee on repeal of these statutes was:

1. The set-off statutes have been erroneously construed to apply to recoupment and in fact to limit recoupment.
2. The set-off statutes are not clearly exhaustive; they do not contain all the situations where set-off will be allowed. It has long been held in this state that equity will permit an equitable set-off whenever justice requires it, even in a case not within the statute of set-offs. Moreover, there could be cases where a defendant would meet the conditions of set-off in section 895.07, but nonetheless be precluded from asserting the set-off.

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95. See J. Conway, Wisconsin and Federal Civil Procedure, Ch. 85, pp. 85-1 to 85-6 (1968).
98. For a case not precisely on point but generally illustrative of the context in which one might be entitled to a set-off by the language of section 895.07 but where...
(3) In some respects these set-off statutes are unnecessarily restrictive. For example, section 895.07(1) provides that the set-off must be based upon a judgment or contract. This subsection corresponds to the counterclaim statute as it existed from 1856 to 1934. Thus, an unliquidated tort claim could not be set off against a contract claim or even another tort claim. There is no good reason for such a rule.

Also section 895.07(3) permits set-off only if the claim existed at the time of commencement of the action and if it belonged to the defendant at commencement. This is functionally equivalent to section 263.14(3). Section 802.07(2) which allows the asserting of after-acquired or after-maturing claims by leave of court, seems clearly preferable.

(4) In some respects, the set-off statutes are simply redundant. For example, section 895.07(2) provides that the defendant's claim "must be due him in his own right, either as being the original creditor or payee or as being the assignee and owner of the demand." It seems that this says nothing more than that the defendant must be the real party in interest with respect to his claim, or indeed simply that the defendant must have a claim.

(5) Section 895.07(6) intrudes on and, as interpreted by our court, contradicts the law of commercial paper found in chapter 403.99

Subsection (2) is identical to Federal Rule 13(e). It changes the former law of section 263.14(3) insofar as it permits the counterclaim of a claim assigned to a defendant after commencement of action, provided the court permits it. There may be cases in which such a counterclaim could be handled expeditiously in an action. In cases in which a counterclaim based on after-acquired rights would unnecessarily complicate a case, or prejudice a plaintiff, the court is empowered to refuse the pleading of the counterclaim.

Subsection (3) is based on Federal Rule 13(g), but a signifi-

the set-off would not be permitted, see Wisconsin Mutual Ins. Co. v. Manson, 24 Wis. 2d 673, 130 N.W.2d 183 (1964).

cant change of wording has been made. Both Federal Rule 13(g) and its Wisconsin counterpart, former section 263.15(1), provide that a crossclaim must be based on the transaction or occurrence that is the "subject matter" of the original claim. The term "subject matter" of the original claim received an unfortunately restrictive interpretation in Liebhauser v. Milwaukee Electric Ry. & Light Co.\textsuperscript{100} In Liebhauser, the plaintiff sued two defendants for personal injuries arising out of a collision between a streetcar operated by one defendant and an automobile operated by the other defendant. The operator of the auto attempted to assert a cross claim against the streetcar company on the theory that the streetcar's operator's negligence was the cause of the accident. The court refused to permit the counterclaim on the ground that the "subject matter" of the plaintiff's action was her right to have the defendants exercise ordinary care with respect to her person and that, thus, the cross-claiming defendant's rights did not involve the transaction which was the "subject matter" of plaintiff's claim. Ten years after Liebhauser, the supreme court amended section 263.15 to permit the Liebhauser-type crossclaim.\textsuperscript{101} The term "subject matter" has been omitted from these rules (except in the jurisdictional context) to avoid any implication that the Liebhauser decision is to be followed.

Based on Federal Rule 13(h), subsection (4) parallels former section 260.19. The right to bring in additional parties is controlled by sections 803.03, 803.04 and 803.05.

Subsection (6) changes the rule under former sections 263.15(3) and 263.20(1), that no responsive pleading is required against a pleading that seeks contribution only. It also requires the party seeking contribution to pray for it in his pleading, changing the former rule that even where defendants do not file a crosscomplaint asking judgment for contribution, the court should treat the pleadings as amended and grant such relief if the record shows the parties are entitled to it.\textsuperscript{102}

802.08 Summary judgment. (1) Availability. At any time after issue is joined but not later than the time provided in the scheduling order under s. 802.10, any party may move,

\begin{itemize}
  \item 100. 180 Wis. 468, 193 N.W. 522, 43 A.L.R. 870 (1923).
  \item 101. Supreme Court Order, 212 Wis. ix. (1934).
  \item 102. Haines v. Duffy, 206 Wis. 193, 199, 240 N.W. 152 (1931); Crye v. Mueller, 7 Wis. 2d 182, 200, 96 N.W.2d 520, 524 (1959).
\end{itemize}
with or without supporting affidavits, for a summary judgment in his favor on any claim, counterclaim, cross claim or third-party claim which he asserts or which is asserted against him. Amendment of pleadings shall be allowed as in cases where objection or defense is made by motion to dismiss.

(2) Motion. The motion shall be served at least 20 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(3) Supporting papers. Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence. Copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith, if not already of record. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of his pleadings but his response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(4) When affidavits unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the motion for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(5) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this section is presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the
affidavits caused him to incur, including reasonable attorney's fees.

(6) JUDGMENT FOR OPPONENT. If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though he has not moved therefor.

This section replaces section 270.635. The forty day rule is abolished in favor of a flexible time limit established in the scheduling order under section 802.10(1). Almost as a matter of course in most courts the forty day period has been enlarged on the grounds of "excusable neglect" under section 269.46(2) when the facts thought to entitle a movant to summary judgment do not become known (through discovery, proceedings or otherwise) until after the forty day period has expired. Most of the "delays" in these cases are really not based on neglect at all—excusable or otherwise—and to go through the enlargement motions should be unnecessary. Under the new rules, the judge will establish a time period for making a motion for summary judgment which takes into account time needed for discovery.103

Also, the new rule does not require that supporting affidavits be filed with the motion for summary judgment. The pleadings and other papers filed in the action (depositions, answers to interrogatories, responses to requests for admissions or denials) may reflect the fact that there is no genuine issue for trial. There is no need for affidavits in such cases.

Subsection (2) of this rule provides that the motion for summary judgment shall be served at least twenty days before the time fixed for hearing. The increased notice of motion period (compared to the former five day period) is deemed necessary to allow the party against whom the motion is asserted to marshal his counter-affidavits. The last sentence of subsection (2) is but one example of the partial summary judgment authorized by subsection (1).

Subsection (3) requires that the affidavits set forth evidentiary facts which would be admissible in evidence. This requirement is intended to reduce the incidence of affidavits containing incompetent evidence, such as hearsay statements.

Subsection (4) is identical to Federal Rule 56(f).

103. See Wis. Stat. § 802.10(1).
Subsection (5) is identical to Federal Rule 56(g) except that it does not include contempt proceedings as an available sanction for affidavits made in bad faith.

Subsection (6) is based on former section 270.635(3).

802.09 Amended and supplemental pleadings. (1) AMENDMENTS. A party may amend his pleading once as a matter of course at any time prior to the entry of the scheduling order provided in s. 802.10 (1). Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 20 days after service of the amended pleading unless (a) the court otherwise orders or (b) no responsive pleading is required or permitted under s. 802.01 (1). At any stage of the action, the court may allow amendment of any process or proceeding if justice requires it.

(2) AMENDMENTS TO CONFORM TO THE EVIDENCE. If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(3) RELATION BACK OF AMENDMENTS. If the claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the filing of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and knew or should have known that, but for a mistake concerning the
identity of the proper party, the action would have been brought against him.

(4) **Supplemental pleadings.** Upon motion of a party the court may, upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Subsection (1) is the counterpart of Federal Rule 15(a) and former sections 263.45 and 269.44. Under the new rule, the timing of amendments has been tied into the section 802.10(1) scheduling conference rather than the service of the original pleading (as under section 263.45) or service of a responsive pleading.

Subsection (2) is identical to Federal Rule 15(b). Its provisions conform substantially with the Wisconsin case law that has developed under section 269.44.104

Identical to Federal Rule 15(c), subsection (3) makes a significant change to Wisconsin law. The rule deals with the relation back of permissible amendments and thus it is directly related to statutes of limitation. The relation back theory of this rule involves both amendments concerning the pleadings and amendments concerning parties to the action.

With respect to relation back of claims, the proposed rule would overturn the rule of *Meinshausen v. A. Gettleman Brewing Co.*105 In *Meinshausen*, the supreme court held that an amendment to a complaint which introduced a different cause of action, and made a different demand from that in the original complaint, did not relate back to the beginning of the action. Thus, the statute of limitations continued to run until the date of the amendment, even though the second cause of action arose out of the same transaction as the first cause of action.106

Under this rule, whenever the claim asserted in the amended pleading arises out of the conduct, transaction or occurrence

104. See, e.g., Nelson v. Preston, 262 Wis. 547, 55 N.W.2d 918 (1952); Martell v. Klingman, 11 Wis. 2d 296, 105 N.W.2d 446 (1960).
105. 133 Wis. 95, 113 N.W. 408 (1907).
106. Compare Frederickson v. Kabat, 264 Wis. 545, 59 N.W.2d 484 (1953) (amendment which merely restated original cause of action in different form related back).
set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading.

With respect to relation back of amendments adding parties, this rule would overturn the rule in *Baker v. Tormey.* In *Baker*, the plaintiff received personal injuries in an accident allegedly caused by the negligence of the driver of a certain automobile. The plaintiff knew that the driver was “X” but for some reason, he sued X’s brother, “Y”, who was a passenger in the car when the accident occurred. Service of process was made by leaving a copy of the summons with “Z”, the mother of X and Y, at the home where X, Y, and Z all resided. Y defended the action and at the trial it appeared that X was the driver of the auto. The trial court allowed the plaintiff to amend his summons and complaint to substitute X for Y as defendant, even though the statute of limitations had run against X. The supreme court reversed. “As against a party added by amendment, the statute of limitations continues to run until the amendment is filed making him a party to the suit.” Under subsection (3), the result would be contrary.

Subsection (4), derived from Federal Rule 15(d), is, with one exception, the same as former section 263.47. The exception is that under section 263.47, facts which were *in esse* at the time of the original pleading but the existence of which did not become known to the pleader until later could be alleged by supplemental pleading. Under the new rule, such pre-existing unknown facts would be alleged in an amended pleading rather than by a supplemental pleading. The role of supplemental pleadings is limited to the raising of facts occurring after the date of the original pleading.

**302.10 Scheduling and pretrial conferences.** (1) SCHEDULING CONFERENCE. (a) Scope. This subsection governs all actions and special proceedings except those governed by chs. 48, 52, 288, 299, 345, 812, and Title XLII-B.

