

COMMENT

HOW WISCONSIN CIRCUIT COURTS CAN ENSURE PROPER SERVICE IN EVICTION ACTIONS AFTER 2013 WISCONSIN ACT 76

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The Wisconsin Legislature made extensive changes to Wisconsin's rental housing laws in a series of three deregulatory bills, which passed into law between 2011 and 2013. Under the most recent bill, 2013 Wisconsin Act 76 (Act 76), the Wisconsin Legislature made four significant changes to Wisconsin's summary eviction process: (1) Wisconsin county circuit courts may enact local rules that would allow landlords to serve eviction actions by certified mail, (2) Wisconsin county circuit courts must schedule return dates and eviction trials faster than previously required by law, (3) judges must issue writs of restitution immediately after entering a judgment of eviction, and (4) landlords may elect to remove and dispose of a tenant's personal property themselves after the sheriff executes the writ of restitution. Proper service is vital for both tenants and landlords. For tenants, proper service provides notice that their landlord commenced an eviction action against them, allowing them the opportunity to seek counsel or try to negotiate with their landlord for an alternative outcome. For landlords, proper service provides assurance that the tenant will not be able to reopen a judgment of eviction or sue them later for damages from a possibly illegal eviction.

This Comment outlines ways in which Wisconsin circuit courts can act to ensure proper service in eviction actions. Even with the new law changes, Wisconsin circuit courts retain the autonomy to create their own local rules for service in all types of small claims proceedings. This Comment takes a county-by-county look at the current state of local rules for service in eviction actions. By comparing each county's local service rule for eviction to its local service rule for replevin, this Comment makes predictions about the long-term impacts of Act 76 on service rules for eviction actions. Then, this Comment suggests changes that each local court should make to ensure tenants are adequately served notice that their landlord has commenced an eviction action against them. This Comment concludes by urging each Wisconsin circuit court to think critically about its local rules and service requirements for eviction actions in light of the recent changes to Wisconsin rental housing law in order to ensure that tenants are properly notified of pending eviction actions and to ensure that judgments of eviction are certain and final.

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Introduction.....	1202
I. Changes to Wisconsin’s Eviction Proceedings.....	1206
A. Timing of Wisconsin’s Summary Eviction Proceedings	1207
1. Notice.....	1208
2. The Eviction Lawsuit.....	1209
B. General Overview of Recent Changes to Wisconsin’s Rental Housing Laws.....	1211
C. Changes to Wisconsin Eviction Proceedings After Act 76.	1213
1. Changes to Eviction Proceedings and Property-Left-Behind Statutes	1214
2. How Service by Mail Could Result in Problems for Tenants and Landlords.....	1215
II. The Role of Wisconsin Circuit Courts in the Summary Eviction Process	1218
A. Service of Process for Small Claims Actions in Wisconsin	1219
B. A County-by-County Look at the Possible Long-Term Impacts of Act 76 on Service Requirements in Evictions	1220
C. Suggestions for Wisconsin Circuit Courts	1224
1. Acting Through Local Rules.....	1225
2. Acting by Construing Service Requirements Strictly ...	1226
Conclusion	1228

INTRODUCTION

*Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home.*¹

Historically, Wisconsin has been a progressive state regarding tenants’ rights.² Recently, the Wisconsin Legislature has been shifting away from protecting tenants’ rights by making sweeping changes to Wisconsin’s rental housing laws. The changes to Wisconsin’s rental housing laws transpired in a series of three bills passed in three consecutive years.³ Both landlord and tenant advocates describe the changes to Wisconsin’s rental housing laws as largely pro-landlord and

1. *Pernell v. Southall Realty*, 416 U.S. 363, 385 (1974).

2. 1 BRENDA J. STUGELMEYER, *WISCONSIN PRACTICE SERIES: METHODS OF PRACTICE* § 13:1 (Jay E. Grenig & Nathan A. Fishbach eds., 5th ed. 2012).

3. See 2013 Wis. Act 76, available at <http://docs.legis.wisconsin.gov/2013/related/acts/76.pdf>; 2011 Wis. Act 143; 2011 Wis. Act 108.

anti-tenant.⁴ According to one tenant advocate, the Wisconsin Legislature is now “trying to systematically make life easier for landlords at the expense of tenant’s rights.”⁵ According to one landlord advocate, the “new law will benefit landlords and ‘good’ tenants,” but “[b]ad’ tenants . . . will not like this new law.”⁶

The most recent bill, 2013 Wisconsin Act 76 (Act 76), significantly changed Wisconsin’s eviction proceedings and statutes regarding property left behind.⁷ If allowed by local county rule, landlords no longer need to personally serve tenants a summons and complaint to commence an eviction action.⁸ Instead, Wisconsin county circuit courts may permit landlords to serve tenants eviction actions by certified mail.⁹ Due to Act 76, tenants also face faster return dates for eviction actions, and courts must issue writs of restitution immediately after entering judgments of eviction.¹⁰ Additionally, after the sheriff executes a writ of restitution, the landlord has the option of disposing of a tenant’s property instead of moving and storing the tenant’s property, as previously required by law.¹¹

To illustrate the harsh effects that Act 76 could have on tenants, imagine the following hypothetical. Sue is a single woman, renting a one-bedroom apartment in Washburn County.¹² Sue pays her rent on the first of every month through an automatic electronic payment system that

4. See Activists Circulate “Responsible Landlords Pledge” After Walker Signs Anti-Tenants’ Rights Bill, WISCONSIN TENANTS’ RTS. INITIATIVE (Dec. 7, 2011, 2:57 PM), <http://wisconsinalliancefortenantsrights.blogspot.com/2011/12/activists-circulate-responsible.html>; Tristan R. Pettit, *Landlord’s Omnibus Bill—with Amendments—to Be Signed into Law Today*, TRISTAN’S LANDLORD-TENANT L. BLOG (Mar. 20, 2012), <http://petriestocking.com/blog/2012/03/20/landlords-omnibus-bill-with-many-revisions-to-be-signed-into-law-tomorrow/>.

5. Candace Romano, *New State Senate Bill Brings Dispute Over Renters’ Rights*, DIAL URB. MILWAUKEE (Feb. 21, 2012), <http://urbanmilwaukeedial.com/2012/02/21/new-state-senate-bill-brings-dispute-over-renters-rights/>.

6. Tristan R. Pettit, *Act 76 – Wisconsin’s New Landlord-Tenant Law – Part 1: Background and Overview*, TRISTAN’S LANDLORD-TENANT L. BLOG (Nov. 21, 2013), <http://petriestocking.com/blog/2013/11/21/wisconsins-new-landlord-tenant-law-part-1-background-and-overview/>.

7. See 2013 Wis. Act 76, available at <http://docs.legis.wisconsin.gov/2013/related/acts/76.pdf>.

8. WIS. STAT. § 799.12(2)–(3) (2011–12), available at <https://docs.legis.wisconsin.gov/statutes/statutes/799.pdf> (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014).

9. *Id.*

10. See *infra* Part I.C.

11. WIS. STAT. § 704.05(5) (2011–12), available at <https://docs.legis.wisconsin.gov/statutes/statutes/704.pdf> (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014); § 799.45.

12. For more information on Washburn County, see WASHBURN COUNTY GOV’T, <http://www.co.washburn.wi.us/> (last visited Nov. 14, 2014).

she set up with her bank a few months ago. Recently, Sue's mother became very ill, so Sue takes an extended leave of absence from her job to go stay with her mother. During the month Sue is staying with her mother, Sue's automatic payment fails, and she does not notice, leaving her monthly rent unpaid. On the fifth of the month, Sue's landlord posts a five-day "Pay or Quit" notice on her door and mails her a copy. Sue asks the post office to hold her mail while she is away, and therefore, she does not receive the notice. If she had received the notice, it would have informed her that she needed to pay her rent or her landlord was going to evict her.

After the time for the notice passes, Sue's landlord files a summons and complaint and attempts to serve it on Sue by certified mail. Because the post office is holding Sue's mail, Sue does not receive the certified mail, and the post office does not return it to the clerk prior to Sue's return date. As a result, Sue does not appear in court on the return date. By default, the court issues a judgment of eviction and a writ of restitution. Sue does not actually find out she has been evicted until she gets back to her apartment a month later. When she gets back, she finds that her landlord has changed the locks on her door, disposed of her belongings, and she no longer has a place to live.

Although the facts described above do not represent the average eviction, the scenario is entirely possible in several counties under Wisconsin's new rental housing laws. As illustrated above, eviction comes with serious consequences for tenants. Beyond the obvious effect that tenants lose their homes when evicted, landlords may legally discriminate against applicants with an eviction on their record, making it harder for tenants to find another place to live.¹³ Even one eviction can make it very difficult for a tenant to rent again. If given a choice, landlords typically will not rent to tenants with a history of not paying rent on time or breaking lease terms. Additionally, after eviction, a tenant is still responsible for paying rent until the end of their lease, as long as the landlord takes reasonable steps to mitigate.¹⁴ For many tenants, especially those evicted for nonpayment of rent, coming up with money to pay for two homes is nearly impossible. Finally, for tenants who receive Section 8 vouchers,¹⁵ eviction means the loss of valuable rental payment assistance.¹⁶

13. See WIS. STAT. § 106.50(1m)(h) (2011–12) (listing the following as protected classes: "sex, race, color, sexual orientation, disability, religion, national origin, marital status, family status, status as a victim of domestic abuse, sexual assault, or stalking, lawful source of income, age, or ancestry").

