Ameliorating the Harsh Effects of Wisconsin's Municipal Notice of Claim Statute

Michael J. Waldspurger

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
AMELIORATING THE HARSH EFFECTS OF WISCONSIN'S MUNICIPAL NOTICE OF CLAIM STATUTE

I. Introduction

Under Wisconsin's municipal notice of claim statute, a claimant must, as a condition precedent to suit, follow certain procedural requirements before commencing a lawsuit against a municipality or a municipal employee. The most stringent of these requirements is that notice must be provided to the municipality within 120 days after the event giving rise to the injury. The general rule states that failure to comply with the 120-day requirement is fatal to the claimant's cause of action. In this way, the 120-day requirement often operates as a truncated statute of limitations.

1. Wis. Stat. § 893.80 (1991-92) provides in pertinent part:

   (1) Except as provided in subs (1m) and (1p), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employee of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

   (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employee; and

   (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed. Failure of the appropriate body to disallow within 120 days after presentation is disallowance. . . . No action on a claim against any defendant . . . may be brought after 6 months from the date of service of the notice, and the notice shall contain a statement to that effect.

2. " 'Municipality' means any county, city, village, town, school district (as enumerated in s. 67.01(5)), sewer district, drainage district, and, without restriction because of failure of enumeration, any other political subdivision." Wis. Stat. § 345.05 (1991-92).

3. See Felder v. Casey, 487 U.S. 131, 155 (1988) (White, J., concurring). While in practice the notice of claim statute often has the same effect as a statute of limitations, the view that such statutes are essentially statutes of limitations has been rejected. See Mannino v. Davenport, 99 Wis. 2d 602, 607, 299 N.W.2d 823, 828 (1981). The notice of claim statute "is not a statute of limitation but imposes a condition precedent to the right to maintain an action." Nelson v. American Employers' Ins. Co., 262 Wis. 271, 276, 55 N.W.2d 13, 15 (1952).
However, a claimant may invoke an exception to the general rule if the claimant can show that the municipality had actual knowledge that the claimant intended to hold the municipality responsible and that the municipality was not prejudiced by the lack of formal written notice within the 120-day notice period. Regardless of who wins the motion for summary judgment, the notice requirement serves as a front-line defense for municipalities and an immediate obstacle for claimants to overcome.

After providing a historical backdrop, this Comment will examine the 120-day notice rule and the other requirements of the municipal notice of claim statute. The focus will then turn to the purposes of the statute and the means by which the Wisconsin Supreme Court has attempted to ameliorate some of its harsh consequences. Specifically, the doctrine of substantial compliance and the statutory actual notice exception will be discussed. Finally, this Comment will offer a recommendation that would bring equity and consistency to this area of the law.

II. HISTORICAL BACKGROUND

Notice of claim statutes stem from the common law doctrine of sovereign immunity. This doctrine was premised on the dual ideology that "the King can do no wrong," and that it would be inconsistent with his sovereignty to subject him to suit in his own courts. In the 1788 case of *Russell v. Men of Devon*, an English court created the doctrine of governmental, or municipal, immunity by extending the concept of sovereign immunity to local units of government.

4. An "immunity" is the avoidance of "liability in tort under all circumstances, within the limits of the immunity itself; it is conferred, not because of the particular facts, but because of the status . . . of the favored defendant; and it does not deny the tort, but the resulting liability." WILLIAM L. PROSSER, LAW OF TORTS 970 (4th ed. 1971). For a detailed discussion of sovereign immunity in Wisconsin, see Janet S. Harring & Sidney L. Harring, Comment, State Immunity from Suit Without Consent, Scope and Implications, 1971 Wis. L. Rev. 879.

5. See Edwin M. Borchard, Governmental Responsibility in Tort, 36 YALE L.J. 1, 52 (1926); PROSSER, supra note 4, at 975. Justice Holmes later explained the ideology as follows: "A sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907), superceded by statute as stated in Burdinie v. Glendale Heights, 565 N.E.2d (Ill. 1990).


7. Wisconsin courts interchangeably refer to the doctrine as "governmental" or "municipal" immunity. See, e.g., Holytz v. City of Milwaukee, 17 Wis. 2d 26, 29, 115 N.W.2d 618, 620 (1962).

8. Sovereign immunity is most easily understood as immunity as it applies to the State. Governmental or municipal immunity is most easily understood as immunity as it applies to local governments. For an explanation of this distinction, see generally Apfelbacher v. State,
In *Russell*, the plaintiff brought an action against the County of Devon to recover for damages that his wagon incurred when it struck a hole in a County of Devon bridge. Fearing recovery would result in "an infinity of actions" and recognizing that the unincorporated county had no corporate fund out of which satisfaction could be made, the court extended immunity to the local government. The court justified its decision on the ground that it is better for an individual to suffer a loss than it is to "inconvenience" the public.

After its introduction to this country, the doctrine of governmental immunity quickly pervaded the American courts. Dissatisfied, however, with the rationale in *Russell*, these courts developed new justifications for governmental immunity. For example: municipalities perform non-profit governmental functions that are solely for the benefit of the public and, therefore, should not be subject to liability; governmental agents would be unable to effectively perform if their actions were subject to liability; and diverting tax revenues from public use to redress the torts

160 Wis. 565, 152 N.W. 144 (1915); see also Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 460 (Cal. 1961).

Governmental immunity is inextricably linked to sovereign immunity, since the former stems from the latter. In Wisconsin, the municipality was viewed as a representative of the sovereign and, therefore, was afforded the benefit of governmental immunity. See Britten v. City of Eau Claire, 260 Wis. 382, 51 N.W.2d 30 (1952); see also Patricia Godfrey, Note, *Torts—Municipal Corporations—Abolition of the Doctrine of Immunity*, 45 MARQ. L. REV. 452 (1961-62).


10. *Id.* at 362.
11. *Id.* Legal scholars have sharply criticized the reasoning in *Russell*. Professor Edwin Borchard, in what remains the preeminent historical exposition on governmental immunity, argued that public inconvenience cannot justify the destruction of individual rights. Edwin Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-25); see also PROSSER, *supra* note 4, at 978 ("[I]t is better that the losses due to tortious conduct should fall upon the municipality rather than the injured individual, and that the torts of public employees are properly to be regarded . . . as a cost of the administration of government, which should be distributed by taxes to the public.").
12. Governmental immunity was introduced to America by Riddle v. Proprietors of the Locks & Canals, 7 Mass. 169 (1810) (dicta), and subsequently adopted as law in *Mower*, 9 Mass. at 250.
13. See, e.g., Howard v. City of Worcester, 153 Mass. 426 (1891); Hill v. City of Boston, 122 Mass. 344 (1877); see also PROSSER, *supra* note 4, at 978 n.76.
of governmental employees would render local government ineffectual.\textsuperscript{15} As with the initial reasoning employed by the court in \textit{Russell}, legal scholars refuted these justifications.\textsuperscript{16}

In Wisconsin, the supreme court wholly adopted the doctrine of governmental immunity in the 1873 case of \textit{Hayes v. City of Oshkosh}.\textsuperscript{17} The \textit{Hayes} court justified the doctrine as follows:

The grounds of exemption from liability \ldots are, that the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants, or the community.\textsuperscript{18}

Notwithstanding this justification, the inequities caused by the doctrine prompted later Wisconsin courts and legislatures to carve various exceptions from the rule.\textsuperscript{19} Judicial efforts to mitigate the inequities of the rule focused primarily on the "highly artificial"\textsuperscript{20} distinction between proprietary and governmental activities.\textsuperscript{21} Activities that a municipality engaged in as a subdivision of the state and that were political in nature were generally considered to be governmental activities.\textsuperscript{22} Conversely, activities that a municipality engaged in as a corporate entity and that were private in nature were generally considered to be proprietary activities.\textsuperscript{23} Governmental activities enjoyed immunity, whereas proprietary activities did not.\textsuperscript{24}

\begin{itemize}
  \item \textsuperscript{15} See, e.g., \textit{Coolidge v. Brookline}, 114 Mass. 592 (1874).
  \item \textsuperscript{16} See \textit{Borchard}, supra note 11, at 129, 229 (stating that tortious conduct should be inhibited, not encouraged); Edgar Fuller \& A. James Casner, \textit{Municipal Tort Liability in Operation}, 54 \textit{Harv. L. Rev.} 437 (1941); Leon Green, \textit{Freedom of Litigation (III): Municipal Liability for Torts}, 38 \textit{U. Ill. L. Rev.} 355 (1944); Albert J. Harno, \textit{Tort Immunity of Municipal Corporations}, 4 \textit{Ill. L.Q.} 28 (1921).
  \item \textsuperscript{17} 33 Wis. 314 (1873), overruled by \textit{Holytz v. City of Milwaukee}, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).
  \item \textsuperscript{18} Id. at 318.
  \item \textsuperscript{19} See \textit{Godfrey}, supra note 8, at 454. The general rule in Wisconsin, and elsewhere, was that governmental units were not subject to liability unless liability was mandated by statute. Joseph M. Bernstein, Comment, \textit{Governmental Tort Liability and Immunity in Wisconsin}, 1961 \textit{Wis. L. Rev.} 486, 489.
  \item \textsuperscript{20} \textit{Holytz v. City of Milwaukee}, 17 Wis. 2d 26, 32, 115 N.W.2d 618, 621 (1962).
  \item \textsuperscript{22} See Bernstein, supra note 19, at 488.
  \item \textsuperscript{23} See id.
  \item \textsuperscript{24} There is general agreement that the proprietary-governmental distinction left the law in a veritable state of confusion. See \textit{Lindemeyer v. City of Milwaukee}, 241 Wis. 637, 644, 6
Independent of the governmental-proprietary distinction, Wisconsin courts also applied a “governor to governed” test.\(^{25}\) Under this test, municipalities were held responsible for nuisance where no “governor to governed” relationship existed between the municipality and the claimant.\(^{26}\) Generally, a governor to governed relationship would exist when a party was injured while using a public facility for its intended use.\(^{27}\) For example, such a relationship was held to exist when a child was injured while playing in a public swimming pool, but not when the child was injured while playing in a garbage dump.\(^{28}\)

Legislative efforts to mitigate the inequities of the doctrine produced statutes such as the highway defects statute,\(^{29}\) the safe place statute,\(^{30}\) the judgments against public officers statute,\(^{31}\) and the motor vehicle accident statute.\(^{32}\) These statutes enabled injured parties to sue local governments under specific, highly controlled circumstances. However, even when such an exception applied, municipal tort victims were still not placed on equal footing with private tort victims.