(b) Conference. Not less than 60 nor more than 120 days after the summons is filed, the judge to whom the case has been assigned shall set a date for a scheduling conference, upon at least 10 days written notice by mail to all attorneys of record and to all parties who have appeared of record and are not represented by counsel. The conference shall be held

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107. 209 Wis. 627, 245 N.W. 652 (1932).
at a place designated by the judge and shall be attended by
the judge and at least one attorney of record for each party
to the action who is represented by counsel. Any party who
has appeared and who is not represented by counsel shall
attend personally, or by its officer or agent. After consulta-
tion, the judge shall set:
1. The time at which a motion for default judgment may
be heard;
2. The times within which discovery must be completed;
3. The time, prior to the pretrial conference, within
which impleader shall be completed and within which plead-
ings may be amended;
4. A time at or prior to the pretrial conference within
which motions before trial shall be served and heard;
5. A date for the pretrial conference and a date or tenta-
tive date for trial as soon as practicable after the pretrial
conference but not later than 30 days thereafter.

(c) Scheduling order. The judge shall issue a written
order which recites the schedules established. Such order
when entered shall control the course of the action, unless
modified as herein provided. If at any time it should appear
that such schedules cannot reasonably be met, the judge may
amend the order upon timely motion of any party. Whenever
the judge shall determine that he cannot reasonably meet the
pretrial date or trial date established, he may amend the
order on his own motion.

(d) Use of telephone and mail; standard order. In lieu of
a scheduling conference under par. (b), the judge may obtain
scheduling information by telephone, mail or otherwise and
enter a scheduling order on the basis of the information so
obtained or may serve upon the parties a standard scheduling
order. Such orders are subject to amendment as provided in
par. (c). If a standard scheduling order is entered, it shall be
entered within 150 days after commencement of the action.

(e) Sanctions. Violation of a scheduling order is subject
to s. 805.03.

(2) Pretrial conference. (a) Scope. In all contested
civil actions and contested special proceedings except those
under chs. 48, 52, 288, 299 and 345, the judge shall, unless
waived by the parties with the approval of the judge, and in
all other civil actions and special proceedings, the judge may
direct the attorneys for the parties to appear before him for
a pretrial conference to determine whether an order should be
entered on any or all of the following matters:
1. Definition and simplification of the issues of fact and
law;
2. Necessity or desirability of amendment to the pleadings;
3. Stipulations of fact and agreements concerning the identity of or authenticity of documents which will avoid unnecessary proof;
4. Limitation of the number of expert witnesses and the exchange of the names of expert witnesses;
5. Whether issues shall be tried by court or jury;
6. Advisability of preliminary reference of issues for findings to be used as evidence when the trial is to be by jury;
7. Number of jurors to be impaneled, voir dire examination, and the number of strikes to be allowed;
8. Order of proof and order of argument;
9. Separation or consolidation of claims for trial;
10. Jury views and the costs thereof;
11. Disclosure of insurance policy limits;
12. Filing and exchanging of trial briefs; and
13. Such other matters as may aid in the disposition of the action.

(b) Time; participants. The date and time for the pretrial conference shall be set in the scheduling order as provided in sub. (1). At least one attorney planning to take part in the trial shall appear for each of the parties and participate in the pretrial conference. Attorneys appearing at the conference must have authority to enter stipulations.

(c) Additional conferences. If necessary or advisable, the judge may adjourn the pretrial conference from time to time or may order an additional pretrial conference.

(d) Pretrial order. The judge shall make an order which recites the action taken with respect in the matters described in par. (a) and which sets or confirms the final trial date. The order when entered shall control the subsequent course of action, unless modified thereafter on motion of a party or the court for good cause. If for any reason, the action is not tried on the date set in the scheduling order or the pretrial order, the judge shall, within 30 days after the date set in the scheduling order or pretrial order, set another date for trial on the earliest available trial date.

(e) Sanctions. If without just excuse or because of failure to give reasonable attention to the matter, no appearance is made on behalf of a party at a pretrial conference, or if an attorney is grossly unprepared to participate in the conference, the judge may, in his sound discretion:
1. Reschedule the conference and order the payment by the delinquent attorney or, when just, by the party he repre-
sents of the reasonable expenses, including reasonable attorney’s fees, to the aggrieved party;

2. Conduct the conference and enter the pretrial order without participation by the delinquent attorney;

3. Order dismissal or entry of a default judgment.

Subsection (1) has no express counterpart in the Federal Rules or in the Wisconsin statutes. It is based on the practice of many federal district courts to call in the attorneys in an action shortly after commencement for a report on the status of the action and for the setting of dates. This scheduling conference is essentially a “pre-pretrial.” The purpose of the scheduling conference is to get the litigation moving and keep it moving. In probably the most significant change from the current practice, the new rules—most especially section 802.10—place the responsibility for moving the case on the court, as well as on the attorneys.

At the scheduling conference, the attorneys should be sufficiently familiar with the case to form a realistic opinion as to the amount of time necessary to complete discovery and to discover whether impleader of third parties will probably be necessary. The judge’s decision on dates for pretrial conference and trial will necessarily be predicated on the time required for discovery and impleader.

At the conference, the judge issues a scheduling order reciting the dates established. This order controls the course of the action and relief from it should not be granted lightly. One of the primary goals of the rules is to establish a system in which lawyers and litigants may confidently expect their cases to move along apace. The scheduling order is intended to provide the framework in which lawyers can realistically allocate time to the pretrial activities in each case. Since modifications of the scheduling order necessarily lessens the scheduling certainty that is the goal of this rule, they should be granted sparingly.

Subsection (2) is substantially the same as Federal Rule 16 and former section 269.65, although it is more explicit than its counterpart in enumerating the matters that should be considered at the pretrial conference. The expanded list of matters which may be considered should not be considered exhaustive.

When subsection (2) is read together with subsection (1) and other new pleading rules, it is easily seen that the role of the trial judge during the pretrial stage of litigation will be expanded significantly by these rules. Issue formulation cur-
rently is accomplished primarily by pleadings; under the new rules, the real issues will often be articulated in the judge’s pretrial order, following the pretrial conference. Under the former practice, moving each case along was a matter of concern only to the litigants and the attorneys. In counties other than Milwaukee, a case is not on the judge’s calendar until after a notice of trial and certificate of readiness is filed by one of the attorneys. Under the new rules, each case is to be on a judge’s scheduling calendar within sixty to one hundred and twenty days after commencement and thereafter the judge has a significant role in moving the case. It can easily be seen that the success of these rules is to a great extent dependent upon the judge’s authoritative implementation of section 802.10.

Paragraphs (2)(b) and (2)(c) are designed to lessen a serious problem caused by the unprepared “participant” at the pretrial conference. These rules require that each attorney participating at the pretrial: (1) expect to take part in the trial itself; (2) have authority to enter into stipulations; and (3) be prepared to participate meaningfully in the conference. A failure to comply with the rules exposes the litigant and his attorney to the sanctions listed in paragraph (2)(e) and, in appropriate cases, to contempt proceedings. It merits repeating that the success of the new rules respecting procedure from commencement to trial depends on the vigor with which trial court judges exercise their judicial authority under section 802.10. In the hands of a judge who refuses to exercise the authority that is his, these rules will be “like the necks of the flamingoes in *Alice in Wonderland* which failed to remain sufficiently rigid to be used effectively as mallets by the croquet-players.”

A pretrial conference that consists of little more than “What do you want?”, “What will you take?”, “Bring in my book, Mary.”, is a waste of time for the participants and will not suffice under these rules.

**Chapter 803**

**Parties**

803.01 Parties plaintiff and defendant; capacity.

(1) **Real party in interest.** No action shall be dismissed on

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the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(2) **Representatives.** A personal representative, executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the person for whose benefit the action is brought. A partner asserting a partnership claim may sue in his own name without joining the other members of the partnership, but he shall indicate in his pleading that the claim asserted belongs to the partnership.

(3) **Infants or Incompetent Persons.**

(a) **Appearance by guardian or guardian ad litem.** If a party to an action or proceeding is a minor, or if the court has reason to believe that a party is mentally incompetent to have charge of his affairs, he shall appear by an attorney, by the general guardian of his property who may appear by attorney or by a guardian ad litem who is an attorney. A guardian ad litem shall be appointed in all cases where the minor or incompetent has no general guardian of his property, or where the general guardian fails to appear and act on his behalf, or where the interest of the minor or incompetent is adverse to that of the general guardian. Except as provided in s. 807.10, if the general guardian does appear and act and his interests are not adverse to the minor or incompetent, a guardian ad litem shall not be appointed. Where the interests of the minor or mentally incompetent person are represented by an attorney of record the court shall, except upon good cause stated in the record, appoint that attorney as the guardian ad litem.

(b) **Guardian ad litem.**

1. The guardian ad litem shall be appointed by a circuit or a county court of the county where the action is to be commenced or is pending.

2. When the plaintiff is a minor 14 years of age or over, upon his application; or if the plaintiff is under that age or is mentally incompetent, upon application of his guardian or of a relative or friend. If made by a relative or friend, notice thereof must first be given to his guardian if he has one in this state; if he has none, then to the person with whom the minor or mentally incompetent resides or who has him in custody.
3. When the defendant is a minor 14 years of age or over, upon his application made within 20 days after the service of the summons or other original process; if the defendant is under that age or neglects to so apply or is mentally incompetent, then upon the court’s own motion or upon the application of any other party or any relative or friend or his guardian upon such notice of the application as the court directs or approves.

4. If the appointment, for a plaintiff or a defendant, is after the commencement of the action, it shall be upon motion entitled in the action. If the appointment is for a plaintiff and is made before the action is begun, the petition for appointment shall be entitled in the name of the action proposed to be brought by the minor or incompetent, and the appointment may be made before the summons is served. Upon the filing of a petition for appointment before summons, the clerk may impose a suit tax and filing fee but in that event no additional suit tax and filing fee shall be imposed when the summons is filed.

5. The motion or petition under sub. 4 shall state facts showing the need and authority for the appointment. The hearing on the motion or petition under sub. 4, if made by a minor or mentally incompetent person for his own guardian ad litem, may be held without notice and the appointment made by order. If the motion or petition is made for a minor or mentally incompetent who is an adverse party, the hearing shall be on notice.

6. If a compromise or a settlement of an action or proceeding to which an unrepresented minor or mentally incompetent person is a party is proposed, a guardian ad litem shall be appointed, upon petition in a special proceeding, to protect the interest of the minor or incompetent even though commencement of an action is not proposed. Any compromise or settlement shall be subject to s. 807.10.

(c) Procedure where minor or incompetent not represented.

1. If at any time prior to the entry of judgment or final order, the court finds that either a minor, or a person believed by the court to be mentally incompetent to have charge of his affairs, has not been represented in the action or proceeding as provided in par. (a), there shall be no further proceedings until a guardian ad litem is appointed. In making such appointment, the court shall fix a reasonable time within which the guardian ad litem may move to vacate or strike any order entered or action taken during the period when a guardian ad litem was required; and as to all matters to which objection
is not made, he and his ward shall be bound. Any such motion by a guardian ad litem shall be granted as a matter of right.

2. If the court finds after the entry of judgment or final order that a person, who at the time of entry of judgment or final order was a minor or mentally incompetent, was not represented in the action or proceeding by an attorney of record or otherwise represented as provided in par. (a) the judgment or order shall be vacated on motion of:

a. The minor or mentally incompetent, for whom no appointment was made, at any time prior to the expiration of one year after his disability is removed; or

b. The personal representative of such minor or mentally incompetent at any time prior to the expiration of one year after the death of the minor or mentally incompetent.

Subsection (1), which replaced section 260.13, is based on the last sentence of Federal Rule 17. This provision preserves the common law real-party-in-interest rule, although the emphasis is somewhat different.

