

COUNTY PROSECUTION OF POWTS VIOLATIONS THROUGH CIRCUIT COURT USING SMALL CLAIMS PROCEDURES

Introduction: (who I am)

Duane Greuel wanted me to talk about prosecuting POWTS violators by using the small claims procedures. The procedures we will be talking about though, apply not only to prosecuting POWTS violations, but to land use regulation, environmental health as well as floodplain and shoreland regulation violations, too.

There are actually several procedures available for prosecuting attorneys to use in bringing a law suit against a POWTS violator. They include, what is often called a long form complaint procedure, under ch.778 of the statutes, which is entitled: Forfeitures. A second option is the citation process, which is addressed at sections 66.0113 - 66.0115, stats. The third method of enforcing the ordinance via the courts is the so called short form complaint process, available in the small claims statute, found in ch. 799 of the state stats.

Lets talk for a few moments on the two procedures we don't use in Wood County and why.

First we have Wis. Stat. section

778.10. (entitled) Municipal forfeitures, how recovered

"All forfeitures imposed by any ordinance or regulation of any county, town, city, or village, or of any other domestic corporation may be sued for and recovered, under this chapter, in the name of the county, town, city, village, or corporation. It is sufficient to allege in the complaint that the defendant is indebted to the plaintiff in the amount of the forfeiture claimed, specifying the ordinance or regulation that imposes it , plus costs, fees, and surcharges imposed under ch. 814. If the ordinance or regulation imposes a penalty or forfeiture for several offenses or delinquencies, the complaint shall specify the particular offenses or delinquency for which the action is brought, with a demand for judgment for the amount of the forfeiture, plus costs, fees, and surcharges imposed under ch. 814. All moneys collected on the judgment shall be paid to the treasurer of the county, town, city, village, or corporation, except that all jail surcharges imposed under ch. 814 shall be paid to the county treasurer."

This statute is sometimes called the long- form process, because it requires the attorney bringing the lawsuit to type out a full blown summons and complaint. It is like bringing a normal civil action in circuit court. Which means it is very formal in how it looks (lengthy and intimidating), it requires personal service (with the upfront

cost that this usually entails), it is more time consuming to prepare than the other methods of suing, it costs a lot more money to file it with the clerk of courts office, it is a slower process in so far as actually getting the case before the judge for the trial, it requires a formal answer, which may mean the defendant needs to hire counsel. For these reasons, I rarely use it.

There are a few oddities to this statute which governs long form complaints, specifically, at section 778.25, stats., it allows a citation to be brought pursuant to this chapter, but only for the following types of infractions: alcohol, drug paraphernalia, harassment, safety at sporting events, underage tobacco use and possession violations and some other odd-ball things are involved. Consequently, for your purposes, this chapter can only be used with the long form complaint process.

The second process that is available for bringing a forfeiture action, and one that is more commonly used, is the citation process that is allowed in Wis. Stats. sections 66.0113 to 66.0115. The law specifically provides as follows:

66.0113 (is entitled) Citations for certain ordinance violations

(1) Adoption; content. (a) Except as provided in sub. (5),

the governing body of a county, town, city, village, town sanitary district or public inland lake protection and rehabilitation district may by ordinance adopt and authorize the use of a citation under this section to be issued for violations of ordinances, including ordinances for which a statutory counterpart exists.

(2) Issuance; filing. (a) Citations authorized under this section may be issued by law enforcement officers of the county, town, city, village, town sanitary district or public inland lake protection and rehabilitation district. In addition, the governing body of a county, town, city, village, town sanitary district or public inland lake protection and rehabilitation district may designate by ordinance or resolution other county, town, city, village, town sanitary district or public inland lake protection and rehabilitation district officials who may issue citations with respect to ordinances which are directly related to the official responsibilities of the officials. Officials granted the authority to issue citations may delegate, with the approval of the governing body, the authority to employees. Authority delegated to an official or employee shall be revoked in the same manner by which it is conferred.

(b) The issuance of a citation by a person authorized to do so under par. (a) shall be deemed adequate process to give the appropriate court jurisdiction over the subject matter of the offense for the purpose of receiving cash deposits, if directed to do so, and for the purposes of sub. (3)(b) and

(c). Issuance and filing of a citation does not constitute commencement of an action. Issuance of a citation does not violate [s. 946.68](#).