With the expansion of municipal tort liability, a fear arose that local governments would be inundated with specious claims.\(^{33}\) As a result, statutory exceptions to the common law doctrine of governmental immunity were accompanied by notice of claim provisions. These provisions generally required a claimant to submit to the municipality, within a time period ranging from thirty to ninety days after the date of injury, a written statement (1) describing the place where the injury occurred and the nature of the injury and (2) declaring an intent to hold the mu-

\(^{25}\) See, e.g., Pohland v. City of Sheboygan, 251 Wis. 20, 27 N.W.2d 736 (1947), overruled by Marshall v. Green Bay, 18 Wis. 2d 496, 118 N.W.2d 715 (1963); Erickson v. Village of West Salem, 205 Wis. 107, 236 N.W. 579 (1931).
\(^{26}\) See, e.g., Flamingo v. City of Waukesha, 262 Wis. 219, 55 N.W.2d 24 (1952); Robb v. City of Milwaukee, 241 Wis. 107, 236 N.W. 579 (1931).
\(^{27}\) See Bernstein, supra note 19, at 497.
\(^{28}\) See id.
\(^{29}\) Wis. Stat. § 1339 (1878) (current version at Wis. Stat. § 81.15 (1991-92)).
\(^{31}\) Wis. Stat. § 270.58 (1943) (current version at Wis. Stat. §§ 895.46, 893.80 (1991-92)).
\(^{32}\) Wis. Stat. § 345.05 (1959) (current version at Wis. Stat. § 345.05 (1991-92)).
\(^{33}\) See Nielsen v. Town of Silver Cliff, 112 Wis. 2d 574, 580, 334 N.W.2d 242, 245 (1983).
municipality responsible. The filing of a timely notice of claim was a condition precedent to recovery.

In light of the contemporaneous expansion of municipal tort liability, these early notice of claim statutes were generally praised. This praise came notwithstanding that the notice of claim provisions were generally held to require strict compliance and were merely a vestige of the highly criticized doctrine of governmental immunity.

In the 1962 case of *Holytz v. City of Milwaukee*, the Wisconsin Supreme Court prospectively abrogated the principle of governmental immunity. The court stressed that "so far as governmental responsibility for torts is concerned, the rule is liability—the exception is immunity." In reaching its conclusion, the court embraced the universal

---

34. See, e.g., *Wis. Stat.* § 1339 (1878). Wisconsin’s highway defects statute contained the state’s first statewide notice of claim provision. *Id.; see also* Benson v. City of Madison, 101 Wis. 312, 77 N.W. 161 (1898) (requiring location of injury to be sufficiently definite); Sowle v. City of Tomah, 81 Wis. 349, 51 N.W. 571 (1892) (requiring notice of claim to be stated with reasonable certainty).

35. See *Rudolph v. Currer*, 5 Wis. 2d 639, 94 N.W.2d 132 (1959), overruled by *Radtke v. City of Milwaukee*, 116 Wis. 2d 550, 342 N.W.2d 435 (1984) (holding that because plaintiff’s right to sue a municipality is purely statutory, failure to comply with conditions imposed by legislature are fatal to plaintiff’s cause of action); Sowle v. City of Tomah, 81 Wis. 349, 51 N.W. 571 (1892) (holding that notice is a statutory condition precedent to maintaining an action); *Dorsey v. City of Racine*, 60 Wis. 292, 18 N.W. 928 (1884) (holding that notice is a condition precedent to suit).


38. 17 *Wis. 2d* 26, 115 N.W.2d 618 (1962).

39. *Id.* at 35, 115 N.W.2d at 626. The proper role of the court was also at issue in *Holytz* because the court had previously stated that any proposed change in the doctrine of governmental immunity should be directed at the legislature. See *Britten v. Eau Claire*, 260 Wis. 382, 51 N.W.2d 30 (1951). The *Holytz* court cleared this hurdle by reasoning that because the doctrine was judicially created, it could be judicially abrogated. *Holytz*, 17 *Wis. 2d* at 36, 115 N.W.2d at 623.

The Florida Supreme Court, in 1957, led the way in abolishing the doctrine of governmental immunity. *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957). By 1978, over half of the States had either judicially or legislatively abolished the doctrine. 18 *MCQUILLIN, supra* note 37, § 53.0(a) n.5.

40. *Holytz*, 17 *Wis. 2d* at 39, 115 N.W.2d at 625. Qualifying as an exception, the exercise of legislative or judicial or quasi-legislative or quasi-judicial functions will not subject local governments to liability. *Id.* at 40, 115 N.W.2d at 625.

Although *Holytz* dealt specifically with governmental immunity as it applied to a city, the court made clear that its decision applies to the "state, counties, cities, villages, towns, school districts, sewer districts, drainage districts, and any other political subdivisions of the state—whether they be incorporated or not." *Id.* Furthermore, governmental units may be held lia-
scholarly condemnation of governmental immunity:41 "'[T]he rule of ... immunity is unjust, unsupported by any valid reason, and has no rightful place in modern day society.'42 . . . 'The municipal corporation today is an active and virile creature capable of inflicting much harm. Its civil responsibility should be coextensive.'"43

In addition, the court emphasized the fundamental unfairness of the rule.

It is almost incredible that in this modern age of comparative sociological enlightenment . . . [we] should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.44

Upon judicially abrogating governmental immunity, however, the court explained that, if public policy so dictated, the legislature was free to reinstate immunity.45 As an alternative, the court suggested that the legislature impose a ceiling on governmental liability and implement notice provisions like those found in section 81.15 of the Wisconsin Statutes.46

The legislative response was quick and favorable. In 1963, the legislature effectively codified the Holytz decision in section 331.43 of the Wisconsin Statutes.47 In so doing, the legislature elected to expose Wisconsin's local governments to liability and defense costs. To assist in controlling those costs, the statute contained a damage cap48 and a 120-
day notice of claim provision. The legislature has since amended and renumbered section 331.43 as section 893.80.

III. WISCONSIN STATUTES SECTION 893.80

Subsections 893.80(1)(a) and (b) of the Wisconsin Statutes compose the heart of the present municipal notice of claim statute. Subsection (a) deals primarily with the filing time requirements of notice, while subsection (b) concomitantly deals with the content requirements of notice. Distinguishing between these two requirements is especially significant in the area of substantial compliance.

Under subsection (a), "no action may be brought or maintained against any governmental subdivision" unless a written and signed notice of the "circumstances of the claim" is served on the subdivision within 120 days after the event giving rise to the claim. "Failure to give the requisite notice shall not bar action on the claim if the . . . subdivision . . . had actual notice of the claim and the claimant shows . . . that the delay or failure to give the requisite notice has not been prejudicial to the defendant." Whether actual notice must be received within 120 days is subject to dispute and will be discussed later in this Comment.

Subsection (b) requires the claimant to submit a claim containing his or her address and "an itemized statement of the relief sought. The statute imposes no time limit for the filing of the itemized statement of relief. Hence, the claimant may separately file the written notice of the

Wis. L. Rev. 155. Punitive damages were not recoverable under the original statute; nor are they recoverable under the present statute. See Wis. Stat. § 331.43(2) (1963); Wis. Stat. § 893.80(3) (1991-92); see also James D. Ghiardi, Punitive Damages in Wisconsin, 60 Marq. L. Rev. 753 (1977).

49. Wis. Stat. § 331.43(1) (1963). The original bill contained a 30 day notice of claim provision. This time period, however, was rejected in favor of the more equitable 120 day provision.

50. 1979 Wis. Laws ch. 323, § 29.


53. Wis. Stat. § 893.80(1)(a) (1991-92). This time limit is statutorily extended under two circumstances. With respect to a claim to recover damages for medical malpractice, the time period is extended to 180 days after the discovery of the injury or the date on which the injury should have been discovered. Id. § 893.80(1m). With respect to a claim for negligent inspection of property, the time limit is extended to one year after the discovery of the negligent act or omission. Id. § 893.80(1p).

54. Id. § 893.80(1)(a).

55. Id. § 893.80(1)(b).

56. Figgs v. City of Milwaukee, 121 Wis. 2d 44, 50, 357 N.W.2d 548, 552 (1984), rev'd 116 Wis. 2d 281, 342 N.W.2d 254 (Ct. App.). However, subsection (b) obviously has some time
circumstances of the claim required under subsection (a) and the itemized statement of relief required under subsection (b). However, it is equally appropriate for the plaintiff to file a single document, within 120 days, containing both elements of information.

Although subsection (b) requires an itemized statement of "relief," it does not require an itemized statement of "damages." The only time that a claimant must provide an item-by-item list is when more than one type of "relief" is sought. Because damages are merely one type of relief, plaintiffs are not required to itemize their damages; a damage claim only need set forth a specific dollar amount. For example, if the plaintiff is seeking damages and specific performance on a contract, the plaintiff must itemize the two forms of relief. However, if the plaintiff is seeking only damages, the plaintiff may combine the total amount of damages and state them as one lump sum.

