

It's The Law



by Attorney Robert P. Rusch

Part 1 Timber trespass

Wisconsin's primary civil statute dealing with timber theft (more informally referred to as timber trespass) is Section 26.09 of Wisconsin Statutes or civil liability for unauthorized cutting, removal or transportation of raw forest products.

Wisconsin has long had statutes dealing with the unlawful cutting of another person's timber. In the year 2000, the Wisconsin legislature made massive changes to the law. The changes set higher penalties for the timber trespasser based upon the degree of his or her culpability.

The purpose of this article will be to provide an overview of the new law.

Background

The unlawful cutting of another person's trees, commonly referred to as timber trespass, is a problem older than the State of Wisconsin. There is a Wisconsin historical marker along Highway 70 noting the site where, when government surveyors first reached the location, they found that someone had already cut all of the trees and floated them downstream on the Chippewa River.

For years the Wisconsin legislature has wrestled with a host of issues touching upon timber trespass. One of the most vexing issues was how to make the wrongdoer responsible to pay for damages; what is the proper penalty for an innocent mistake versus intentional conduct?

I live in the Town of Rib Lake, which was founded by J.J. Kennedy. Kennedy was a self-made man and cut much of the virgin forest in Northeast Taylor County. He was once successfully sued for timber trespass. Rumor has it that when J.J. walked out of the Taylor County Courthouse he was heard to remark "it was still

cheap timber." In other words, even though the court had found J.J. responsible for timber trespass and he was forced to pay damages, Kennedy felt the timber trespass still netted him a healthy profit.

Section 26.09 now sets three different levels of penalties. The lowest penalty is designed for a timber trespasser who made "an honest mistake" and inadvertently cut across the boundary line. The highest penalties are reserved for cases of intentional theft or egregiously careless cutting.

Civil vs. criminal law issues

Bear in mind that Section 26.09 provides for a civil lawsuit. A civil lawsuit is brought by a private party or by his or her privately hired attorney.

Under special circumstances, a timber trespasser may also be prosecuted in a criminal lawsuit. Criminal actions are brought by the District Attorney of the county in which the unlawful cutting took place. A criminal defendant has a right to trial by jury and the jury must unanimously find the defendant guilty beyond all reasonable doubt before any penalties may be imposed.

The likely criminal statute would be theft or receiving stolen property. That statute is either a felony or a misdemeanor based upon the value of the stolen objects. In all criminal actions, the convicted defendant is subject to being fined or jailed/imprisoned. In addition, the court may order restitution (that is, money damages) to be paid by the defendant to the victim (landowner).

The criminal statutes of theft or receiving stolen property require the state to prove that the wrongdoer engaged in conduct in which the wrongdoer knew that what the wrongdoer was doing was wrong. For this reason a District Attorney will only prosecute a case of timber trespass in those rare cases where there is evidence that the wrongdoer had no basis for claiming an "honest mistake."

Section 26.05(2) provides: "no person may cut, remove or transport raw forest products or direct the cutting, removal or transportation of raw forest products, without the consent of the owner." A person violating this statute is subject to a forfeiture of not less than \$100 nor more than \$10,000. A forfeiture action is a non-criminal lawsuit which can be commenced by Department of Natural Resources personnel, including conservation wardens, and are prosecuted by the local district attorney. Forfeitures are money damages paid to the state.

What does Section 26.09 say?

The statute itself should be carefully read and studied by woodland owners. I will attempt here only to comment on some of its provisions.

A. Definitions. Section 26.09(1b) defines certain key words used within the statute.

B. The defense of a written agreement. Section 26.09(2)(b) says:

"An owner may not recover damages under this subsection if the person harvesting the raw forest products or the person giving consent for the harvesting reasonably relied on a written agreement among adjacent owners...." (emphasis added)

The law is clearly attempting to get neighboring landowners to talk to one another before one cuts near the boundary line. The law provides that if you have entered into a written agreement prior to the cutting which identified the area to be cut and authorized the cutting, such a written agreement will serve as a defense as long as the cutter reasonably relied on the written agreement.

