

Wisconsin Editorial Boards Agree

Remove Liability Provisions from State Budget

MILWAUKEE • WISCONSIN
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Uncivil fault finding – The Joint Finance Committee should strip joint and several liability issues from the budget. Existing law already compromises in favor of injured parties. . . This is simple unfair. *April 24, 2009*

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Gazette

Liability change could doom companies – The change would be yet another blow dealt out by Democrats in Madison to companies-perhaps even your employer-trying to survive in the economic downturn. *May 5, 2009*

Wisconsin State Journal

Block the return of lawsuit abuse – Legislators should strip from the state budget Gov. Jim Doyle's sneaky attempt to sweep away an important piece of liability law reform. At stake is who pays for damages when plaintiffs win lawsuits. Doyle's proposal risks costly consequences for businesses, consumers and taxpayers. *April 28, 2009*

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Keep policy issues out of state budget – Change in how negligence is assigned to parties in a civil damage suit . . . we don't think it should be part of the state budget bill. . . Whether a policy becomes state law should be determined by a separate vote of the Legislature, not because it was part of a state budget. *April 7, 2009*

LA CROSSE
Tribune

Get non-budget items out of the budget – They're important enough to the future of our state to be debated separately and openly, not as add-ons to a state budget that's being debated in the most economically challenging time in decades. In the case of joint and several liability standards, we're talking about changes that could have a significant impact on the business climate of Wisconsin. *March 25, 2009*

GREEN BAY PRESS-GAZETTE

Boot out budget's nonfiscal matters – Democratic leaders should remove nonfiscal policy items from the budget bill and send them as separate legislation to the appropriate committees. . . The budget is a big enough task for now; these other matters can wait a little longer. *April 10, 2009*

Friday, April 24, 2009

THE MILWAUKEE JOURNAL
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EDITORIALS

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CIVIL SUITS

Uncivil fault finding

The Joint Finance Committee should strip joint and several liability issues from the budget. Existing law already compromises in favor of injured parties.

Just as there are degrees of fault, there should be reasonable degrees of liability. This is the common-sense underpinning for current Wisconsin law that holds that a person or entity sued for causing injury can only be held fully liable if more than half at fault — 51% or more.

Gov. Jim Doyle proposes in his budget to reverse this law, established in 1995. Under his proposal, if you are at fault at all, you can be held 100% liable if the others at fault don't have any money to pay damages.

This is simply unfair.

The counterargument understandably commands sympathy. Why should an injured person be able to recoup only a fraction of the damage due him or her because no one defendant is more than half responsible and one or more of them has no money for damages?

Isn't it more just if the defendant is fully compensated and "wrongdoers" — as the president of the Wisconsin Association for Justice, a trial lawyers group, calls defendants — are left to sue each other to recoup what had to be paid?

This argument, however, would visit financial injury on a person or entity potentially only minimally responsible. And besides, the 51% figure arrived at in 1995 is already a compromise that works in favor of injured parties.

The trial lawyers argue that such cases — a single, minimally responsible defendant with deep pockets

amid multiple parties at fault — represent only about 13% of cases. We believe them. This, however, will not make it any more palatable for a defendant in that rare case who has to pay all damages when only minimally responsible.

The governor also proposes that this minimally responsible person be able to sue folks even less at fault than he is as long as everyone being sued is more at fault combined. Currently, he can sue only those more at fault. This, too, sets fairness on its head.

But we have no problem with another of the governor's proposal. He would allow juries to be apprised that how they determine fault can affect who is responsible. Business interests worry that juries sympathetic to injured parties will "adjust" their findings to get at least one defendant to that 51% figure. We believe this unfairly judges jurors' ability to arrive at fair decisions. This change would simply make the entire process more transparent from the beginning.

We editorialized earlier that the Joint Finance Committee should strip the joint-and-several liability issues from the budget as they are more about policy than fiscal matters, therefore deserving of stand-alone legislation. We still believe that. But if the committee doesn't strip these items, it should reject them outright. And if they get to the floor in a budget bill, legislators should amend the bill to delete the items.

Janesville Gazette

8A • Tuesday, May 5, 2009

OPINION

OUR VIEWS

Liability change could doom companies

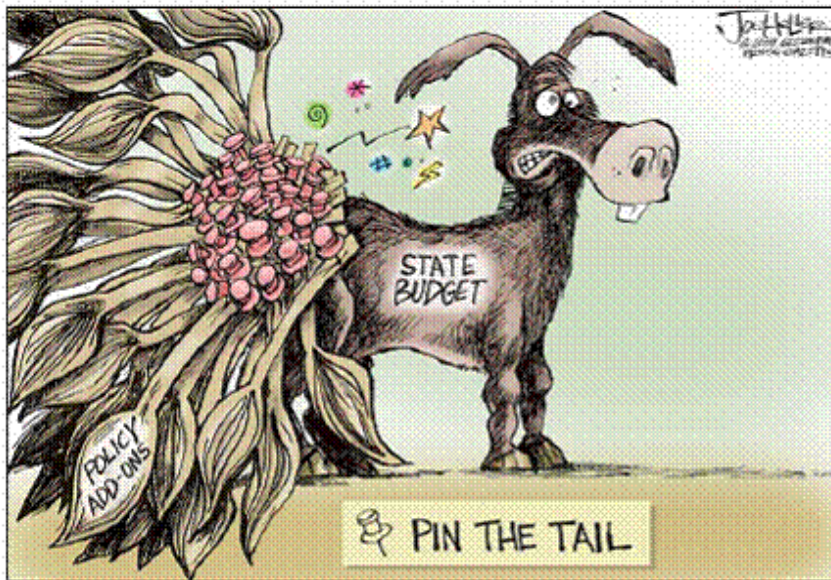
Imagine you invest your nest egg to open a small business downtown. You're having a sale and erect a sidewalk sign as permitted by city ordinance.

