

STATE OF WISCONSIN
SUPREME COURT

In re:

PROPOSED AMENDMENT TO
WISCONSIN STATUTES § 806.02

**MEMORANDUM IN SUPPORT OF PETITION
OF WISCONSIN JUDICIAL COUNCIL
FOR AN ORDER AMENDING WIS. STATS. § 806.02**

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ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

April 2, 2018

INTRODUCTION

The Wisconsin Judicial Council respectfully petitions the Wisconsin Supreme Court to amend Wis. Stat. § 806.02. This petition is directed to the Supreme Court's rule-making authority under Wis Stat. § 751.12. Because it views this proposed amendment as a correction of a drafting oversight, the Council has not put this proposal out for public comment but understands that the Court will do so as part of its rules consideration process.

THE ISSUE

Wis. Stat. § 806.02 grants a plaintiff the opportunity to move for default judgment when a defendant fails to timely answer the complaint, but it does not give the same right to a defendant when an opposing party fails to respond to a counterclaim or cross claim. Therefore, the issue is: Should § 806.02 be amended to provide parties filing counterclaims or cross claims with the right to file motions for default judgment when an opposing party fails to serve a timely reply to a counterclaim or answer to a cross claim?

STATUS OF CURRENT CASE LAW

A. *Pollack v. Calimag*, 157 Wis. 2d 222, 458 N.W.2d 591 (Ct. App. 1990):

In *Pollack*, the court of appeals concluded that a defendant has no standing to move for default judgment on a counterclaim to which a plaintiff has failed to reply. The court reasoned that Wis. Stat. § 806.02(2) unambiguously provides that a "plaintiff" may move for judgment according to the demand of the complaint, but that the statute addressing counterclaims, Wis. Stat. § 802.07, "gives no indication that the appellations 'plaintiff' and 'defendant' may be reversed for purposes of a counterclaim." 157 Wis. 2d at 235. It continued: "We make no comment on the logic of a rule limiting default judgment to a plaintiff. But where, as here, the statutory language is unambiguous, we are bound by it and changes in it are for the legislature,

not this court.” *Id.* Therefore, the court concluded that, although the statutory language of § 806.02(2) grants a plaintiff the opportunity to move for default judgment when a defendant fails to serve a timely answer, it does not give a commensurate right to a defendant to ask for default judgment when a plaintiff fails to reply to a counterclaim.

The *Pollack* court’s assumption that the legislature was the source of § 806.02(2) is incorrect. This Court adopted the rule when it promulgated the Rules of Civil Procedure in 1975, S. Ct. Order, 67 Wis. 2d 585, 716-18. And the ultimate source of the rule, including its failure to extend a commensurate right to defendants whose counterclaims and cross claims are not responded to, appears to have been an earlier order of this Court, adopting former § 270.62, S. Ct. Order, 258 Wis. v (eff. July 1, 1951). See *Reynolds v. Taylor*, 60 Wis. 2d 178, 179, 208 N.W.2d 305 (1973) (referring to “the adoption, by court rule, of the present default judgment statute”).

B. *Bako v. Leader Nat. Ins. Co.*, 222 Wis. 2d 216, 587 N.W.2d 213 (Ct. App. 1998) (Unpublished):

In *Bako*, defendant USF&G did not file a timely answer to co-defendant General Casualty’s cross claim for indemnification; USF&G did file a late answer and a motion for a retroactive enlargement of time to do so. The trial court struck the late answer, denied the motion to enlarge time, and entered an order conditionally granting General Casualty’s motion for default judgment on the cross claim. *Bako*, at ¶ 2. USF&G appealed. Based on *Pollack*, the court of appeals concluded that the trial court had improperly granted the motion for default judgment. The court noted that it had pointed out the anomaly in the rule in *Pollack* in 1990, but by the time of the *Bako* case in 1998 the rule had not been amended to provide defendants filing cross claims or counterclaims with the right to file motions for default judgment. *Id.*

C. *Shelby Ins. Co. v. Heritage Mut. Ins. Co.*, 2000 WI App 143, 237 Wis. 2d 695, 616 N.W.2d 923 (Unpublished):

In *Shelby*, Heritage moved for a default judgment because Shelby had not replied to its counterclaim. The circuit court found that the counterclaim did not raise any new issues and that Heritage had not been prejudiced by Shelby's failure to reply to the counterclaim because the parties eventually tried the coverage issues, so the court declined to enter a default judgment. 2000 WI App 143, ¶ 11. On appeal, Heritage challenged the refusal to award a default judgment on the coverage counterclaim. The court of appeals, citing *Pollack*, again concluded that § 806.02 does not provide for a default judgment on a counterclaim. *Id.*

