



A Primer on Defending Cases in Small Claims Court

by: Patricia Epstein Putney, Bell, Moore & Richter, S.C.¹

I. Introduction

As defense counsel, we are periodically called upon to represent and defend our clients and their insureds in small claims actions. Often, we assign these matters to our young associates to cut their teeth on, given the relatively low exposure of those cases, but we do not always provide enough guidance as to what the rules are in small claims court and how best to defend our clients in that venue. The purpose of this article is to refresh the civil defense bar on the most pertinent rules and statutes governing small claims actions so that we can provide the best defense to our clients, even if the dispute is often about “small potatoes.” These “small potatoes” often mean a lot to the clients, and they deserve a vigorous defense.²

II. A Brief Recap on the Applicability of Chapter 799, Wisconsin Statutes

Pursuing an action through small claims court is appropriate only for a handful of actions,³ most of which have monetary caps. Specifically, small claims actions are brought exclusively for the following actions: evictions; return of earnest money tendered pursuant to a contract for the purchase of real property; replevins where the value of the property claimed does not exceed \$10,000 or consumer credit transactions when financed at \$25,000 or less; actions regarding real estate arbitration; third-party complaints, **personal injury claims and actions based in tort, that are under \$5,000**; and other civil actions for money judgments or garnishment of wages, where the amount claimed is \$10,000 or less. Additionally,

small claims procedure is permissible for taxing authorities to recover a tax, including penalties and interest, of \$10,000 or less.

While the monetary caps for a claim to proceed in small claims court are fairly straightforward there are a few wrinkles worth noting. First, the distinction between “other civil actions” (\$10,000 cap) under Wis. Stat. § 799.01(1)(d) and “actions based in tort” (\$5,000 cap) under Wis. Stat. § 799.01(1)(cr) is worth your careful attention because it determines which monetary cap is applicable for a given civil action.⁴ In *Estate of Miller v. Storey*, the Wisconsin Supreme Court clarified that “actions in tort” are specific to actions based in common law tort; whereas, “other civil actions” encompasses statutory civil claims.⁵ Second, a monetary cap is a limit on recovery and not a bar on pursuing action in small claims courts for claims that might exceed a monetary cap.⁶

III. What are the Rules on Service of Process and When is the Answer Due?

The mode and manner of service of process for small claims actions are mostly dictated by the statutes revolving around civil procedure.⁷ However, it is good practice to check with the Clerk of Courts because circuit courts may have their own rules regarding service of summons by mailing or publication in lieu of personal or substituted service.

A defendant can file a motion to dismiss if service is improperly effectuated pursuant to Wis. Stat. 802.06(2)(a)(4).

As for your answer deadline, generally one should file the answer on the date specified by the Clerk of Courts by the Return Date listed. While the clerk may have the date wrong, best to err on the side of caution.

IV. Venue

The venue used in a small claims procedure depends on the type of action being pursued.⁸ There are express rules for certain actions, such as garnishments and taxes. For the majority of claims, however, including torts, the appropriate venue is determined by common civil procedure pursuant to Wis. Stat. § 801.50. In instances of multiple defendants and where venue is based on residence, then the residence of any defendant is an appropriate venue.

If the county where a small claims action is commenced is inappropriate and another county would be the proper venue, the court may transfer venue, either by its own motion or motion of a party, unless the defendant appears and waives the improper venue.

V. Substitution of Judge

A substitution of judge may be requested by any party to a small claims action.⁹ The request must be filed on the return date of the summons or within ten days after the case is scheduled for trial. Each party is entitled to only one request for substitution of judge and the request must be in writing.

VI. Does Counsel Need to Appear on Return Date or Just get the Answer Filed?

Circuit courts have broad authority to permit a defendant to join issue without appearing in person, either by telephone or by mail.¹⁰ Additionally, circuit courts are required to adopt rules permitting non-resident defendants to join issue without appearing in person. On the return date of the summons the defendant may answer, move to dismiss or verbally respond to the complaint.¹¹ If the defendant appears on the return date of the summons the court will inquire if the defendant has a defense to the claims.

A defendant's failure to either answer or appear on the return date is detrimental to his or her defense leading to a default judgment.