A speeding auto accidentally strikes and injures a pedestrian near your store. The victim sues the driver for \$3 million and names you in the suit after learning that your sign distracted the motorist.

You breathe a sigh of relief when the jury finds the driver 99 percent at fault and you just 1 percent to blame. But the driver has few assets and only \$100,000 in insurance. The judge says you owe \$2.9 million, even though your store's insurance coverage is only \$500,000. You'll have to sell the shop to pay the verdict.

Or consider this scenario. A drunken driver swerves off the road and hits a tree on your property, killing his buddy. The friend's family wants to sue for \$5 million, but because the driver is uninsured, the family goes after you for that amount.

In either case, you



would be stunned, of course. How can this be?

Such scenarios could play out if lawmakers don't strip what's known as joint and several liability from Gov. Jim Doyle's budget proposal.

"I feel it is a giant step backward in Wisconsin law," says Jim Viney, president and CEO of Sugar Creek Mutual Insurance in Elkhorn. "I am personally opposed to the change.

"I support personal responsibility," Viney wrote in an e-mail to the

Gazette, "but this seems to favor transferring responsibility not based on respective liability but on assets or insurance coverage."

Two decades ago, a defendant in a lawsuit might have had to pay the entire amount if found at least 1 percent at fault. In 1995, Wisconsin joined most states in reform. The Legislature changed the law to require a defendant to be at least 51 percent guilty before being on the hook for all damages.

Doyle believes his change would protect consumers.

The Wisconsin Civil Justice Council has a different view. In a news release, the council said Doyle's change also would rig the system to give juries a roadmap to maximize payouts from deep pockets—anyone with a business, farm, home or adequate insurance.

"The trial lawyers are already trying to cash in on Gov. Doyle's budget gift," council spokesman

Bob Fassbender says. "Hurting Wisconsin's economy through an explosion of lawsuits is just good business for the trial lawyers."

Bill Smith, state director of the National Federation of Independent Business, agrees. "These changes would result in more lawsuits, targeting more people, businesses, charities and anyone with money or insurance," Smith said in the news release. "And it appears Wisconsin's wealthiest trial lawyers have wasted no time in trying to cash in."

The council cites the Lake Geneva personal injury attorneys of Habush, Habush & Rottier as one such company salivating over Doyle's proposal.

The change would be yet another blow dealt out by Democrats in Madison to companies—perhaps even your employer—trying to survive in this economic downturn.

This is another policy issue the Joint Finance Committee should strike from the budget bill. If it doesn't, the Senate or Assembly should do so.

OPINION

"Wisconsin's independent voice"

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OUR OPINION

Block the return of lawsuit abuse

Legislators should strip from the state budget Gov. Jim Doyle's sneaky attempt to sweep away an important piece of liability law reform.

At stake is who pays for damages when plaintiffs win lawsuits. Doyle's proposal risks costly consequences for businesses, consumers and taxpayers.

The State Journal editorial board has already noted that Doyle's budget contains dozens of policy changes that have no fiscal impact. Including these non-fiscal items in the budget is a common political trick, employed to push through changes without exposing them to separate debate.

We have called for the Legislature's budget committee to strip these matters from the budget so they can be considered on their own merits.

That call applies to the liability law proposal.

But while some policy matters from the budget deserve to be passed on their own merits — such as the proposed statewide ban on smoking in bars and restaurants — the liability law plan should be stopped dead in its tracks.

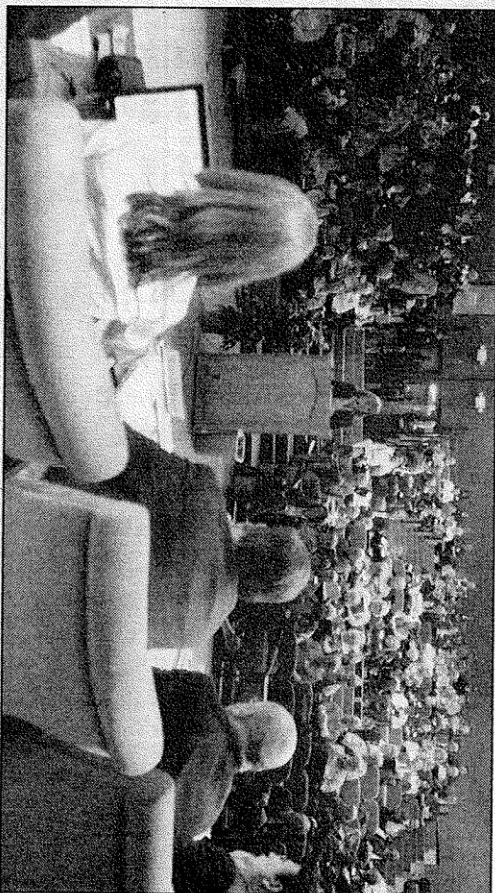
Lawmakers should reject Gov. Jim Doyle's plan to roll back an important piece of liability law reform.

Doyle proposes to roll back a liability law reform passed by the Legislature in 1995.

Until 1995, Wisconsin provided for joint and several liability. Under this system, each defendant in a lawsuit could be held liable to pay the entire amount of the damages, regardless of the degree of fault, as long as the defendant was found at least 1 percent at fault.