D. *Keene v. Sippel*, 2007 WI App 261, 306 Wis. 2d 643, 743 N.W.2d 838:

The Keenes brought an action against their building contractor, Sippel. Sippel was properly served and failed to answer, so the Keenes moved for default judgment. Sippel filed an answer and counterclaim, along with a motion for enlargement of time. Finding no excusable neglect, the court denied Sippel's motion for enlargement and granted the Keenes' motion for default judgment on the complaint. *Id.* at ¶ 2. Sippel then moved for default judgment against the Keenes on his counterclaim. The court concluded that “[n]o reply was necessary to [Sippel's] counterclaim in a defective answer” and denied Sippel's motion. *Id.* at ¶ 4. Among other issues that Sippel raised on appeal, he challenged the denial of his motion for default judgment on the counterclaim. The court of appeals held that the circuit court had correctly determined that, under *Pollack*, a defendant has no standing to move for default judgment on a counterclaim to which a plaintiff has failed to reply. The court concluded that, “In short, though the statutory language of § 806.02(2) grants a plaintiff the opportunity to move for default judgment when a defendant fails to timely answer, it does not give a commensurate right to a defendant to ask for default judgment when a plaintiff fails to reply to a counterclaim.” *Id.* at ¶ 18.

RELEVANT WISCONSIN STATUTES

A. Current Wis Stat. § 806.02, “Default judgment,” states:

(1) A default judgment may be rendered as provided in subs. (1) to (4) if no issue of law or fact has been joined and if the time for joining issue has expired. Any defendant appearing in an action shall be entitled to notice of motion for judgment.

(2) After filing the complaint and proof of service of the summons on one or more of the defendants and an affidavit that the defendant is in default for failure to join issue, the plaintiff may move for judgment according to the demand of the complaint. If the amount of money sought was excluded from the demand for judgment, as required under s. 802.02(1m), the court shall require the plaintiff to specify the amount of money claimed and provide that information to the court and to the other parties prior to the court rendering judgment. If proof of any fact is necessary for the court to give judgment, the court shall receive the proof.

(3) If a defendant fails to appear in an action within the time fixed in s. 801.09 the court shall, before entering a judgment against such defendant, require proof of service of the summons in the manner required by s. 801.10 and, in addition, shall require further proof as follows:

(a) Where a personal claim is made against the defendant, the court shall require proof by affidavit or other evidence, to be made and filed, of the existence of any fact not shown by the complaint which is needed to establish grounds for personal jurisdiction over the defendant. The court may require such additional proof as the interests of justice require.

(b) Where no personal claim is made against the defendant, the court shall require such proofs, by affidavit or otherwise, as are necessary to show the court’s jurisdiction has been invoked over the status, property or thing which is the subject of the action. The court may require such additional proof as the interests of justice require.

(4) In an action on express contract for recovery of a liquidated amount of money only, the plaintiff may file with the clerk proof of personal service of the summons on one or more of the defendants and an affidavit that the defendant is in default for failure to join issue. The clerk shall render and enter judgment against the defendants who are in default for the amount demanded in the complaint. Leaving the summons at the abode of a defendant is not personal service within the meaning of this subsection.

(5) A default judgment may be rendered against any defendant who has appeared in the action but who fails to appear at trial. If proof of any fact is necessary for the court to render judgment, the court shall receive the proof.

B. Current Wis Stat. § 802.07, “Counterclaim and cross claim,” states:

(1) Counterclaim. A defendant may counterclaim any claim which the defendant has against a plaintiff, upon which a judgment may be had in the action. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. Except as prohibited by s. 802.02(1m), the counterclaim may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(2) Counterclaim maturing or acquired after pleading. A claim which either matured or was acquired by the pleader after serving the pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(3) Cross claim. A pleading may state as a cross claim any claim by one party against a coparty if the cross claim is based on the same transaction, occurrence, or series of transactions or occurrences as is the claim in the original action or as is a counterclaim therein, or if the cross claim relates to any property that is involved in the original action. Except as prohibited by s. 802.02(1m), the cross claim may include a claim that the party against whom it is asserted is or may be liable to the cross claimant for all or part of a claim asserted in the action against the cross claimant.

(4) Joinder of additional parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross claim in accordance with ss. 803.03 to 803.05.