It is highly recommended that the young associate (or the legal assistant) call the small claims clerk in the court where the matter is pending to find out if the return date requires an in-person appearance. Most often, one must only get their answer filed by the return date deadline but not appear. However, every court is different, so it is prudent to call and find out.

VII. Motions to Dismiss

The small claims statute, Wis. Stat. § 799.20(1), expressly allows a motion to dismiss in lieu of an answer pursuant to Wis. Stat. § 802.06 (2).¹² These should be done wherever appropriate.

Your author recently defended a court commissioner from another county who was sued in small claims court in the plaintiff's county of residence. A motion to dismiss was filed on judicial immunity grounds. The motion to dismiss was promptly granted. Any of the grounds listed in § 802.06(2) may be bases for motions to dismiss in small claims as well.¹³ Keep those defenses in mind upon initial review of the complaint.

Another example that comes to mind is medical negligence lawsuits. The exclusive remedy for medical negligence lies in Chapter 655 and those rules must be followed. Disgruntled *pro se* patients cannot simply sue their doctors in small claims court. Seek prompt dismissal when this occurs.

VIII. Discovery: Is it Allowed?

There is nothing prohibiting discovery in small claims court and it is frequently pursued. Given the limited damages involved, however, you will want to be judicious about legal fees incurred. But if certain written discovery, or even a deposition, is required to properly defend the case, then go ahead -- with your client's approval, of course. Nothing prevents you from doing so.

IX. Can you File for Summary Judgment in Small Claims Court?

Yes, you can file for summary judgment. As above, there is nothing in the statutes preventing such a motion and in the right case, where there is no dispute of material fact, it should be pursued.

X. Hearings: Things to Know

While the vast majority of small claims trials are before a court commissioner or judge, many do not know that a small claims party may request a jury of six.¹⁴ This right to a jury trial will be waived if not timely filed. If a commissioner presides, the request for jury trial shall be made at the time a demand for trial is made; otherwise, if a judge presides, the request must be filed before the time of joinder of issue for eviction actions; in all other actions within twenty days after the joinder of issue.

The hearings are typically presided over by a small claims court commissioner. The plaintiff has the burden of proof (civil burden by a preponderance of the evidence). Each side can put on witnesses and cross-examine witnesses. The court commissioner typically rules from the bench but sometimes issues a written decision.

XI. Do the Rules of Evidence Apply?

Small claims statute gives Wisconsin circuit courts wide discretion in the admissibility of evidence.¹⁵ Small claims courts are mandated to be informal and are not governed by common law or the statutory rules of evidence except those relating to privileges under ch. 905 or to admissibility under § 901.05.¹⁶ A judge or commissioner shall admit all evidence that has “reasonable probative value” but may dismiss irrelevant evidence at his or her discretion.¹⁷ Additionally, a judge or commissioner may question a witness himself or herself.

So, do the rules of evidence apply? In short, no. However, the judicial official presiding over the case still has the right to control his or her courtroom. If something would be highly objectionable in a

circuit court action, it is worth objecting in small claims court. (But not so much that you will irritate the court commissioner or judge hearing the dispute. Object with caution!)

XII. Are Expert Witnesses Required?

Circuit courts have broad discretion to admit witnesses’ testimony regardless of whether the testimony is characterized as “expert” or otherwise.¹⁸ The only limit on that discretion is that a court’s finding of fact cannot be wholly based on a claimant’s oral hearsay statement.¹⁹ Generally, in small claims court, it is best to have the expert witness testify in person as written statements from an expert witness will not suffice.²⁰

Accordingly, Wisconsin circuit courts have used their discretion to either allow or dismiss testimony from experts in varying circumstances. In *Smith v. Menard*, the court held that there was no error in the plaintiff testifying as an expert witness in his own case because the plaintiff’s experience in the construction industry showed that the plaintiff was qualified to testify to the cost of damaged construction parts.²¹ Furthermore, the defendant had the burden to prove that the plaintiff’s expert testimony was irrelevant to the case.²²

Although small claims courts have broad discretion to allow expert witness testimony, courts tend to use that discretion judiciously. Therefore, at any time in the case’s procedure, the court may dismiss any unqualified expert witness testimony.