Joint and several liability produced some infamous results. In a 1991

Milwaukee case, a driver with faulty brakes struck and killed a boy in a school crosswalk. The crossing guard was found 1 percent at fault for failing to prevent the accident. But because the city, as the crossing guard's employer, was the only solvent defendant, the city was stuck paying 100 percent of the damages.



MARK HERTZBERG - Racine Journal Times

The Legislature's budget committee members, seated with backs to camera, listen to public opinion on Gov. Jim Doyle's state budget plan at a hearing in Racine last month. Tucked into the budget are several dozen non-fiscal policy changes, including a rollback of liability law reform.

Joint and several liability proved to be not only unfair but also costly as businesses and government units were hit with damage awards that raised insurance rates.

The expense was passed on to consumers and taxpayers.

That's why Wisconsin joined most other states in reform. Wisconsin now

requires a defendant to be at least 51 percent at fault before being held liable for all damages.

The reformed system remains fair to injured parties without being unfair to defendants who deserve almost no blame.

The state should keep that system. The governor's plan should be rejected.

The Sheboygan Press

The Sheboygan Press

April 7, 2009

Editorial: Keep policy issues out of state budget

We've been critical of Congress for slipping billions of dollars worth of pork barrel spending into non-related bills.

This is not only a tremendous waste of taxpayers' money, but also the worst way to handle it, too. We've often said that spending and policy items should stand or fall on their own merits — not get passed only because they were tacked onto something else.

It's pretty much the same thing when a governor loads up the state budget with what are policy issues that are unrelated to spending on state government operations.

There are dozens of these items in the biennial budget proposed last month by Gov. Jim Doyle.

Right up there at the top is a statewide ban on smoking in the workplace, including bars and restaurants. We've long been in favor of the smoking ban, but we don't think it should be part of the state budget bill.

Neither should:

- A requirement that all motorists carry a minimum level of liability insurance.
- A proposal giving all members of the University of Wisconsin faculty the right to form collective bargaining units.
- A proposal that would require developers who receive public financing to pay prevailing wages on their private projects.
- A proposal to collect data on traffic stops to check for racial profiling — although the governor's office said the provision to keep the data secret was a mistake.
- A change in how negligence is assigned to parties in a civil damage suit.

Giving legal status to domestic partnerships between two unmarried people by allowing county clerks to issue "declarations of domestic partnership," similar to a marriage license.

Gov. Doyle isn't the first governor to use the state budget to get non-budget issues passed, nor will he be the last. Lawmakers, too, are guilty of trying to use the budget to get pet projects passed. In the last budget, Senate Democrats inserted a massive state-run health insurance program into the budget. Thankfully, it was removed, but its presence probably contributed to the budget being more than four months late in getting passed.

What Gov. Doyle has proposed outside of government spending are some pretty substantive items and should be fully explored by committees and be further explored through public hearings. This usually doesn't happen when they are made part of the budget. Instead they become political volleyballs that are batted back and forth.

They also can be huge stumbling blocks to having a budget in place by the June 30 deadline and take time away from the task of deciding how the state spends taxpayer dollars.

Have the debate on smoking bans, domestic partnerships, mandatory liability insurance and the rest outside of the state budget.

Whether a policy becomes state law should be determined by a separate vote of the Legislature, not because it was part of a state budget.



March 25, 2009

Our view: Get non-budget items out of the budget

By Tribune editorial board

The Tribune — and every other newspaper in this country — gets a call, every day, from an interest group that wants to make its pitch.

Raise taxes.

Lower taxes.

Get tough on crime.

Decriminalize marijuana.

They're rarely slam dunks. Even the most unpopular ideas can be argued well and convincingly.

But we ran into a slam dunk the other day.

It's unclear at the moment whether Wisconsin's laws regarding joint and several liability are perfect.

According to the Wisconsin Law Journal, prior to 1995, joint and several liability was a common law rule that permitted a plaintiff to recover all of his damages from any defendant whose negligence caused injury. In 1995, joint and several liability was limited to defendants 51 percent or more causally negligent.

Is that change flawed? That's something we should debate.

And should Wisconsin's laws regarding automobile insurance be changed?

Maybe. Maybe not.

But what is clear is that these issues don't belong in the state budget proposal offered by

Gov. Jim Doyle. They're important enough to the future of our state to be debated separately and openly, not as add-ons to a state budget that's being debated in the most economically challenging time in decades.

In the case of joint and several liability standards, we're talking about changes that could have a significant impact on the business climate of Wisconsin.

In the case of automobile insurance, we're talking about changes that could change the market for insurance from the bottom end of the spectrum to the top.

Why are these items included in the budget proposal?

They're revenue neutral as far as state government is concerned.

The reason they're in the state budget is to shove them through without appropriate scrutiny.

That's not good for Wisconsin.

Automobile insurance consumers and business people in Wisconsin would do well to let their legislators know that they want these issues debated separately and openly.



Green Bay Press-Gazette: Editorial

April 10, 2009

Boot out budget's nonfiscal matters

The poet Robert Browning wrote that "a man's reach should exceed his grasp, or what's a heaven for?" He was talking about setting lofty goals in life, but the words spring to mind in plumbing the depths of Gov. Jim Doyle's 2009-2011 state budget plan.

The nonpartisan Legislative Fiscal Bureau sent lawmakers a memo Tuesday listing about 85 nonfiscal policy items loaded into Doyle's budget. The vast majority are provisions that exceed the grasp of a budget — they have no fiscal effect on the state and have failed to pass as separate legislation at least once.

Anyone who has followed the state political machine for any length of time has long ago grown weary of this back-door tactic to avoid the careful public scrutiny that many of these issues deserve — or to bypass the carefully considered public rejection of these issues.