14. § 704.29.

15. "The housing choice voucher program is the federal government's major program for assisting very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market." U.S. DEP'T OF HOUS. & URBAN

Generally, eviction is a summary proceeding with a very limited number of issues a tenant may permissively raise.¹⁷ “Because the summary procedure for eviction enable[s] the landlord to enforce the terms of the lease[] within a framework designed for speed rather than fairness,” the timing and service of eviction actions are particularly important.¹⁸ Due process requires that an opposing party receive actual notice of the proceedings.¹⁹ “Due process [also] requires that there be an opportunity to present every available defense.”²⁰ With this in mind, Wisconsin’s county circuit courts need to consider whether service by certified mail will provide tenants in their counties with actual notice that their landlord commenced an eviction action against them and whether it will provide them the opportunity to present the limited number of defenses available to them.

Inadequate service could also have severe consequences for landlords. The changes to the property left behind statutes make it easier for landlords to dispose of property tenants leave behind after they are evicted.²¹ However, if landlords dispose of property following an improperly served eviction, they will be open to large damage suits from tenants under ATCP section 134.09(4).²² Thus, to utilize their new

DEV., *Housing Choice Vouchers Fact Sheet*, HUD.GOV http://portal.hud.gov/hudportal/HUD?src=/topics/housing_choice_voucher_program_section_8 (last visited Nov. 14, 2014). Public housing agencies (PHAs) locally administer Section 8 housing-choice vouchers. *Id.* If a PHA issues a voucher, the family is free to find a suitable housing unit anywhere they choose, so long as the housing unit meets the PHA’s minimum health and safety standards. *Id.* Then, the PHA pays the subsidy to the landlord directly, and the family pays the difference between the actual rent charged by the landlord and the amount of the housing voucher. *Id.*

16. 24 C.F.R. § 982.552 (2010).

17. *Scalzo v. Anderson*, 87 Wis. 2d 834, 847–48, 275 N.W.2d 894 (1979).

18. Mary B. Spector, *Tenants’ Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137 (2000).

19. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

20. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)).

21. See 2013 Wis. Act 76, §§ 9–11, 40–57, available at <http://docs.legis.wisconsin.gov/2013/related/acts/76.pdf>.

22. See WIS. ADMIN. CODE ATCP § 134.09(4)(a) (2014), available at https://docs.legis.wisconsin.gov/code/admin_code/atcp/090/134.pdf (current through Wis. Admin. Reg. 705 (Sept. 30, 2014)). Chapter 134 was adopted under the authority of section 100.20, meaning that any person suffering pecuniary loss because of a violation of Chapter 134 may sue for damages and “shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney’s fee.” *Id.* ATCP § 134.01; WIS. STAT. § 100.20(5) (2011–12), available at <http://docs.legis.wisconsin.gov/statutes/statutes/100.pdf> (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014). ATCP is an abbreviation for Agriculture, Trade and Consumer Protection. See Preliminary Note, WIS. ADMIN. CODE ch. ATCP 134 (“This chapter is adopted under

authority to dispose of property left behind effectively, landlords have a great interest in ensuring that service is complete and judgments of eviction are final.

Wisconsin circuit courts can act to alleviate some of the negative potential impacts the new Wisconsin housing laws will have on the summary eviction process. First, each Wisconsin circuit court can decide, through its own court rules, whether personal service for evictions is required. Wisconsin county circuit courts can also add additional requirements to their local court rules to ensure that tenants receive proper eviction notices. If Wisconsin county circuit courts allow service by certified mail, they can construe service requirements strictly and add additional safeguards into their local rules to guarantee that tenants receive actual notice of pending eviction actions.

Part I of this Comment examines the current eviction process in the state of Wisconsin and how the recent changes to Wisconsin state law have altered the eviction process. Part I also discusses some of the problems landlords, tenants, and courts may face in light of Act 76. Part II starts by discussing the current county-by-county requirements for service in small claims actions across the state of Wisconsin. Then, Part II discusses how Wisconsin circuit courts should change and/or interpret their local rules in light of the new legislation. Part II also argues that Wisconsin courts should strictly construe service requirements when examining whether a landlord properly notified and served a tenant in an eviction action. Finally, this Comment concludes that each Wisconsin circuit court should think critically about whether their current rules for service in eviction actions ensure that tenants receive proper notice, and about whether service by certified mail will ensure that judgments of eviction are certain and final.

I. CHANGES TO WISCONSIN'S EVICTION PROCEEDINGS

This Section provides background information on Wisconsin's process for summary eviction and an overview of the changes that the Wisconsin Legislature recently made to that process. This Section begins by giving a general overview of Wisconsin's summary eviction process. Then, this Section gives an overview of the recent changes the Wisconsin Legislature made to Wisconsin's rental housing laws. Finally, the Section concludes with a discussion of how the new law changes have affected the summary eviction process and how those changes will affect both landlords and tenants.

authority of s. 100.20(2), Stats., and is administered by the Wisconsin department of agriculture, trade, and consumer protection.”)

A. Timing of Wisconsin's Summary Eviction Proceedings

Eviction actions in Wisconsin are relatively straightforward.²³ Simply defined, an eviction is “[a]n action by a landlord to remove a tenant from the landlord’s [rental] property.”²⁴ In Wisconsin, this process usually involves two main steps: notice and the eviction lawsuit. First, the landlord typically must notify the tenant that they are beginning the eviction process and afford the tenant the opportunity to move out, or in most instances, the opportunity to cure the lease violation and stop the eviction process.²⁵ Second, if the tenant does not cure the lease violation or move out, the landlord may file an eviction lawsuit against the tenant.²⁶ If the court finds that the landlord is entitled to possession of the property, the court must immediately order the tenant to return the property to the landlord and must issue a writ of restitution.²⁷

23. The timing of Wisconsin’s summary eviction proceedings sits in stark contrast to that of Wisconsin’s foreclosure proceedings. “The entire process takes between four and 18 months . . .” Mark Richard Cummisford, *Advising Clients Facing Foreclosure*, WIS. LAW., Dec. 2007, at 12, 13. The typical foreclosure timeline includes the following steps: (1) the homeowner begins missing payments, (2) the lender mails default notices to the homeowner, (3) the lender files a foreclosure lawsuit, (4) the homeowner’s answer is due, (5) the foreclosure lawsuit proceeds in court, (6) the court enters a judgment in favor of the lender, (7) the redemption period takes place, (8) the public notice of sale is published, (9) the sheriff’s sale occurs, (10) there is a confirmation hearing in court, and finally, (11) the homeowner must move out. *See id.* at 13–15.

24. WIS. COURT SYS., BASIC GUIDE TO WISCONSIN SMALL CLAIMS ACTIONS 14 (2007), available at <http://pdf.countyofdane.com/court/SC-6000.pdf>. “Until the expiration date specified in the lease, or the termination of a periodic tenancy or tenancy at will, and so long as the tenant is not in default, the tenant has the right to exclusive possession of the premises . . .” WIS. STAT. § 704.05(2) (2011–12), available at <https://docs.legis.wisconsin.gov/statutes/statutes/799.pdf> (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014).

25. *See* § 704.17. Advance notice is required in all cases other than that of a holdover tenant. *See id.*; *id.* § 704.23. If the tenant is a holdover tenant, meaning that the tenant does not leave the rental unit after his lease term has expired, the landlord does not need to notify the tenant that she is beginning the eviction process. *See id.* §§ 704.23, 704.25(1). Rather, the landlord can proceed directly to filing a summons and complaint. *See id.*

26. *Eviction*, TENANT RESOURCE CENTER FOR HOUSING JUST. WISCONSIN, <http://www.tenantresourcecenter.org/eviction> (last visited Nov. 14, 2014); *Wisconsin Eviction Process*, EVICTION RESOURCES, http://www.evictionresources.com/eviction_process_articles/wisconsin_eviction_process.html (last visited Nov. 14, 2014). Even if the tenant does move out, the landlord can still file an eviction action against the tenant. *Eviction*, *supra*. The purpose of an eviction action is to restore exclusive possession of the premises to the landlord. WIS. STAT. § 704.05(2); § 799.44 (2011–12). Therefore, the landlord may continue with the eviction action even after the tenant moves out, to ensure that the landlord legally regains exclusive possession of her rental property. *See* WIS. STAT. § 704.05(2); § 799.44 (2011–12); *Eviction*, *supra*.

27. § 799.44(1)–(2).