The "real party in interest" has been defined as "one who has a right to control and receive the fruits of the litigation." This concept closely resembles the concept of standing to sue. Standing to sue, however, addresses the question of whether the plaintiff has suffered legal injury sufficient to invoke the judicial process. The real-party-in-interest rule on the other hand, operates to identify who, among several persons, possesses the substantive right upon which the suit depends.

The real party in interest has always been required to bring the action, but at common law he was required to bring the action in the name of the person with whom the defendant originally had privity. This phenomenon, called the "name suit," was the result of the common law court's refusal to recognize assignments of choses in action or other equitable interests.

Equity courts, on the other hand, were more concerned with having the parties with actual ownership interests before the court in order to resolve disputes completely. The courts of equity recognized the rights of trustees, equitable assignees, subrogees, guardians and similar interest-holders to bring ac-

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tions in their own names without joining the original interest-holder of the substantive right being enforced. Consequently, it was never necessary to resort to the "name suit" practice in equity.

With the merger of law and equity, the more practical approach of the courts of equity was adopted in the New York Code, requiring every action to be prosecuted in the name of the real party in interest except for certain actions where legal representatives or statutorily-authorized persons could sue without joining the person who would benefit by the action.\textsuperscript{111}

The obstacle which the rule was designed to overcome was eliminated when courts of law finally recognized the assignments of choses in action.\textsuperscript{112} The modern functions of the rule have primarily been to prevent separate actions by the assignor and assignee of the same interest to enforce the same substantive right, and to ensure the proper res judicata effect of judgments:

The purpose of the real-party-in-interest statute is to prevent a multiplicity of suits, to make sure that a defendant can assert his defenses when sued upon an assigned claim, to assure that a judgment will completely settle the claim, and to make it possible to discharge the debt by paying the assignee with no vestigial right of action remaining in the assignor.\textsuperscript{113}

Since the modern purpose for the rule is to protect defendants from vexatious litigation with respect to the same claim, it would seem that this function has been subsumed by the mandatory joinder rule, section 803.03.\textsuperscript{114} Indeed, the modern elements of the real-party-in-interest rule are nearly identical to the functional test laid out in section 803.03(3) for determining whether a party should be joined if feasible:

\begin{quote}
\begin{itemize}
\item The rule was unnecessary because (1) the law would be the same without any express rule, (2) it was an inept statement of an obvious principle of substantive law, (3) it misleadingly seemed to say that the action must be brought by the party to be benefited, and (4) the second part of [the former New York rule equivalent to the second sentence of Federal Rule 17(a)] . . . was not an exception to the first part even though it was cast in the form of an exception.
\end{itemize}
\end{quote}
[A] fundamental test [in determining the real party in interest] . . . is whether the prosecution of the action will save the defendant from further harassment for the same demand, will cut the defendant off from any just defense, offset, or counterclaim against the demand, and whether the discharge of the judgment in behalf of the party suing will fully protect the defendant. 115

Because the affirmative requirement that the party who possesses the right to receive the fruits of the litigation be joined is implicit in section 803.03, this mandatory joinder aspect of the original real-party-in-interest rule has been eliminated in its positive terms from the new language of section 803.01(1). 116 The new rule addresses only the procedural impact of the failure to join the real party in interest. It is the purpose of the "necessary and indispensable party" rule, section 803.03, to ensure that the parties with material interests which might be affected be joined in the action. The purpose of the real-party-in-interest rule, on the other hand, was merely to get around the common law privity problems. For this reason the new section 803.01 will minimize the consequences and injustice of dismissing an action where an honest mistake has been made in choosing the party in whose name the action has been filed. The new language expels mandatory joinder questions from real party in interest cases, leaving such questions to their proper place in section 803.03.

Intrusion of mandatory joinder questions under the guise of real-party-in-interest issues arose in cases such as Borde v. Hake, 117 where less than all interested holders of a substantive right brought an action on the claim held between them. In such cases, the interrelatedness of the real-party-in-interest rule and the "necessary and indispensable party" rule immediately became apparent. In Borde v. Hake, the plaintiff, who was injured in an automobile collision with the defendant, brought an action for personal injury and property damage. The defendant interposed a plea in abatement alleging that the plaintiff was not the real party in interest in that a portion of

115. Mortgage Associates v. Monona Shores, 47 Wis. 2d at 179, 177 N.W. 2d at 346, 347.
116. The old rule read: "260.13 Real party in interest must prosecute. Every action must be prosecuted in the name of the real party in interest except as otherwise provided in section 260.15." (Emphasis supplied).
117. 44 Wis. 2d 22, 170 N.W.2d 763 (1969).
the claim belonged to the plaintiff's collision insurance carrier (Heritage) who had paid plaintiff's property damage less a fifty dollar deductible. The circuit court held that the plea in abatement was proper under Patitucci v. Gerhardt. That case had held that a collision insurance carrier, which had paid a plaintiff's claim under a collision policy, was an indispensable party to the lawsuit, and the failure to join the insurer would be grounds for a plea in abatement. The circuit court in Borde ordered the entire action suspended until all parties united in interest were joined. However, the statute of limitations had since run on the property damage claim in which the insurer held an interest, and a holding that the action had not been commenced would have barred the entire claim—even the personal injury claim in which Heritage held no interest. On appeal, the Wisconsin Supreme Court held that the property and personal injury damages were two separate "rights of action" within one cause of action, and the circuit court's abatement of the "right of action" in which Heritage held no interest was error. But as to the property damage "right of action," the abatement was correct. The net effect, from the plaintiff's point of view, was to lose the fifty dollar deductible interest still held by him in the property damage right of action "while preserving the more substantial personal injury right of action."

In essence, the Borde court held that by virtue of Heritage's subrogation, the cause of action became two separate claims which had to have been commenced together in order to toll the statute of limitations. In so concluding, the court stated that:

\[\ldots\text{[O]nce a defendant is freed of potential liability by the running of the statute of limitations in a civil suit, [to extend the period of limitations] \ldots would subject a defendant to}\]

118. 206 Wis. 358, 240 N.W. 385 (1932).

119. This holding has since been modified, and to a considerable degree the theoretical problems which developed under the old necessary and indispensable party rule, § 260.12(1), were resolved in Heifetz v. Johnson, 61 Wis. 2d 111, 120, 211 N.W.2d 834, 840 (1973), wherein it was stated that "[i]t is better to think of the [subrogated] insurer as an assignee of part of the claim than to speak of the insured and the insurer as joint owners of the claim." Thus, a subrogated insurer is really only a "necessary" party under the old mandatory joinder rule, although the court in Heifetz did not definitely rule to this effect. See Commentary on Wis. Stat. § 803.03, infra p. 81.
liability without due process of law in violation of the Constitution of the United States.\textsuperscript{120}

Thus, the court invoked the real-party-in-interest rule—a purely procedural rule\textsuperscript{121}—to impose the substantive bar of limitations of actions. There is little authority or logic to support this conclusion. Both the old and new versions of the real-party-in-interest rule require \textit{prosecution} rather than \textit{institution} by the real party in interest.\textsuperscript{122} The question of commencement of actions is irrelevant in this context. A curious situation would have resulted if the insurer had paid the plaintiff's claim subsequent to the commencement of the action but before judgment was rendered. It would be absurd to hold that the subrogation at that point would void the action \textit{ab initio}.

The commencement of the action by one of the interested parties in \textit{Borde} should have been effective to toll the statute as to the entire claim. If, as the court declared in \textit{Heifetz v. Johnson},\textsuperscript{123} "acceptance of payment from an insurer . . . operates as a virtual assignment of the cause of action to the insurer and a part payment operates as an assignment pro tanto," then the assigned portion of the plaintiff's claim in \textit{Borde} was a part of the original claim for which only one commencement would be necessary. This is the only logical result since the real-party-in-interest rule has nothing to do with the commencement of actions. While the Wisconsin court in \textit{Heifetz} withdrew somewhat from the position taken in \textit{Borde}, claiming that the discussion relating to the statute of limitations was dicta, the court still remains enmeshed in problems of limitations of actions in the area of joinder.\textsuperscript{124}

\textsuperscript{120} Borde v. Hake, 44 Wis. 2d at 31, 170 N.W.2d at 772. In Wisconsin, limitations "are not treated as statutes of repose. The limitation of actions is a right as well as a remedy, extinguishing the right on one side and creating a right on the other, which is of high dignity as regards judicial remedies as any other right and it is a right which enjoys constitutional protection." Maryland Casualty Co. v. Beleznay, 245 Wis. 390, 393, 14 N.W.2d 177, 179 (1944).

\textsuperscript{121} CLARK, \textit{CODE PLEADING}, § 22 (2d ed. 1947).


\textsuperscript{123} 61 Wis. 2d at 114, 211 N.W.2d at 836.

\textsuperscript{124} This problem is very similar to the question of whether a failure to join a "necessary party" under § 803.03 is a jurisdictional defect. See Commentary on Wis. Stat. § 803.03, \textit{infra} p. 81. In both real party in interest and "necessary" party issues, the courts have continually overlooked the fact that these are procedural rather than substantive rules. The thrust of the new joinder provisions of Chapter 803 is to elimi-
Hence, under new section 803.01(1), commencement of the action by any of the persons holding a part of the claim will toll the statute of limitations as to all, provided that within a reasonable time after objection is made, the other persons holding parts of the claim ratify the plaintiff's commencement of the action or are themselves joined or substituted in the action.

Two matters remain unclear under the wording of section 803.01(1). The first, related directly to the discussion immediately above, is that the rule recognizes by implication that an action may be dismissed when a reasonable time has expired following a real-party-in-interest objection and no joinder, substitution, or ratification has taken place. Does this mean that the entire action would be dismissed, or, as in Borde, would the plaintiff who had commenced the action stay in court on his right of action?

A second problem is that the rule retains the phrase "the real party in interest" with the connotation that there can be only one such party with respect to a given claim. It must carefully be noted that "there may be as many real parties in interest as there are rights of action by substantive law." 125

One further caveat must be taken into account with respect to the provision for nondismissal until a reasonable time has been allowed for ratification, joinder or substitution of the real party in interest. The Federal Rules Advisory Committee's Note to Federal Rule 17(a) (the equivalent of section 803.01) observed:

The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. It does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period.

Section 803.01(2) is based on section 260.15 and Federal Rule 17(a). This subsection adds guardians and bailees to the list of persons authorized under the old rule 260.15 to bring suits without naming the person for whose benefit the suit is brought. This section also allows a partner to sue on a partnership claim without joining the other members of the partnership, provided the pleading indicates that the claim belongs to the partnership.

Section 803.01(3) is derived from former sections 260.22 through 260.24.

803.02 Joinder of claims and remedies. (1) A party asserting a claim to relief as an original claim, counterclaim, cross claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.

(2) Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

Subsection (1) creates an unlimited right of claim joinder. In cases involving a single plaintiff and defendant there is no limitation upon joining any number of claims, legal or equitable. The party joinder rules, sections 803.03 and 803.04, provide the limitation on the size and cohesiveness of multi-party cases.\textsuperscript{126} If a party must be dropped under section 803.06 for misjoinder, the claim for relief asserted against that party is also dropped.