It is recommended that if you are defending a case that ordinarily would require an expert witness if it were brought in large claims court, you should make that argument in small claims court as well.

XIII. Circuit Court *De Novo* Review

If things go south for either party, they may request a *de novo* review of a circuit court commissioner by a judge within the branch of court in which the case was assigned. The request must be made within twenty calendar days of the hearing if there

was an oral decision or twenty days from a written decision. Requests for *de novo* review do not stay the order unless otherwise ordered by the circuit court.²³

If it is a circuit court judge who presides over the small claims actions—which regularly occurs in smaller rural counties—then it is the court of appeals which conducts the *de novo* review.

XIV. Conclusion

There are obviously more provisions that may apply to a given small claims action, so always review Chapter 799 carefully for any issue not specifically addressed in this article. Hopefully, this provides some helpful information for defending cases in small claims courts.

Author Biography:

Patricia Epstein Putney is a Shareholder at Bell, Moore & Richter, S.C. in Madison. She obtained her Bachelor of Arts degree in Art History from Bryn Mawr College in 1984 and her Juris Doctor degree from Brooklyn Law School in 1989. She moved from New York City to Madison in 1995. Patti's practice area relates to the defense of all types of civil litigation. This includes defense of physicians, nurses, and other health care professionals in medical malpractice cases, as well as in licensing, disciplinary and credentialing disputes. She regularly defends personal injury and wrongful death actions, including automobile accidents, premises liability, products liability, insurance agent negligence as well as insurance coverage disputes. Patti has had numerous jury trials throughout the state, has litigated in federal courts and appellate courts and has argued before the Wisconsin Supreme Court and the 7th Circuit Court of Appeals. Patti is a member of the State Bar of Wisconsin, the Dane County Bar Association, Legal Association of Women and she is a Board Member for Wisconsin Defense Counsel. She also started a group called "Lawyer Moms" for working women lawyers with children when her children were young. Patti has been a SuperLawyer since

2012 and is currently on the Top25 List of Madison Lawyers. In her spare time, she plays the flute and piccolo in two community orchestras and a woodwind quintet.

References

- 1 With special thanks to University of Wisconsin Law student, Marlo Fields, for his assistance on this article.
- 2 In fact, the courts provide significant information to litigants on all of the required steps and resources, including forms and guidance. See <https://www.wicourts.gov/services/public/selfhelp/smallclaims.htm>.
- 3 Wis. Stat. §799.01 provides as follows, in pertinent part: "(1) Exclusive use of small claims procedure: (a) Eviction actions. Actions for eviction as defined in s. 799.40 regardless of the amount of rent claimed therein. (am) Return of earnest money... (b) Forfeitures...regardless of any limitation contained therein. (c) Replevins...where the value of the property claimed does not exceed \$10,000. (cm) Arbitration... (cr) Third-party complaints, personal injury claims, and actions based in tort, where the amount claimed is \$5,000 or less. (d) Other civil actions. Other civil actions where the amount claimed is \$10,000 or less [for the following actions]: 1. For money judgments only except for cognovit judgments which shall be taken pursuant to s. 806.25; or 2. For attachment under ch. 811 and garnishment under such. I of ch. 812, [except that s. 811.09] 3. To enforce a lien upon personalty."
- 4 See *Est. of Miller v. Storey*, 2017 WI 99, 378 Wis. 2d 358, 903 N.W.2d 759 (holding that a plaintiff's claim of civil theft for money was an "other civil action" and not "an action based in tort" and therefore subject to the \$10,000 limit of Wis. Stat. § 799.01(1)(d)).
- 5 *Id.* at ¶ 42.
- 6 See *Bryham v. Pink*, 2006 WI App 111, 294 Wis. 2d 347, 718 N.W.2d 112 (holding that a plaintiff may elect to sue in small claims court to save time and money even when actual damages exceed the small claims limit).
- 7 Wis. Stat. § 799.12 provides as follows: "(1) Except as otherwise provided in this chapter, all provisions of chs. 801 to 847 with respect to jurisdiction of the persons of defendants, the procedure of commencing civil actions, and the mode and manner of service of process, shall apply to actions and proceedings under this chapter. (2) Any circuit court may by rule authorize the service of summons in some or all actions under this chapter by mail under sub. (3) in lieu of personal or substituted service under s. 801.11..."
- 8 Wis. Stat. § 799.11(1) details the small claims court venue procedures for various of actions: "(1) The venue of actions in which the procedure of this chapter is used is as follows: ... (e) In all other actions, the county specified by s. 801.50. (3) When, in any action under this chapter, it appears...[that venue is not proper place], the court or circuit court commissioner shall, on motion of a party or its