1. NOTICE

The timing of the eviction process depends largely on the type of rental agreement between the landlord and the tenant. Wisconsin law requires different types of eviction notices for different types of rental agreements.²⁸ There are two broad categories: eviction notices for tenants with term leases and eviction notices for periodic tenants.²⁹

If a landlord wants to evict a tenant who has a term lease of one year or less, the landlord must first identify a tenant behavior that violates a term of the lease between the parties.³⁰ There are two categories of tenant behavior that may serve as grounds for an eviction: (1) the tenant fails to pay an installment of rent when it is due, or (2) the tenant commits waste or breaches a condition of the lease (other than payment of rent).³¹ Once the landlord identifies a lease violation, the landlord can begin the eviction process, if she chooses, by giving the tenant notice that she intends to terminate the tenancy.³² The first time the tenant violates the lease, the landlord must give the tenant a five-day notice, which gives the tenant the option either to remedy the violation or to vacate the premises.³³ If the tenant commits another same-category violation within one year, the landlord may give the tenant a fourteen-day notice to vacate with no option to cure the lease violation.³⁴

If the tenant is a periodic tenant (e.g., month-to-month or week-to-week), the landlord can terminate the tenancy for any material violation of the rental agreement.³⁵ The landlord still has the option of giving the tenant a five-day notice with a right to cure if the tenant fails to pay rent.³⁶ However, with a periodic tenant, the landlord may choose to give the tenant a fourteen-day notice for the first missed rental payment without ever giving the tenant a five-day notice.³⁷ The

28. See § 704.17.

29. TENANT RES. CTR., HOUSING COUNSELOR TRAINING GUIDE: DANE COUNTY, 85–86 (2014) (on file with author) [hereinafter TRC TRAINING GUIDE]. “A periodic tenancy is a tenancy in which there is no lease with a definite beginning or ending date and there is a recurring rental period in which payments are made on a regular schedule.” *Id.* at 13.

30. See § 704.17(2). A lease is “an agreement, whether oral or written, for transfer of possession of real property . . . for a definite period of time.” *Id.* § 704.01(1).

31. *Id.* § 704.17(2)(a)–(b).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* § 704.17(1)(b).

36. *Id.* § 704.17(1)(a).

37. See *id.*

fourteen-day notice comes with no right to cure; the tenant must vacate the premises.³⁸

Tenants with leases lasting more than one year have significantly more protection against eviction. For any lease violation, the landlord must serve the tenant with a 30-day notice.³⁹ The tenant only needs to take “reasonable steps” to remedy the default listed in the notice to avoid eviction.⁴⁰

Landlords can also evict tenants for holding over.⁴¹ A tenant is considered to be holding over if the tenant stays at the rental property past his agreed upon lease dates.⁴² If a tenant holds over, the landlord does not need to give the tenant any notice that she is beginning the eviction proceeding.⁴³ Instead, the landlord may immediately seek eviction by filing a summons and complaint.⁴⁴

2. THE EVICTION LAWSUIT

After the landlord gives the tenant proper notice, the landlord must fill out a summons and complaint form and file it with the clerk of courts to commence the eviction lawsuit.⁴⁵ Then, the landlord needs to serve the summons and complaint on the tenant.⁴⁶ Due to Act 76, the landlord will need to check her local rules to determine the proper method of service for an eviction action.⁴⁷

There are potentially two court dates for which both the tenant and the landlord must be present. The first is the return date.⁴⁸ The return date serves as an opportunity for the court to see if the tenant claims a defense to the eviction, if the parties can stipulate to an agreement, or if the action is subject to immediate dismissal.⁴⁹ If the landlord and the tenant cannot reach an agreement and the tenant claims a defense to the eviction, the court must set a trial date.⁵⁰ The court must schedule and

38. *See id.* § 704.17(1)(a)–(b).

39. *Id.* § 704.17(3).

40. *Id.*

41. *Id.* § 704.25(1).

42. *Eviction, supra* note 26.

43. *See* § 704.23.

44. *See id.*

45. *Eviction, supra* note 26; *Wisconsin Eviction Process, supra* note 26.

46. *See* WIS. STAT. § 799.12(1) (2011–12), available at <http://docs.legis.wisconsin.gov/statutes/statutes/799.pdf> (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014).

47. *See infra* Part II.A–B.

48. *Eviction, supra* note 26.

49. § 799.20(4).

50. *Id.*

complete the trial within 30 days of the return date.⁵¹ Frequently, the court will turn immediately from the initial appearance to the trial unless the parties request otherwise.⁵²

Since eviction is a summary proceeding, there are a very limited number of issues a tenant may permissibly raise in an eviction action. In *Scalzo v. Anderson*,⁵³ the Wisconsin Supreme Court listed the following issues that circuit courts may consider in an eviction action: “(a) whether the relation of landlord and tenant exists between the parties; (b) whether the tenant is holding over; (c) whether proper notice was given; (d) whether the landlord has proper title to the premises, and (e) whether the landlord is attempting retaliatory eviction.”⁵⁴ A tenant may not make counterclaims that are “extrinsic or collateral to the lease,” or that do not arise “from the same transaction or occurrence that is the subject matter of the plaintiff’s eviction suit.”⁵⁵ As a result, most evictions are uncontested, meaning a trial is never scheduled, and the judge either dismisses the case or enters a judgment of eviction on the return date.⁵⁶

If the judge enters a judgment of eviction either on the return date or after a trial, the judge must also immediately issue a writ of restitution.⁵⁷ Then, the landlord must deliver the writ of restitution to the sheriff, and after the landlord pays a fee to the sheriff, the sheriff will execute the writ.⁵⁸ The sheriff must execute the writ within ten days of receiving it.⁵⁹

If the landlord provided written notice to the tenant that she will not store any items of personal property that the tenant leaves behind, then the landlord has three options for removing and storing or disposing of a tenant’s property after the sheriff executes the writ.⁶⁰ First, the landlord

51. *Id.*

52. *See Eviction, supra* note 26.

53. 87 Wis. 2d 834, 275 N.W.2d 894 (1979).

54. *Id.* at 848.

55. *Id.*

56. DIV. OF EXEC. BUDGET AND FIN., WIS. DEP’T OF ADMIN., FISCAL ESTIMATE – SB179 (2013), *available at* http://docs.legis.wisconsin.gov/2013/related/fe/sb179/sb179_CTS.pdf. In 2012, there were a total of 28,533 eviction actions filed in Wisconsin circuit courts. *Id.* Out of those 28,533 eviction actions, “24,962 were uncontested and 3,571 were contested actions.” *Id.* Of the contested cases, only a third actually went to trial. *Id.*

57. *See* WIS. STAT. § 799.44(1) (2011–12), *available at* <http://docs.legis.wisconsin.gov/statutes/statutes/799.pdf> (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014).

58. *See id.* § 799.45(1).

59. *Id.* § 799.45(5).

60. Tristan R. Pettit, *Act 76 – Wisconsin’s New Landlord-Tenant Law – Part 6: Alternative Disposition of Property During Eviction*, TRISTAN’S LANDLORD-TENANT L. BLOG (June 9, 2014), <http://petriestocking.com/blog/2014/06/09/act-76-wisconsins-new-landlord-tenant-law-part-6-alternative-disposition-of-property-during-eviction/>; *see also* WIS. STAT. § 704.05(5) (2011–12), *available at* <http://docs.legis.wisconsin.gov/statutes/>

may elect to operate under the old law and hire the sheriff to engage the services of a mover to move and store the tenant's personal property at a place within the county.⁶¹ The sheriff must notify the tenant of where his property is being stored within three days of moving the property.⁶² Second, the landlord can notify the sheriff that she will remove and store or dispose of the property.⁶³ Then, she can elect to "dispose of the [tenant's] personal property in any manner that the landlord, in [her] sole discretion, determines is appropriate."⁶⁴ Third, the landlord can ask the sheriff to supervise the "removal and handling of the property."⁶⁵

If the landlord does not provide written notice to the tenant that she will not store any items of personal property that the tenant leaves behind, the landlord may remove and store the tenant's property.⁶⁶ If the landlord wants to dispose of the tenant's property, the landlord must notify the tenant by personal service or by mail to the tenant's last known address that she intends to dispose of the property.⁶⁷ If the tenant does not repossess the property within 30 days of the landlord's notice, the landlord may "dispose of the property by private or public sale or any other appropriate means."⁶⁸

B. General Overview of Recent Changes to Wisconsin's Rental Housing Laws

The recent changes to Wisconsin's rental housing laws transpired in a series of three bills passed in three consecutive years.⁶⁹ Although the changes from Senate Bill 179 are most relevant to this Comment, each of the bills is briefly explained in this Section.

statutes/704.pdf (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014); § 799.45(3)–(3m).

61. § 799.45(3).

62. *Id.* § 799.45(3)(b).

63. *Id.* § 799.45(3m).

64. § 704.05(5)(a)1.

65. § 799.45(3m).

66. § 704.05(5)(bf) (stating that if the landlord does not provide written notice to the tenant that she will not store any items of personal property that the tenant leaves behind if he is evicted then "the landlord shall comply with s. 704.05, 2009 stats., with respect to any personal property left behind by the tenant"); WIS. STAT. § 704.05(5) (2009–10).

67. § 704.05(5).

68. *Id.* § 704.05(5)(a)2.

69. See 2013 Wis. Act 76, available at <http://docs.legis.wisconsin.gov/2013/related/acts/76.pdf>; 2012 Wis. Act 143; 2011 Wis. Act 108.