In addition to specifying the content requirements of notice, section 893.80(1)(b) operates as an exhaustion requirement. Before commencing an action against a municipality, a plaintiff must wait until his or her claim, containing an itemized statement of the relief sought, is disal-

57. Figgs, 121 Wis. 2d at 50, 357 N.W.2d at 552. The court explained:
Counsel may, by the circumstances of the injury, be unable to state any monetary claim for relief within one hundred twenty days. Hence, in such cases, the written "notice of circumstances" will be filed initially, and the statement of the claim containing an 'itemized statement of the relief sought' will come later.
Id. at 50 n.5, 357 N.W.2d at 552 n.5.
58. Id. at 50, 357 N.W.2d at 552; Gutter v. Seemandel, 103 Wis. 2d 1, 10, 308 N.W.2d 403, 408 (1981).
59. Figgs, 121 Wis. 2d at 49, 357 N.W.2d at 551. The terms "relief" and "damages" are not synonymous. See id.
60. Id. at 53, 357 N.W.2d at 553.
61. Gutter, 103 Wis. 2d at 9, 308 N.W.2d at 407.
62. "Separate amounts for pain and suffering, lost wages, medical bills, and future or permanent disability are claims for special damages. They are not different types of relief. They all seek the relief of damages." Id. Therefore, they could all be combined and set forth as one lump sum.
63. Subsection (b) has been characterized as containing an exhaustion requirement because it forces claimants to seek satisfaction from the governmental defendant before commencing a cause of action. Felder v. Casey, 487 U.S. 131, 142 (1988) (discussing the "exhaustion requirement" of § 893.80(1)(b)). The theory is that the governmental defendant will investigate the claim and attempt to settle if it is found to have merit. Id.
lowed.\textsuperscript{64} If the municipality expressly disallows the claim within 120 days of receiving it, the municipality earns the benefit of a six-month statute of limitations, which runs from the date of disallowance.\textsuperscript{65} On the other hand, if the municipality fails to expressly disallow within 120 days, the plaintiff's claim is automatically disallowed, and the six-month abbreviated statute of limitations does not apply.\textsuperscript{66} Instead, the statute of limitations for the underlying action applies. For example, if the underlying action was one for personal injury, the three-year statute of limitations for personal injury actions would apply.\textsuperscript{67}

\textbf{A. Pleading Noncompliance}

The notice requirements of section 893.80(1) operate as a condition precedent to recovery in all actions brought against governmental entities or officers.\textsuperscript{68} Noncompliance with the notice requirements is an affirmative defense,\textsuperscript{69} which must be pled by the municipal defendant.\textsuperscript{70} While the plaintiff has the burden of proving compliance with the notice requirements of subsections (a) and (b), the plaintiff is not required to allege compliance in the complaint.\textsuperscript{71}

\textsuperscript{64} Although an action commenced before disallowance is considered "defective," the claimant may refile the action after disallowance and dismissal of the defective action. Fox v. City of Milwaukee, 159 Wis. 2d 581, 464 N.W.2d 845 (Ct. App. 1990). If the action was otherwise timely, the statute of limitations is tolled. \textit{Id.}

\textsuperscript{65} \textit{Wis. Stat.} § 893.80(1)(b) (1991-92).

\textsuperscript{66} \textit{See} Linstrom v. Christianson, 161 Wis. 2d 635, 469 N.W.2d 189 (Ct. App. 1991) (noting that where the municipality does not serve notice of disallowance of claim, the six month limitation on bringing action is not triggered).

\textsuperscript{67} \textit{See} Schwetz v. Employers Ins. of Wausau, 126 Wis. 2d 32, 36, 374 N.W.2d 241, 243 (Ct. App. 1985); \textit{see also} Jasenczak v. Schill, 55 Wis. 2d 378, 385, 198 N.W.2d 369, 372 (1972). The statute of limitations for personal injury actions is \textit{Wis. Stat.} § 893.54 (1991-92).

\textsuperscript{68} Sambs v. Nowak, 47 Wis. 2d 158, 167, 177 N.W.2d 144, 149 (1970). Stated differently, compliance with § 893.80 is a "condition in fact requisite to liability." Majerus v. Milwaukee County, 39 Wis. 2d 311, 317, 159 N.W.2d 86, 88 (1968).

\textsuperscript{69} Felder v. Casey, 139 Wis. 2d 614, 618, 408 N.W.2d 19, 21 (1987), \textit{rev'd on other grounds}, 487 U.S. 131 (1988). Although lack of notice is a complete defense, a claimant's failure to comply with § 893.80 does not deprive the court of subject matter jurisdiction. Figgs v. City of Milwaukee, 121 Wis. 2d 44, 51 n.6, 357 N.W.2d 548, 552 n.6 (1984) (citing Lees v. ILHR Dep't, 49 Wis. 2d 491, 497, 182 N.W.2d 245, 248-49 (1971)). The significance of this is that noncompliance with the statute does not render an assertion of estoppel unavailable to the plaintiff.

\textsuperscript{70} Weiss v. City of Milwaukee, 79 Wis. 2d 213, 228, 255 N.W.2d 496, 501 (1977) (citing Rabe v. Outagamie County, 72 Wis. 2d 492, 498, 241 N.W.2d 428 (1976)).

\textsuperscript{71} \textit{Id.}
B. Scope and Coverage of the Statute

Although Wisconsin's notice of claim statute was previously limited to tort actions, the current version, by virtue of the language "no action," applies to all claims against a municipality, including claims for equitable relief. However, the United States Supreme Court has held that the notice requirements are preempted when federal civil rights actions are brought in state court.

As in its scope, the notice of claim statute is quite broad in its coverage. The statute expressly states that it applies to claims against all governmental bodies, political corporations, governmental subdivisions, and their agents and employees. Falling within one or more of these categories are municipalities, counties, cities, villages, towns, school districts, sewer districts, and all other political subdivisions of the state.

Prior to 1977, different areas of municipal liability, such as the highway defects statute, contained their own notice provisions. The different provisions created a "procedural maze unique to each type of governmental agency." However, section 893.80 now embodies the singular notice of claim procedure for suing all governmental entities other than the state.

C. Justifications and Purposes of the Statute

A critical examination of any statute necessitates inquiry into whether its purposes justify its existence. Specifically, a notice of claim statute demands inquiry into whether its purposes justify segregation of the governmental unit into a privileged class of defendants, even at the

---

73. State v. City of Waukesha, 184 Wis. 2d 178, 181, 515 N.W.2d 888, 890 (1994), overruling Nicolet v. Village of Fox Point, 177 Wis. 2d 80, 501 N.W.2d 842 (Ct. App. 1993) (holding that statute does not apply to claims for equitable relief); Harkness v. Palmyra-Eagle Sch. Dist., 157 Wis. 2d 567, 460 N.W.2d 769 (Ct. App. 1990) (same); Kaiser v. City of Mauston, 99 Wis. 2d 345, 299 N.W.2d 259 (Ct. App. 1980) (same).
76. See id. § 345.01(1)(e).
78. See Rabe v. Outagamie County, 72 Wis. 2d 492, 501, 241 N.W.2d 428, 433 (1976).
79. The procedural requirements for suing the State of Wisconsin are found in Wis. Stat. § 893.82 (1991-92). The notice provisions are more rigid under the State notice of claim statute than under the municipal notice of claim statute.
cost of excluding some valid claims from adjudication. Wisconsin courts have traditionally attached different purposes to notice statutes depending on whether the particular statute is a "notice of injury" or a "notice of claim." However, this distinction has become meaningless in relation to section 893.80 of the Wisconsin Statutes. Wisconsin courts disagree about whether the statute is a notice of injury or a notice of claim. As borne out by this divergence among the courts, section 893.80 evidently serves the purposes of both types of statutes. Accordingly, although this writer and others refer to the statute as a notice of claim statute, it is in fact both a notice of claim and a notice of injury statute. Specifically, subsection (a) of the statute serves the traditional function of a notice of injury statute, and subsection (b) serves the traditional function of a notice of claim statute. As such, each subsection of the statute has one primary and one secondary purpose.

80. The principal purpose of a notice of injury statute is to enable municipal officers to investigate the matter, whereas the principal purpose of a notice of claim statute is "to afford the municipality an opportunity to effect a compromise without suit." See Colburn v. Ozaukee County, 39 Wis. 2d 231, 239, 159 N.W.2d 33, 36 (1968); Pattermann v. City of Whitewater, 32 Wis. 2d 350, 357, 145 N.W.2d 705, 708 (1966); Van v. Town of Manitowoc Rapids, 150 Wis. 2d 929, 933, 442 N.W.2d 557, 559 (Ct. App. 1989).

81. The following cases have either expressly characterized Wis. Stat. § 893.80 (1991-92), or its predecessor, as a notice of injury statute or have assigned to the statute the traditional purpose of a notice of injury statute: Nielsen v. Town of Silver Cliff, 112 Wis. 2d 574, 580, 334 N.W.2d 242, 245 (1983) (assigning purpose of notice of injury statute); Pattermann, 32 Wis. 2d at 358, 145 N.W.2d at 709 (characterizing as notice of injury statute); Van, 150 Wis. 2d at 933, 442 N.W.2d at 559 (characterizing as notice of injury statute); Elkhorn Area Sch. Dist. v. East Troy Community Sch. Dist., 110 Wis. 2d 1, 5, 327 N.W.2d 206, 208 (Ct. App. 1982) (characterizing as notice of injury statute).

The following cases have either expressly characterized Wis. Stat. § 893.80 (1991-92), or its predecessor, as a notice of claim statute or have assigned to the statute the traditional purpose of a notice of claim statute: Felder v. Casey, 139 Wis. 2d 614, 624, 408 N.W.2d 19, 23 (1987) (characterizing as notice of claim), rev'd on other grounds, 487 U.S. 131 (1988); Figgs v. City of Milwaukee, 121 Wis. 2d 44, 53, 357 N.W.2d 548, 553 (1984) (assigning purpose of notice of claim statute); Gutter v. Seaman, 103 Wis. 2d 1, 9, 308 N.W.2d 403, 407 (1981) (assigning purpose of notice of claim statute).

82. See Smith v. Milwaukee County, 149 Wis. 2d 934, 937-38, 440 N.W.2d 360, 361-62 (1989) (stating that § 893.80 (serves both purposes).


84. This conclusion is buttressed by the traditional purposes assigned to each type of statute. Accord Figgs, 121 Wis. 2d at 53, 357 N.W.2d at 553; Gutter, 103 Wis. 2d at 9, 308 N.W.2d at 407; Elkhorn, 110 Wis. 2d at 5, 327 N.W.2d at 208; Nielsen, 112 Wis. 2d at 580, 334 N.W.2d at 245. Contra Pattermann, 32 Wis. 2d at 358, 145 N.W.2d at 709 (stating that statute does not serve dual function); Gonzalez v. Tesky, 160 Wis. 2d 1, 6, 465 N.W.2d 525, 527 (Ct. App. 1990) (stating that subsection (b) is notice of injury statute).

85. Notice of claim statutes in most jurisdictions are justified on the same four basic purposes. See Gordon, supra note 8, at 423-24; Comment, Notice of Claim Requirement Under the Minnesota Municipal Tort Liability Act, 4 WM. MITCHELL L. REV. 93, 96 (1978).
The primary purpose of notice under subsection (a) is to provide governmental authorities with an opportunity to make a prompt investigation of the circumstances giving rise to the claim. The reasoning is that fraudulent and specious claims will more readily be detected when the facts are fresh, the witnesses are available, and the conditions have not materially changed. This purpose, however, would seem to be equally applicable to a suit by one private individual against another. Moreover, empirical studies have indicated that municipalities likely receive more efficient legal services than the average plaintiff and, therefore, do not need special treatment to prepare a strong defense. Hence, the “prompt investigation” purpose alone arguably does not justify segregation of the governmental unit into a privileged class.