Let me give you an illustration of how this might work. Let's say that neighbors Jones and Schmidt own unsurveyed land but feel they know where the boundary line is but they do not want to incur the costs of paying for a survey. If Jones wants to cut near the boundary, he could walk the land with Schmidt and they could mark the proposed cut area by flagging or paint blazes. Jones and Schmidt could then enter into a written agreement in which Schmidt would say, among other things, that he acknowledges that Jones owns the trees within the marked area and he has no objection to Jones cutting and selling those trees.

If Jones then cut only within the marked area, Jones could advance the existence of the written contract as a defense if he were later sued by Schmidt if Schmidt, for example, later learned that the trees were, in fact, on Schmidt's property.

C. The damage staircase. Section 26.09(3) provides for either 1x, 2x, or 4x damages depending upon the degree of culpability on the part of the wrongdoer.

1. Single (1x) damages. Section 26.09(3)(b1) provides:

"A court shall award damages that equal the stumpage value of the raw forest products harvested if the person harvesting the raw forest products or the person giving consent for the harvesting

reasonably relied on a recorded survey that was done by a person that is registered as a land surveyor or who is issued a permit to practice land surveying under Section 443.06 even if the recorded survey is determined, after the harvesting, to be in error.” (emphasis added)

The law rewards a person who reasonably relied upon a properly prepared land survey provided two conditions exist:

- A. The survey was prepared before the cutting took place, and
- B. The cutter reasonably relied on the survey.

The statute itself does not define what is meant by the term reasonable reliance. The term reasonable reliance requires that the tree harvester¹ has a good faith basis to believe that the survey was accurate.

If, for example, it could be proved that the harvester had bribed a land surveyor to inaccurately show where a boundary line was as part of a fraudulent scheme by the harvester, the harvester could not then “reasonably rely” on the survey.

It is very important to note that the law holds a harvester responsible even for an honest mistake. You will note that the law did not say that a landowner reasonably relying on a survey paid no damages.

2. **Double damages (2x).** Section 26.09(3)(b)(2) provides:

“A court shall award damages that are equal to 2 times the stumpage value of the raw forest products harvested if a recorded survey was not relied upon as specified in sub. (1), but the person harvesting the raw forest products took reasonable precautions in identifying harvesting boundaries.”

In other words, the harvester has to pay double damages where there was no survey but the harvester took reasonable precautions to make up for the lack of a survey.

What are the reasonable precautions that will limit a harvester’s liability to only double damages? The answer to that question is set forth in Section 26.09(5): “...a person takes reasonable precautions if the person [harvester] does all of the following.”

1. Reviews land ownership records. This would include, for example, deeds recorded at the Register of Deeds

¹ I use the term tree harvester to refer to either the person actually cutting the trees or the person authorized to cut the trees. Section 26.09(b) defines “harvesting” to mean cutting, removing or transporting.

office. In addition, the harvester has the duty to seek out and review “...records, resources and documents include instruments of conveyance, certified survey maps, survey field notes and information of the land’s boundaries provided by the owners...of any land that abuts a proposed harvesting boundary.”

2. The harvester gets the benefits of paying only double damages where the harvester tried to accurately determine the “harvesting boundaries” by any of the following methods:

- Use of a compass or GPS. It is vital to read the actual statute. You will note, for example, that reliance on a GPS (Global Positioning System) is authorized by the statute only if “...the identification is conducted by a person trained in the method used and if the identification is based on an established survey corner...”

Unfortunately, the statute is ambiguous in places. For example, what constitutes sufficient training in GPS to render a GPS established boundary appropriate? The statute provides no answer.

3. **Quadruple damages (4x).** Section 26.09(3)(b)(3) provides: “A court shall award damages that are equal to 4 times the stumpage value or 2 times the fair market value of the raw forest products harvested, whichever is greater, if a recorded survey was not relied upon as specified in sub. (1) and the person harvesting the raw forest products did not take reasonable precautions in identifying the harvesting boundaries.” (emphasis added)

In other words, the law will really sock it to a person who had no survey and took no reasonable precautions to identify the harvesting boundaries.

Possible additional damages

Section 26.09(3) provides for the possibility of two other forms of damages being awarded to the victim. First, (3) provides that the court shall award the owner of raw forest products that were harvested without the consent of the owner “any economic damages resulting from that harvest.” The term economic damages would exclude things such as personal damages of the shock or emotional distress that the owner may have experienced in losing his or her beloved trees. But the term would include, for example, the diminished value of the land. For example, the cutting of shade or ornamental trees

next to a residence could vastly depreciate the fair market value of the residence.