Section 803.02 is derived from Federal Rule 18(a) which "proceeds upon the theory that no inconvenience can result from the joinder of two or more matters in the pleadings, but only from trying two or more matters together which have little or nothing in common."\textsuperscript{127} Thus, the Federal Rules Advisory Committee Note to Rule 18 states that the claim joinder rule

\textsuperscript{126} The problems of "uniting causes of action" in multi-party cases under the old rule § 263.04 are dealt with in the commentary on permissive joinder of parties under § 803.04 \textit{infra} p. 92.

"has permitted a party to plead multiple claims of all types against an opposing party, subject to the court's power to direct an appropriate procedure for trying the claims." Under the new rules, the appropriate procedure for making the trial of multiple claims more manageable is through the severance provisions of section 803.04(2)(b), section 803.04(3) and section 803.06. This approach saves the time, effort, and expense of instituting separate lawsuits on each claim.

While joinder of claims is completely permissive, the plaintiff must be careful not to split a single claim into two separate lawsuits, because a judgment in the first action may bar recovery in the second action under the doctrine of res judicata. In this regard, it must also be noted that the concept of a "claim" under the Federal Rules and new Wisconsin rules has a broader connotation than the concept of "cause of action."

Subsection (2), derived from Federal Rule 18(b), allows a plaintiff to join claims in one action regardless of the fact that the plaintiff's right to recover on one claim so joined depends upon the successful prosecution of the other claim. This provision is purely procedural. Its practical effect is to save the expense, delay, and effort of initiating separate suits. The last sentence of subsection (2) is intended to abolish the rule of Lipman v. Manger, that "[i]f the plaintiffs were general creditors and desired to follow property fraudulently transferred . . . it would be necessary first to procure judgment against the real debtor and exhaust their remedies against [the real debtor]."

803.03 Joinder of persons needed for just and complete adjudication. (1) Persons to be joined if feasible. A person who is subject to service of process shall be joined as a party in the action if (a) in his absence complete relief cannot be accorded among those already parties, or (b) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may 1. as a practical matter impair or impede his ability to protect that interest or 2. leave any of the persons already

130. 185 Wis. 63, 73, 200 N.W. 663, 667 (1924). See also Running v. Widdes, 52 Wis. 2d 254, 190 N.W.2d 169 (1971).
parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest.

(2) **Claims arising by subrogation, derivation and assignment.** (a) **Joinder of related claims.** A party asserting a claim for affirmative relief shall join as parties to the action all persons who at the commencement of the action have claims based upon subrogation to the rights of the party asserting the principal claim, derivation from the principal claim, or assignment of part of the principal claim. For purposes of this section, a person’s right to recover for loss of consortium shall be deemed a derivative right. Any party asserting a claim based upon subrogation to part of the claim of another, derivation from the rights or claim of another shall join as a party to the action the person to whose rights he is subrogated, from whose claim he derives his rights or claim, or by whose assignment he acquired his rights or claim.

(b) **Options after joinder.** Any party joined pursuant to par. (a) may 1. participate in the prosecution of the action, 2. agree to have his interest represented by the party who caused his joinder, or 3. move for dismissal with or without prejudice. If the party joined chooses to participate in the prosecution of the action, he shall have an equal voice with other claimants in such prosecution. If he chooses to have his interest represented by the party who caused his joinder, he shall sign a written waiver of his right to participate which shall express his consent to be bound by the judgment in the action. Such waiver shall become binding when filed with the court, but a party may withdraw his waiver upon timely motion to the judge to whom the case has been assigned with notice to the other parties. A party who represents the interest of another party and who obtains a judgment favorable to such other party may be awarded reasonable attorney’s fees by the court. If the party joined moves for dismissal without prejudice as to his claim, he shall demonstrate to the court that it would be unjust to require him to prosecute his claim with the principal claim. In determining whether to grant the motion to dismiss, the court shall weigh the possible prejudice to the movant against the state’s interest in economy of judicial effort.

(c) **Scheduling and pretrial conferences.** At the scheduling conference and pretrial conference, the judge to whom the case has been assigned shall inquire concerning the existence of and joinder of persons with subrogated, derivative or **
signed rights and shall make such orders as are necessary to effectuate the purposes of this section.

(3) Determination by Court Whenever Joinder Not Feasible. If any such person has not been so joined, the judge to whom the case has been assigned shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If a person as described in subs. (1) and (2) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include:

(a) To what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties;
(b) The extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
(c) Where a judgment rendered in the person's absence will be adequate; and
(d) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(4) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subs. (1) and (2) who are not joined, and the reasons why they are not joined.

(5) Exception of Class Actions. This section is subject to s. 803.08.

All of this rule, with the exception of subsection (2), is derived from Federal Rule 19, as amended in 1966. Section 803.03 deals with mandatory joinder, as distinguished from permissive joinder under section 803.04, and is closely related to section 803.09 governing intervention.

The general purpose behind section 803.03 is to require, when feasible, the inclusion in an action of those parties necessary to a complete determination of a single controversy for res judicata purposes. Since this rule is fundamentally a departure from the theory under the old mandatory joinder rule in Wis-

131. Although it is commonly assumed that the concept of mandatory joinder embraces the real-party-in-interest rule (§ 803.01), the latter, in its proper application, simply raises the question of whether or not a plaintiff possesses the particular substantive right which he seeks to enforce. See commentary on § 803.01, supra p. 77. Therefore, the use of the term “mandatory joinder” is limited herein to the subject of § 803.03.
consin, the theoretical underpinnings of both the old and new rules must be examined.

The old Wisconsin mandatory joinder rule provided:

260.12 Parties united in interest to be joined; class actions; alternative joinder.

Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants, but if the consent of any one who should be joined as plaintiff cannot be obtained he may be made a defendant, the reason thereof being stated in the complaint, and when the question is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole. And when more than one person makes a separate claim for damage against the same person or persons based upon the same alleged tortious conduct, they may unite in prosecuting their claims in one action.

A determination of whether a party had to be joined depended upon defining the phrase "united in interest." The statute never used the terms "necessary" or "indispensable" parties yet those classifications were central to the analysis under the old rule.132 The terms originated in case law dating back to the nineteenth century.133 In Shields v. Barrow,134 the Supreme Court attempted to define these two generic types of litigants:

Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it . . . are commonly termed necessary parties; but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons, not before the court, the latter are not indispensable parties . . . . Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that

132. See e.g., Heifetz v. Johnson, 61 Wis. 2d 111, 211 N.W.2d 834 (1973), and Kochel v. Hartford Accident & Indemnity Co., 66 Wis. 2d 405, 225 N.W.2d 604 (1975).
134. 58 U.S. (17 How.) 130 (1854).
interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience [are indispensable parties]. . . .\textsuperscript{135}

Largely as a result of this language in \textit{Shields}, courts began to examine the nature of a person’s property interest in the subject matter of the controversy in order to determine whether a party was “necessary” or “indispensable.” This analysis proceeded upon a theoretical basis—attempting to fit the joint, common, or several interest into one of the two theoretical categories of “necessary” or “indispensable.”\textsuperscript{136} From this analysis, the old Wisconsin mandatory joinder rule derived the “united in interest” concept.

Wisconsin case law, operating under the “united in interest” concept and the approach of looking for the proper theoretical category in which to place the absent person’s interest, has resulted in the rule that “joint owners must sue jointly and neither can recover in an action in which he is the sole plaintiff.”\textsuperscript{137} But the concept of joint ownership is difficult to define in all its applications and thus fails to advance much farther than the concept of “united in interest.” Under the recent cases of \textit{Heifetz v. Johnson}\textsuperscript{138} and \textit{Kochel v. Hartford Accident & Indemnity Co.},\textsuperscript{139} the court has remedied this definitional problem somewhat by further refining the concept of joint ownership to require “joint owners in the same sense as the joint payees of a note.”\textsuperscript{140} The rationale for this rule was stated in \textit{Kochel} to be, “Joint payees of a note are entitled to one undivided recovery because of the inherent nature of their claim. If one sues and recovers, the other would be left with no cause of action.”\textsuperscript{141} Even with this narrower definition of joint ownership, the analysis remains unsatisfactory since it is premised upon the questionable assumption that all joint owners bear such a relation to the action that their presence is indispensa-

\textsuperscript{135} \textit{Id.} at 139.

\textsuperscript{136} This type of analysis was also the basis upon which class action theory proceeded under original Federal Rule 23. This rule distinguished between “joint,” “several,” and “spurious” unions. See, 3B Moore’s \textit{Federal Practice} § 23.01[8].

\textsuperscript{137} \textit{Heifetz v. Johnson}, 61 Wis. 2d 111, 211 N.W.2d at 840.

\textsuperscript{138} 61 Wis. 2d 111, 211 N.W.2d 834 (1973).

\textsuperscript{139} 66 Wis. 2d 405, 225 N.W.2d 604 (1975).

\textsuperscript{140} \textit{Heifetz v. Johnson}, 61 Wis. 2d 111, 211 N.W.2d 834.

\textsuperscript{141} \textit{Kochel v. Hartford Accident & Indemnity Co.}, 66 Wis. 2d 414, 225 N.W.2d 609 (1975).
ble. The Federal Rules Committee Note of 1966 to Rule 19 emphasized this point:

... [P]ersons holding an interest technically “joint” are not always so related to an action that it would be unwise to proceed without joining all of them, whereas persons holding an interest not technically “joint” may have this relation to an action.

The assumption, under present Wisconsin law, that all joint interest holders bear an indispensable relation to an action must itself be premised on either or both of the following propositions: (1) failure to join an “indispensable” party presents a jurisdictional defect; or (2) the court is incapable of shaping the relief awarded to the joint-owner party to the action so as to protect the absent joint-owner. As to the former proposition, the Wisconsin court has held in definitive terms that failure to join an indispensable party does not present a jurisdictional defect.\(^{142}\) As to the latter proposition, there has never been any doubt that a court is capable of shaping relief to protect an absent party, but this function has largely been ignored as an alternative to dismissal of an action when joinder of a party who ought to be joined is not feasible.\(^{143}\) For this reason, the ability of the court to overcome prejudice to the absent party by shaping relief is specifically emphasized as a relevant factor under section 803.03(3)(b) in considering whether or not the action may proceed.

Thus, the concept of “jointness” of interest is not of itself indicative of whether or not a person is so related to the subject matter of the action that he must be joined in order to avoid dismissal. The concept is relevant insofar as it aids in the identification of parties who ought to be joined in the action, but the decision as to whether an action should be dismissed because of such a party’s absence should be controlled by a consideration of the practical alternatives. This was the thrust of

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\(^{142}\) Heifetz v. Johnson, 61 Wis. 2d 111, 211 N.W.2d 834 (1973).

\(^{143}\) A case in which the tool of “shaping relief” was employed was Patatucci v. Gerhardt, 206 Wis. 358, 240 N.W. 385 (1932). In that case, the court recognized that where the subrogated interest of an insurer in its insured’s claim did not come to the court’s attention before it proceeded to judgment, the insurer could recover the entire amount of the damages, including those accruing to the insurer’s “right” of action, and would then hold the insurer’s portion as trustee. Thus, the court protected the insurer’s interest by shaping the relief awarded to the plaintiff.
the Federal Advisory Committee's criticisms of the old Federal Rule 19 in its Note to the 1966 revision:

The use of "indispensable" and "joint interest" in the context of original Rule 19 directed attention to the technical or abstract character of the rights or obligations of the persons whose joinder was in question, and correspondingly distracted attention from the pragmatic considerations which should be controlling.