A secondary purpose of subsection (a) is to alert municipalities of dangerous conditions or inappropriate and unlawful governmental conduct. This allows the municipality to take prompt corrective measures and thereby prevent similar accidents from occurring in the future. The reasoning is that, unlike an individual, a municipality is often unaware of its tortious activity and, therefore, needs the added protection of a notice statute in order to avoid incurring multiple losses caused by one defective condition or a singular practice of unlawful conduct.

Although this reasoning is compelling, it alone cannot support the existence of the notice of claim statute. First, while it is true that the governing body of a municipality might be unaware of its agent’s torts, the same can be said for any private corporation that cannot continuously watch all of its agents. Similarly, an individual might be unaware of a dangerous condition on his or her property. Second, only two Wisconsin cases have even mentioned that the statute serves to prevent similar accidents in the future, and those cases considered such a purpose to be merely an ancillary benefit of the statute rather than one of its gen-

86. Pattermann, 32 Wis. 2d at 353, 145 N.W.2d at 708-9; Elkhorn 110 Wis. 2d at 5, 327 N.W.2d at 208; Nielsen, 112 Wis. 2d at 580, 334 N.W.2d at 245.
87. See Nielsen, 112 Wis. 2d at 580, 334 N.W.2d at 245; 56 AM. JUR. 2D Municipal Corporations § 686 (Supp. 1993).
88. Fuller & Casner, supra note 16, at 446. Public attorneys rapidly become specialists in their field and often possess the principal facts necessary to defend an action even before the claimant has consulted with a lawyer. Id. Although these studies were done to determine the validity of the fears used to justify maintaining governmental immunity, the same reasoning applies here.
89. Felder v. Casey, 487 U.S. 131, 143 (1988) (stating that although the Wisconsin Notice of Claim Statute allows a municipality to take prompt corrective action, that function is not a primary purpose of the statute).
90. Nielsen, 112 Wis. 2d at 580, 334 N.W.2d at 245.
91. See Sahm, supra note 36, at 3.
eral or primary purposes. The legislature surely did not intend that a mere ancillary benefit serve as the justification for placing municipal tort-feasors into a privileged class. Moreover, when a municipality is subject to complete liability for its torts, "[p]ublic safety becomes a matter of real concern . . . repair programs are stimulated . . . [and] safety education for . . . officers and the general public is likely to result. Without laboring the point, it seems clear that such results are highly desirable."

The primary purpose of subsection (b) of the statute "is to give the municipality the opportunity to attempt to compromise the claim and effect settlement before the parties are forced to proceed with a lengthy or costly lawsuit." The supreme court has elaborated on this point as follows:

Statutory . . . provisions requiring presentation of claims or demands to the governing body of the municipal corporation before an action is instituted are in furtherance of a public policy to prevent needless litigation and to save unnecessary expenses and costs by affording an opportunity amicably to adjust all claims against municipal corporations before suit is brought.

Thus, similar to the reasoning behind subsection (a), the underlying rationale of subsection (b) appears to be that prompt notice enables municipalities to more easily and accurately ascertain the facts. The municipality is thus in a better position to determine whether liability exists. If it determines that liability exists, the municipality can settle and avoid needless litigation. On the other hand, if it determines that no liability exists, or if the plaintiff is unable to procure a satisfactory settle-

92. "Thorough investigations guard against specious claims and may help prevent similar accidents in the future." Nielsen, 112 Wis. 2d at 580, 334 N.W.2d at 245 (citing Rabe v. Outagamie County, 72 Wis, 2d 492, 497, 241 N.W.2d 428 (1976)).

93. One commentator has argued that notice of claim statutes are generally motivated by concern for the public purse, and not for public safety. See Gordon, supra note 8, at 423. This appears to be the case in Wisconsin.

94. Fuller & Casner, supra note 16, at 460.

95. Felder v. Casey, 139 Wis. 2d 614, 624, 408 N.W.2d 19, 23-24 (1987) (citing Pattermann v. City of Whitewater, 32 Wis. 2d 350, 357, 145 N.W.2d 705, 709 (1966)), rev'd, 487 U.S. 131 (1988). The Wisconsin Supreme Court has on one occasion stated that "'[t]here is nothing in sec. 893.80, Stats., to suggest that the legislature intended any different or additional purpose for this particular notice-of-claim statute." Figgs v. City of Milwaukee, 121 Wis. 2d 44, 53-54, 357 N.W.2d 548, 553 (1984).

96. Felder, 139 Wis. 2d at 624, 408 N.W.2d at 24 (citations omitted).

97. Members of the Supreme Court have expressed that notice enables officials to investigate claims in a timely fashion, thereby making it easier to ascertain the facts accurately and to settle meritorious claims without litigation. Felder v. Casey, 487 U.S. 131, 142 (1988); see also 56 AM. JUR. 2D Municipal Corporations § 686 (Supp. 1993).
ment, the statute assures prompt initiation of litigation, which inures to the benefit of both the plaintiff and the municipal defendant.

Although municipalities should be given an opportunity to avoid expensive litigation, this purpose does not justify placing governmental defendants in a privileged class. Again, this reasoning seems to be equally applicable to a suit by one private individual against another. Furthermore, the statute is not benefitting the plaintiff in any way that the plaintiff would not be benefitted in its absence. Thus, the "settlement and compromise" purpose of the statute is also singularly without force as a justification for the statute.

A secondary purpose of subsection (b) is to alert municipalities of "possible expenses so that appropriate review of the budget can be made." Consistent with this purpose, Wisconsin courts have emphasized that notice under section 893.80 must state the amount of damages the plaintiff seeks and an intent to hold the governing body responsible for those damages. However, the budgetary planning purpose has rarely been mentioned by the courts. In fact, the supreme court, which has on numerous occasions enunciated the purposes of the statute, has never mentioned that the statute serves a budgetary planning purpose.

Like the other purposes previously discussed, review of the budget would seem equally applicable to a suit by one private individual against another. Although private defendants generally have less exposure in terms of the number of claims filed against them, municipal defendants generally have deeper pockets. Moreover, the liability of municipal defendants is statutorily limited, whereas the liability of private defendants is not. Providing municipalities with time to review their budgets

98. Regarding Wisconsin's notice of claim statute, the United States Supreme Court has stated that "such statutes 'are enacted primarily for the benefit of governmental defendants,' and are intended to afford such defendants an opportunity to prepare a stronger case." Felder, 487 U.S. at 145 (citations omitted).

99. Van v. Town of Manitowoc Rapids, 150 Wis. 2d 929, 933, 442 N.W.2d 557, 559 (Ct. App. 1989) (citing Elm Park Iowa, Inc. v. Denniston, 92 Wis. 2d 723, 730, 286 N.W.2d 5, 8-9 (Ct. App. 1979)).

100. See Gutter v. Seamandel, 103 Wis. 2d 1, 9, 308 N.W. 2d 403, 407 (1981) (stating that the statute's purpose cannot be served unless the claim demands a specific sum of money).


102. The California Supreme Court has suggested that the "budget review" purpose was more compelling in the "early days [when] towns were small and such expenditures were important items in a limited budget." Note, supra note 36, at 87 (quoting Cresent Wharf & Warehouse Co. v. City of Los Angeles, 278 P. 1028, 1030 (Cal. 1929)).

hardly seems to justify the existence of a statute that occasionally excludes valid claims.

D. The Insurance Crunch

As discussed earlier, local governments have always feared the expansion of municipal liability.\textsuperscript{104} In the mid-to-late 1980s, a virtually nonexistent insurance market exacerbated this fear.\textsuperscript{105} Insurance companies claimed that the rapid expansion of municipal liability made the municipal insurance market unpredictable and, consequently, difficult to underwrite.\textsuperscript{106} As a result, even when insurance was technically available, high insurance premiums often made coverage cost prohibitive.\textsuperscript{107}

Across the nation, many municipalities, teetering on the verge of insolvency, urged their legislatures to pass laws reducing municipal liability and ensuring that municipalities could obtain coverage for such liability.\textsuperscript{108} Hence, any attempt to remove an existing barrier to municipal liability, such as a municipal notice of claim statute, is likely to meet with staunch opposition from both the insurance industry and municipalities.

The insurance industry will argue that the mere threat of expanding municipal liability will further decrease the predictability of the market and, thus, the availability of insurance.\textsuperscript{109} Municipalities will argue that the removal of existing barriers will increase their liability exposure, completely eliminate the availability of insurance, and render municipalities insolvent, resulting in empty coffers to pay even the most deserving claims.

However, these fears cannot support the existence of Wisconsin's municipal notice of claim statute. Maintaining the statute will not solve the recurring insurance dilemma. Indeed, the statute was in place when the insurance crunch reached its apex in the late 1980s. Whether eliminating parts of the statute will decrease the availability of insurance is subject to debate.\textsuperscript{110} For example, if Wisconsin courts interpret an ex-

\begin{thebibliography}{110}
\bibitem{104} See supra notes 33-36 and accompanying text.
\bibitem{106} Id. at 49.
\bibitem{108} Hackney, supra note 107, at 389.
\bibitem{109} See Blodgett, supra note 105, at 51.
\bibitem{110} Arguably, a notice of claim statute might help stabilize the insurance market by delineating the scope of governmental liability. However, if the statute is applied on a case-by-
ception to the general rule of section 893.80 so broadly that the excepti-
on swallows the rule, then the rule will rarely bar recovery and any
increase in liability resulting from the abolition of the rule will be de
minimis. As discussed later, Wisconsin courts arguably have permitted
the actual notice exception to swallow the written notice rule.

In any event, arguments concerning the statute’s effect on either the
insurance market or the coffers of municipalities are unpersuasive. Such
arguments harken back to the rationale in Russell v. Men of Devon,111
where the court, fearing an infinity of actions and recognizing that the
County of Devon had no funds with which to pay the plaintiff, extended
immunity to the county. As previously discussed, the rationale in Russell
has “been shot to death on so many different battlefields that it would
seem utter folly now to resurrect it.”112 The Russell rationale is incap-
able of supporting immunity in any form. The legislature certainly would
not reinstate governmental immunity to encourage insurance companies
to underwrite. Thus, why would the legislature maintain inequitable no-
tice provisions, which have the same effect and are supported by the
same justifications as governmental immunity, just to encourage insur-
ance companies to underwrite municipal claims policies?