There are some good points and some bad points about using the citation process. The positive aspects, in my mind, are that you have the enforcement agent, YOU, immediately issuing the citation to the POWTS (or other code) violator, this places you and not your attorney in a position of authority in future contact with the property owner. It cuts down on paperwork, processing time, service problems - if the property owner is present - and the time in which the case will be heard by a judge. There is no up front filing fee that has to be paid by your dept.

Some of the negative aspects of the citation process are that it can put you in a very confrontational position, it forces you to serve the property owner with the citation - which can be difficult- it requires more procedural processing on your part as far as filing the complaint and keeping tabs on it and it tends to have the citation treated less seriously, as the court is handling it with many other citations of traffic and other minor regulatory violations, like disorderly conducts. In my mind, this leads to added pressure on your part to settle the case instead of simply forcing compliance on to the property owner.

Do any of those in attendance wish to make any comments on the pros and or cons of using the citation process?

Finally, we have the litigation process that I want to discuss at length today, the small claims process. Wis. Stats. ch. 799 governs small claims procedures and provides in relevant part as follows:

799.01. Applicability of chapter

(1) Exclusive use of small claims procedure. Except as provided in [ss. 799.02\(1\)](#) and [799.21\(4\)](#) and except as provided under sub. (2), the procedure in this chapter is the exclusive procedure to be used in circuit court in the following actions:

(a) Eviction actions.

(am) Return of earnest money.

(b) Forfeitures. Actions to recover forfeitures except as a different procedure is prescribed in chs. 23, 66, 345 and 778, or elsewhere, and such different procedures shall apply equally to the state, a county or a municipality regardless of any limitation contained therein.

(c) Replevins.

(cm) Arbitration.

(d) Other civil actions. Other civil actions where the amount claimed is \$5,000 or less,

So, there are two important things to draw from the statute at this point in time: that small claims is not the exclusive remedy available for a forfeiture action but that it is an available process and secondly, you are not limited in your forfeiture actions to a forfeiture of \$5,000., there is no dollar limit on forfeitures in small claims actions.

So what are some of the advantages and disadvantages of going the small claims route? It is a very simple process in the sense that there is a statewide one page form that is used by the courts and the clerk of courts office for the summons and complaint. The form can be added to by simply checking a box that states there is additional material attached. It is much simpler to complete than the long form complaint but allows for more information to be set forth in the complaint than does a citation. It does currently cost \$84.00 to file, which you will only recover if in fact you win the case and the defendant ultimately pays. This can be compared to, no cost for filing a citation and the several hundred dollars for filing a long form complaint with the clerk of courts office. The clerk of courts will have a local rule on serving the small claims complaint on the defendant, but that usually entails the clerks office mailing the complaint to the defendant and that being adequate service - this is a significant advantage to the small claims process. The case will make it through the legal system, usually about as fast as the citation process, but you typically encounter less pressure to settle and are scheduled for more court time when the hearing comes up.

Another huge advantage to the small claims procedure is what happens after you win your case. With both the

citation and long form complaint process you end up with a monetary judgment that you are stuck trying to collect. With the small claims process, the law is designed to help you collect the judgment. We will flesh that out a little bit later

Every county has their own process for dealing with small claims, some will require the parties to be ready to proceed to trial immediately after the defendant enters a not guilty plea, but those counties are in the minority, the common practice across the state is to schedule the case for trial if and when the defendant pleads not guilty (some courts schedule a pretrial - explain). The idiosyncrasies of your county will impact the attractiveness of this process.

Okay, so now you have some idea as to why Wood County utilizes the small claims process, lets go through that process and the forms that are built in to it.

Step #1 After it is ascertained that a property owner or the person controlling the property, whichever is applicable under the regulation you are seeking to enforce, is maintaining the property in violation of your regulation, you, as the enforcement officer, need to communicate this to the subject. Whether that is done orally or not, a written communication should go out to the subject. The Notice of Violation should, at a minimum, notify the subject:

- who you are
- what the law provides
- how they violated the law

- what you want them to do
- how long they have to comply
- and what will happen if they do not timely comply with your directive

In Wood County, our enforcement personnel have taken to also advising the property owners in this first written notice, at least in certain cases, that they will be sued unless they agree to settle the matter outside of court. Form #1, which you have in your materials, contains that type of notice. Presently this notice has been used only for property owners who fail to timely report the maintenance of their holding tank system. Duane has found that the form has generated a very high response and compliance level and is therefore looking to expand its use to other types of violations.