Another form of economic damage could be restoration damages. The costs necessary to replace unlawfully cut trees can, sometimes, be ordered by a court. This is a complex issue of law and one which deserves a separate article. Suffice it here to say that in order to be awarded restoration damages, an injured party must present evidence of a personal reason to restore the land to its former condition and show that restoration is practical. (For more information, see *Threlfall v. Town of Muscoda*, 190 Wis.2d at 121, 139 N. 11, 527 N.W.2d 367 (Ct. App. 1994) and *Bill’s Distributing, Ltd. v. Cormican*, 256 Wis. 2d 142, 647 N.W.2d 908 (Ct. App. 2002).

Section 26.09(3)(d) also provides: “A court shall award other reasonable and necessary costs which may include costs for any of the following: 1) repair of damage to or clean up on the land...2) removal of slash...3) determining the fair market value, stumpage value or volume of raw forest products that were harvested², 4) determining the location of the property boundaries necessary for determining whether a violation occurred³, 5) preparing forest management or reforestation plans, 6) reforestation, 7) replanting.

Please note that these costs can really add up. These costs could far exceed stumpage value and the fair market value damages. This provision of the law demonstrates the intention of the legislature to try to make the wronged landowner whole; the law here seeks to have the innocent landowner fully reimbursed for all of the costs that the landowner experiences in both proving that timber trespass took place, and, trying to ameliorate the harm flowing from the unlawful cutting. 🌲

Watch for Part 2 in the summer issue

Attorney Robert P. Rusch is a woodland owner and charter member of WWOA. He has been a WWOA member since 1979, and served on the original board of directors. He received WWOA’s Special Recognition Award in 1995. His firm, Rusch and Rusch Law Office, S.C., specializes in woodland matters.

² This would include the reasonable costs of hiring a forester and/or an appraiser.

³ This would include the costs of hiring a surveyor.

It's The Law



by Attorney Robert P. Rusch

Part 2 Timber trespass

In the Spring issue, Robert Rusch discussed Wisconsin's statute dealing with timber theft. This is the second and concluding part of his article.

Legal costs

In the vast majority of civil lawsuits, courts apply what is routinely referred to as the American rule. Except for some token damages and legal fees, even the winning party in a lawsuit must pay his or her own attorney's fees. Just think about that for a second. In a typical lawsuit one can end up paying his or her attorney fees that exceed the amount of the damages recovered.

Section 26.09(4) addresses that issue by providing: "...the court shall award the successful party in a civil action brought under sub. (2) court costs and reasonable attorney's fees if the unsuccessful party, before the commencement of the action, unreasonably refused to pay a demand for damages or to accept an offer of payment for damages."

How does one determine whether or not an attorney's fee is reasonable? Answer: You submit it to the court and let the court decide.

To be eligible to be reimbursed for attorney's fees, two separate facts have to have occurred. First, you must have won the lawsuit. And, secondly, you must show that the unsuccessful litigant either "unreasonably refused to pay a demand for damages or to accept an offer of payment for damages."

Let's say that you are walking your back 40 and you are surprised to see fresh cutting and you think it has crossed the boundary onto your land. What should you do? You should consult with both an attorney and a forester. Have the forester and the attorney work together to prepare the written documents that will demonstrate

that timber trespass did occur and itemize all of the damages that you are entitled to. Your attorney should then submit that written material to the wrongdoer with a demand for payment. The ball has now been put into the hands of the wrongdoer.

If the wrongdoer under those circumstances "unreasonably refuses or neglects to pay a demand for damages," this failure—in the eyes of the law—made litigation necessary and forced you to sue; under those circumstances you are eligible for your actual, reasonable attorney's fees above and beyond all of the other damages.

Also, note this scenario. Let's say that you are a logger and you had just put a new man on the job and given him strict orders to stay within a marked harvest area; let's say you came back the next day and found that the new employee cut across the boundary line. The logger could then contact the injured party and offer to pay the injured party damages. If the injured party—under these circumstances—accepted the offer or negotiated a mutually acceptable new figure, no attorney's fees would be owed. On the other hand, if the injured party unreasonably refused the offer and held out for exorbitant and unjustified damages, that party loses his/her right to recoup attorney's fees.