Reminding a politician of the difference between campaign promises and actual performance is a common ploy. And so Republicans were eager this week to share a document from the 2002 campaign of Democratic Gov. Doyle.

Speaking of the process that led to the 2001-2003 state budget, Doyle's campaign wrote:

"Jim Doyle believes that the state budget is a powerful and important financial document, but should not be a political vehicle to hide hundreds of policy items that deserve separate consideration and debate. As governor, Doyle will veto all non-fiscal items in the budget to bring this process back under control."

It's easy to criticize the man who campaigned on those words for turning the 2009-2011 budget into a political vehicle to hide policy items. He was right seven years ago, and he's wrong now.

It's also easy to criticize the Republicans for similar political hypocrisy. Lawmakers from both sides of the aisle tend to condone this behavior when they hold the power, and they vociferously object when they're in the minority. But the fact that they were on the wrong side seven years ago doesn't justify inaction now.

After all, changes that have no fiscal impact on state government may have profound impact on the rest of us. A series of 10 adjustments in insurance law, for example, could raise many low-income families' insurance premiums astronomically, according to the Wisconsin Insurance Alliance.

Some of these items are worthy proposals. One is the statewide smoking ban, which has been held up for far too long by the Tavern League. The convenience of bypassing special-interest flak, however, is no justification for slipping non-budget items into the bill.

Democratic leaders should remove nonfiscal policy items from the budget bill and send them as separate legislation to the appropriate committees.

And Doyle should, as promised, veto any nonfiscal policy items that the Legislature inserts into the budget.

The budget is a big enough task for now; these other matters can wait a little longer.

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Founder 1882 1916-1963

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EDITORIALS

STATE BUDGET

Afraid of scrutiny?

Two items in particular in the governor's budget have more to do with policy than the state's finances. They should be treated as separate bills.

When legislators start affecting who is liable for what in lawsuits, the battle lines get drawn quickly. Think about insurance and business groups decrying staggering damages that encourage runaway litigation. Think trial lawyers thundering about justice for grievously injured defendants.

But it's inescapable that amid this rhetoric are real policy issues, affecting real people. That's why any legislation causing such changes should get the kind of full and proper vetting that generally accompanies stand-alone bills.

There are several such items in the governor's budget that the Legislature's Joint Finance Committee should strip from the document. And if their supporters think they can stand the scrutiny, they should submit them as separate pieces of legislation.

Unfortunately, the committee leaders — Rep. Mark Pocan (D-Madison) and Sen. Mark Miller (D-Monona) — said on Tuesday that they would allow some of these key measures to remain in the budget.

Among these is one dealing with joint and several liability. This has to do with the ability for injured parties to get full damages from one or more of defendants if other defendants don't have the money.

Another has to do with auto insurance provisions in the budget that would force motorists to maintain higher minimum liability coverage.

All sides make compelling points. Why, for instance, should an injured party (or the state through BadgerCare or Medicaid if this

person is low-income) have to bear the full cost of recovery while one or more of those who caused the injury skip out on any damages? Or, in the case of auto liability, is it worth the pain higher premiums will cause consumers?

We will, in a future editorial, weigh in on the worthiness (or lack thereof) of the governor's proposals. Our point today, however, is that because there are compelling points to be made on both sides, these are serious policy issues that demand an open and lively debate. They will likely not get it as part of a 1,700-page budget.

On Tuesday, the Legislative Fiscal Bureau listed these items among others in the Gov. Jim Doyle's budget as having no fiscal impact or whose policy implications may outweigh such impact. Joint Finance Committee chairs are nonetheless free to choose which ones remain in the budget. And we know that just because they're in for now doesn't mean that the committee chairs can't strip them later.

In the case of joint and several liability, there is fiscal cost but, in our eyes, the policy change is the true issue. It deserves a full vetting. And the auto insurance change affects so many people that, even if there is no state fiscal impact, there is enough personal impact to warrant full vetting outside the Joint Finance Committee.

Miller and Pocan should reconsider their inclusion in the budget. But if they balk, the committee should reject these items and direct them to other committees as stand-alone legislation.

Should joint and several liability and changes in auto insurance remain in the governor's budget? E-mail your opinion to jsedit@journalssentinel.com to be considered for publication as a letter to the editor. Please see letters guidelines.

Wisconsin State Journal

SAT., APR 11, 2009 - 9:19 AM

Pluck policy from state budget

A Wisconsin State Journal editorial

The easiest way to speed a controversial bill through the Wisconsin Legislature is to tuck it into the giant state budget -- even if it has no effect on state spending.

Gov. Jim Doyle's budget contains 80 such policy items, according to a report last week by the nonpartisan Legislative Fiscal Bureau.

They include such sweeping policy changes as:

- A statewide smoking ban in bars and restaurants.
- Permission for local governments to create regional transit authorities.
- A domestic partner registry.

The State Journal editorial board supports all three of these measures as well as others on the Fiscal Bureau's long list.

But none belongs in the state budget.

The Legislature's budget committee -- led by Sen. Mark Miller, D-Monona, and Rep. Mark Pocan, D-Madison -- should strip all 80 non-fiscal policy items out of the budget. That way, all of these proposals must stand or fall on their own merits in the light of day.

Like camouflage, the thick state budget can hide both desirable and dubious policy proposals from public scrutiny. Sneaking policy into the budget also protects lawmakers from taking tough votes.

And in the worst cases, policy is put in the budget as the only way to get it approved. It can become law even if it doesn't have anything close to majority support in both legislative houses.

The governor and every lawmaker knows this is wrong. And they've actually made progress toward clean budgets in recent years.