Arguably, some middle ground between complete and zero immunity
is necessary to prevent unlimited municipal liability and widespread mu-
nicipal insolvency. In Wisconsin, this middle ground is largely secured
by section 893.80(3) of the Wisconsin Statutes, which limits an individual
plaintiff’s recovery to $50,000.113 This middle ground can be further se-
cured by means that do not produce the harsh results associated with the
notice of claim statute. For instance, many municipalities currently cope
with the insurance dilemma either by self insuring or by pooling funds
with other municipalities and entering into a mutual insurance
agreement.114
IV. MITIGATING THE "HARSH CONSEQUENCES" OF THE STATUTE

In recent years, Wisconsin courts have expressed their disapproval of notice of claim statutes.

We do not enthusiastically endorse the result in this case. The requirements of sec. 893.80(1)(a), Stats., produce harsh consequences. Nonetheless, as the Wisconsin Supreme Court noted about another notice of injury provision, "the terms of this legislative enactment must be applied in accord with their plain meaning, and we are not free to ignore their import." We join the court in recognizing that although the goals sought to be achieved by notice of injury statutes are not improper, the legislature might achieve its objectives by less drastic means.115

The legislature has not responded to these criticisms. As a result, Wisconsin courts have struggled to adhere to the mandate of the statute without allowing inequitable results to flow from its technical requirements. Pursuant to this goal, Wisconsin courts have occasionally applied the doctrine of substantial compliance and have broadly construed the statute's actual notice exception.

A. Substantial Compliance

The most common means employed by other state courts to alleviate the harsh effects of their notice of claim statutes is application of the doctrine of substantial compliance.116 Although this application generally has been effective, it also has tended, because of its fact-intensive nature, to be unpredictable. Moreover, while courts have freely applied this doctrine to the content requirements of notice statutes, it has been applied far more sparingly to the rigid time requirements of the statutes.117 Wisconsin's application of the doctrine is illustrative.

which would operate to deter municipalities from engaging in harmful practices in the future. Id. at 397. By so doing, states could take advantage of low insurance rates when available and self-insure when premiums are high or insurance is unavailable. Id. at 399 n.41. In addition, because states have a larger base from which to draw their tax revenues, state funding of municipal liability would more equitably spread the loss from richer municipalities to poorer municipalities. Id. at 397.


117. "In one respect, courts are . . . quite strict in requiring compliance with notice requirements: the notice must be given within the time specified by the relevant legislation;
In 1913, the Wisconsin Supreme Court first applied the doctrine of substantial compliance to a notice of claim statute. Since then, the supreme court has developed a clearly established policy of substantial compliance with regard to the content requirements of notice found in section 893.80(1)(b) of the Wisconsin Statutes. To determine whether a plaintiff's cause of action is saved by substantial compliance, the supreme court uses the following guidelines:

1. The statement of the demand must be definite enough to fulfill the purpose of the claim statute; and
2. "[a] construction which preserves a bona fide claim so that it may be passed upon by a competent tribunal is to be preferred to a construction which cuts it off without a trial." Notwithstanding the court's ostensibly plaintiff-friendly stance, plaintiffs should exercise care to strictly comply with the requirements of the statute. As the following cases demonstrate, the parameters of substantial compliance in Wisconsin are not fully defined.

The Wisconsin notice of claim statute requires a plaintiff to present an "itemized statement of the relief sought." This requirement has long been interpreted to mean that when a plaintiff is seeking damages a dollar amount must be stated. While substantial compliance with the requirement is sufficient, what constitutes substantial compliance is less definite. Clearly, if no dollar amount is stated, there is no substantial filing even one day late will bar a claim." Osborne M. Reynolds, Jr., Local Government Law, Liability in Tort § 195, at 701 (1982).

118. See Moyer v. City of Oshkosh, 151 Wis. 586, 593, 139 N.W. 378, 381 (1913).
119. Gutter v. Seamandel, 103 Wis. 2d 1, 10-11, 308 N.W.2d 403, 408 (1981) (quoting Moyer, 151 Wis. at 593, 139 N.W. at 380 (1913)).
120. At least one legal scholar has sharply criticized the courts' application of substantial compliance to notice of claim statutes. To permit any departure from its plain terms is to introduce into it an element of uncertainty, and to open the way for a complete breaking down and nullification of the statute; and instead of having a uniform interpretation applicable to all cases, there will be no settled rule. As a consequence, the courts will be called upon, over and over again, to determine whether upon the facts in each particular case the statute has been substantially complied with, or its spirit and purpose subserved, thus leading to endless confusion.

Sahm, supra note 36, at 10.
122. "Implicit in the requirements of . . . [notice of claim statutes] is that the amount of the claim be stated in dollars and cents, because without this it would be impossible for the [municipality] to properly allow the claim." Pattermann v. City of Whitewater, 32 Wis. 2d 350, 358, 145 N.W.2d 705, 709 (1966) (quoting Firemen's Ins. Co. v. Washburn County, 2 Wis. 2d 214, 226, 85 N.W.2d 840, 846 (1957)) (emphasis added).
compliance.\textsuperscript{123} Likewise, a notice of claim stating that "damages [will] not exceed the $25,000 statutory limitation" fails to satisfy the requirement.\textsuperscript{124} The supreme court also has held that a claim stating that the "claimant has been damaged in excess of Twenty-five Thousand ($25,000) Dollars" fails to substantially comply with the requirement.\textsuperscript{125}

Conversely, the supreme court has held that a notice of claim stating a demand in excess of the statutory damage limitation\textsuperscript{126} does substantially comply with the requirement.\textsuperscript{127} The court also has held that a notice of claim stating that "[o]ur demand at this time is $25,000" satisfies the notice requirement.\textsuperscript{128} Thus, although the courts are willing to permit substantial compliance with the "itemized statement of relief" requirement, the scope of the doctrine is quite narrow in its application. Hence, when seeking monetary damages, the wise practitioner will strictly comply with the requirement by demanding a specific dollar amount.

Wisconsin's notice of claim statute also requires a plaintiff to include his or her address in the notice of claim.\textsuperscript{129} Substantial compliance with this requirement is also sufficient. In Novak v. City of Delavan,\textsuperscript{130} the plaintiffs' causes of action hinged upon whether filing a notice of claim with their attorney's address constituted substantial compliance with the statutory requirement that a notice of claim contain the claimant's address.\textsuperscript{131} The court held that the plaintiffs "reasonably" complied with the statute, stating that "the policy of this court [is] to preserve a \textit{bona fide} claim where there has been substantial compliance with a statute requiring notice."\textsuperscript{132}

\textsuperscript{123} "It is difficult to see how [a] notice of claim . . . could give the city an opportunity to compromise when the amount of the claim was not stated." Sambs v. Nowak, 47 Wis. 2d 158, 166, 177 N.W.2d 144, 148 (1970).
\textsuperscript{124} See Pattermann, 32 Wis. 2d at 358, 145 N.W.2d at 709. Similarly, a notice of claim stating that damages "to" the amount of fifty thousand dollars for one plaintiff, and "up to" fifteen thousand dollars for the other plaintiff does not satisfy the requirement. See Colburn v. Ozaukee County, 39 Wis. 2d 231, 237-38, 159 N.W.2d 331 (1968).
\textsuperscript{125} Gutter v. Seamandel, 103 Wis. 2d 1, 12, 308 N.W.2d 403, 408 (1981).
\textsuperscript{126} See Wis. Stat. § 893.80(3) (1991-92).
\textsuperscript{127} See Schwartz v. City of Milwaukee, 43 Wis. 2d 200, 143 N.W.2d 6 (1966).
\textsuperscript{128} See Gutter, 103 Wis. 2d at 5, 11, 308 N.W.2d at 405, 408 (emphasis added). However, the court dramatically tempered its holding by stating "we recommend that hereafter counsel not use any ambiguous phrasing in setting forth the sum demanded if counsel wish the demand to be viewed as a claim which complies with the statute." Id. at 11, 308 N.W.2d at 408.
\textsuperscript{129} See Wis. Stat. § 893.80(1)(b) (1991-92).
\textsuperscript{130} 31 Wis. 2d 200, 143 N.W.2d 6 (1966).
\textsuperscript{131} See Wis. Stat. § 62.25 (1)(c) (1959).
\textsuperscript{132} Novak, 31 Wis. 2d at 211, 143 N.W.2d at 12.
Two requirements of section 893.80(1)(b) are not satisfied by substantial compliance: (1) disallowance and (2) commencement of an action. For example, in Schwetz v. Employers Insurance of Wausau, the plaintiffs' claims were dismissed twice for failing to strictly comply with these requirements—once for commencing their action before their claims were disallowed and, upon refiling their claims, a second time for failing to commence their action within the three year statute of limitations. The supreme court has held that requirements concerning the act of filing, such as the 120-day notice requirement, are to be distinguished from those concerning the contents of the document after it is filed. Substantial compliance may, if the facts warrant, satisfy the latter, but not the former.

Consistent with this distinction, Wisconsin courts have not overtly applied the doctrine of substantial compliance to the 120-day notice requirement under section 893.80(1)(a). As discussed later in this Comment, the legislature has written an “actual notice” exception into the 120-day notice requirement. Plaintiffs have relied on this exception, rather than on the doctrine of substantial compliance, to excuse untimely notice. However, the state notice of claim statute, the sister statute to the municipal notice of claim statute, does not have an actual notice exception. Without this exception at their disposal, plaintiffs have ar-

133. See Rabe v. Outagamie County, 72 Wis. 2d 492, 501, 241 N.W.2d 428, 433 (1976); Jasenczak v. Schill, 55 Wis. 2d 378, 198 N.W.2d 369 (1972); Schwetz v. Employers Ins. of Wausau, 126 Wis. 2d 32, 34, 374 N.W.2d 241, 243 (Ct. App. 1985).
134. 126 Wis. 2d 32, 374 N.W.2d 241 (Ct. App. 1985).
135. Id. at 33-34, 374 N.W.2d at 242-43.
136. See Rabe, 72 Wis. 2d at 501, 241 N.W.2d at 433 (distinguishing Novak v. City of Delavan, 31 Wis. 2d 200, 143 N.W.2d 6 (1966), and other cases summarized therein relating to substantial compliance).
137. See Rabe, 72 Wis. 2d at 501, 241 N.W.2d at 433.
138. Wis. Stat. § 893.82(3) (1991-92) provides in pertinent part: [N]o civil action or civil proceeding may be brought against any state officer, employee or agent for or on account of any act growing out of or committed in the course of the discharge of the officer’s, employe’s or agent’s duties ... unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location, and circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employe or agent involved. A specific denial by the attorney general is not a condition precedent to bringing the civil action or civil proceeding.
139. The rationale for not providing state tort victims with an actual notice exception has not been articulated by the courts or the legislature.
gued that substantial compliance satisfies the 120-day notice requirement of the state notice of claim statute.