Thus, the amended Federal Rule 19 and new section 803.03 set up functional tests, based on pragmatic considerations, for determining: (1) who must be joined in the action among the parties subject to service of process; and (2) whether or not the court should proceed to judgment in the absence of a person who, but for his being beyond the reach of process, would otherwise be mandatorily joined.

Subsection (1) provides the test for parties who must be joined unless their absence is excused under subsection (3). A party who satisfies the requirements of either paragraph (a) or paragraph (b) of subsection (1) must be joined if subject to service of process. These criteria focus upon the practical effect of nonjoinder. In Wisconsin, because of the liberal "long-arm" provisions of Chapter 801, there will be very few instances where a party who must be joined, under the test set out in this subsection, will not be subject to service of process.144

When a party is not subject to service of process, subsection (3) provides a functional test for determining whether or not "in equity and good conscience" the court should proceed to judgment with the parties before it, or dismiss the action. The court must consider the factors set out in paragraph (a) through (d) after which the decision of dismissal or non-dismissal is made. Included in these factors is the consideration of whether prejudice can be avoided by the shaping of relief. If a decision of dismissal is reached, it is only at such time that the absent party is, in a conclusory sense, deemed "indispensable."

Even under the new pragmatic analysis there will more

144. Problems of joinder under Federal Rule 19 become more complex due to the limitation on extraterritorial service of process in Federal Rule 4(f), although 4(e) permits extraterritorial service whenever a statute or rule of the forum state provides therefor. Of greater significance, however, is the requirement in Federal Rule 19 that joinder not destroy federal diversity jurisdiction.
often be a finding of "indispensability" in those instances where an absent person holds a "truly joint" and "material" interest which is inseparable from a right or liability held by a party joined in the action. In such cases a trial might—as a practical matter—be declarative of the absent party's right or liability. But the mere existence of such a "joint" interest is not a substitute for the functional analysis set out in the rule. The court must look not only at the interest held by the absent party, but primarily at the practical effect of nonjoinder. In close cases, the court, after complying with the analysis under the rule, will be forced to make a decision which will result in leaving a defendant open to a second suit with inconsistent results, or leave a plaintiff with only "hollow" relief or no trial at all, or leave an absent party with a fait accompli.

A theoretical problem which has frequently arisen under the federal and state mandatory joinder rules is whether the absence of a party who ought to be joined, such as a joint owner of a note, deprives the court of subject matter jurisdiction. The Federal Advisory Committee Note of 1966 to Rule 19 explained that subject matter jurisdiction does not properly enter into questions of mandatory joinder:

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a person to a later inconsistent recovery by the absent person. These are matters which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

The Wisconsin Supreme Court in Heifetz v. Johnson held that nonjoinder of "indispensable" parties has never been viewed as a defect going to the jurisdiction of the court in

145. See e.g., Samuel Goldwyn, Inc. v. United Artists Corp., 113 F.2d 703, 707 (3d Cir. 1940); Sellman v. Haddock, 310 P.2d 1045 (1957); Heifetz v. Johnson, 61 Wis. 2d 111, 211 N.W.2d 834 (1973).
146. 61 Wis. 2d at 121, 211 N.W.2d at 840.
Wisconsin, withdrawing any contrary language in *Borde v. Hake.* This ruling is consistent with the theory underlying section 803.03. However, the court in *Heifetz* became entangled in the question of commencement and limitations of actions while considering a case dealing with mandatory joinder and thereby elevated a purely procedural rule to a place of substantive significance.

In *Heifetz,* the plaintiff had been injured in an automobile collision with the defendant in 1968 and was paid $2,000 for medical expenses by his insurer, Heritage Mutual Insurance Co. (Heritage). Heifetz executed a "subrogation receipt and assignment" to Heritage in 1969. Heifetz then commenced an action for personal injury damages against defendant in 1971, eleven days before the statute of limitations was due to run, and without joining Heritage in the action. After the eleven days had passed, defendants moved for summary judgment on the basis that Heritage was an indispensable party to the action and that the failure to join such an indispensable party before the running of the statute of limitations was ineffective to toll the statute even as to those plaintiffs already joined in the action. The trial court denied the motion for summary judgment and the defendant appealed.

On appeal, the supreme court held that although Heritage was initially indispensable, the statute of limitations had effectively barred Heritage from asserting its cause of action:

The respondents also persuasively argue that the purpose of the mandatory joinder statutes . . . is to protect the defendant against a multiplicity of suits and that the purpose is served when by operation of the statute of limitations the insurer is barred forever from any claim against the defendant. There is, in effect, no longer any lack of an indispensable party for the insurer no longer has any interest in the action."

The court grounded this conclusion on the principle that in Wisconsin the running of the statute of limitations extinguishes the cause of action as well as the right of action.
This result was also reached in the recent case of Kochel v. Hartford Accident & Indemnity Co.,\textsuperscript{1} in which two brothers commenced an action for the wrongful death of their father without joining their three sisters. The defendant was granted summary judgment by the trial court on the basis of nonjoinder of indispensable parties. On appeal, the court held that the action was properly commenced as to the two brothers, but that because the statute of limitations had since run on the wrongful death claims of the three sisters, the statute of limitations would preclude them fromcommencing independent wrongful death actions in the future. Therefore, the sisters were no longer indispensable parties.

The problem with the court’s reasoning is that there is no justification for the rule that the statute of limitations on a split cause of action cannot be tolled by the commencement of an action by an owner of a part of the action.\textsuperscript{2} The Heifetz court stated that “it is better to think of the insurer as an assignee of part of the claim than to speak of the insured and the insurer as joint owners of the claim.”\textsuperscript{3} Similarly, “a cause of action for wrongful death is a single cause of action with ownership thereof vested in ‘the person to whom the amount recovered belongs’ as designated [in the wrongful death statute].”\textsuperscript{4} If, then, there is only one cause of action, albeit, split into two or more parts, there is no logical reason to require more than one commencement of that cause of action. The court in Heifetz ironically observed:

It was well stated in Bank of California v. Superior Court [16 Cal. 2d 516, 521, 106 P.2d 879 (1940):

“... Bearing in mind the fundamental purpose of the doctrine, we should, in dealing with “necessary” and “indispensable” parties, be careful to avoid converting a discretionary

\textsuperscript{1} In Wisconsin the running of the statute of limitations absolutely extinguishes the cause of action for in Wisconsin limitations are not treated as statutes of repose. The limitation of actions is a right as well as a remedy, extinguishing the right on one side and creating a right on the other, which is as of high dignity as regards judicial remedies as any other right and it is a right which enjoys constitutional protection. . . ."

Haase v. Sawicke, 20 Wis. 2d 308, 311, 312, 121 N.W.2d 876 (1963), quoting from Maryland Casualty Co. v. Beleznay, 245 Wis. 390, 393, 14 N.W.2d 177 (1944).

\textsuperscript{2} See also commentary on § 803.01, supra p. 69.

\textsuperscript{3} Heifetz v. Johnson, 61 Wis. 2d at 120, 211 N.W.2d at 839.

\textsuperscript{4} Truesdill v. Roach, 11 Wis. 2d 497, 105 N.W.2d at 874 (1960).
Yet, the court proceeded to do just that, namely to invoke a rule of procedure, the mandatory joinder statute, to impose the substantive bar of the statute of limitations.

Subsection (2) of section 803.03 is designed to eliminate the confusion of statute of limitations questions with the rules governing joinder of parties. This subsection mandates the joinder of persons who at the commencement of the action possess a part of the original cause of action by virtue of subrogation to, derivation from, or assignment of, a part of the principal claim possessed by the plaintiff. By this part of subsection (2), such persons are included in the class of persons needed for just and complete adjudication. The Judicial Council Committee's Note, 1974, emphasizes that subsection (2) "is intended to foster economy of judicial effort by requiring that all 'parts' of a single cause of action whether arising by subrogation, derivation, or assignment, be brought before the court in one action."

It should be noted that this subsection refers to these three types of related claims as "parts" of the principal claim. This emphasis makes it apparent that one commencement is sufficient to toll the statute of limitations since there is actually only one cause of action.

Similarly, the thrust of section 803.01, the real-party-in-interest rule, with its relation back provision, is directly related to section 803.03(2)(b) which recognizes the right of a person holding a related claim to have such claim represented by the party who caused his joinder—a frequent ground for real-party-in-interest objections under present case law. Therefore, the relation back provision of section 803.01 should apply equally to section 803.03.

Paragraph (c) of subsection (2) also makes it clear that the entire claim, including all of its constituent parts, is effectively commenced with the filing of one summons by the principal claimant. At the scheduling and pre-trial conferences, the judge assigned to the case "shall inquire concerning the existence of and joinder of persons with subrogated, derivative, or assigned rights and shall make such orders as are necessary to effectuate the purposes of this section." If the new rules were

155. Helfetz v. Johnson, 61 Wis. 2d at 123, 211 N.W.2d at 841.
to recognize the Heifetz and Kochel holdings with reference to the statute of limitations, the judge would be unable to order the joinder of a party possessing a subrogated, assigned or derivative part of the principal claim if the statute of limitations had run between that time and the commencement of the principal action. But the rule recognizes no such limitation. Thus, the new rules provide a clear basis for a change in the rulings of Heifetz and Kochel with respect to commencement of actions in those cases where a claim is split.\textsuperscript{156}

Paragraph (b) of subsection (2) provides the mechanism whereby a party joined as a related-claim holder under paragraph (c) of subsection (2) may choose among several procedural alternatives including: (1) participating in the prosecution of the action, (2) consenting to having his interest represented by the party causing his joinder, and (3) moving for dismissal without prejudice.

This paragraph recognizes the practical problems encountered in cases involving subrogated insurers. Since the insurance industry operates on the basis of actuarial tables, with a conceded measure of losses, subrogated insurers are not interested in expending money and effort in doubtful cases, and therefore frequently ignore a subrogated claim upon which they are legally entitled to act. In such cases, the insurer can merely agree to have his interest represented by its insured in a suit against the tort-feasor.

\textbf{803.04 Permissive joinder of parties.} (1) \textbf{Permissive joinder.} All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for

\textsuperscript{156} Cf., commentary on § 802.09 Amended and Supplemental Pleadings, supra p. 63. Section 802.09 overthrows case law that had set up a procedural rule of pleading as an aid to the substantive defense of limitations of actions.
one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(2) **Negligence actions; insurers.** (a) In any action for damages caused by negligence, any insurer which has an interest in the outcome of such controversy adverse to the plaintiff or any of the parties to such controversy, or which by its policy of insurance assumes or reserves the right to control the prosecution, defense or settlement of the claim or action, or which by its policy agrees to prosecute or defend the action brought by plaintiff or any of the parties to such action, or agrees to engage counsel to prosecute or defend said action or agrees to pay the costs of such litigation, is by this section made a proper party defendant in any action brought by plaintiff in this state on account of any claim against the insured. If the policy of insurance was issued or delivered outside this state, the insurer is by this paragraph made a proper party defendant only if the accident, injury or negligence occurred in this state.