Doyle has stuck less policy into his budgets than his predecessors. And the Legislature's budget committee, split between Democrats and Republicans in recent years, has policed Doyle well. The committee has removed virtually all non-fiscal policy from the last three budgets.

But now that Democrats control the Assembly, Senate and governor's office, it appears the appetite for stealthy legislation is back.

The Legislature's budget committee is to begin voting on changes to the governor's budget this week. Miller and Pocan indicated in a memo last week that they intend to take out only half of the 80 policy items.

That's not good enough.

All 80 of the policy proposals -- even those the State Journal strongly agrees with -- should come out and stand as separate bills. Backpedaling on the progress made in recent years would be a terrible mistake.

Miller and Pocan need to show more respect for the democratic process and their constituents. Tell them this week to stop the sneaky budget games that undermine public respect and confidence in state decisions.



March 26, 2009

Editorial: Changes don't serve state budget's function

Gov. Jim Doyle's 2009-11 budget plan is beginning to look like an onion — the more people peel back the layers, the more tears are flowing.

More and more questions are arising about why certain policy changes are even in the budget — and why the governor didn't mention some of them in the first place.

- The Wisconsin Insurance Alliance lists 10 changes in the way automobile insurance is mandated — changes that don't affect state spending, but which the alliance says could increase rates 33-43 percent for low- and middle-income families that can only afford the most basic mandated coverage.
- The Wisconsin Civil Justice Council found basic changes in the way juries can assign fault in negligence cases — changes that, for practical purposes, make it possible for a plaintiff to collect damages even when he or she is more at fault than individual defendants.

Meeting this week with the Green Bay Press-Gazette editorial board, these two groups said they were blindsided by the governor, who didn't even mention these changes in his budget speech or the 94-page written summary of the budget.

At the very least, these matters should be introduced as separate bills, not snuck into the 1,743-page budget bill. As Andy Franken of the insurance group said, this is not the change voters mandated in November — "this is old-time, backroom politics."

Robert Fassbender of the Civil Justice Council said the changes in "contributory negligence" law repeal reforms that were passed in 1995 — as separate legislation.

"We'll take them on and fight on the merits of a bill, try and reach some consensus, but don't bury this in the budget," Fassbender said.

These matters join other longtime pet projects in Doyle's budget that bear little relationship to the tax-and-spending functions of a budget.

- As much as we support a statewide smoking ban, we're not sure it's a budget-related issue.
- The budget bill awards collective bargaining rights to University of Wisconsin System faculty — another issue that has languished without legislative approval for years.
- The budget bill establishes domestic partnerships between two unmarried people as a legal entity, and sets up a system where county clerks take applications and issue "declarations of domestic partnership," similar to the system of issuing marriage licenses.

Including these issues in the budget, rather than introducing them as separate bills, bypasses the full legislative hearing that the subjects deserve.

At some point, legislative leaders will decide which nonbudget policy items to remove from Doyle's budget. The answer ought to be "all of them," but these are five very good examples with which to start.

Each member of the Assembly and Senate who votes for the budget also should be prepared to defend every one of these items. It's not enough to say, "On balance, I could accept most of them and the budget had to be passed." By definition, the budget does not have to be passed with nonbudget items included.

Frankly, we could use a hand. The budget bill is long and complicated, and if the Legislature follows the law, by June 30 it will pass the bill and the governor will sign it. We have posted a link to the bill online; if you see something in it that raises more questions, let us know. Working together, perhaps we all can bring this under control.



Law firm gives a lot, gets a lot with Doyle

Posted: May. 10, 2009

Trial lawyers have been showing the love to Gov. **Jim Doyle** ever since he took statewide office, and now he is returning the affection.

Just consider **Habush, Habush & Rottier**, the biggest personal-injury firm in the state. Over the past 15 years, Habush staffers and their spouses made more than 160 donations totaling a staggering \$245,500 to Doyle's campaign fund.

You don't give that kind of money without expecting something in return.

Then take a look at the provision in the current budget proposal that would change the liability rules in personal injury cases.

Right now, those sued for injuring somebody else would have to pay all of that person's medical expenses only if they are determined to be more than half at fault - 51% or more. Under Doyle's plan, somebody might have to cover the full amount even if he is as little as 1% responsible in some cases.

For example, you are in a multi-car accident and found to be only slightly responsible for what happened. Doyle's plan would mean that your insurance might have to pick up the entire cost for another's injury if you were the only one in the wreck with enough money or insurance to pay damages.

In short, the change would make it easier to collect more money for plaintiffs. And more money for plaintiffs means more money for their lawyers, who usually get up to a third of any judgment or settlement.

"Anybody who understands this provision knows it's a trial lawyer's bonanza," said Robert Fassbender of the **Wisconsin Civil Justice Council**, a business group opposing the recommended change.

The governor's office was much, much too busy last week to return calls regarding the legislation and Doyle's ties to the plaintiffs' bar. **Mark Thomsen**, head of the trial lawyers' lobbying arm, has defended the provision as pro-consumer because it would make it less likely that innocent victims have to pay the cost for their injuries.

Besides, Thomsen has said, just a small fraction of personal injury cases would be affected by the legislation.

But if that's the message, somebody forgot to tell the folks at Habush.

To them, the Doyle plan would mean big changes.

In a blog posting on the Habush Web site earlier this year, the law firm touted the budget proposal under the headline: "Liability may become easier to prove."

"Instead of proving a majority of fault, victims will only have to prove that the fault is there in order to hold the defendant liable," said the item posted Feb. 25. "If this is signed into law, liability cases will change a great deal."

The blog then asks any potential client to give a call to Habush's Lake Geneva office.