The courts have applied the doctrine of substantial compliance to the content requirements of the state notice of claim statute in a manner that is generally analogous to the application of that doctrine to the content requirements of the municipal notice of claim statute.\(^\text{140}\) Accordingly,\(^\text{141}\) the courts have uniformly held that substantial compliance with the filing time under the state notice of claim statute is insufficient.\(^\text{142}\)

In *Yotvat v. Roth*,\(^\text{143}\) the court of appeals held that under the state notice statute, "[n]o exception is permitted. When the legislature has intended otherwise in a comparable situation, it has expressly allowed an exception to the time requirements in filing notice."\(^\text{144}\) The comparable situation to which the court refers is, of course, the municipal notice of claim statute.\(^\text{145}\)

In *Renner v. Madison General Hospital*,\(^\text{146}\) the plaintiff allegedly received negligent medical treatment while giving birth to her daughter.\(^\text{147}\) Unbeknownst to the plaintiff or her attorney, the defendant doctors were employed by the University of Wisconsin Hospital and Clinics, thereby making them state employees, shielded by the notice provisions of the state notice of claim statute.\(^\text{148}\) The plaintiff became aware that the defendants were state employees by virtue of their motion to dismiss

\(^{140}\) See, e.g., *Daily v. University of Wis., Whitewater*, 145 Wis. 2d 756, 759-60, 429 N.W.2d 83, 84-85 (Ct. App. 1988) (holding that the failure to state the name of state employee alleged to be negligent, as required by statute, is not fatal to the claim). *Daily* explicitly drew its reasoning from cases dealing with the municipal notice of claims statute. *Id.* at 759, 429 N.W.2d at 85. Prior to *Daily*, the appellate court, relying on *Yotvat v. Roth*, 95 Wis. 2d 357, 290 N.W.2d 524 (Ct. App. 1980), had held that the failure to name medical personnel in the notice of claim nullified the notice as to those defendants. *See Protic v. Castle Co.*, 132 Wis. 2d 364, 369, 392 N.W.2d 119, 122 (Ct. App. 1986). However, in *Daily*, the court acknowledged that its earlier reliance on *Yotvat* was misplaced. *Daily*, 145 Wis. 2d at 759, 429 N.W.2d at 84. This misplaced reliance resulted because the court in *Protic* failed to distinguish between the time requirements and the content requirements of notice. *See supra* notes 134-35 and accompanying text.

\(^{141}\) The courts' application is consistent with the supreme court's distinction between the requirements concerning the act of filing and those concerning the contents of the document after it is filed. *See supra* notes 136-37 and accompanying text.

\(^{142}\) See *Renner v. Madison Gen. Hosp.*, 151 Wis. 2d 885, 889, 447 N.W.2d 97, 99 (Ct. App. 1989); *Yotvat*, 95 Wis. 2d at 362, 290 N.W.2d at 527.

\(^{143}\) 95 Wis. 2d 357, 290 N.W.2d 524 (Ct. App. 1980).

\(^{144}\) *Id.* at 361, 290 N.W.2d at 527.

\(^{145}\) *Id.*

\(^{146}\) 151 Wis. 2d 885, 447 N.W.2d 97 (Ct. App. 1989).

\(^{147}\) *Id.* at 888, 447 N.W.2d at 98.

\(^{148}\) *Id.*
and immediately filed a claim with the attorney general.\textsuperscript{149} Although cognizant of the plaintiff's hardship, the court expressly reaffirmed its decision in \textit{Roth}, holding that "substantial compliance with the filing time under the State notice of claim statute is insufficient."\textsuperscript{150} The court reasoned that "[a] liberal construction which would excuse the filing of an untimely claim would not effect the legislative intent to provide the attorney general with adequate time to investigate claims."\textsuperscript{151}

The purposes underlying the municipal notice of claim statute and the state notice of claim statute are virtually identical.\textsuperscript{152} Hence, one might cogently reason that if substantial compliance with the filing time under the state notice of claim statute would defeat its purpose, then substantial compliance with the filing time under the municipal notice of claim statute would defeat its purpose as well. This reasoning is even more compelling in light of the fact that the courts' first guiding principle in invoking the doctrine of substantial compliance requires inquiry into whether the plaintiff has complied "enough to fulfill the purpose of the claim statute."\textsuperscript{153}

\textbf{B. The Actual Notice Exception}

To ameliorate some of the harsh consequences of the filing time requirements in notice of claim statutes, some state legislatures have incorporated exceptions that resemble the doctrine of substantial compliance into their notice of claim statutes.\textsuperscript{154} Couched in terms of an "actual notice" provision, Wisconsin's modern notice of claim statute has contained such an exception since its inception in 1963.\textsuperscript{155} Wisconsin courts

\begin{itemize}
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{Id.} at 889, 447 N.W.2d at 99.
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} The legislature has expressly stated that the purposes of the State notice of claim statute are to:
\begin{enumerate}
\item Provide the attorney general with adequate time to investigate claims which might result in judgments to be paid by the state.
\item Provide the attorney general with an opportunity to effect a compromise without a civil action or civil proceeding.
\end{enumerate}
\item Likewise, "[t]he purpose of the 'notice of claim' statute, sec. 893.80, Stats., . . . is to afford . . . governmental units an opportunity to investigate and amicably compromise claims without litigation." Smith v. Milwaukee County, 149 Wis. 2d 934, 937-38, 440 N.W.2d 360, 361-62 (1989); see also supra notes 86-99 and accompanying text.
\item \textsuperscript{153} Gutter v. Seamandel, 103 Wis. 2d 1, 10-11, 308 N.W.2d 403, 408 (1981).
\item \textsuperscript{155} \textit{See Wis. Stat.} § 331.43 (1963) (current version at \textit{Wis. Stat.} § 893.80 (1991-92)).
\end{itemize}
have generally used the actual notice exception to avoid injustice; however, the breadth of the exception has created inconsistent reasoning by the courts and raised concerns about the legitimacy of the statute.

1. Defining “Actual Notice”

Wisconsin’s municipal notice of claim statute provides that a claimant’s failure to furnish a written notice of claim within 120 days will not bar action on the claim if the claimant demonstrates that the municipality had “actual notice” of the claim and was not prejudiced by the claimant’s failure to provide the requisite written notice.\textsuperscript{156} Although the statute is silent on what constitutes actual notice, “[d]ocuments which have been held to constitute adequate [actual] notice have usually, at a minimum, recited the facts giving rise to the injury and have indicated an intent on the plaintiff’s part to hold the city responsible for any damages resulting from the injury.”\textsuperscript{157} Because actual notice under the statute is equivalent to actual knowledge that an injured party intends to pursue a claim against the municipality,\textsuperscript{158} constructive notice is not sufficient to satisfy the actual notice exception.\textsuperscript{159} Thus, actual notice must meet the same basic content requirements as formal written notice.

While not articulated in any reported Wisconsin decision, the rationale behind insisting that actual notice inform the municipality of the injured party’s intent to hold the municipality responsible appears to be that in the absence of such a requirement, municipalities would be compelled to investigate every incident upon the assumption that it might lead to litigation.\textsuperscript{160} That result would place an onerous burden on municipalities and would be contrary to the statute’s general purpose of

\textsuperscript{156} Wis. Stat. § 893.80(1)(a) (1991-92). Whether a municipality had actual notice of the plaintiff’s claim presents a mixed question of fact and law. Olsen v. Township of Spooner, 133 Wis. 2d 371, 377, 395 N.W.2d 808, 811 (Ct. App. 1986). What the municipality knew about the claim is a factual finding that may not be overturned unless clearly erroneous; but, whether that knowledge constituted actual notice under the law is a question of law. \textit{Id.}

\textsuperscript{157} Felder v. Casey, 139 Wis. 2d 614, 630, 408 N.W.2d 19, 26 (1987), rev’d on other grounds, 487 U.S. 131 (1988).

\textsuperscript{158} See Elkhorn Area Sch. Dist. v. East Troy Community Sch. Dist., 110 Wis. 2d 1, 5-6, 327 N.W.2d 206, 209 (Ct. App. 1982).

\textsuperscript{159} Id. at 6, 327 N.W.2d at 209; Olsen, 133 Wis. 2d at 378, 395 N.W.2d at 811. Even if the municipality is able to hypothesize from its knowledge that an individual might have a claim for damages, such knowledge does not satisfy the requirements of actual notice. Olsen, 133 Wis. 2d at 378, 395 N.W.2d at 811.

abrogating immunity under conditions designed to minimize governmental liability and the expenses associated with it.\textsuperscript{161}

On the other hand, requiring that actual notice indicate an intent to hold the municipality liable has definite shortcomings. Controlled by this requirement, Wisconsin's notice of claim statute precludes liability irrespective of whether the municipality knew of the defective condition or practice of illegal conduct. Even if the municipality immediately investigated the claim, corrected any defect, had ample opportunity to compromise the claim, and was in no other way disadvantaged, the actual notice exception does not apply. The facts in \textit{Felder v. Casey}\textsuperscript{162} illustrate this point.

In \textit{Felder}, the plaintiff alleged in his complaint against the City of Milwaukee that several white police officers unlawfully "beat [him] with batons, carried him to a paddy wagon while he was partially unconscious, and threw him through the air and into the paddy wagon."\textsuperscript{163} Felder did not dispute that he failed to give the standard written notice under the statute, but contended that the following undisputed facts provided the city with actual notice within hours of his arrest: (1) a city alderman was present at the scene of the arrest and contacted the police chief, by letter, to personally inform him of the incident; (2) the city police department completed the initial phase of its investigation into the arrest within hours of its occurrence; (3) several police reports were individually prepared by the participating officers shortly after the arrest; and (4) the police captain in charge of the district knew of the arrest and the various police reports.\textsuperscript{164} The Wisconsin Supreme Court summarily held that these facts did not demonstrate actual notice.\textsuperscript{165} None of the facts indicated that Felder intended to bring suit against the city.\textsuperscript{166}

Notwithstanding the result in \textit{Felder}, one should not read the case to mean that the content requirement of the actual notice exception is diffi-


\textsuperscript{162} 139 Wis. 2d 614, 408 N.W.2d 19 (1987), \textit{rev'd on other grounds}, 487 U.S. 131 (1988).

\textsuperscript{163} \textit{Id.} at 617, 408 N.W.2d at 21. Felder, a black man, alleged that the beating and arrest were racially motivated and thus a violation of his civil rights under 42 U.S.C. \textsection{} 1983. \textit{Id.} at 617-18, 408 N.W.2d at 21.