In short, the law is designed to try to promote dispute settlement without litigation.

Other damage issues

- A. Section 26.09(6) caps certain damages: "an owner may not receive both payments under s. 26.06(3) and damages specified under sub. (3)(b) or (c) from the same person. An owner may not receive both payments under 26.05(3)(c) and the damages specified in sub. (3)(d)3." These statutes provide for certain costs to be recouped from the wrongdoer in actions brought by the state.
- B. Are double or quadruple damages "punitive damages"? Punitive damages are designed to punish the wrongdoer rather than make whole the innocent party. The typical insurance policy provides that the insurance company has no duty to pay "punitive damages" on behalf of its insured. In the case of *Hartman Cicero Mutual Insurance Company v. Elmer*⁴ the insurance company tried to avoid a claim; it argued

⁴ You can find this case at 122 Wis. 2d 481 or 363 N.W.2d 552; it is a 1984 decision of the Wisconsin Court of Appeals.

Thank you Robert!

Woodland Management and the WWOA Publications Committee thank Robert P. Rusch for his columns over the years. Robert served on the first WWOA Board of Directors, serving as secretary. He began writing for the magazine during WWOA's first year, generously answering questions of WWOA members and writing about laws that woodland owners often find confusing or have trouble with. He received WWOA's Special Recognition Award in 1995 in recognition of all of the assistance he has given to WWOA members. Readers will see on page 25 where the "It's The Law" column has been one of the most popular columns with WWOA members over the years. An index of Robert's columns was featured in the Fall, 2000 issue of *Woodland Management* magazine, page 11, along with an article by Jack Edson featuring Robert.

Robert Rusch is retiring in June and will no longer be writing his column. Fortunately other WWOA members who are also attorneys have volunteered to assist with future columns and we hope to keep WWOA members up-to-date on woodland laws. We wish Robert a wonderful retirement, and many years of enjoyment on his 200 acres of woodland in Taylor County. Thank you Robert! 🌲

that the double damages [2x damages] provided for under then section 26.09⁵ were punitive in nature and, therefore, the insurance company had no duty to cover the damages.

The Court of Appeals ruled: "We conclude that the language contained in the exclusionary provision of the [insurance] policy issued by Hartman is ambiguous for it does not expressly and unambiguously exclude coverage for statutory double damages under the terms of the policy. As the drafter of the policy, Hartman had the full opportunity to explain its terms and

⁵ This statute was a predecessor to the statute we currently have under discussion in this article, namely, section 26.09.


thus specifically excludes statutory double-multiple damages from coverage. A reasonable person in Elmer's⁶ position would have understood the insurance policy to cover any mistaken or accidental acts committed. In accordance with the canon of construction that requires exclusionary provisions to be construed most strongly against the insurer, we hold that the insurance policy does not exclude statutory double damages..." In short, the insurance company had to pay the double damages for its insured.

While we are discussing insurance, let me also provide another suggestion. If you are possibly involved in timber trespass, it is probably a good idea to contact your insurance company. If you are the wrongdoer, you could ask your insurance company to settle the case on your behalf. If you are the innocent, injured landowner, you could make your claim against either your insurance company and/or the wrongdoer. Bear in mind that the wrongdoer may go bankrupt or have no money to pay a judgment for damages. Your insurance company should not present those problems.

Nearly all insurance policies require an insured to give prompt notice by its insured to the insurance company. If you are thinking about the possibility of making a claim against your insurance company, notify the company. If you wait too long in notifying your insurance company of the existence of a claim or possible claim, you may forfeit your right to have the insurance company handle the issue and/or pay the claim.

Summary

The Wisconsin Statutes have been amended to give the victims of unauthorized tree cutting powerful legal rights. Unless the cutter and landowner entered into a written contract, anyone who cuts the trees of an owner without the consent of the owner must pay damages; an "honest mistake" regarding the boundary line is not a defense.

Both the innocent party and the wrongdoer may be able to recoup his/her actual, reasonable attorney's fees, provided he/she takes certain pre-litigation steps. 

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⁶ Elmer was the defendant in the lawsuit — Elmer had purchased the insurance policy and was the insured.



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