Step #2 If the subject of the matter, lets call him the property owner, even though that might not always be the case, if the property owner is interested in settling the matter outside of court, in response to receiving Form #1, our enforcement officer prepares and sends to the property owner the cover letter and agreement designated as Form #2: Out of Court Agreement and Cover Letter. The cover letter advises the property owner how much time he has to sign and return the agreement. The agreement, designated as Form #2.A, simply makes clear that it is an agreement entered into by the parties outside of court and what each party will do and when. (The last clause and signatory provision that we have on our form is not necessary, it just adds a little more formality to the document.) If the Out of

Court Agreement is signed and returned by the property owner, then the matter is not referred on to the corp. counsel, unless the subject fails to comply with the terms. In that scenario, the enforcement officer would notify the prosecutor/corp. counsel of what the subject failed to do so that the corp. counsel can commence his or her role in prosecuting the case. Likewise, if the property owner fails to sign the Out of Court Agreement, the enforcement agent refers the case on to the prosecutor/corp. counsel to pursue the matter.

Step #3 When my office receives a referral from our code enforcer that they want us to prosecute a person for failing to comply with an ordinance, whether the code enforcer has used Form #1 or just an old fashioned notice to comply with the law by such-and-such a date or else communication, then my office will either send out a last chance letter or we will immediately commence litigation. The decision on whether to send a last chance letter or go immediately to litigation is a decision that is made by the enforcement officer and it is reflected in the notice they have already sent out. In other words, if the enforcement officer states in his notice to the property owner that if they do not comply with the initial warning, then the matter will be referred to the corp. counsel's office, then we do a last chance letter from my office. If, on the other hand, the enforcement officer's warning letter states that the property owner must comply with the order or else they will be sued, then I forgo a warning letter from my office and simply start suit upon referral.

If my office does send out a last chance letter, it

typically looks something like Form #3. It advises what must be done and by when. It also advises the recipient that there will be court costs involved in litigation that they will be ultimately responsible for.

Step #4 is the commencement of litigation. If the property owner has failed to comply with my last chance letter or if no last chance letter was sent as the code enforcer wanted me to proceed simply to litigation, then in those situations, we sue. For the reasons discussed earlier, Wood County typically uses the small claims process, in lieu of a citation process or the long form complaint method. Form #4 in your materials is the small claims summons and complaint form that was developed by the state records and forms board and can be utilized in any county in the state.

In my office, the enforcement officer decides what amount of forfeiture they want. I will give input if I think they are too low. My preference is to go on the high side, it gets the defendant's attention and it encourages settlement by the defendant. So, my secretary fills out the form, inserting the defendant property owner's address, the amount of the requested forfeiture in the space after the dollar sign and then she checks the money box. In so far as the "Brief statement of dates and facts," we attach a form that will identify the defendant as the owner of the subject property, what the law provides - which we usually quote - and then the facts that support our allegation that the defendant violated the law. Although it is not necessary and technically is not relevant, our office also includes in the complaint a statement on what notices have been provided

to the defendant concerning the illegal activity. This puts the judge in the right frame of mind if and when the case gets to trial, because at a trial, the judge is going to start by reading the allegations in the complaint to himself and then will see that the defendant was given notice to correct the situation and apparently didn't. So the judge is going to start the case thinking that the defendant was given a chance to comply with the law but didn't and now I, the judge, have to waste my time, to deal with this situation.

Your corp. counsel's office will work with the clerk of courts office in identifying what time and date should be inserted in the "When to Appear" box.

In the materials provided to you, you will find Forms #4A , #4B and #4C; these are the types of standardized attachments that are used with small claims complaints. We develop these types of formats for ease in drafting complaints. You and your counsel may have already done the same with respect to the types of violations that you prosecute. In any event, this is the type of information that I suggest go into the complaint portion of a small claims summons and complaint form.

Step #5 If prior to the trial, including before, at or after the first appearance date a/k/a the return date (on the summons and complaint, in the "When to Appear" box), the defendant agrees to have judgment taken against him in the full amount sought in the complaint or for a lesser amount agreed to by the parties, then a consent to judgment can be used. Included in your materials and labeled as Form #5 is a "Consent to Judgment" form. The consent to

judgment is typically used when the defendant agrees to have judgment taken against him but does not have the ability to immediately pay the judgment amount.

Step #6 If, on the other hand, the defendant wants to settle the case and has the ability to pay the forfeiture, and a forfeiture is all we are seeking, then we will accept payment and in exchange for that payment, we will execute a stipulation and order dismissing the case. There are two types of such documents: one is where the defendant has not made an appearance in the case yet, either personally or in writing. In that scenario, Form #6 can be used. If the defendant has personally appeared for the return date or has filed an answer with the court or is represented by an attorney who has filed any written document with the court, then Form #6.A should be used. Your attorney may have different versions of these forms.