\textsuperscript{164} \textit{Id.} at 628-29, 408 N.W.2d at 25-26.

\textsuperscript{165} \textit{Id.} at 630, 408 N.W.2d at 26.

\textsuperscript{166} In a vigorous dissent, Justice Bablitch argued that the city received actual notice under the statute. \textit{Id.} at 634, 408 N.W.2d at 28. Implicitly equating the actual notice exception to the doctrine of substantial compliance, Justice Bablitch concluded that the "purpose [of the statute] was more than fulfilled in this case. If these facts and circumstances do not constitute actual notice under the statute, 'actual notice' has become meaningless." \textit{Id.}
cult to satisfy.167 Again, actual notice demands only a document that recites the facts giving rise to the injury and indicates an intent to hold the city responsible.168 Most plaintiffs will have little difficulty complying with such minimal content requirements. However, the exception fails to ameliorate the harshness of the notice requirement when a plaintiff unwittingly makes no attempt to comply, as in Felder.169 Thus, although the actual notice standard is not difficult to satisfy, it nevertheless represents a hurdle for municipal tort victims to clear.170

2. Competing Interpretations of Timely Notice

Under Wisconsin's municipal notice of claim statute, the failure to provide written notice within 120 days after the event giving rise to the claim is fatal to the claim unless the plaintiff can show that the municipality had actual notice and was not prejudiced by the delay or lack of standard written notice.171 However, the statute is ambiguous with respect to whether the municipality must receive actual notice within the same 120-day period as standard written notice. Although virtually all Wisconsin courts have effectively extended the statutory notice period under the guise of the actual notice exception, a few Wisconsin courts have interpreted the statute differently.172

167. See, e.g., Felder v. Casey, 487 U.S. 131, 155 n.3 (1988) (White, J., concurring). Justice White expressed that, based on the facts in Felder, the actual notice requirement of § 893.80 is difficult to satisfy. Id.

168. See supra notes 158-61 and accompanying text.

169. 139 Wis. 2d 614, 408 N.W.2d 19 (1987).

170. Justice O'Connor has argued that Wis. Stat. § 893.80(1)(a) is not a “sufficiently burdensome notice of claim requirement [that] could effectively act as a statute of limitations.” Felder, 487 U.S. 131, 162 (1988) (O'Connor, J., dissenting). In this regard, however, Justice O'Connor misses the mark. A statute of limitations is not a burdensome requirement because it sets out some complex means by which one must comply. Rather a statute of limitations is burdensome because of its finality when someone does not attempt to comply, because they were unaware of the deadline or otherwise. Similarly, the notice of claim statute is burdensome because it too has a harsh finality if the plaintiff does not attempt to comply.


172. See Medley v. City of Milwaukee, 969 F.2d 312, 320 (7th Cir. 1992); Brockert v. Skornicka, 711 F.2d 1376 (7th Cir. 1983) (dicta); Craney v. Pacetti, No. 90-CV-367 (Wis. Ct. App. Dist. II June 3, 1992); Rhyner v. Sauk County, No. 83-1777 (Wis. Ct. App. 1985). Some courts outside Wisconsin have also been reluctant to apply such exceptions in a manner that would extend the statutory notice period. See, e.g., Kelly v. City of Rochester, 231 N.W.2d 275 (Minn. 1975) (holding that only actual notice within the notice period excuses late notice); Bell v. Dallas-Fort Worth Regional Airport Bd., 427 F. Supp. 927 (N.D. Tex. 1977) (holding that actual notice must be within statutory notice period).
Two Wisconsin Supreme Court decisions form the touchstone for the predominant view that no time limit applies to actual notice. In Weiss v. City of Milwaukee, the plaintiff allowed more than two years to pass before providing the city with a notice of claim for damages. Without discussion, the supreme court held that the tardy notice of claim constituted actual notice under the statute. The court also summarily concluded that the city was not prejudiced by the lack of timely notice.

In Nielsen v. Town of Silver Cliff, a young child was playing on property owned by the defendant municipality when a large stone monument fell on her leg. Her father managed to lift the monument from her leg, but injured his back in the process. Although notice of the child’s injuries was received within 120 days, no notice of the father’s injuries was received until approximately one year after the incident, at which time he submitted a claim for damages. Reaffirming Weiss, the supreme court in Nielsen held that the father’s claim for damages constituted actual notice under the statute and that the delay in notice was not prejudicial to the municipality.

Actual notice must satisfy the same basic content requirements as requisite written notice. By accepting actual notice beyond the notice

---

173. 79 Wis. 2d 213, 255 N.W.2d 496 (1977).
174. 79 Wis. 2d 213, 255 N.W.2d 499.
175. 79 Wis. 2d 213, 255 N.W.2d 501.
176. Id. at 228, 255 N.W.2d at 501. One possible explanation for the court’s cursory treatment of the notice statute is that the court also held, after lengthy discussion, that the defendant was not negligent as a matter of law. Id. at 234, 255 N.W.2d at 504. Thus, arguably, the court did not fully consider whether extending the statutory notice period would defeat the purposes of the statute.
177. 112 Wis. 2d 574, 334 N.W.2d 242 (1983).
178. Id. at 575, 334 N.W.2d at 243.
179. Id. at 576, 334 N.W.2d at 243.
180. Id.
181. In reversing the court of appeals, the supreme court resolved that “Weiss establishes that... a... claim may be preserved by actual notice received more than 120 days after the event causing the injury provided the claimant shows that the failure to give timely written notice was not prejudicial to the municipality.” Nielsen, 112 Wis. 2d at 581, 334 N.W.2d at 245.
182. Nielsen, 112 Wis. 2d at 582, 334 N.W.2d at 246.
183. See supra notes 159-61 and accompanying text.
period, Nielsen made “prejudice” the linchpin of the notice statute. Indeed, Nielsen states:

The purpose of [the statute] is to avoid prejudice to governmental units resulting from the late filing of claims. Specifically, the notice requirements are designed to ensure that governmental units have a sufficient opportunity to investigate. . . . [Thus,] actual notice . . . does not need a time limit because a subjective showing of no prejudice assures that the statute's purpose has been satisfied regardless of when actual notice is received.\(^{184}\)

Hence, under Nielsen, courts may determine whether the statute’s general purpose has been satisfied without directly considering all of the traditional, more specific purposes of the statute.\(^{185}\) Prejudice is the linchpin because so long as no prejudice has occurred to the municipality, the purpose of the statute has been satisfied, and the actual notice exception may be invoked.\(^{186}\)

In light of the foregoing, the obvious question to be addressed is what constitutes prejudice under the statute.\(^{187}\) Although courts no longer need to directly consider whether the traditional purposes of the statute have been satisfied, those purposes have been used to justify a finding of prejudice or no prejudice. For example, the Nielsen court based its finding of no prejudice on three grounds: first, the municipality was not impaired in its investigation of the incident; second, the municipality was not impaired in its ability to settle the claim; and third, the municipality was not prejudiced in its defense.\(^{188}\) According to the court, the city had “ample opportunity to investigate [the] claim after

---

\(^{184}\) Nielsen, 112 Wis. 2d at 580, 334 N.W.2d at 245 (emphasis added). Although the language “regardless of when actual notice is received” implies that actual notice has absolutely no time constraint, the court later indicated that the two year time period accepted in Weiss marks or at least approaches the boundary of the extended notice period. Nielsen, 112 Wis. 2d at 581-82, 334 N.W.2d at 246.

\(^{185}\) See supra notes 86-103 and accompanying text.

\(^{186}\) The receipt of timely requisite notice creates a conclusive presumption of no prejudice. Nielsen, 112 Wis. 2d at 580, 334 N.W.2d at 245. Because actual notice is substantially the same as requisite notice, see Felder v. Casey, 139 Wis. 2d 614, 630, 408 N.W.2d 19, 26 (1987), rev'd, 487 U.S. 131 (1988), the receipt of actual notice within the statutory notice period should also create a conclusive presumption of no prejudice.

\(^{187}\) The statute itself is silent on the issue. See Wis. Stat. § 893.80(1)(a) (1991-92). Whether a municipality has suffered prejudice is a mixed question of fact and law. Olson v. Township of Spooner, 133 Wis. 2d 371, 378, 395 N.W.2d 808, 811 (Ct. App. 1986). The trial court's factual findings must be upheld unless clearly erroneous, but "[h]ow the facts fit the statutory concept of 'prejudice' is a question of law." Id. at 379, 395 N.W.2d at 811.

\(^{188}\) Nielsen, 112 Wis. 2d at 581-82, 334 N.W.2d at 246.
receiving actual notice. . . . Earlier notice would have made no apprecia-
table difference.”

Purporting to advance a more concrete standard, the court of appeals in Olsen v. Township of Spooner later defined prejudice as “the inabil-
ity of a party to adequately defend a claim.” In so doing, however, the Olsen court also relegated the purpose of section 893.80(1)(a) to ensuring that municipalities can adequately defend a claim. Thus, whenever a municipality can adequately defend, the purpose of the statute is met and, under Nielsen, the actual notice exception may be invoked.

Applying its novel definition to the facts before it, the Olsen court upheld the trial court’s conclusion that the municipality received actual notice of the plaintiff’s claim, but was prejudiced by the three-year lag between the event giving rise to the claim and the receipt of actual no-
tice. The decision turned on the fact that during the three-year lag material evidence had vanished. Hence, Olsen can fairly be read as stating that a municipality suffers prejudice when material evidence, or presumably a material witness, vanishes as a result of the claimant’s fail-
ure to strictly comply with the statute.

b. Actual Notice Confined to Statutory Notice Period

Despite the holding in Nielsen, a minority interpretation of the actual notice exception recently has arisen in Wisconsin. Under this interpreta-
tion, actual notice must be received within the same 120-day period as standard written notice. Although the decisions embracing the minority interpretation have generally failed to justify their departure from

189. Id. (emphasis added).
190. 133 Wis. 2d 371, 395 N.W.2d 808 (1986). Olsen acknowledged that “[o]pinions applying sec. 893.80(1)(a) have typically treated the prejudice question summarily, listing facts, then declaring whether these facts supported a finding of prejudice.” Id. at 379 n.4, 395 N.W.2d at 811 n.4. (citing as an example Weiss v. City of Milwaukee, 79 Wis. 2d 213, 227-28, 255 N.W.2d 496, 501 (1977)).
191. Id. at 379, 395 N.W.2d at 811-12 (borrowing definition from United States v. Eighteen Thousand Five Hundred and Five Dollars and Ten Cents ($18,505.10), 739 F.2d 354, 356 (8th Cir. 1984)).
192. Although Olsen sought to delineate the meaning of prejudice, its only effect was to rephrase the pivotal issue. Before Olsen, the issue was whether the municipality was prejudiced. After Olsen the issue is whether the municipality is unable to adequately defend.
193. Olsen, 133 Wis. 2d at 380, 395 N.W.2d at 812.
194. Id.
Nielsen and are of no precedential value in Wisconsin, they prompt important questions concerning whether the courts have been consistent in their reasoning and whether they have effectively allowed the actual notice exception to swallow the 120-day written notice rule.