(b) If an insurer is made a party defendant pursuant to this section and it appears at any time before or during the trial that there is or may be a cross issue between the insurer and the insured or any issue between any other person and the insurer involving the question of the insurer's liability if judgment should be rendered against the insured, the court may, upon motion of any defendant in the action, cause the person who may be liable upon such cross issue to be made a party defendant to the action and all the issues involved in the controversy determined in the trial of the action or any third-party may be impleaded as provided in s. 803.05. Nothing herein contained shall be construed as prohibiting the trial court from directing and conducting separate trials on the issue of liability to the plaintiff or other party seeking affirmative relief and on the issue of whether the insurance policy in question affords coverage. Any party may move for such separate trials and if the court orders separate trials it shall specify in its order the sequence in which such trials shall be conducted.

(3) **Separate trials.** The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.
Potential parties to an action fall into one of two categories: (1) those who must be joined in the action in order to give proper res judicata effect to judgments, unless their absence is excused; or (2) those who may properly be joined, at the option of the pleader, because their relation to the subject matter of the action is such that their inclusion will save unnecessary expense, delay, and duplication of effort generally. Those persons falling into the first category (mandatory joinder) are dealt with in section 803.03, and those in the latter category (permissive joinder) are dealt with in this rule, section 803.04.

Subsections (1) and (3) are taken from Federal Rule 20(a) and (b), with respect to which it has been said:

• [F]ree joinder of parties has become one of the commonplaces of procedural reform. . . . [T]he purpose and construction of Rule 20 . . . [section 803.04] . . . is obviously . . . to center in one piece of litigation all the controversies related to a particular transaction and affecting all the parties thereto. Rule 20 [section 803.04] is simply a procedural rule, the sole purpose of which is to remove the procedural obstacles of the common law as well as of the earlier codes in certain regards. . . . Convenience is the avowed criterion.157

Since the rule is permissive, defendants may not compel the plaintiff to join other persons as defendants. Of course the defendant might be able to accomplish this himself by impleader under section 803.05, provided its requirements are met.

Under subsection (1) of section 803.04, permissive joinder of plaintiffs depends upon the satisfaction of two requirements: (1) the right to relief asserted by all plaintiffs must be "in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences," and (2) "any question of law or fact common to all" plaintiffs will arise in the action. Permissive joinder of defendants depends upon the satisfaction of the same two requirements, but the transaction, occurrence, or series of transactions or occurrences which "binds" all defendants need not (and often will not) be the same transaction, or occurrence, or series of transactions or occurrences which "binds" all plaintiffs.

This rule, by its requirements of "transactional relationship" and common questions of law or fact, operates not only to identify those persons who would be proper parties, but also

those who are improper parties and excluded from participating in the action.

It should be emphasized that once a party is properly joined under this rule, any claim may be asserted by or against that party regardless of whether, under the terms of the old claim joinder rule, section 263.04, they "affect all parties to the action." The new language now states that "[a] plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded." However, since a party who is not interested in one of the claims asserted by or against a co-party might be put through unnecessary expense, delay, or embarrassment by awaiting the trial phases of that issue, subsection (3) provides for separate trial of such claims.

Subsection (2) preserves the language of the old statute, section 260.11, except for the first two sentences. It is by this provision that Wisconsin allows direct action against insurers in negligence actions.

The major importance of the new party joinder rule is that it will probably clear up the theoretical difficulties which the Wisconsin court has encountered in multi-party cases where plaintiffs have joined consecutive tortfeasors who produced indivisible injuries, and those where different theories of action (e.g., tort and contract) are asserted against different defendants in the same action. In both of these types of actions the Wisconsin court has sustained joinder objections for failure to satisfy the provisions of former section 263.04.

The claim joinder statute under the old rules provided that:

The plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable or both. But the causes of action so united must affect all parties to the action and not require different places of trial, and must be stated separately.158

The requirements of same place of trial and separate statement presented little problem, but the requirement that the causes of action united "must affect all the parties to the action" presented substantial difficulty.159

Fitzwilliams v. O'Shaughnessy,160 is illustrative of the con-

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159. An example of a case where all three requirements were lacking is Caygill v. Ipsen, 27 Wis. 2d 578, 135 N.W.2d 284 (1965).
160. 40 Wis. 2d 123, 161 N.W.2d 242 (1968).
secutive tortfeasor problem. Fitzwilliams, a passenger in a car driven by defendant Krzewinski, was initially injured when the car was rear-ended by a vehicle driven by defendant O'Shaughnessy. Fitzwilliams was subsequently placed in an ambulance which became involved in a collision with defendant Lauck's car. The length of time and distance between the two accidents was unclear from the record but they were on the same highway in the same county. Fitzwilliams alleged that the injuries received from the two collisions were indivisible. The trial court concluded that the complaint improperly united two separate causes of action inasmuch as they failed to affect all parties joined as defendants. The supreme court affirmed.

The basis for the court's conclusion that the causes of action did not affect all parties to the action was the theoretical definition of a cause of action. The court reaffirmed the definition set out in *Caygill v. Ipsen* and *Hartwig v. Bitter*:

> [A] cause of action must be viewed as a grouping of facts falling into a single unit or occurrence as a lay person would view them. This grouping of facts consists of "the defendants wrongful act."

On this basis, the court concluded that there were two separate and distinct causes of action, even though it appeared that the two collisions occurred closely in time and space. The court observed that:

> There may be a situation where the acts are consecutive and closely enough related in time sequence to constitute one event and therefore permit a proper joinder of causes in action, but such is not the case now before us.

The court dismissed the plaintiff's arguments that: (1) joinder should be allowed since the Wisconsin approach to causation in negligence would extend the foreseeable results of the first negligent act through the second collision; and (2) the indivisibility of the injuries sustained by the plaintiff as a result of the two collisions was a proper basis for joinder.

The court's analysis by implication conceded that the join-

161. 27 Wis. 2d at 582, 135 N.W.2d at 287.
162. 29 Wis. 2d 653, 660, 139 N.W.2d 644, 650 (1966).
163. Fitzwilliams v. O'Shaughnessy, 40 Wis. 2d at 126, 161 N.W.2d at 244.
der question is relative, but emphasized the closeness of events in time sequence as the important factor of relativity. Under section 803.04, the new language emphasizes that the subject-matter relatedness of various events constituting a claim should be interpreted more broadly, and should be as important in joinder questions as is the time factor. The persons seeking to join together as plaintiffs may assert a right to relief "arising out of the same transaction, occurrence, or series of transactions or occurrences." The joinder question in each case will depend on how broadly the court views the phrase "series of transactions or occurrences" with respect to the particular set of facts. In two cases factually similar to Fitzwilliams, Rule 20 joinder was permitted. In Lucas v. Juneau, the ambulance trip which resulted in a collision aggravating the plaintiff's injuries from the first auto collision, occurred eighteen days after the first collision, yet the court allowed joinder since the ambulance trip was necessitated by the first collision. The ultimate purpose of limitations on joinder is to assure that actions do not become too complex to resolve, but this purpose will now be resolved through the use of the separate trials provision of section 803.04(3) and misjoinder is no longer grounds for dismissal.

The second type of case giving rise to problems under the old statute was that in which a plaintiff joined different theories of action against different defendants. An illustration of this misjoinder problem under the old statute was presented in A.C. Storage Co. v. Madison Moving & Wrecking Corp. The plaintiff had stored equipment of the Fox Head Brewing Company which had allegedly breached its contract with plaintiff for rents. Fox Head employed Madison Moving and Wrecking Corporation to remove its equipment. In removing the equipment, Madison Moving damaged plaintiff's premises. Plaintiff

165. Wis. Stat. § 803.04(1).
166. For an interesting illustration of how courts may differ over the definition of "same transaction or occurrence" with respect to the same set of facts, compare the district court opinion of Lasa Per L'Industria Del Marno Societa Per Azioni v. Southern Builders, Inc., 45 F.R.D. 435 (W.D. Tenn. 1967), with the appellate court reversal in 414 F.2d 143 (6th Cir. 1969).
169. Wis. Stat. § 803.06.
170. 38 Wis. 2d 15, 155 N.W.2d 567 (1968).
attempted to unite the contract cause of action against Fox Head with a negligence cause of action against Madison Moving. The court sustained a demurrer on grounds of improper uniting of causes of action.

The problem with this result is that there is no justification for prohibiting the joinder of causes of action based on different legal theories. The joinder rules must find a balance between the conflicting goals of avoiding overcomplexity of trials and avoiding piecemeal litigation. This balance can be much more readily accommodated through allowing joinder based upon a series of transactions or occurrences with common legal or factual questions.

803.05 Third-party practice. (1) At any time after commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him, or who is a necessary party under s. 803.03. The third-party plaintiff need not obtain leave to implead if he serves the third-party summons and third-party complaint not later than the time set in the scheduling order under s. 802.10 (1) (b) 3. Otherwise, he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in s. 802.06 and his counterclaims against the third-party plaintiff and cross claims against any other defendant as provided in s. 802.07. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff if the claim is based upon the same transaction, occurrence or series of transactions or occurrences as is the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant if the claim is based upon the same transaction, occurrence or series of transactions or occurrences as is the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as

171. In this respect, the problem of joinder is similar to the problem of relation back of amendments which change causes of action. The new rule 802.09(3) overturns the bar to such amendments which was established in Meinshausen v. A. Gettleman Brewing Co., 133 Wis. 95, 113 N.W. 408 (1907).
provided in s. 802.06 and his counterclaims and cross claims as provided in s. 802.07.

(2) When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this section would entitle a defendant to do so.

Section 803.05 provides the procedure by which a party against whom a claim is asserted may join a person not a party to the action who actually or potentially shares in the substantive liabilities asserted by the original claimant against the defending party. The rule also governs the procedure by which claims and defenses are to be asserted among the parties already joined in the action and the impleaded party.

Subsection (2) of the rule permits a plaintiff against whom a counterclaim is asserted to implead a third party under the same circumstances that the rule allows a defendant to do so. Consequently, the discussion of impleader herein will be treated from the defendant's perspective, but applies equally to plaintiffs defending against counterclaims.

The rule, being permissive in nature, is designed taking into account many of the same considerations which underly section 803.04 governing permissive joinder of parties. Hence, the rule should be construed liberally to accommodate a wider scope of civil action. This procedure avoids multiplicity and circuity of actions and eliminates the expense and delay of initiating separate lawsuits. The court can prevent overcomplexity by ordering separate trials under sections 803.04(3) and 805.05(2).

This rule permits a defending party to implead a third party, not already a party to the action, "who is or may be liable to him for all or part of the plaintiff's claim against him, or who is a necessary party under s. 803.03." The function of the phrase "is or may be" is to permit joinder before a determination of the third-party defendant's liability has been made. In order to avoid delay and circuity of actions, the third-party defendant's liability is properly made a question to be determined as a part of the same lawsuit with questions of fact resolved by a single jury.172

The phrase "is or may be liable to him" serves two functions. The first is to require the third-party plaintiff to assert

a substantive basis for impleader. Such substantive bases may include contribution or indemnity. The second function of this provision is to recognize that the third-party plaintiff can only attempt to shift liability to the impleaded party under this rule, rather than substitute the impleaded party for himself.