The first significant change took place in 2011 when the Wisconsin Legislature passed the “Landlord Preemption Bill.”⁷⁰ The bill, which became 2011 Wisconsin Act 108, created a new section of the Wisconsin Statutes that prohibits cities, villages, towns, or counties from enacting ordinances that place certain limits on residential landlords.⁷¹ Additionally, the bill preempted any existing local ordinances that were inconsistent with its provisions.⁷² The bill successfully wiped out many existing local housing regulations that were both specifically tailored to the local housing market and were the product of years of collaborative effort with landlords and property managers.⁷³

The “Landlord’s Omnibus Bill,” which became 2011 Wisconsin Act 143, followed in 2012.⁷⁴ According to the Tenant Resource Center, 2011 Wisconsin Act 143 “made the most comprehensive changes to Wisconsin Tenant Landlord law in the last 40 years.”⁷⁵ The bill included many miscellaneous landlord-tenant provisions⁷⁶ and received significant

70. S.B. 107, 2011–12 Leg. (Wis. 2011); Tristan R. Pettit, “*Landlord Preemption Bill*” Signed into Law, TRISTAN’S LANDLORD-TENANT L. BLOG (Dec. 28, 2011), <http://petriestocking.com/blog>.

71. See 2011 Wis. Act 108. Specifically, under Wisconsin statute section 66.0104, local municipalities are prohibited from placing limitations on landlords that prevent them from obtaining or using any of the following information about a tenant or prospective tenant: monthly household income, occupation, rental history, credit information, court records, or social security number. *Id.* Additionally, local municipalities cannot place limitations on landlords relating either to entering into a new rental agreement with a prospective tenant or showing premises to a new prospective tenant during the tenancy of a current tenant. *Id.* Finally, local municipalities cannot place additional requirements on landlords relating to security deposits or pre- and post-tenancy inspections. *Id.*

72. *Id.*

73. Scott J. Resnick, *Madison Housing Ordinances: How Will SB 107 Impact Students?*, ALDER RESNICK’S BLOG (Oct. 31, 2011, 8:51 PM), <http://www.cityofmadison.com/council/district8/blog/?Id=537>. Since Dane County, the city of Madison, and Fitchburg had local rental housing ordinances, in addition to the state laws and regulations, 2011 Wisconsin Act 108 had the greatest impact on them. See TRC TRAINING GUIDE, *supra* note 29, at 2. The city of Madison disagrees strongly with the state overriding its local control. See *id.* at 5–6. “The Mayor and Common Council of the City of Madison have refused to repeal local ordinances and openly challenged landlords to violate them, indicating they would prosecute according to the ordinances as they were written prior to the recent law changes, particularly in the area of the landlord’s duty to communicate information about fire safety.” *Id.*

74. 2011 Wis. Act 143; Pettit, *supra* note 4.

75. TENANT RES. CTR., COUNSELOR TRAINING GUIDE: STATE OF WISCONSIN 12 (15th ed. 2012) (on file with author).

76. See 2011 Wis. Act 143. Some examples of these miscellaneous provisions include the following: the bill codified provisions of the Wisconsin Administrative Code; the bill allows landlords to sever some void lease provisions but specifies that retaliatory provisions would invalidate the lease; the bill allows landlords not to disclose building or housing code violations if the landlord does not have actual knowledge of the violation;

attention for two main reasons. First, the bill gave landlords the power to dispose of a tenant's "abandoned" personal property immediately after a tenant vacates the landlord's property or is evicted, as well as the power to keep any profits generated from the property for themselves.⁷⁷ Previously, the landlord needed to provide the tenant with notice that she intended to dispose of the property and needed to store the property for a minimum of 30 days before it could be sold, with any profits from the property going to the Housing Fund.⁷⁸ Second, the bill prohibits any municipality from creating ordinances placing moratoriums on evictions.⁷⁹ For example, this means that local municipalities can no longer prohibit landlords from evicting tenants during the holidays.

Finally, in 2013, the Wisconsin Legislature passed Senate Bill 179, which became Act 76.⁸⁰ This bill clarifies some of the confusing language of the previous landlord-tenant bill and makes several significant changes to the small claims eviction procedure.⁸¹ Among other changes, the bill changes the timing and manner of service of small claims eviction actions.⁸²

C. Changes to Wisconsin Eviction Proceedings After Act 76

In Act 76, the Wisconsin Legislature made significant changes to the timing of eviction proceedings and the property-left-behind statutes. The effective date of Act 76 was March 1, 2014.⁸³ This Section focuses on two aspects of Act 76's changes. First, this Section discusses the changes that Act 76 made to the eviction process and property-left-behind statutes. Then, this Section discusses the effects that these changes will have on both tenants and landlords.

the bill requires landlords to provide a check-in sheet to their tenants documenting the condition of the premises; the bill allows tenants to sue their landlords for double damages, court costs, and attorney's fees if the landlord violates Chapter 704. *Id.*; TRC TRAINING GUIDE, *supra* note 29, at 1–3.

77. 2011 Wis. Act 143.

78. S.B. 466, 2011–12 Leg. (Wis. 2011).

79. 2011 Wis. Act 143.

80. S.B. 179, 2013–14 Leg. (Wis. 2013); 2013 Wis. Act 76, *available at* <http://docs.legis.wisconsin.gov/2013/related/acts/76.pdf>.

81. *See* TENANT RES. CTR., WISCONSIN LAW CHANGES – 3/1/14: 2013 WIS. ACT 76 (SB179), at 1–4 (2014), <https://www.dropbox.com/s/ao1xsnl6f16uyhp/wisact76.pdf>.

82. *See infra* Part I.C.

83. 2013 Wis. Act 76, *available at* <http://docs.legis.wisconsin.gov/2013/related/acts/76.pdf>.

1. CHANGES TO EVICTION PROCEEDINGS AND
PROPERTY-LEFT-BEHIND STATUTES

Through Act 76, the Wisconsin Legislature intended to speed up the eviction process.⁸⁴ In part, Act 76 was a response to significant delays various landlords had been experiencing in the eviction process.⁸⁵ For example, in contested cases where tenants requested jury trials, some landlords waited months to go to trial, making the eviction process even more expensive for them.⁸⁶ In Milwaukee County, some landlords waited up to six months after the return date for a trial in contested cases where the tenant requested a jury trial.⁸⁷

The first major change Act 76 made to the summary eviction process was to the personal service requirements. Landlords may not need to personally serve their tenants an eviction summons and complaint if their county circuit court has authorized service by certified mail.⁸⁸ If the county chooses to allow service by certified mail, service is complete upon mailing “unless the envelope enclosing the summons has been returned unopened to the clerk prior to the return date.”⁸⁹

The next major change Act 76 made to the summary eviction process was to the timing of eviction actions. Courts must set the return date for most small claims actions between eight and 30 days after issuing the summons.⁹⁰ Previously, the court needed to set the return date for eviction actions between five and 30 days from the issue date.⁹¹ Act 76 changed the requirement for the return date in evictions to between five and 25 days after the date the court issues the summons.⁹² Additionally, Act 76 changed the law to require that eviction trials be scheduled and completed within 30 days of the return date and that the court issue the writ of restitution “immediately” after it issues a judgment of eviction.⁹³ Previously, the court needed to set eviction trials “as soon

84. See Pettit, *supra* note 6.

85. See *id.*

86. *Id.*

87. *Id.*

88. 2013 Wis. Act 76, available at <http://docs.legis.wisconsin.gov/2013/related/acts/76.pdf>; WIS. STAT. § 799.12(2) (2011–12), available at <https://docs.legis.wisconsin.gov/statutes/statutes/799.pdf> (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014).

89. § 799.12(2).

90. See § *id.* 799.05(3).

91. 2013 Wis. Act 76, available at <http://docs.legis.wisconsin.gov/2013/related/acts/76.pdf> (amending Wisconsin statute section 799.05(3)).

92. *Id.*

93. 2013 Wis. Act 76, available at <http://docs.legis.wisconsin.gov/2013/related/acts/76.pdf> (amending WIS. STAT. §§ 799.20(4), 799.206(3), 799.44).

as possible,” and it had some leeway as to when it issued the writ of restitution.⁹⁴

Finally, Act 76 created new options for landlords seeking to dispose of a tenant’s personal property after the sheriff executes the writ of restitution and returns possession of the property to the landlord.⁹⁵ Before Act 76, if a landlord’s property was located in a county with a population of over 500,000, the landlord was required to hire a bonded mover to move and store any of the tenant’s property determined to be of value.⁹⁶ If the landlord lived in a county with a population of less than 500,000, the landlord could remove the tenant’s property of value herself but needed to post bond, which could be very expensive.⁹⁷ Today, if a landlord notifies a tenant in writing when the tenant signs or renews his lease that the landlord will not move or store property that is left behind, the landlord may dispose of the property after the sheriff executes the writ of restitution and returns possession of the property to the landlord.⁹⁸

2. HOW SERVICE BY MAIL COULD RESULT IN PROBLEMS FOR TENANTS AND LANDLORDS

Introducing certified mail into the eviction process may ignite a logistical nightmare. Certified mail requires that the delivery person obtain a signature at the time of delivery and then provide the sender with a mailing receipt.⁹⁹ However, certified mail does not provide expedited delivery, and it does not provide a guaranteed delivery time.¹⁰⁰ If the United States Postal Service (USPS) cannot deliver a certified mail item to the recipient on its initial delivery attempt, it will make a second

94. *Id.* (amending the language of Wisconsin statute section 799.206(3), which prior to Act 76 read as follows: “When all parties appear in person or by their attorneys on the return date in an eviction, garnishment, or replevin action and any party claims that a contest exists, the matter shall be forthwith scheduled for a hearing, to be held as soon as possible before a judge.”)