In recent days, the item has been scrubbed from the law firm's site - after Fassbender's group turned it up. But as any pol knows, nothing ever truly disappears from cyberspace. **No Quarter** was still able to locate a cached version of Habush's blog item the other day.

Christopher Duesing, a lawyer in Habush's Lake Geneva office, said last week that he didn't even know about the posting. He vowed to get those running the blog to return a call. That never happened. Likewise, the firm's namesake, **Robert Habush**, was unavailable.

Fassbender said Friday that he is sure that Habush's team was trying to destroy the online evidence. But that, he said, is not surprising.

"Habush's position for marketing was 180 degrees different from their association's official position," Fassbender said.

OK, that might be overstating it.

But still, the two positions are distinct enough that swiveling too quickly between them could give the plaintiffs' bar a severe case of political whiplash - and, no doubt, grounds for future litigation.

Tongue lashing

When you've rightly earned the nickname "Snarlin' Marlin," it's probably not a good idea to start lecturing people about incivility.

But that's what state Rep. **Marlin Schneider** was planning to do.

In a recent e-mail to all of his legislative colleagues, the Wisconsin Rapids Democrat asked for help in putting together a piece on the subject.

"The uncivil state of political discourse in these times I alluded to earlier . . . has got me thinking that I'd like to write my monthly newspaper column on the topic," Schneider wrote last month. "Have any of you received recent correspondence that exemplifies this phenomenon?"

Within minutes, a staffer for state Sen. **Alberta Darling** fired back two nasty notes that his office had received in the past.

The first, written in 2005, was entitled "my final wishes":

"If I am ever found to be in a persistent vegetative state, void of all brain function, it is my profound wish that my loving wife, should I be fortunate (enough to) find another, with the support of my friends, prevent me from becoming a Republican leader in Congress."

The second, sent to all Wisconsin lawmakers just before Christmas 2003, was a lengthy rant about the supposedly contradictory things Republicans believe on such issues as Iraq, former President **Bill Clinton** and talk-show host **Rush Limbaugh**.

For instance, it said, Republicans think "being a drug addict is a moral failing and a crime, unless you're a conservative radio host. Then it's an illness and you need our prayers."

The author of these nasty-grams?

You got it: Snarlin' Marlin.

"I just never deleted them," said **Jay Risch**, the aide to Darling, a River Hills Republican. "Turns out it came in handy when a guy who routinely torches Republicans via e-mail then asks us to send him examples of uncivil e-mails."

But Schneider took the response in good humor.

"I guess what goes around comes around, huh?" he replied a day later to Risch.

Business Issues John Torinus

Liability change could send ski areas downhill

Jim and Kim Engel run the Sunburst Ski Area in Kewaskum, and they are upset. Jonathan Barry runs Tyrol Basin, and he is apoplectic.

Their major-league heartburn has been caused by the push by Wisconsin trial lawyers and their allies in the Democratic Party to change the game on legal liability. Since skiing is inherently a risky sport, the state's ski industry is perhaps the best example of what the changed rules mean for businesses.

They make the plausible case that their plight under the proposed changes would affect the rest of tourism and hospitality industries in the state and even business across the board.

At the heart of the dispute are the 1% and 51% rules. Under the existing law, adopted by relatively bipartisan votes in both houses after a long debate in 1995, only a party with 51% or more of the responsibility for an accident could be held liable for 100% of the damage award.

If a party is less than 51% responsible under present law, it pays only that percentage of the damages. If the business is 20% at fault, it pays 20% of the damages.

Under the proposed change, buried in the gargantuan budget bill, the burden could shift to anyone with 1% of the responsibility for the accident.

So, if I'm a skier, and I'm skiing at very high speed, intoxicated, and I hit another skier, I'm probably 99% at fault. If I have no insurance or money, the lawyers for the innocent skier can go after the deep pockets instead. They can sue the ski hill operator for 100% of the damages, even though the ski hill operator has only 1% responsibility for what happened.

Doesn't seem fair, does it?

But trial lawyers would be able to use the proposed rule to leverage out-of-court settlements from ski hill operators who don't want to take the chance of 100% damages if they go in front of a jury.

The damage to the operators could occur even before there is an accident next winter. The Engels and Barry say there are only two insurance brokers in the country that place casualty insurance for the ski industry and only a half-dozen insurance companies that will write the business.

They are afraid they will be unable to even get insurance if the proposed law passes. "We know we will be faced with a large number of frivolous lawsuits," Jim Engel said. That prospect may scare insurers away from covering the 32 ski areas in Wisconsin.

Before the 1995 reform, insurance cost about \$6 for each ski ticket, Barry said. It is now running about \$2.85 per ticket.

Either the failure to obtain insurance or the increase in the ticket prices could cause Tyrol Basin to close, Barry said.

There is an economic development dimension to the debate. Engel said the state's ski areas employ 4,500 people during the season, including about 200 full-timers. These businesses take pride in giving high school students their first jobs and job training.

Skiers at Tyrol Basin drive about \$2.5 million in economic activity, Barry said.

Their case is strong enough that it at least deserves a separate debate in the Legislature.

Burying the liability change in the budget bill is a sneaky way to do business. It has little, if anything, to do with the state budget.

John Torinus is chairman of Serigraph Inc. of West Bend. Contact him at torcolumn@serigraph.com.

Milwaukee Journal Sentinel

Doyle leading state back to judicial hell: Opinion

Mar. 5, 2009

Any kid who's broken a window understands joint and several liability and why Gov. Jim Doyle is doing something dumb and underhanded.