The provision allowing impleader in order to join a necessary party under section 803.03 is not included in Federal Rule 14. This use of impleader was added to the Wisconsin rule to provide a procedural mechanism permitting a defendant to join necessary parties which the plaintiff has omitted from the action.

The major innovation produced by this rule is in its liberal claim joinder provisions. The recent case of Bolton v. Chicago Title & Trust Co. presents a convenient factual framework in which the old and new rules relating to joinder of claims in impleader actions may be examined.

In Bolton, A commenced an action against B to recover on a $5,000 draft drawn by B in A's favor pursuant to an escrow agreement. B answered denying liability, asserting certain affirmative defenses, and counterclaimed against A for recission. B also commenced a third-party action against C, who answered asserting six counterclaims, four of which involved a draft of $100,000 drawn by B from the same escrow account in favor of C. B demurred to all six counterclaims on the ground that they were not pleadable in a third-party action under the old rule governing cross complaints and third-party actions. The old rule, subsection 263.15(1), read:

263.15 Cross complaint and third-party actions. (1) A defendant or a person interpleaded or intervening may have affirmative relief against a codefendant, or a codefendant and the plaintiff, or part of the plaintiffs, or a codefendant and a person not a party, or against such person alone, upon his being brought in: but in all such cases such relief must involve or in some manner affect the contract, transaction or property which is the subject matter of the action or relates to the occurrence out of which the action arose. . . . (Emphasis supplied).

The demurrer was sustained by the trial court. On appeal, the Wisconsin Supreme Court posed the issue thusly:

173. 64 Wis. 2d 714, 221 N.W.2d 911 (1974).
May a third-party defendant [C] seek affirmative relief by way of counterclaim against a third-party plaintiff [B] when such relief does not involve or affect the contract, transaction, or property which is the subject matter of the action or relate to the occurrence out of which the action arose?\textsuperscript{175}

The court answered this question in the negative stating that:

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\ldots \text{[T]he purpose of requiring or permitting concert of action or joining of issues germane to the main controversy is not intended to produce a result which would require a plaintiff who commences an action, to be compelled to stand by while others who have become plaintiffs and defendants against his wishes litigate their causes of action.}^{176}
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C conceded that his counterclaims did not involve the particular subject matter of the principal action (the $5,000 draft drawn in A's favor), but argued that because four of the claims arose out of B's obligation with respect to the same escrow account, the same subject matter was involved. The court held, nevertheless, that C's claims failed to satisfy the standard that "such relief must involve or in some manner affect the contract, transaction, or property which is the subject matter of the action or relates to the occurrence out of which the action arose."\textsuperscript{177} The court likened the case to *Piper v. Strohn,*\textsuperscript{178} where the court held that a counterclaim involving management of land in Michigan was not sufficiently related to a partition action in Wisconsin. While it is arguable that claims relating to two different parcels of land located in different states are much less related than claims involving two drafts drawn from the same escrow account, the Wisconsin court adopted the narrower view of the terms "same transaction" and "subject matter."\textsuperscript{179}

Hence, under the old rules of civil procedure, claim joinder was limited as to all parties. A plaintiff was limited to joining causes of action by the requirement that all causes of action

\textsuperscript{175. 64 Wis. 2d at 714, 221 N.W.2d at 913.}
\textsuperscript{176. Id. at 718, 221 N.W.2d at 914.}
\textsuperscript{177. Id. at 719, 221 N.W.2d at 914, citing Wis. Stat. § 163.15 (1973).}
\textsuperscript{178. 253 Wis. 503, 34 N.W.2d 859 (1948).}
\textsuperscript{179. The Wisconsin court had given a restrictive construction to the words "subject matter" in Liebhauser v. Milwaukee Elec. Railway & Light Co., 180 Wis. 468, 193 N.W. 522 (1923). For this reason, the Judicial Council Committee omitted the references to subject matter in §§ 802.07 and 803.05 so that the provisions of those statutes would not be interpreted restrictively. See the Judicial Council Committee's Notes to §§ 802.07 and 803.05.}
“must affect all parties to the action.” As to defendants (third-party plaintiffs), former section 260.19 made no express limitation on claims against third-party defendants, but section 260.19 allowed impleader only “when a complete determination of the controversy in court cannot be made without the joinder of additional parties.” Since impleader was allowed only when the particular controversy before the court could not be resolved without the third-party defendant, there was an implicit limitation of claims against the third-party defendant to that controversy. Of course, there were no limitations upon the subject matter of the defendant’s claims against the plaintiff in the principal action. Finally, as to third-party defendants, Bolton established the rule that a third-party defendant could only assert counterclaims which “involve or in some manner affect the contract, transaction, or property which is the subject matter of the action or related to the occurrence out of which the action arose.” In sum, then, the scope of the civil action in Wisconsin was limited under the old rules to the subject matter of the original action.

The basic scheme of joinder in the new Wisconsin rules of civil procedure appears to be the same as that of the Federal Rules in that claim joinder is limited only by the restrictions on party joinder. Where C is properly a party, therefore, there is no restriction on the claims which may be asserted by or against him except for the discretionary power of the court to order separate trials under section 803.04(3) or to sever claims under section 803.06.

As a “party asserting a claim to relief as an original claim” under the terms of new subsection 803.02(1), A may join “either as independent or as alternative claims, as many claims, legal or equitable, as he has against” B. Further, under new section 802.07(1), B, as defendant, may counterclaim any claim which he has against A. The Judicial Council Committee Note indicates that the section is intended to be at least as expansive as to counterclaims as the former section 263.14(1) under which courts have not limited counterclaims to the sub-

183. Wis. Stat. § 263.15 (1973); Bolton v. Chicago Title & Trust Co., 64 Wis. 2d at 716, 221 N.W.2d at 913.
ject matter of the plaintiff's claim. In any event, under section 803.02(1), B, as a party asserting a counterclaim which may or may not be based on A's action, may join as many claims as he has against A. In effect, then, as between A and B only, the availability of claim joinder in cases involving third-party claims is identical to the new practice under sections 803.02 and 803.04 with the objective of resolving in one judicial proceeding all points of controversy between parties to a lawsuit.

As a "defending party," B may join C under section 803.05(1) as a "person not a party to the action who is or may be liable to him for all or part of" A's claim against him. The Judicial Council Committee's Note to section 803.05 indicates that the scope of impleader by defendants is intended to be somewhat more limited than that which was permitted under the "complete determination of the controversy" test of former rule 216.19. Section 803.05 now limits impleader to cases involving contribution, indemnity, or where a person is a necessary party under section 803.03. For the purposes of this analysis it will be assumed that B's claim against C, characterized in Bolton as one of "equitable subrogation," fits within the limits set forth in section 803.05, such that C is deemed to be properly joined in the action as a third-party defendant.

The scheme of section 803.05(1) as to what claims may be asserted by and against the impleaded third-party is substantially the same as that of Federal Rule 14. Under the new rule, the third-party defendant, C, "shall" assert his counterclaims against the third-party plaintiff, B, as provided in section 802.07. As noted, there is no express limitation in that section as to the subject matter of counterclaims asserted by C against B, indicating that he may assert any counterclaim against B that he has. At this point, then, the limitation of former section 263.15(1) which was held in Bolton to foreclose C's claim in that case seems to have been overcome by the new rules.

An anomalous situation arises under section 803.05 in the factual context of Bolton. The new "third-party practice" rule allows C, as third-party defendant, to assert against A, the original plaintiff, claims which are based upon the "transaction, occurrence or series of transactions or occurrences" which form the basis of A's claim against B, the third-party plaintiff. Similarly, the plaintiff, A, may assert any claim against C, the third-party defendant, which is based on the same "transaction, occurrence or series of transactions or occurrences" on
which his claim against B is based. Should A assert such a
claim, however, C may then assert his counterclaim under
subsection 802.07(1), which, as noted, does not place a limit on
the basis for such claims.

Under this state of affairs, then, the new Wisconsin rules
present the anomalous situation of limiting, in the first in-
stance, claims between A and C to the same transaction, oc-
currence or series of transactions or occurrences out of which
the claim asserted by A against B arose. But, there are appar-
ently no limitations on the claims which C is authorized by
section 803.05(1) to assert through the counterclaim provisions
of section 802.07 against the third-party plaintiff and the origi-
nal plaintiff should the original plaintiff choose to assert a
claim against C, the third-party defendant.

A further question remains with regard to the claims plead-
able by B against C. It might be argued that the first sentence
of section 803.05 limits B to claims against C for liability over
to A on a theory of contribution or indemnity. But it is clear
that such a restrictive interpretation would be inconsistent
with the thrust of the new rules. The first sentence, stating that
"... a defending party, as a third-party plaintiff, may cause
a summons and complaint to be served upon a person not a
party to the action who is or may be liable to him for all or part
of the plaintiff's claim against him, or who is a necessary party
under 803.08." serves to identify when impleader is proper in
the first instance, rather than to limit the types of claims which
a third-party plaintiff may assert. A restrictive interpretation
would be inconsistent with section 803.02(1) which provides
that "[a] party asserting a . . . third-party claim, may join,
either as independent or alternate claims, as many claims,
legal or equitable, as he has against an opposing party." The
corresponding Federal Rule 14 has been interpreted to allow B
to assert any claims against C once C is properly impleaded.184

The new Wisconsin section 803.05(1) and section 803.02 should
be liberally interpreted to fulfill the Judicial Council Commit-
tee's intention that the only formal limitation or claim joinder
was that imposed indirectly by the limitations on party joinder.
Where joined claims threaten to complicate the issues or make
the litigation unmanageable, the court is authorized to order
separate trials under subsection 803.04(3) and section 805.05,

and to sever claims to be proceeded with separately under section 803.06.

In summary, the result in Bolton is not commanded by the new rules and, indeed, could be said to be erroneous under those provisions.

An impleaded third-party generally takes control of the defense. When he does so, section 803.05 allows him to "assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim." Since the third-party plaintiff is bound by any judgment in the action, when considering impleader he will take into consideration the fact that his liability will depend upon the adequacy of the third-party defendant's defense. In any case, where the third-party defendant has clear liability over to the plaintiff for the total amount, impleader is desirable.

The decision to allow or deny impleader rests in the discretion of the court. Where impleader would not serve the purpose of convenience and resolution of a single controversy it should be denied. Another situation in which impleader should be denied is where a third-party defendant is brought into the action in order to attract jury sympathy and a smaller damage award. This was the situation in Goodhart v. United States Liner Co., where an insurance company impleaded its insured's employee for indemnification. It was obvious that the impecunious employee would have been unable to indemnify the insurance company for any substantial amount and that the only purpose for impleader was to seek jury sympathy. The court denied impleader because the plaintiff's case would have been unduly prejudiced. The insurance company was protected since it could properly commence a separate suit for indemnification from the employee if it so desired. In such a case, the court might also allow impleader but order separate trials and thus save the expense of commencing separate actions.

803.06 Misjoinder and nonjoinder of parties. Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Section 803.06, taken from Federal Rule 21, is consistent with the liberal permissive joinder under sections 803.04 and 803.02. When a party is improperly joined under section 803.04 by reason of the failure to satisfy the "transactional relationship" and "common question of law or fact" requirements, the party may be dropped by the court without dismissing the entire action. This eliminates unnecessary delay and the expense of commencing the action a second time.