Step #7 If the defendant fails to appear at the trial, the court will grant the county a default judgment. The clerk of courts office will typically prepare and disseminate the default judgment. Some small claims courts require the plaintiff to file with the court an Affidavit of Nonmilitary Service before a default judgment will be granted. In your materials at Form #7 is an Affidavit of Nonmilitary service that was prepared by the state's Records Retention and Forms Board which can be used in any county in the state. Since you may be asked to complete this form, I have included the instruction sheet with it, which is labeled Form #7.A. When a case is pursued using a citation process, then the Affidavit of Nonmilitary Service is not required.

Your attorney will know or verify that the clerk of courts office will prepare the default judgment. If the clerks office doesn't do this, then your attorney will. The other thing that your counsel will need to verify is that whenever judgment is taken, that the clerk of courts actually docket the judgment. Docketing the judgment places it on record so that when the subject tries to sell any property he owns, he will need to pay the judgment in order to pass clear title to the property. (A satisfaction of judgment will also have to be provided to the defendant when he pays the judgment. The defendant will need to pay the clerk of courts to record the satisfaction, but that is his burden and expense. A judgment can be satisfied for less than full value.)

Step #8 If you (or your attorney) and the defendant agree to settle the case short of trial, but the defendant will have to do something that can not be immediately accomplished, like the installation of a code compliant septic system, then a different type of stipulation will need to be entered into. In your materials and identified as Form #8 is an example of one such type of stipulation. This stipulation allows that the case be dismissed as the defendant has agreed to do certain things, which are listed thereon.

Step #9 If the defendant fails to comply with the terms of this type of stipulation and order of dismissal, then your attorney can file an ex parte motion with the court to have the case reopened and judgment granted in the full amount sought in the small claims complaint. (Explain the concept of an ex parte motion.) Form #9 is a version of an ex parte motion that we have used for years. You can

expect the judge to sign this judgment without any further notice or hearing. (The same issue of docketing the judgment that we just reviewed applies here and your counsel will follow up on this.)

Step #10 Accompanying an ex parte motion to reopen a stipulated dismissal and to grant judgment as initially sought in the small claims complaint, there needs to be an affidavit. Typically, the affidavit would be signed by the enforcement officer. A sample affidavit is in your materials and labeled as Form #10. It basically recites what the defendant agreed to do in the stipulation and that you have verified that the defendant has failed to comply with all of the terms of the stipulation.

Step #11 One of the biggest reasons that Wood County uses the small claims process for prosecuting our ordinance violations is the built in assistance you receive from the court system in collecting on the judgments.

Most of the judgments we take are from people who never showed up in the process, so they end up defaulting at the initial appearance/plea date/return date. So, if we obtained a judgment using a long form complaint or a citation, the judgment gets docketed, the same with the small claims judgment, but that is it. If you want to actually collect on the judgment, your attorney will have to go through a bit of effort to enforce the judgment. With the small claims process, though, once you get the judgment, the clerk of courts office is statutorily required (Section 799.26, Wis. Stats.) to send out to the judgment debtor (the defendant) a notice that within 15 days they must either

provide to the judgment creditor (you or your counsel) or to the clerk of courts office a completed financial disclosure statement unless they pay the judgment in full. If the defendant ignores this order, your counsel can notify the court of the fact and the court will issue an order requiring the defendant to show up in court to explain why he hasn't paid up or completed a financial disclosure statement. If the defendant fails to show for this hearing, and half of them do fail to show, then the court will issue a warrant for the defendant's arrest. The warrant will require law enforcement to detain and take the defendant to jail unless he pays the judgment in full or provides a financial disclosure statement. Although some defendants will send in a questionable financial disclosure statement, many don't bother and having a sheriff's deputy show up at there door or place of work really gets their attention.

If you take a look at Form #11, you will see that it is another form that can be used statewide and that it is a request for a hearing on contempt. This is the form that your attorney would use if in fact the defendant does not provide a financial disclosure statement or pay the judgment.

Wood County still ends up with cases where the defendant doesn't pay the judgment and we have to utilize standard collection procedures, such as garnishing wages and intercepting the judgment debtors taxes via (TRIP) the tax refund interception program. Yet, the use of the small claims procedures, in my experience is better designed than the citation process and the long form complaint process to get the attention of the ordinance violator and to ultimately

get them to comply with the ordinance or to pay increasing forfeiture amounts.