95. *See id.*

96. WIS. STAT. § 799.45 (2011–12), available at <http://docs.legis.wisconsin.gov/statutes/statutes/799.pdf> (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014).

97. *Id.*

98. *Id.* § 799.45; WIS. STAT. § 704.05(5) (2011–12), available at <http://docs.legis.wisconsin.gov/statutes/statutes/704.pdf> (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014).

99. *What Is Certified Mail?*, USPS.COM, <http://faq.usps.com/> (last visited Nov. 14, 2014) (type into the search field “What is certified mail?”; then follow the hyperlink titled “What Is Certified Mail?”).

100. *Id.*

and final delivery attempt five days after issuing its first notice.¹⁰¹ In total, the USPS will hold certified mail at the post office for 15 days before returning the mail to the sender.¹⁰²

Under section 799.12(3), when certified mail is used, “[s]ervice of the summons is considered completed when it is mailed, unless the envelope enclosing the summons has been returned unopened to the clerk prior to the return date.”¹⁰³ The fact that the USPS holds certified mail for 15 days before returning the mail to the sender creates a potential problem for tenants with return dates less than 15 days from when the court issues the summons, if the landlord chooses to have the clerk serve the summons by certified mail. If the tenant is not home when the USPS attempts to deliver the certified mail or does not go to pick up his mail after receiving the delivery attempt notices, the tenant may not receive actual notice of the eviction lawsuit before the return date. Then, because the USPS will still be holding the mail, the court may still consider service complete because the USPS has not returned the summons unopened to the clerk prior to the return date.¹⁰⁴

Under section 799.14, if a defendant does not receive actual notice of a lawsuit where service of the summons is made by mailing, the defendant can petition the court to set aside the judgment and request an opportunity to be heard on the merits at any time within 15 days of receiving actual knowledge of the lawsuit.¹⁰⁵ A tenant that does not receive actual notice of an eviction action served by certified mail could use section 799.14 to petition the court to set aside the judgment.¹⁰⁶ However, this may not actually provide a meaningful remedy to the tenant if the sheriff has already executed the writ of restitution and the landlord has already removed and/or disposed of the tenant’s personal property. If the tenant petitions the court to set aside the judgment, it may prolong the very eviction process that Act 76 attempted to abridge. Additionally, if the tenant does not receive proper service, the tenant could sue his landlord for illegal eviction under ATCP section 134.09(7),

101. *What Are the Second and Final Notice and Return Dates for Redelivery?*, USPS.COM, <http://faq.usps.com/> (last visited Nov. 14, 2014) (type into the search field “What are the second and final notice and return dates for redelivery?”; then follow the hyperlink titled “What Are the Second and Final Notice and Return Dates for Redelivery?”).

102. *Id.*

103. § 799.12(3).

104. *See id.*

105. *Id.* § 799.14.

106. *See id.*

which could result in a large judgment for the tenant if the tenant is successful.¹⁰⁷

It is also unclear how the requirements of section 799.05(3)(b) interact with local court rules allowing service by certified mail in eviction actions. Under section 799.05(3)(b), the landlord must serve the tenant “not less than 5 days prior to the return date.”¹⁰⁸ Presumably, this provision is satisfied immediately when a landlord elects to serve her tenant by certified mail because the service is considered complete upon mailing.¹⁰⁹ However, this provision seems to show that the Wisconsin Legislature thought it was important to give tenants at least five days to prepare for their return date.¹¹⁰

Additionally, the new language of section 799.20(4) clearly states that “[i]n a residential eviction action, the court . . . shall hold and complete a court or jury trial . . . within 30 days of the return date of the summons or any adjourned date thereof.”¹¹¹ Based on the plain language of the statute, courts that are unable to hold and complete court or jury trials within 30 days may be forced to dismiss the eviction actions, and landlords may be forced to refile. Again, this may prolong the very eviction process that Act 76 attempted to shorten for landlords seeking to regain exclusive possession of their rental property.¹¹²

107. Tenants could bring claims under ATCP section 134.09(7) for illegal eviction and under section ATCP 134.09(4) for confiscation of personal property. WIS. ADMIN. CODE ATCP § 134.09(4), (7) (2014), available at https://docs.legis.wisconsin.gov/code/admin_code/atcp/090/134.pdf (current through Wis. Admin. Reg. 705 (Sept. 30, 2014)). Successful plaintiffs suing under chapter 134 can recover double damages and reasonable attorney’s fees. *Id.* ATCP § 134.01; WIS. STAT. § 100.20(5) (2011–12), available at <http://docs.legis.wisconsin.gov/statutes/statutes/100.pdf> (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014).

108. § 799.05(3)(b).

109. *See id.* § 799.12(3).

110. Although five days seems extremely short, this does not raise due process concerns. In *Lindsey v. Normet*, 405 U.S. 56 (1972), the Supreme Court held that an Oregon statute that allowed a landlord to serve a complaint in an action for possession “not less than two nor more than four days before the trial date” was not facially invalid under the Due Process Clause. *Id.* at 63–65. The Court found that the time was not unduly short for trial preparation for the following reason:

Tenants would appear to have as much access to relevant facts as their landlord, and they can be expected to know the terms of their lease, whether they have paid their rent, whether they are in possession of the premises, and whether they have received a proper notice to quit, if one is necessary.

Id. at 65.

111. § 799.20(4).

112. *Id.*

II. THE ROLE OF WISCONSIN CIRCUIT COURTS IN THE SUMMARY EVICTION PROCESS

Generally, the purpose of serving a summons is to give defendants notice that a plaintiff has commenced a legal action, and to allow the court to exercise personal jurisdiction over these defendants.¹¹³ “Small claims procedures enjoy the advantages, or disadvantages, depending on [one’s] perspective, of simplified service, relaxed pleadings requirements, expeditious hearing process, relaxed application of evidentiary rules, and reduced costs.”¹¹⁴ Traditionally though, in Wisconsin small claims eviction proceedings, where the defendant-tenant stood to lose his or her home, the law did not allow simplified service.¹¹⁵ The rules for service in small claims eviction proceedings were as strict as they were for all other non-small claims matters.¹¹⁶ Presumably, the Wisconsin Legislature chose to require personal service in eviction actions because taking someone’s home away is very serious.

This Part begins by discussing the current requirements for service of small claims proceedings in Wisconsin. Then, this Part delves into a discussion of how the local rules for service of eviction actions may change because of Act 76. This Part compares each county’s current local rules for eviction actions to their local rules for replevin actions in order to gain insights into the long-term impacts Act 76 may have on small claims service rules throughout Wisconsin.¹¹⁷ Finally, this Part discusses actions that each local court must take to ensure that tenants are adequately notified of eviction proceedings commenced against them.

113. *Kruse v. Miller Brewing Co.*, 89 Wis. 2d 522, 528, 279 N.W.2d 198 (1979).

114. 12 ROBERT A. PASCH, WISCONSIN PRACTICE SERIES: WISCONSIN COLLECTION LAW § 7:1 (2d ed. 2006).

115. Compare § 799.12(2) (2011–12), available at <https://docs.legis.wisconsin.gov/statutes/statutes/799.pdf> (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014) (“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.”), with WIS. STAT. § 799.12(2) (2011–12) (“Any circuit court may by rule authorize the service of summons in some or all actions under this chapter, *except eviction actions*, by mail under sub. (3) in lieu of personal or substituted service under s. 801.11.” (emphasis added)).

116. § 799.12(2) (2011–12); *see also* WIS. STAT. § 801.11 (2011–12).

117.

Replevin is an action in which the plaintiff seeks the return of his [personal] property which is in the possession of another person. Replevin most frequently arises in one of three common situations; in a secured party transaction where a creditor obtains collateral from a debtor, in a lease of personal property, or in a bailment.

PASCH, *supra* note 114, § 10:1.

This Part then ends by discussing proposals for new provisions to local small claims service rules and methods of examining service.

A. Service of Process for Small Claims Actions in Wisconsin

Wisconsin statute section 799.12 governs service for small claims actions in Wisconsin.¹¹⁸ Under section 799.12, the Wisconsin Legislature gives Wisconsin circuit courts extensive autonomy to create their own local rules for service in almost all types of small claims proceedings.¹¹⁹ The autonomy the Wisconsin Legislature gives to Wisconsin circuit courts has created a patchwork of different service rules for different small claims proceedings across the state.¹²⁰

Prior to Act 76, section 799.12 carved out an exception for eviction actions, requiring personal or substituted service under section 801.11.¹²¹ However, this was the only type of small claims proceeding in which a specific type of service was required by statute.¹²² For the remaining small claims proceedings, the local court could create its own local rules for service.¹²³ These rules could range from requiring personal service for all or specific small claims proceedings to allowing service by mail for all small claims proceedings besides eviction.¹²⁴

118. See WIS. STAT. ch. 799 (2011–12), available at <https://docs.legis.wisconsin.gov/statutes/statutes/799.pdf> (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014) (entitled “Procedure in Small Claims Actions”); *Id.* § 799.12 (entitled “Service of summons”).