The question of nonjoinder relates to the mandatory joinder section 803.03. Whether or not the failure to join a party under section 803.03 is a ground for dismissal is determined by the functional test set out therein.

The Judicial Council Committee's Note states that nonjoinder and misjoinder issues may be raised by answer or motion under section 802.06(2). In the case of nonjoinder objections, section 802.06(2)(g) specifically provides for a motion. But with respect to misjoinder objections it is unclear which provision under section 802.06(2) would be appropriate. Subsection (f) (failure to state a claim upon which relief can be granted) would be inappropriate since section 802.06 states that misjoinder is not a basis for dismissal, and none of the other motions are relevant to misjoinder. Therefore, section 803.06 itself is apparently the authority for the motion to drop a party for misjoinder. Of course, the rule also authorizes the court to drop or add parties on its own initiative at any stage of the action.

While the dropping of a misjoined party will necessarily result in the dropping of the claim asserted by or against that party; where the party has been properly joined but his presence in the action will make the trial of all claims too complex for one proceeding, severance is the appropriate mechanism to "unclutter" the trial. The severance provision may also be used to provide jury trial of certain issues and a trial to the court of the other issues.

803.07 Interpleader. Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain
such interpleader by way of cross claim or counterclaim. The provisions of this section supplement and do not in any way limit the joinder of parties permitted in s. 803.04.

Section 803.07, taken from rule 22 of the Federal Rules, codifies the common law action of interpleader recognized in Wisconsin as early as 1847 in Bird v. Fake. Before the adoption of section 803.07, the Wisconsin statutes recognized interpleader only in cases where a defendant was subject to double liability with respect to the same debt or specific property sought by the plaintiff. No statute recognized the right of a person facing double liability with respect to the same fund to initiate an interpleader action himself.

Generally, interpleader provides a procedure whereby a person holding a fund or “stake,” against which two or more persons have claims incapable of being satisfied out of the value of the “stake,” may deposit the “stake” into court, receive a discharge from further liability, and compel the adverse claimants to litigate their claims to the “stake” among themselves. Thus the procedure is a two-step process: (1) the stakeholder must first deposit the stake into court; and (2) the claimants then litigate their claims to the stake. The interpleader action typically arises where two injured parties have sustained large amounts of damages due to the negligence of A, and A’s liability insurance policy is insufficient to cover both claims. Since the two claimants might start separate actions in separate courts and receive separate judgments in the amount of the entire policy limit (or added together in excess of the policy limit), the insurance carrier is threatened with double liability and may therefore interplead both claimants.

The availability of the traditional bill in equity for interpleader was restricted by stringent requirements:

(1) The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded;
(2) all of their adverse titles or claims must be dependent or be derived from a common source;
(3) The one seeking a relief must not have nor claim any interest in the subject matter; and

186. 2 Pinney 69 (1847).
(4) he must have incurred no independent liability to either of the claimants. 188

In modern practice the requirements have substantially been dispensed with in order to accommodate the more liberal notions of simplifying civil procedure. 189

Wisconsin's new section 803.07, following the language of Federal Rule 22, allows interpleader when "the plaintiff is or may be exposed to double or multiple liability." Hence, the threat of double or multiple liability is sufficient to support an interpleader action. Section 803.07 also dispenses with the "same thing, debt, or duty" and common-origin-of-title requirements, so long as the claims threatening the plaintiff remain adverse. Similarly, the requirements that the plaintiff be completely disinterested from the stake and have incurred no independent liability to any claimant, have been eliminated. Now, the plaintiff may tender the stake into court and himself become one of the adverse claimants in the second stage of the interpleader action. Thus, the new requirements are limited to (1) actual or threatened double or multiple liability, and (2) adverse claimants.

Interpleader actions may arise in two ways: (1) the stakeholder, recognizing the threat of multiple liability, may bring an action in interpleader against the adverse claimants, or (2) the stakeholder having been made a defendant in an action brought by one or more of the adverse claimants, may obtain interpleader by way of cross-claim or counterclaim. As mentioned before, the former Wisconsin rules allowed interpleader only in the second situation mentioned above. The new section 803.07 permits interpleader in both situations.

With respect to personal jurisdiction in interpleader cases, the Judicial Council Committee's Note states: "This statute is not jurisdictional; that is, it does not do away with the requirement that there exist as to each defendant an independent ground for asserting jurisdiction over his person." 190

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190. Jurisdiction in state interpleader actions does not present as complex a problem as do jurisdictional problems in the federal courts. See also New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916) and the statutory response thereto at 28 U.S.C.
803.08 Class actions. When the question before the court is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

The Judicial Council Committee was presented with and studied a substantial amount of material concerning class action procedure, both under the "old" Federal Rule 23 and under the "new" Rule 23 (i.e., as amended in 1966). During its deliberations on class actions, the committee was fortunate to have present Professor William Foster of the University of Wisconsin Law School faculty. Professor Foster was on the research staff of the American Bar Foundation engaged in a study of class actions. He suggested that experience in the federal courts has been less than felicitous under both the old Rule 23 and the new Rule 23 and that Wisconsin would probably be well advised to adopt neither at this time. The Judicial Council Committee agreed. The new rule is essentially identical to the class action rule in former section 260.12.

803.09 Intervention. (1) Upon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

(2) Upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order or rule administered by a federal or state governmental officer or agency or upon any regulation, order, rule, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely motion may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(3) A person desiring to intervene shall serve a motion to intervene upon the parties as provided in s. 801.14. The motion shall state the grounds therefor and shall be accompa-
nied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene.

This section, based on Federal Rule 24, replaces section 260.205. The new section provides a mechanism whereby a person not joined by the plaintiff or defendant may participate in an action in which he claims an interest or in which legal or factual questions will be tried which are related to the movant’s claim or defense. The rule is governed by the same considerations of avoiding circuity of actions and achieving complete determinations of controversies which underly sections 803.03 and 803.04 relating to mandatory and permissive joinder respectively.

The former rule, section 260.205, provided in part:

260.205  Intervention. If in an action for the recovery of property, a person not a party has an interest in the property, or if any other action, a person not a party has such an interest in the subject matter of the controversy as requires him to be a party for his own protection, and such person applies to the court to be made a party, the court may order him brought in.

This rule was not governed by considerations of convenience or avoiding multiple suits involving similar issues, and even in its function of providing protection for absent parties’ interests was only permissive, i.e., permitted in the court’s discretion.

Under the new rule, subsection (1) provides for intervention of right when the movant claims an interest relating to the property or transaction which is the subject of the action and is so situated that a judgment in his absence may as a practical matter impair or impede his ability to protect his interest. While the intervention under subsection (1) is of right (“shall be permitted”), the rule is still discretionary insofar as the court must make a determination as to whether or not the motion is timely, whether the absent party’s ability to protect his interest may as a practical matter be impaired, and whether the absent party’s interest is adequately represented by existing parties.

Nevertheless, the new rule is founded upon the same considerations underlying section 803.03 which define those parties who must be joined in an action if feasible.\footnote{See commentary on § 803.03, supra p. 79.}
purpose for the provision for intervention of right is to permit participation by a party who should have been mandatorily joined under section 803.03, but was not so joined because he: (1) was beyond the reach of process; or (2) possessed an interest not discovered by the parties; or (3) possessed an interest of only questionable relation to the subject matter of the action; or (4) because the parties assumed his interest was already adequately represented.

Subsection (2) provides for intervention in the court’s discretion when the movant’s claim or defense and the main action have a common question of law or fact. This permissive intervention is grounded on considerations of convenience and economy of judicial effort such that the question common to both the main action and the movant’s claim or defense may be resolved in the same proceeding. Thus, permissive intervention under this subsection is proper under circumstances where permissive joinder under section 803.04 is allowed. Although the requirement of “same transaction, occurrence, or series of transactions or occurrences” found in section 803.04 is not specifically mentioned under this rule, it is implicit in the last sentence of subsection (2) which requires the court in exercising its discretion to consider whether intervention will unduly delay the adjudication of the rights of the original parties. If the common legal or factual question does not relate to or arise out of the same transaction, occurrence or series of transactions or occurrences, the presence of the intervenor will probably result in undue delay.

The requirement under subsections (1) and (2) that the motion for intervention be timely is directly tied to the last sentence of subsection (2) which provides that the court shall consider whether the intervention will unduly prejudice the adjudication of the rights of the original parties. This requirement should not be confused with the question of commencement and limitation of actions which has insinuated itself into joinder questions in the case law under the former rules.  

803.10 Substitution of parties. (1) Death. (a) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The mo-
tion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in s. 801.14 and upon persons not parties in the manner provided in s. 801.11 for the service of a summons. Unless the motion for substitution is made not later than 90 days after the death is suggested on the record by service of a statement of the facts of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(b) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in the action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(2) INCOMPETENCY. If a party becomes incompetent, the court upon motion served as provided in sub. (1) may allow the action to be continued by or against his representative.

(3) TRANSFER OF INTEREST. In case of any transfer of interest, the action may be continued by or against the original party unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in sub. (1).

(4) PUBLIC OFFICERS; DEATH OR SEPARATION FROM OFFICE.

(a) When a public officer, including a receiver or trustee appointed by virtue of any statute, is a party to an action in his official capacity and during its pendency he dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(b) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

(5) DEATH AFTER VERDICT OR FINDINGS. After an accepted offer to allow judgment to be taken or to settle pursuant to s. 807.01, or after a verdict, report of a referee or finding by the court in any action, the action does not abate by the death of any party, but shall be further proceeded with in the same
manner as if the cause of action survived by law; or the court may enter judgment in the names of the original parties if such offer, verdict, report of finding be not set aside. But a verdict, report or finding rendered against a party after his death is void.

Section 803.10 is based on Federal Rule 25 with the exception of subsection (5) which is based on former section 269.22. The new rule provides for substitution of parties who die, become incompetent, or transfer their interest, under the same circumstances in which substitution would be permitted under the former sections 269.14 through 269.24. In the case of death, resignation or removal of a public officer, receiver, or trustee appointed by statute, the new rule extends substitution of his successor to cases in which the party was a defendant in a pending action when death or separation from office occurred, in addition to where such party was a plaintiff in a pending action.

The procedure for substitution prescribed in subsection (1) is simplified and made to conform with section 802.01(2) which eliminates the usage of orders to show cause unless specifically authorized by statute. Under the new rule, the motion for substitution may be made by any party or by the successor or representative of the deceased party. Where the movant is a party to the action attempting to substitute a non-party, service is to be made as required by section 801.11 governing service of summons. Where the movant is the deceased party's successor or representative, service is to be made as prescribed in section 804.14 governing service of pleadings and other papers.

Subsection (5) is based on former section 269.22 which operated to continue those actions which were substantially complete to their formal conclusion rather than for such actions to abate. This subsection broadens the former rule, however, by providing that the rule extends not only to deaths subsequent to verdict, findings of the court, report of the referee, and accepted offers to allow judgment to be taken, but also to accepted offers to settle pursuant to section 807.01 (former rule 269.02).

194. Former § 269.23 provided that a party seeking to oppose the revival of an action by a successor entitled to do so show cause by affidavit within twenty days or else the action would stand revived.