After distinguishing Nielsen on questionable grounds, the court of appeals, in an unpublished decision, held that actual notice must occur within 120 days, because "[i]o hold otherwise would lead to absurd results and would render superfluous the requirement of written notice within 120 days." The court of appeals reasoned that a claimant could simply file a tardy notice with the municipality at any time prior to the running of the statute of limitations and argue that the late notice did not prejudice the municipality. Under a narrow definition of prejudice, this reasoning has merit.

In addition, while not discussed by any court, allowing actual notice beyond the statutory notice period arguably conflicts with Renner v. Madison General Hospital. As discussed earlier, Renner held that relaxing the notice time requirement would defeat the purpose of the state notice of claim statute. Because the state notice of claim statute and the municipal notice of claim statute share the same purposes, it would seem that relaxing the notice time requirement under the municipal notice statute would defeat its purpose as well. Furthermore, allowing actual notice beyond the statutory notice period arguably conflicts with the supreme court’s distinction between requirements concerning the act of filing and those concerning the contents of the document after it is filed.

196. For example, the Seventh Circuit recently held that “actual notice must be received within the same 120 days as the written notice.” Medley, 969 F.2d at 320. However, the court failed to cite any cases or provide any reasoning to support its position.

197. In Craney, the court of appeals distinguished Nielsen on the grounds that Nielsen involved Wis. Stat. § 893.43 (1975), which required notice of the “time, place and circumstances of the injury or damage.” The statute was subsequently repealed and recreated with the language “circumstances of the claim” replacing “time, place and circumstances of the injury or damage.” 1977 Wis. Laws 285. The court held that the change in the language was sufficient to permit a different result than that reached in Nielsen. This change in the language, however, does not change any of the reasoning in Nielsen; nor does it allow for a contrary result.

199. Id.
200. 151 Wis. 2d 885, 447 N.W.2d 97 (Ct. App. 1989).
201. Id. at 889, 447 N.W.2d at 98-99; see also supra notes 150-51 and accompanying text.
202. See supra note 152 and accompanying text.
203. See supra notes 152-53 and accompanying text.
204. See Rabe v. Outagamie County, 72 Wis. 2d 492, 501, 241 N.W.2d 428, 433 (1976); see also supra notes 136-37.
c. Interpretation Under Analogous State Statutes

Minnesota and Texas have notice of claim statutes that are similar to section 893.80 of the Wisconsin Statutes.\(^{205}\) The courts of both states have consistently required that some actual notice be given within the statutory notice period before the exception may be invoked.\(^{206}\) Although other state courts hold contrary to Minnesota and Texas,\(^{207}\) the reasoning of the Texas and Minnesota courts is persuasive because their notice statutes are nearly identical to section 893.80(1) of the Wisconsin Statutes.

The reasoning in *Bell v. Dallas-Fort Worth Regional Airport Board*\(^{208}\) is particularly relevant here. In *Bell*, the plaintiff argued that the statutory actual notice exception does not require actual notice to be received within the statutory notice period.\(^{209}\) The court disagreed, holding that without knowledge that is substantially equivalent to the knowledge provided by formal notice, “the governmental defendant cannot reasonably anticipate that an injured party will assert a claim and, therefore, has no opportunity to investigate on a timely basis and to attempt to settle the claim short of litigation as is intended by the [statute].”\(^{210}\) Furthermore, while the terms of the Texas statute are to be liberally construed,

the above interpretation of “actual notice” would appear to be as liberal as can be devised if the formal notice requirement is to retain any force. It is a basic principle of statutory construction that a provision of a statute will not be interpreted so as to render nugatory another provision unless such result cannot be avoided.

\(^{205}\) See Minn. Stat. § 466.05 (Supp. 1993); Tex. Code Ann. § 41-4-16 (1992).


\(^{207}\) Some jurisdictions permit substantial compliance with the filing time requirements in their notice of claim statute. See, e.g., Yurechko v. County of Allegheny, 243 A.2d 372, 377 (Pa. 1968) (extending statutory notice period because no prejudice to municipality occurred). However, the language used in notice of claim statutes varies from state to state, making a relevant comparison of the law in each state nearly impossible. Nonetheless, Reynolds reports that in most jurisdictions, “the notice must be given within the time specified by the relevant legislation; filing even one day late will bar a claim. Reynolds, supra note 117, at 701.

\(^{208}\) 427 F. Supp. 927 (N.D. Tex. 1977). In *Nielsen v. Town of Silver Cliff*, the Wisconsin Court of Appeals cited *Bell* with approval, holding that actual notice must be received within 120 days after the event causing injury. Nielsen v. Town of Silver Cliff, No. 81-1390, 1982 WL 172323 (Wis. Ct. App. July 6, 1982), rev’d, 112 Wis. 2d 574, 334 N.W.2d 242 (1983). In reversing, the supreme court implicitly rejected the reasoning in *Bell*, but did not mention the case specifically. See Nielsen, 112 Wis. 2d at 582, 334 N.W.2d at 246.

\(^{209}\) Bell, 427 F. Supp. at 929.

\(^{210}\) Id. at 930.
The overly liberal interpretation of "actual notice" urged by the Plaintiff would defeat the purpose of the Legislature in enacting a notice provision.211

3. Analysis

Under section 893.80(1)(a) of the Wisconsin Statutes, the plaintiff must provide the defendant with written notice within 120 days. The plaintiff may invoke an exception to this rule by demonstrating actual notice coupled with a separate finding of no prejudice. Because "actual notice" is the basic equivalent of formal written notice, prejudice is the linchpin in determining when the exception may be invoked. Hence, under a sufficiently narrow definition of prejudice, the exception would swallow the rule and thereby render it superfluous. Allowing the exception to swallow the rule would, in turn, evidence a belief on the part of the majority of Wisconsin courts that the purposes of the statute are either generally satisfied irrespective of when notice is given or are undeserving of enforcement.

Wisconsin courts generally have used the exception to extend the statutory notice period. In Weiss, the supreme court invoked the exception despite a two-year lag between the event giving rise to the claim and the receipt of notice.212 There is no logical reason for the 120-day requirement if notice may be given two years after the event giving rise to the claim. The purpose of the statute is to allow the municipality to promptly investigate when the facts are fresh. Arguably, facts are no more fresh after two years than they would be under the three-year personal injury statute of limitations.

In Nielsen, the supreme court invoked the exception despite a one-year lag between the event giving rise to the claim and the receipt of notice. The court reasoned that the municipality had "ample opportunity to investigate [the] claim after receiving actual notice. . . . Earlier notice would have made no appreciable difference."213 This reasoning clearly demonstrates that the court believes that the purposes are generally satisfied regardless of when notice is received.214

211. Id.
214. Although the facts in Nielsen underpin the court's statement, they are by no means unusual. The municipality became aware of the incident—by information not constituting actual notice—within four days, and sent a representative to the scene to investigate. Id. at 582, 334 N.W.2d at 246. Hence, the investigation was not impaired. Similarly, there was noth-
Finally, in Olsen, the court of appeals emasculated the 120-day notice rule by narrowly defining prejudice as the inability to adequately defend a claim. Because municipalities will rarely be unable to adequately defend a claim, the court's definition of prejudice makes the actual notice exception readily accessible and, therefore, obviates the need for formal written notice in most cases.

As the foregoing demonstrates, Weiss and its progeny have allowed the exception to swallow the rule. Moreover, by so doing, the courts seem to have acknowledged that the purposes of the statute will generally be satisfied irrespective of when notice is given to the municipality. This understanding provides a new perspective for analyzing whether the traditional purposes of the Wisconsin notice of claim statute justify placing municipalities into a privileged class of defendants. In addition, it confirms that Wisconsin is continuing on its clear course away from governmental immunity.

V. Conclusion

Wisconsin's municipal notice of claim statute blatantly discriminates in a manner detrimental to the victim of a municipal tort. Many municipal tort victims will fail to appreciate the relatively short window within which they must provide notice to preserve their claim. While most should be able to invoke the actual notice exception, a few victims will inevitably be barred from recovery for failure to strictly comply with the 120-day time limitation.

The general purpose of the notice statute is to ensure that municipalities can adequately defend a claim. Specifically, the statute seeks to provide municipal defendants with an opportunity to quickly investigate and amicably compromise claims without litigation. The courts have implicitly acknowledged that these purposes are generally served in the absence of a notice of claim requirement. As expressed in Nielsen v. Town of Silver Cliff, municipal defendants, in the absence of compliance

*Id.*
with the statute, still have ample opportunity to effect a settlement prior to engaging in a costly lawsuit. In any event, while facilitating compromise and settlement is a favorite of the law, such an objective should not be pursued at the expense of innocent victims of municipal torts. In light of the statute's relatively weak justifications, the preclusion of any valid claims resulting from the failure to comply with the notice of claim requirement is unacceptable. Accordingly, Wisconsin should abandon the notice of claim requirement in the municipal notice of claim statute.

Wisconsin's municipal notice of claim statute is nothing more than an antiquated remnant of the universally berated doctrine of governmental immunity. The purposes underpinning the notice of claim statute mirror those that once supported governmental immunity in this state. There were no tenable justifications to save the doctrine of governmental immunity from abolition, and none exist to save its descendant. Wisconsin has long acknowledged the social desirability of spreading losses rather than denying a remedy to an innocent claimant. The 120-day notice requirement in Wisconsin's municipal notice of claim statute is antithetical to that socially desirable purpose and, accordingly, should be abandoned.

MICHAEL J. WALDSPURGER

---

220. *Id.* at 582, 334 N.W.2d at 246.
221. *See* Holytz v. City of Milwaukee, 17 Wis. 2d 26, 33, 115 N.W.2d 618, 621 (1962).
223. *See* Holytz, 17 Wis. 2d at 34, 115 N.W.2d at 622.