119. See *id.* WIS. STAT. § 799.12(2).

120. See *infra* Figure 1.

121. § 799.12(2) (2011–12) (“Any circuit court may by rule authorize the service of summons in some or all actions under this chapter, except eviction actions, by mail under sub. (3) in lieu of personal or substituted service under s. 801.11.”).

122. See *id.*

123. *Id.*

124. Prior to the changes from the Act, Wisconsin statute section 799.12(3) read as follows:

If authorized by court rule under sub. (2), service may be made by mail by leaving the original and necessary copies of the summons with the clerk of court, together with the fee prescribed in s. 814.62(4). The court may by rule require the use of certified mail with return receipt requested, in which event the additional fee prescribed in s. 814.62(4) shall be paid for each defendant. The clerk shall mail a copy to each defendant at the last-known address as specified in the summons. Service of the summons is considered completed when it is mailed, unless the envelope enclosing the summons has been returned unopened to the clerk prior to the return date. All mailing of summonses shall be done in envelopes upon which the clerk's return address appears, with a request to return to that address. Service by mail to obtain a personal judgment shall be limited to the county where the action is commenced.

Id. § 799.12(3).

Due to the autonomy that section 799.12 gives Wisconsin courts to create rules for service, Wisconsin's county-by-county local rules for small claims actions are currently a patchwork of different service rules for different small claims proceedings.¹²⁵ Some counties allow for service by mail in almost every type of proceeding, and some clearly specify the types of proceedings in which service by mail is acceptable.¹²⁶ Figure 1, which is included in the next Section, shows some of these county-by-county variations in small claims service requirements.

Because of Act 76, each local court may now choose to authorize service by certified mail in eviction actions.¹²⁷ Several counties have already responded to Act 76 by changing their local court rules to allow service by certified mail in eviction actions.¹²⁸ However, most counties still require personal service in small claims eviction proceedings.¹²⁹ The next Section discusses the current state of county-by-county small claims service requirements across the state of Wisconsin.

B. A County-by-County Look at the Possible Long-Term Impacts of Act 76 on Service Requirements in Evictions

Interestingly, although there is no requirement for a more stringent method of service in replevin actions than service by regular mail, many Wisconsin circuit courts treat replevin similarly to eviction and require a more stringent method of service.¹³⁰ Both types of actions logically require stricter notice requirements because the defendant in both cases stands to lose a significant property interest, whether personal property or real property.¹³¹ Because there is no statutory requirement for more

125. See *infra* Figure 1.

126. See *infra* Figure 1.

127. 2013 Wis. Act 76, available at <http://docs.legis.wisconsin.gov/2013/related/acts/76.pdf>; § 799.12 (2011–12), available at <https://docs.legis.wisconsin.gov/statutes/statutes/799.pdf> (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014).

128. Grant Cnty. Cir. Ct. R. 1101; Green Lake Cnty. Cir. Ct. Small Claims R. I; Iowa Cnty. Cir. Ct. Small Claims Service R.; Jackson Cnty. Cir. Ct. R. 47; Pepin Cnty. Cir. Ct. R. 2014-01; Price Cnty. Cir. Ct. R.; Richland Cnty. Cir. Ct. R. 3; Trempealeau Cnty. Cir. Ct. R. 3; Washburn Cnty. Cir. Ct. R. 901.01; Waushara Cnty. Cir. Ct. Small Claims R. II(b).

129. See *infra* Figure 1.

130. See *infra* Figure 1.

131. Eviction is defined as “[t]he act or process of legally dispossessing a person of land or rental property.” BLACK’S LAW DICTIONARY 635 (9th ed. 2009); Replevin is defined as “[a]n action for the repossession of personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it.” *Id.* at 1413.

stringent service requirements in replevin actions,¹³² it is insightful to consider what type of service Wisconsin circuit courts require for replevin as an indicator of the long-term direction of local rules for service in eviction actions after Act 76.

Generally, there are three types of local rules for service in replevin actions: the Wisconsin circuit courts either require personal or substituted service, as they do for eviction actions; service by certified mail; or service by regular mail.¹³³ Unless the local court rules authorize service by regular or certified mail in small claims actions, personal or substituted service is required under section 801.11.¹³⁴ Accordingly, a local court rule requiring personal service for replevin and eviction actions might read as follows: “[e]xcept in eviction, replevin or contempt proceedings under Wis. Stat. § 799.26(2), service of any small claims pleadings may be made by 1st class or certified mail, return receipt requested as provided in Wis. Stat. § 799.12(3).”¹³⁵

A typical court allowing mail service generally but requiring a stricter method of service for replevin actions, may have a rule that reads as follows: “[i]n replevin actions, service of summons may be commenced by personal service, substituted service or, if within Clark County, by certified mail with restricted delivery.”¹³⁶ Finally, a court allowing service by regular mail in replevin actions may have a local court rule that reads as follows: “[t]he service of a summons upon any resident of Portage County in all actions under Chapter 799 Wis. Stats., except eviction actions, may be by mail under 799.12(3) Wis. Stats. in lieu of personal or substituted service under Section 801.11 Wis. Stats.”¹³⁷

A county-by-county comparison of service rules for eviction and replevin actions is included on the following page as Figure 1.¹³⁸

132. See § 799.12.

133. See *infra* Figure 1.

134. § 799.12(2).

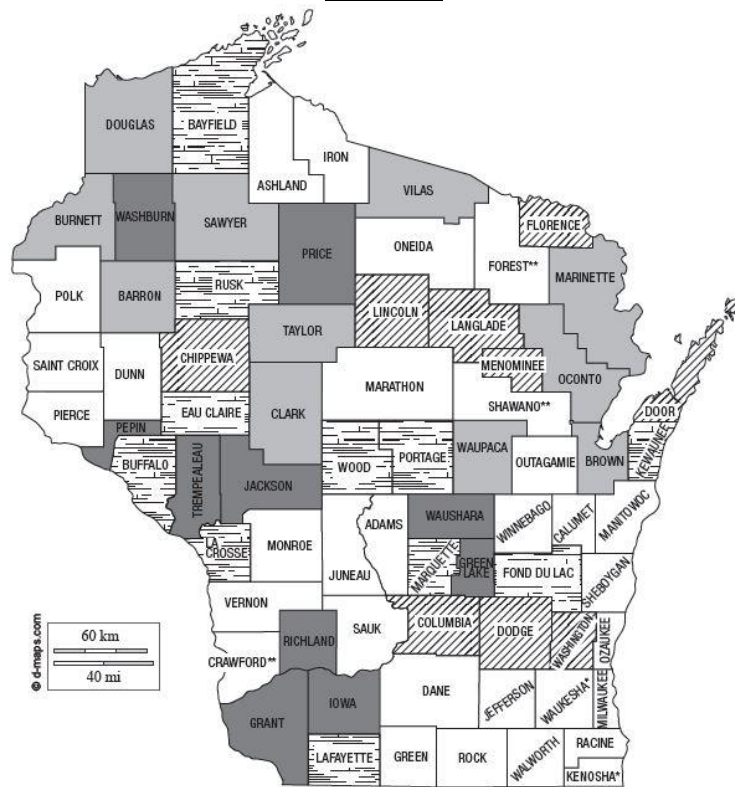
135. Marathon Cnty. Cir. Ct. R. 4.70.

136. *E.g.*, Clark Cnty. Cir. Ct. R. 600.

137. *E.g.*, Portage Cnty. Cir. Ct. Small Claims R. 1.

138. Adams Cnty. Cir. Ct. R. 10.02; Ashland Cnty. Cir. Ct. R. 901.01; Barron Cnty. Cir. Ct. R. 901.01; Bayfield Cnty. Cir. Ct. R. 901; Brown Cnty. Cir. Ct. R. 600-01; Buffalo Cnty. Cir. Ct. R. 2009-01; Burnett Cnty. Cir. Ct. R. 901.01; Calumet Cnty. Cir. Ct. R. 12; Clark Cnty. Cir. Ct. R. 600; Crawford Cnty. Cir. Ct. R. 804; Dane Cnty. Cir. Ct. R. 308; Douglas Cnty. Cir. Ct. R. 901.01; Dunn Cnty. Cir. Ct. R. 905.01, 906.01; Eau Claire Cnty. Cir. Ct. R. 901; Fond du Lac Cnty. Cir. Ct. R. 5.1; Forest Cnty. Cir. Ct. R. 4; Grant Cnty. Cir. Ct. R. 1101; Green Cnty. Cir. Ct. R. 301(A); Green Lake Cnty. Cir. Ct. Small Claims R. I; Iowa Cnty. Cir. Ct. Small Claims Service R.; Iron Cnty. Cir. Ct. R. 7.01; Jackson Cnty. Cir. Ct. R. 47; Jefferson Cnty. Cir. Ct. Civil Litigation R. I.B.; Juneau Cnty. Cir. Ct. Small Claims R. I.B; Kenosha Cnty. Cir. Ct. R. CR 08-2; Kewaunee Cnty. Cir. Ct. R. 1101; La Crosse Cnty. Cir. Ct. R. 701; Lafayette Cnty. Cir.