OK, you and the guys are hitting a ball. It goes through a neighbor's window. By the time old Mr. Grumpquist storms out, the other kids have fled while you, petrified, are left to be jointly and severally liable - that is, holding the bat.

It's less of a chuckle once lawyers get involved, so in 1995, Wisconsin reformed lawsuits. For the past decade, Wisconsin has said that each losing defendant is responsible for paying as much of the damages as he is at fault for. This is about to change back to the old standard, which was: Someone's got to pay, and you've got money.

You'll find this on [page 1605 of Doyle's budget](#) now before the Legislature: "Any person found to be causally negligent whose percentage of causal negligence is equal to or greater than the negligence of the person recovering shall be jointly and severally liable."

That's how things used to be, and it means that defendants barely at fault can get stuck paying the whole bill. Take the 1991 Wisconsin case in which a driver failed to obey a stop sign and drove in front of a bus carrying the Burlington High School soccer team. One of his passengers was left needing lifelong care. The driver's insurance wasn't nearly enough to cover that, so inventive lawyers sued the bus company, which a jury found minimally at fault. Spooked, the bus company's insurer settled for \$1.9 million.

Such cases are rare. Joan T. Schmit, who teaches risk management at the University of Wisconsin-Madison, says sticking a slightly liable defendant with the entire bill, even where that's allowed, requires very particular circumstances. She feels businesses may be too afraid of it. Still, even if the risk is low, she says, "businesses know it's not zero, either."

That unpredictability "puts an element of fear in the hearts of small business owners," says Bill Smith, head of the Wisconsin chapter of the National Federation of Independent Business. So they insure more than they should have to. Paradoxically, that makes responsible, well-insured businesses even richer targets if the old regime returns.

Because even if losing is rare, cases often wouldn't get that far, argues Smith. "They're not being decided in the courtroom. They're being decided on the steps of the courthouse," when insurers or businesses settle to make it go away.

"From the business standpoint, it was cheaper to settle the whole thing than take it to trial," says Joanne Huelsman, the now-retired Republican state senator from Waukesha who sponsored the 1995 reform. A lawyer herself, she came up with the compromise that beat the argument for keeping the old system: that it's unfair if someone grievously injured can't collect just because those mainly responsible are broke. Huelsman's reform lets a defendant more than 51% liable for the problem get taken for the whole sum. But if he's, say, only 20% responsible, he pays only 20% of the damages.

Lawyers in the business of suing, however, have never liked Huelsman's compromise. The state bar and the plaintiffs' lawyers associations have long wanted things changed back - "We need to revisit the playing field," as one spokeshark put it - and now the stars have aligned.

What really changed is that the lawsuit lobby's party, the Democrats, now control all of Madison for the first time since reform. "I feel bad about it, but I'm not terribly surprised," says Huelsman. "The trial bar helped get the Democrats elected."

So the state is on the edge of doing something foolish - abandoning the reforms that many other states, and most in the Midwest, adopted in recent years. Just when you thought we were living down that "judicial hellhole" image, the governor seems ready to embrace it.

Another thing: On page 1588 of his budget, there's a bit saying courts shall explain to juries the effect that their findings of percentage of liability will have - "basically explaining how the lottery works," as Bob Fassbender, a lobbyist for businesses likely to be sued, puts it.

But the governor is doing this in an underhanded way, too. Did you hear him discuss this? Did he number it, on TV, among the budget's accomplishments? No. "It's buried in there," says Fassbender. "They must not be particularly proud of it."

But they, the governor and his party, are in charge. Schmit says it comes down to philosophy: Is it worse to unjustly make someone pay or to let a plaintiff go uncompensated?

The governor made his choice: To hell with justice; someone's going to pay big.

Milwaukee • Wisconsin

JOURNAL SENTINEL

'We will not only take our jobs but also jobs from our suppliers'

By [Patrick McIlheran](#) of the Journal Sentinel

May. 8, 2009

Gov. Jim Doyle budget-by-trickery game comes crashing down, now to the tune of [a \\$6.5 billion deficit](#). The gov is now talking about freezing some pay for some state workers (and for others only if unions agree, however). But still in his budget are the billions of dollars in tax increases and spending increases that were there when the deficit was only \$5 billion or so.

All that spending, the governor says, is just what's needed to keep our state great. Yeah? He hasn't convinced John C. Radke, which matters because Radke runs [Bio-Research](#), the kind of company the state would really like to hang onto, a little but growing high-tech outfit.

"Doesn't anyone in Madison understand basic economics 101?" Radke emails me. "Has the University of Wisconsin failed us? Unless they now pass a law that says no company can leave Wisconsin, what do they think is going to happen? Do you realize that even in this recession Indiana has a budget surplus? When I tell folks from other states (except California and New York) that we are facing a \$6,000,000,000 deficit, they can't believe it. I suspect that 6 billion is a number that people simply cannot comprehend."

He's trying, however. Radke sent a letter to the governor. It deserves wider circulation. Here it is:

"Dear Governor Doyle,

"I am a business owner in Wisconsin. My family has been here since 1835. The 'Sanford house' at Old World Wisconsin was built by my great, great grandfather in 1858. The current budget proposal is making me crazy! How can we go from a balanced budget in just a few years to a \$6,000,000,000 deficit? This is ludicrous! What are you thinking? You cannot reasonably expect to dump \$3 or \$4 Billions of new taxes onto already burdened businesses and consumers?

"If this budget passes as is, you can forget about attracting new jobs to the state of Wisconsin. It's not going to happen. Companies are leaving not coming to Wisconsin. BioResearch, founded in 1966, is currently surveying the other 43 more business friendly states and will almost certainly move to one of them if this budget passes intact. We will not only take our jobs, but also jobs from our suppliers in Wisconsin. We won't have to go far!