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

C. Current Wis Stat. § 802.06(1) states:

(1) When presented. Except when a court dismisses an action or special proceeding under s. 802.05(4), a defendant shall serve an answer within 20 days after the service of the complaint upon the defendant. If a guardian ad litem is appointed for a defendant, the guardian ad litem shall have 20 days after appointment to serve the answer. A party served with a pleading stating a cross claim against the party shall serve an answer thereto within 20 days after the service upon the party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer. The state or an agency of the state or an officer, employee, or agent of the state shall serve an answer to the complaint or to a cross claim or a reply to a counterclaim within 45 days after service of the pleading in which the claim is asserted. If any pleading is ordered by the court, it shall be served within 20 days after service of the order, unless the order otherwise directs. If a defendant in the action is an insurance company, or if any cause of action raised in the original pleading, cross claim, or counterclaim is founded in tort, the periods of time to serve a reply or answer shall be 45 days. The service of a motion permitted under sub. (2) alters these periods of time as follows, unless a different time is fixed by

order of the court: if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

JUDICIAL COUNCIL ACTION

This issue was initially raised at the March 17, 2016 meeting of the Evidence & Civil Procedure Committee of the Judicial Council. The Committee recommended to the Judicial Council that the issue be studied, and the Council agreed. Thereafter, the Committee studied and evaluated the issue and concluded that existing Wis. Stat. §806.02 treats plaintiffs and defendants in an unequal and unfair manner and should be amended.

Section 802.06(1) currently requires defendants to file an answer to the complaint. It also requires parties served with counterclaims or cross claims to serve a reply to the counterclaim or an answer to the cross claim. Section 806.02 permits a plaintiff to obtain a default judgment against a defendant who fails to comply with § 802.06(1), but it does not permit any other party to obtain a default judgment when an opposing party fails to comply with § 802.06(1) by failing to file a timely response to a counterclaim or cross claim. The Committee could find no logical basis for this disparity. Furthermore, the Committee noted that Rule 55 of the Federal Rules of Civil Procedure allows any party to obtain judgment against another party who has failed to plead or otherwise defend against any claim asserted against it.

On January 19, 2018, the Evidence & Civil Procedure Committee approved the following draft amendment to current Wis. Stat. § 806.02. The following shows the language which is proposed to be added to and deleted from existing § 806.02:

(1) A default judgment may be rendered in favor of any party as provided in subs. (1) to (4) if no issue of law or fact has been joined on any claim asserted in a complaint, counterclaim or cross claim and if the time for joining issue has expired. Any defendant appearing in an action shall be entitled to notice of motion for judgment.

(2) After filing the complaint, counterclaim or cross claim and proof of service thereof of the summons on one or more of the defendants and after filing an affidavit that the defendant the party against whom judgment is sought is in default for failure to join issue, a party may move for judgment according to the demand of the complaint, counterclaim or cross claim. If the amount of money sought was excluded from the demand for judgment, as required under s. 802.02(1m), the court shall require the plaintiff the moving party to specify the amount of money claimed and provide that information to the court and to the other parties appearing in the action prior to the court rendering judgment. If proof of any fact is necessary for the court to give render judgment, the court shall receive the proof.

(3) If a defendant fails to appear in an action within the time fixed in s. 801.09 the court shall, before entering a judgment against such defendant, require proof of service of the summons in the manner required by s. 801.10 and, in addition, shall require further proof as follows:

(a) Where a personal claim is made against the defendant, the court shall require proof by affidavit or other evidence, to be made and filed, of the existence of any fact not shown by the complaint which is needed to establish grounds for personal jurisdiction over the defendant. The court may require such additional proof as the interests of justice require.

(b) Where no personal claim is made against the defendant, the court shall require such proofs, by affidavit or otherwise, as are necessary to show the court's jurisdiction has been invoked over the status, property or thing which is the subject of the action. The court may require such additional proof as the interests of justice require.

(4) In an action on express contract for recovery of a liquidated amount of money only, the plaintiff may file with the clerk proof of personal service of the summons on one or more of the defendants and an affidavit that the defendant is in default for failure to join issue. The clerk shall render and enter judgment against the defendants who are in default for the amount demanded in the complaint. Leaving the summons at the abode of a defendant is not personal service within the meaning of this subsection.

(5) A default judgment may be rendered against any defendant party who has appeared in the action but who fails to appear at trial. If proof of any fact is necessary for the court to render judgment, the court shall receive the proof.

The draft was approved by the Judicial Council on February 16, 2018. Therefore, the Wisconsin Judicial Council respectfully petitions the Supreme Court to amend Wis. Stat.

§ 806.02 by adopting the version approved by the Judicial Council. As noted, this petition is directed to the Supreme Court's rule-making authority under Wis. Stat. § 751.12.

Dated April 2, 2018.

Respectfully submitted,

WISCONSIN JUDICIAL COUNCIL

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