FIGURE 1



LEGEND

PERSONAL SERVICE REQUIRED IN EVICTION AND REPLEVIN ACTIONS	NO DATA AVAILABLE
PERSONAL SERVICE REQUIRED IN EVICTION ACTIONS, CERTIFIED MAIL REQUIRED IN REPLEVIN ACTIONS	* PERSONAL SERVICE MUST BE ATTEMPTED FIRST FOR ALL PROCEEDINGS, IF UNSUCCESSFUL THEN SERVICE BY MAIL ALLOWED
PERSONAL SERVICE REQUIRED IN EVICTION ACTIONS, SERVICE BY MAIL ALLOWED IN ALL OTHER SMALL CLAIMS ACTIONS	
SERVICE BY CERTIFIED MAIL ALLOWED IN EVICTION ACTIONS, SERVICE BY MAIL ALLOWED IN ALL OTHER SMALL CLAIMS ACTIONS	** LOCAL RULES IMPLY SERVICE BY MAIL IS ALLOWED IN ALL SMALL CLAIMS ACTIONS. HOWEVER, BECAUSE THE LOCAL RULES DO NOT EXPLICITLY AUTHORIZE SERVICE BY MAIL, PERSONAL OR SUBSTITUTED SERVICE UNDER SECTION 801.11 IS REQUIRED IN ALL SMALL CLAIMS ACTIONS.

Ct. R. 705; Manitowoc Cnty. Cir. Ct. R. 5.01; Marathon Cnty. Cir. Ct. R. 4.70; Marinette Cnty. Cir. Ct. R. 1101; Marquette Cnty. Cir. Ct. R. VII; Milwaukee Cnty. Cir. Ct. R. 3.76D; Monroe Cnty. Cir. Ct. R. 11.02; Oconto Cnty. Cir. Ct. R. 1101; Oneida Cnty. Cir. Ct. R. 6; Outagamie Cnty. Cir. Ct. R. 9.2; Ozaukee Cnty. Cir. Ct. R. 207.3; Pepin Cnty. Cir. Ct. R. 2014-01; Pierce Cnty. Cir. Ct. R. 1; Polk Cnty. Cir. Ct. R. 905.01, 906.01; Portage Cnty. Cir. Ct. Small Claims R. 1; Price Cnty. Cir. Ct. R.; Racine Cnty. Cir. Ct. R. IV.B.1; Richland Cnty. Cir. Ct. R. 3; Rock Cnty. Cir. Ct. R. 205D; Rusk Cnty. Cir. Ct. R. 901.01; Saint Croix Cnty. Cir. Ct. R. 901.01; Sauk Cnty. Cir. Ct. R. 9.02d; Sawyer Cnty. Cir. Ct. R. 901; Shawano Cnty. Cir. Ct. R. 1; Sheboygan Cnty. Cir. Ct. R. 805; Taylor Cnty. Cir. Ct. R. 601(1); Trempealeau Cnty. Cir. Ct. R. 3; Vernon Cnty. Cir. Ct. Small Claims Service R.; Vilas Cnty. Cir. Ct. R. 3; Walworth Cnty. Cir. Ct. R. 4; Washburn Cnty. Cir. Ct. R. 901.01; Waukesha Cnty. Cir. Ct. R. 9.4; Waupaca Cnty. Cir. Ct. R. 7.00; Waushara Cnty. Cir. Ct. Small Claims R. II(b); Winnebago Cnty. Cir. Ct. R. 4.02; Wood Cnty. Cir. Ct. R. D.2.

In total, 28 of 72 counties across the state currently require personal or substituted service in both replevin and eviction actions.¹³⁹ Also noteworthy is the fact that the two most populous counties in the state, Dane County and Milwaukee County, both require personal or substituted service in replevin and eviction actions.¹⁴⁰ Seeing that there is no statutory requirement for a more stringent method of service in replevin cases, these counties seem to be making a statement about the importance of personal service in certain types of proceedings.¹⁴¹ Because these counties require personal service in replevin actions, even though they are not statutorily required to, they will likely continue to require personal service in eviction cases despite the recent changes to Wisconsin law.

Eleven of 72 counties across Wisconsin allow service by mail for most small claims proceedings, but require, at a minimum, service by certified mail in replevin actions.¹⁴² The counties that require certified mail in replevin actions make an indirect statement, through their local rules, that some types of proceedings require a more formal method of service. Because these 11 counties have heightened service requirements for replevin actions, they may retain their heightened service requirements for eviction actions. For example, Vilas County updated their local court rules for service in eviction actions in 2014, specifically requiring that “[s]ervice in eviction actions shall be by personal service,” and “[s]ervice in replevin actions may be by certified mail.”¹⁴³

Unlike the counties that require personal service in replevin actions, though, the counties that allow service by certified mail in replevin actions may also be making a statement that certified mail with a return receipt is a sufficient method of service. Therefore, it is also very possible that these counties will change their local rules to require the same type of service in both eviction and replevin proceedings: service by certified mail with return receipt required.

139. *See supra* Figure 1.

140. Dane Cnty. Cir. Ct. R. 308; Milwaukee Cnty. Cir. Ct. R. 3.76. The 2012 population estimates for Milwaukee County and Dane County were 951,315 and 496,997, respectively. WIS. DEP’T OF HEALTH SERVS., *Wisconsin Population Estimates*, <http://www.dhs.wisconsin.gov/population/> (last updated Aug. 18, 2014) (listing Wisconsin population estimates, as of July 1, 2012, by county or region). The 2012 population estimate for the entire state of Wisconsin was 5,715,331. *Id.*

141. For example, Winnebago County updated their local court rules after Act 76. *See* Winnebago Cnty. Cir. Ct. R. 4.02. It requires personal service in eviction and replevin actions despite the fact that it could have elected to make service requirements for both actions less stringent under section 799.12(3). *See id.*; WIS. STAT. § 799.12(3) (2011–12), available at <https://docs.legis.wisconsin.gov/statutes/statutes/799.pdf> (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014).

142. *See supra* Figure 1.

143. Vilas Cnty. Cir. Ct. R. 3(b)–(c).

Eleven other counties across the state carve out an exception only for eviction actions and allow service by mail for all other types of proceedings.¹⁴⁴ Some of these counties simply mirrored the old statutory language of section 799.12 as their local court rules.¹⁴⁵ Therefore, it is difficult to predict how these counties might change their local rules. These counties may update their local rules to match the new language of the statute. If they do not, though, personal service would still be required.¹⁴⁶

In the few months since the effective date of Act 76, 10 counties throughout the state have already changed their local rules to explicitly authorize service by certified mail in eviction actions.¹⁴⁷ The counties that changed their rules to allow service by certified mail in eviction actions are as follows: Grant County, Green Lake County, Iowa County, Jackson County, Pepin County, Price County, Richland County, Trempealeau County, Washburn County, and Waushara County.¹⁴⁸ An example of a local rule for this type of county reads: “[t]he Court authorizes service by mail, as allowed under Wis. Stat 799.12(2) and in eviction proceedings by certified mail as allowed under Wis. Stat. 799.12(3).”¹⁴⁹ These counties will undoubtedly continue to allow service by certified mail in eviction actions.

C. Suggestions for Wisconsin Circuit Courts

The recent changes to Wisconsin’s rental housing laws make the eviction process faster and make it easier for landlords seeking to dispose of property that they deem “abandoned” after the court issues a writ of

144. See *supra* Figure 1.

145. See, e.g., Buffalo Cnty. Cir. Ct. R. 2009-01 (“Service of Buffalo County residents by ordinary mail through the office of the Clerk of Court is hereby authorized in all small claims court actions in Buffalo County pursuant to §799.12(3), except in eviction actions and as otherwise prohibited by law.”). Prior to Act 76, section 799.12(2) read as follows: “[a]ny circuit court may by rule authorize the service of summons in some or all actions under this chapter, except eviction actions, by mail under sub. (3) in lieu of personal or substituted service under s. 801.11.” 2013 Wis. Act 76, available at <http://docs.legis.wisconsin.gov/2013/related/acts/76>.

146. The court would need to require personal service because the language requiring personal service would still be in the local court rules. By giving reasonable effect to every word possible, the court will avoid surplusage. See *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

147. Grant Cnty. Cir. Ct. R. 1101; Green Lake Cnty. Cir. Ct. Small Claims R. I; Iowa Cnty. Cir. Ct. Small Claims Service R.; Jackson Cnty. Cir. Ct. R. 47; Pepin Cnty. Cir. Ct. R. 2014-01; Price Cnty. Cir. Ct. R.; Richland Cnty. Cir. Ct. R. 3; Trempealeau Cnty. Cir. Ct. R. 3; Washburn Cnty. Cir. Ct. R. 901.01; Waushara Cnty. Cir. Ct. Small Claims R. II(b).