- own motion, transfer the action to [an appropriate] county unless the defendant appears and waives the improper venue...”
- 9 Wis. Stat. § 799.205 provides as follows: “(1) Any party to a small claims action or proceeding may file a written request with the clerk of courts for a substitution of a new judge for the judge assigned to the case...”
- 10 Wis. Stat. § 799.22 provides as follows: “(2) ...If the defendant fails to appear on the return date or on the date set for trial, the court may enter a judgment upon due proof of facts which show the plaintiff entitled thereto.”
- 11 Wis. Stat. § 799.20 provides as follows, in pertinent part: “(1) Pleading on return date or adjourned date. On the return date of the summons or any adjourned date thereof the defendant may answer, move to dismiss under s. 802.06 (2) or otherwise respond to the complaint... (4) ... If the defendant appears...the court or circuit court commissioner shall make sufficient inquiry of the defendant to determine whether the defendant claims a defense to the action...” Wis. Stat. § 799.206 provides as follows: “(1) ... all actions and proceedings commenced under this chapter shall be returnable before a circuit court commissioner appointed under s. 757.68 (1) and SCR chapter 75. In any other county, a circuit court commissioner may conduct return date proceedings if delegated such authority under s. 757.69 (1) (d).”
- 12 *Id.*
- 13 Wis. Stat § 802.06(2)(a)-(b) provides as follows in pertinent part: “(a) ... the following defenses may at the option of the pleader be made by motion: 1. Lack of capacity to sue or be sued; 2. Lack of jurisdiction over the subject matter; 3. Lack of jurisdiction over the person or property; 4. Insufficiency of summons or process; 5. Untimeliness or insufficiency of service of summons or process; 6. Failure to state a claim upon which relief can be granted; 7. Failure to join a party under s. 803.03; 8. Res judicata; 9. Statute of limitations; 10. Another action pending between the same parties for the same cause...”
- 14 Wis. Stat § 799.21(3) provides as follows: (a) Any party may...file a written demand for trial by jury... (b) In counties in which a circuit court commissioner is assigned to assist in small claims matters...demand for trial by jury shall be made at the time a demand for trial is filed...”
- 15 Wis. Stat. § 799.209 provides as follows, in pertinent part: “(1) The court or circuit court commissioner shall conduct the proceeding informally... (2) The proceedings shall not be governed by the common law or statutory rules of evidence... The court or circuit court commissioner shall admit all other evidence having reasonable probative value, but may exclude irrelevant or repetitious evidence or arguments. An essential finding of fact may not be based solely on a declarant’s oral hearsay statement unless it would be admissible under the rules of evidence. (3) The court or circuit court commissioner may conduct questioning of the witnesses... (4) The court or circuit court commissioner shall establish the order of trial and the procedure to be followed in the presentation of evidence and arguments in an appropriate manner consistent with the ends of justice and the prompt resolution of the dispute on its merits according to the substantive law.”
- 16 Wis. Stat. § 799.209(2).
- 17 *Id.*
- 18 *Smith v. Menard, Inc.*, 2004 WI App 186, ¶ 18, 276 Wis. 2d 571, 687 N.W.2d 549.
- 19 Wis. Stat. § 799.209(2).
- 20 See https://www.wicourts.gov/formdisplay/SC-6000V_instructions.pdf?formNumber=SC-6000V&formType=Instructions&formatId=2&language=en, at 10 (July 2025).
- 21 *Smith v. Menard*, Wis. 2d 571, ¶¶ 11-18.
- 22 *Id.* ¶ 18.
- 23 Wis. Stat § 767.17 provides as follows: “(1) Right to de novo review. Any decision of a circuit court commissioner under this chapter shall be reviewed by the judge of the branch of court to which the case has been assigned, upon motion of any party...”