

2005 SENATE BILL 425

November 8, 2005 – Introduced by Senators ZIEN, STEPP, LAZICH, REYNOLDS, A. LASEE, DARLING, KEDZIE, BROWN and GROTHMAN, cosponsored by Representatives SUDER, NISCHKE, PETTIS, ALBERS, HAHN, LOTHIAN, F. LASEE, AINSWORTH, HUNDERTMARK, OTT, HINES, WARD, OWENS, KRAWCZYK and LEMAHIEU. Referred to Committee on Judiciary, Corrections and Privacy.

1 **AN ACT** *to renumber and amend* 823.02; *to amend* 165.25 (1); and *to create*
2 165.016, 165.25 (1m), 165.253, 823.02 (1g) and 823.02 (2) and (3) of the statutes;
3 **relating to:** the authority of the Department of Justice and public nuisance
4 actions.

Analysis by the Legislative Reference Bureau

Currently, the Department of Justice (DOJ) is required to prosecute and defend all civil and criminal actions in the court of appeals and supreme court in which the state is interested or is a party. In addition, if requested by the governor or either house of the legislature, DOJ must represent the state or a state agency in any action in which the state or the people of the state may have an interest. This bill requires both houses, rather than just one house, of the legislature to make the request for DOJ to act in such cases. The bill also prohibits DOJ from doing any of the following:

1. Starting a civil action against a party regarding any issue that is the subject of another civil action against that party unless the governor or both houses of the legislature request the department to start the action.

2. Joining in any action that has been commenced by another state unless the governor requests that joinder.

3. Intervening in a civil action unless the governor or both houses request it, all parties agree to the intervention, or the department is required by statute to intervene.

The bill prohibits the attorney general from contracting with or appointing a private attorney as a temporary assistant attorney general unless the governor

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requests that the attorney general do so. The bill also requires DOJ to repay a party the amount of any monetary penalty that was paid by the party to the state as the result of an environmental violation if that party was required to pay a monetary award to another person as the result of an action arising out of the same conduct.

Under current law, DOJ, counties, and local units of government may bring an action to enjoin a public nuisance. Generally, the costs of bringing the action and defending the action are born by each party, except for disbursements and specific amounts for expert and attorney fees. This bill requires a court to award the defendant all of the defendant's costs and expenses, including reasonable attorney fees, expert fees, and engineering fees, if the court determines that the defendant's activity was not a public nuisance. The bill also prohibits DOJ from bringing an action to enjoin a public nuisance if the alleged activity is not in violation of a statute, rule, permit, or ordinance.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 165.016 of the statutes is created to read:

2 **165.016 Prohibition.** The attorney general may not contract with, or appoint
3 as a temporary assistant attorney general, any private attorney to assist the
4 department of justice in any court action unless the governor requests the attorney
5 general to enter into the contract or appoint the temporary assistant attorney
6 general.

7 **SECTION 2.** 165.25 (1) of the statutes is amended to read:

8 **165.25 (1) REPRESENT STATE.** Except as provided in s. ss. 165.253 and 978.05
9 (5), appear for the state and prosecute or defend all actions and proceedings, civil or
10 criminal, in the court of appeals and the supreme court, in which the state is
11 interested or a party, and attend to and prosecute or defend all civil cases sent or
12 remanded to any circuit court in which the state is a party; and, if requested by the
13 governor or ~~either house of~~ by the legislature, by adoption in both houses of a joint
14 resolution, appear for and represent the state, any state department, agency, official,

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1 employee or agent, whether required to appear as a party or witness in any civil or
2 criminal matter, and prosecute or defend in any court or before any officer, any cause
3 or matter, civil or criminal, in which the state or the people of this state may be
4 interested. The public service commission may request under s. 196.497 (7) that the
5 attorney general intervene in federal proceedings. All expenses of the proceedings
6 shall be paid from the appropriation under s. 20.455 (1) (d).

7 **SECTION 3.** 165.25 (1m) of the statutes is created to read:

8 165.25 **(1m)** RETURN OF CERTAIN PENALTIES. Repay to a party, upon that party's
9 request, the amount of any monetary penalty that was paid by the party to the state
10 as the result of an action brought by the state against the party for a violation of an
11 environmental requirement, as defined in s. 299.83 (1) (d), if a private person or the
12 federal environmental protection agency commenced an action against the same
13 party and received a monetary award from the party arising out of the same course
14 of conduct as the conduct that resulted in the department bringing its action.

15 **SECTION 4.** 165.253 of the statutes is created to read:

16 **165.253 Limits on representation. (1)** The department may not do any of
17 the following:

18 (a) Commence a civil action against a party regarding any issue that is the
19 subject of another civil action against that party unless the governor or the
20 legislature, by adoption in both houses of a joint resolution, requests the department
21 to commence the action or unless required to do so under s. 165.25 (2) to (9).

22 (b) Join in any action that has been commenced by another state or political
23 subdivision of another state unless the governor requests the department to join in
24 the action.

25 (c) Intervene in a civil action unless one of the following conditions exist:

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1 1. The governor or the legislature, by adoption in both houses of a joint
2 resolution, requests the department to intervene in the action.

3 2. All parties to the action consent to the intervention.

4 3. The department is required to intervene under s. 165.25 (2) to (9).

5 **SECTION 5.** 823.02 of the statutes is renumbered 823.02 (1m) and amended to
6 read:

7 **823.02 (1m)** An action to enjoin a public nuisance may be commenced and
8 prosecuted in the name of the state, either by the attorney general on information
9 obtained by the department of justice, or upon the relation of a private individual,
10 sewerage commission created under ss. 200.01 to 200.15 or a county, having first
11 obtained leave therefor from the court. An action to enjoin a public nuisance may be
12 commenced and prosecuted by a city, village, town or a metropolitan sewerage
13 district created under ss. 200.21 to 200.65 in the name of the municipality or
14 metropolitan sewerage district, and it is not necessary to obtain leave from the court
15 to commence or prosecute the action. ~~The same rule as to liability for costs shall~~
16 ~~govern as in other actions brought by the state.~~ No stay of any order or judgment
17 enjoining or abating, in any action under this section, may be had unless the appeal
18 is taken within 5 days after notice of entry of the judgment or order or service of the
19 injunction. Upon appeal and stay, the return to the court of appeals or supreme court
20 shall be made immediately.

21 **SECTION 6.** 823.02 (1g) of the statutes is created to read:

22 **823.02 (1g)** In this section, “litigation expenses” means the sum of the costs,
23 disbursements, and expenses, including reasonable attorney fees, expert witnesses,
24 and engineering fees, necessary to prepare or participate in a court action under this
25 section.