148. See *supra* note 147.

149. Green Lake Cnty. Cir. Ct. Small Claims R. I.

restitution.¹⁵⁰ Thus, it is vital that tenants have notice of pending eviction actions. One of the primary purposes of service of a summons is to inform a defendant-tenant that the plaintiff-landlord has commenced a legal action against him.¹⁵¹ Similarly, it is vital to landlords and courts that judgments of eviction are certain and final. One way Wisconsin circuit courts can guarantee that tenants have proper notice of pending eviction actions, and that judgments of eviction are certain and final, is to ensure proper service. This Section addresses two ways in which Wisconsin circuit courts can act. First, courts can act through their local rules, and second, courts can act through their methods of reviewing whether service was adequately completed.

1. ACTING THROUGH LOCAL RULES

The simplest action that Wisconsin circuit courts can take to ensure that tenants are adequately notified that their landlord has commenced a small claims eviction proceeding against them is to enact a local rule requiring personal service. Under Wisconsin statute section 799.12, Wisconsin circuit courts retain their autonomy to enact local small claims service rules.¹⁵² Many Wisconsin circuit courts already have rules requiring personal service in eviction actions,¹⁵³ so the action they need to take is simple: decide to keep the local rules and procedures as they stand.

For counties that choose to allow service by certified mail, it would be beneficial to create a local rule requiring the clerk to set the return date in evictions between 18 and 25 days after the date the court issues the summons. Therefore, if the USPS holds the certified mail for a full 15 days before returning the undelivered certified mail, the clerk will still receive the unopened summons on or prior to the return date. The county could also include in the local rule that if the landlord elects to attempt to personally serve the tenant, the clerk may set the return date between five and 25 days after the date the court issues the summons.

Besides a clear rule stating that personal service is required in eviction proceedings, Wisconsin circuit courts can also add a number of other provisions to their local rules to ensure that tenants have proper notice that their landlord is commencing an eviction proceeding against

150. WIS. STAT. § 704.05(5)(a)1. (2011–12), available at <https://docs.legis.wisconsin.gov/statutes/statutes/799.pdf> (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014).

151. *Kruse v. Miller Brewing Co.*, 89 Wis. 2d 522, 528, 279 N.W.2d 198 (1979).

152. WIS. STAT. § 799.12(2)–(3) (2011–12), available at <https://docs.legis.wisconsin.gov/statutes/statutes/799.pdf> (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014).

153. See *supra* Figure 1.

them. The first suggestion comes from Green County's local rules. In Green County, the courts require an affidavit that the landlord followed the proper procedures for both notice and service.¹⁵⁴ Green County's local court rule reads as follows: "[t]he landlord, or agent of the landlord, must file an affidavit of service of the notice terminating tenancy, and affidavit of service of the eviction action before a judgment of eviction will be entered."¹⁵⁵ This rule would help the local court commissioner easily determine whether a landlord followed the requirements for notifying a tenant that she was terminating the tenancy before filing a summons and complaint.¹⁵⁶

In several counties, the local rules also specifically state when the landlord must file affidavits of service.¹⁵⁷ For example, in Milwaukee County, "[a]n affidavit of service of the Summons shall be filed on the return date."¹⁵⁸ Rules such as this would also help to ensure that court commissioners and judges consistently check to make sure that landlords file affidavits of service that are sufficient to show proper service. In addition, local rules should require that an affidavit showing the landlord gave the tenant proper notice under Wisconsin statute section 704.17 be filed when the action is initiated or on the return date.

2. ACTING BY CONSTRUING SERVICE REQUIREMENTS STRICTLY

Another way to protect tenants would be for courts to construe service requirements strictly. "The [Wisconsin] [S]upreme [C]ourt has held that an action will be dismissed for failure to comply with a statutory service requirement."¹⁵⁹ There are several reasons that Wisconsin requires strict compliance with its rules of statutory service, including the following:

Strict construction is appropriate for policy reasons. Strict construction of the plain, mandatory language . . . helps to maintain a simple, orderly, and uniform way of conducting legal business. If only substantial compliance . . . were permitted, the certainty created by the requirement of certified mailing would be replaced by the costly uncertainty of a case-by-case determination of whether a notice of claim was in

154. See Green Cnty. Cir. Ct. R. 301(E).

155. *Id.*

156. The requirements for notice are found at Wisconsin statute section 704.17.

157. See, e.g., Milwaukee Cnty. Cir. Ct. R. 3.76; Saint Croix Cnty. Cir. Ct. R. 901.01; Waukesha Cnty. Cir. Ct. R. 9.4.

158. Milwaukee Cnty. Cir. Ct. R. 3.76.

159. *Kelly v. Reyes*, 168 Wis. 2d 743, 747, 484 N.W.2d 388 (Ct. App. 1992).

fact sent and received and whether the lack of procedural compliance hindered the purposes of the notice statute. A new level of litigation would be added to suits¹⁶⁰

Beyond the reasons discussed above, the service of a summons in the “manner prescribed by statute is [also] a condition precedent to a valid exercise of personal jurisdiction.”¹⁶¹ This is true even if a defendant has actual knowledge of the contents of the summons and complaint.¹⁶²

Considering that Wisconsin requires strict compliance with statutory service requirements, Wisconsin circuit courts must look to the text of the new statute to determine what is required for service to be valid. According to the current language of section 799.12(3), for service by certified mail to be valid, the court should look for the following: (1) the plaintiff left the original and necessary copies of the summons and complaint with the clerk of courts, (2) the plaintiff paid the necessary fee to the clerk of courts, (3) the court used certified mail with return receipt requested, (4) the clerk mailed the summons and complaint to each defendant at their last known address, and (5) the summons has not been returned unopened to the clerk prior to the return date.¹⁶³

It is unclear how Wisconsin circuit courts should read section 799.16(3) in light of the changes to section 799.12(2). Section 799.16(3) seems to require that the landlord first attempt personal or substituted service and only when personal or substituted service fails are they able to use service by mail.¹⁶⁴ Section 799.16 states that if a plaintiff cannot serve a defendant an eviction action with personal or substituted service, then the plaintiff can mail the defendant a copy of the summons and “affix a copy of the summons and complaint onto some part of the premises where it may be conveniently read.”¹⁶⁵ If the landlord cannot provide proof of compliance with section 799.16(3), then the court cannot enter a judgment.¹⁶⁶

One way to read section 799.16(3) and section 799.12(2) together is that in the absence of a return receipt, Wisconsin circuit courts should require landlords to file proof of compliance with 799.16(3). If the court has not received a signed return receipt more than seven days prior to the return date, the landlord should be required to mail the defendant a copy

160. *Id.* (internal citation omitted).

161. *Mech v. Borowski*, 116 Wis. 2d 683, 686, 342 N.W.2d 759 (Ct. App. 1983).

162. *Id.*

163. WIS. STAT. § 799.12(3) (2011–12), available at <https://docs.legis.wisconsin.gov/statutes/statutes/799.pdf> (current through 2013 Wisconsin Act 380 and through Nov. 4, 2014).

164. *See* § 799.16.

165. *Id.* § 799.16(3)(a)–(b).

166. *Id.* § 799.16(3)(c).

of the summons and complaint to their last known address and post a copy of the summons to some part of the premises where it can be conveniently read. It may seem redundant to mail the tenant a copy of the summons through both regular and certified mail, but unlike certified mail, regular mail is not held at the post office. Posting and mailing the summons and complaint provides two additional ways the tenant may learn that his landlord has commenced an eviction action against him if he has not received it through certified mail.

As a final note, many counties currently have local rules that discuss how to treat refused mail.¹⁶⁷ These rules are inconsistent with the plain language of the statute and thus are invalid. An example of such a provision is: “Refused Mail: Shall constitute a presumption of service upon the defendant since it indicates that he/she was presented with the envelope but refused to accept it under circumstances indicating that he/she had reason to know that it involved legal proceedings against him/her.”¹⁶⁸ Section 799.12(3) specifies that if the envelope including the summons returns unopened, service is not considered complete.¹⁶⁹ Therefore, rules such as these would be invalid.

CONCLUSION

Small claims proceedings are typically designed for speed rather than fairness and certainty. Accordingly, these proceedings often avoid judicial scrutiny. With the new changes to Wisconsin’s rental housing laws, eviction proceedings are even faster, and some landlords are no longer required to obtain personal service of their tenants.

The changes Act 76 made to Wisconsin housing law could have severe impacts on both tenants and landlords. However, Wisconsin courts can act to alleviate these potential negative impacts. First, each Wisconsin circuit court can decide, through its own court rules, whether personal service for evictions is required. Wisconsin county circuit courts can also add additional requirements to their local court rules to ensure tenants are notified of pending eviction actions against them, and that tenants are properly served. Finally, if county circuit courts allow service by certified mail, they can construe service requirements strictly and add additional safeguards to their local rules to guarantee that tenants receive actual notice of pending eviction actions. Each Wisconsin circuit court should think critically about its local rules and service requirements for eviction actions in light of Act 76 to ensure that tenants are properly

167. *See, e.g.*, Iron Cnty. Cir. Ct. R. 7.02.

168. *Id.*

169. *Id.* § 799.12(3).

notified of pending eviction actions, and to ensure that judgments of eviction are certain and final.