"How is it 'fair' that a person as little as 1% at fault could be forced to pay 100% of damages? Is it 'fair' for the party with the least level of fault to be forced to pay a party judged to be more at fault? Is it 'fair' for juries to be given biased instructions in deciding fault levels? Since none of these provisions have anything to do with balancing the state budget is it 'rational' to include them in the state budget? Please consider carefully before deciding on the correct answer to the above questions.

"For the economic health of the state of Wisconsin, I ask you to vote against any budget containing these lawsuit provisions and hey, what about a little restraint when it comes to spending?"

State budget insurance provision is bad for Wisconsin

Posted on April 09, 2009 5:57 AM

• By [Jim Tlusty](#)



Farmers, businesses and anyone who owns property will be threatened by increased lawsuit abuse under a provision in Governor Jim Doyle's budget.

Called "joint and several liability," the provision would require businesses or individuals to pay up to 100 percent of the cost of a lawsuit even if a jury says they were as little as 1 percent to blame.

Under present law, if you are found 1 percent at fault, you are responsible and liable to pay 1 percent of a judgment awarded to an injured party. The person that is 99 percent at fault has to pay their share. That's fair and reasonable. But a provision in the governor's budget proposal will change that.

Farmers could literally lose their farm and business owners might have to close their doors if they are a victim of this unfair proposal. This bill denies fairness and equity to those that have worked hard to build up a business or acquire property.

Support for this comes primarily from the trial lawyers. They argue that injured parties should be compensated for their injuries and loss. Yes, injured people should have the opportunity to sue and recover for their losses, but the money should come from the people that are responsible.

Under the governor's proposal, if the person that is mostly responsible for injuries has inadequate or no insurance, then the other party with insurance, property or assets will be forced to pay. Shifting the responsibility from those that are mostly at fault to those that have virtually no fault is unfair and punitive.

This provision, if it becomes law, could make a farmer or business owner responsible for 100 percent of the cost of someone else's action.

Of all businesses, farmers are among the most at risk from the lawsuit abuse the budget provision invites. Farmers may not make a lot of money. But, because they require a lot of land and equipment to make a living, they can be targets for the predatory lawsuit abuse this legislation encourages.

A plaintiff's attorney might argue that the farmer's large combine sitting along the roadside may have momentarily distracted a careless and speeding driver who then drove through a stop sign and severely injured someone. A jury may say the farmer is 1 percent at fault and award the injured party \$1 million. If the driver has inadequate, little or no insurance or assets, then the farmer is responsible for the balance of the jury award. After the farmer's insurance company pays its limit, then the farmer can start selling his land, machinery and cattle so that he can satisfy the judgment. This will put him out of business. Under current law, the farmer would have been responsible for only 1 percent, or \$10,000, and the farmer likely would have had insurance to cover that amount.

There are two ways to prevent this. One is to buy millions of dollars of liability insurance coverage. The other is to call your state senator and state assembly person and tell them you want this out of the budget.

This proposal is bad for farmers, bad for business, bad for people that have assets and bad for Wisconsin.

Jim Tlusty is president of the Wisconsin Association of Mutual Insurance Companies.

Line item in Doyle's budget would raise liabilities for businesses

Published [February 24, 2009](#) - *Money Weekly*

A line item in Wisconsin Gov. Jim Doyle's 2009-2011 state budget could drastically change the outcome of civil court cases in the state and may greatly endanger the state's small to medium sized businesses, opponents to the change say.

Doyle's budget would change the state's provision for joint and several liability, if it is signed into law. Current state law mandates that a defendant be found at least 51 percent at fault to be found liable. However, Doyle's budget proposes that a defendant, whether a corporation or individual resident, could be liable if they were found at least 1 percent liable.

"If you're a manufacturer of a bicycle and someone is injured on that bike... and if the (jury) finds the bike company 1 percent responsible, they can be required to pay 100 percent of damages," said Bob Fassbender, spokesman for the Wisconsin Civil Justice Council Inc. (WCJC). The council was formed to represent Wisconsin employers facing litigation.

"This (legislation) is after deep pockets – manufacturers and other businesses – which plaintiff lawyers will attempt to find, to find someone a little bit responsible so they can get those deep pockets into court and get a settlement," Fassbender said.

Bill Smith, state director of the National Federation of Independent Businesses (NFIB), said that if the state's provision for joint and several liability is changed, it will present two significant problems to the state's business community.

"This could make every Main Street business vulnerable to lawsuits and it destroys the predictability we want to have in our civil justice system," Smith said. "This restores unpredictability in our state – it puts every small business in jeopardy of being caught in a lawsuit."

The change will cause raise insurance premiums, both Smith and Andrew Franken, president of the Wisconsin Insurance Alliance, said.

"Back in 1995, a lot of changes were made that brought more sanity to our (legal) climate in Wisconsin," Franken said. "This turns the clock back, which will jeopardize every manufacturer, church or charity that will be subject to lawsuits that go down to one percent of occurrence."

The Wisconsin Association for Justice, formerly known as the Wisconsin Academy of Trial Lawyers, said the change will ensure that residents and their health insurance providers are not left without protection after a car accident or other damages.

"We are at a time in our history when we need to revisit the playing field with it comes to the rights of consumers," said Mark Thomsen, president of the association. "There have been a lot of changes made over the past couple of decades that have tipped the playing field against the consumer in many ways. This change in the law will help restore fairness in the law for consumers."

A Doyle administration spokeswoman agreed with Thomsen.

"The provision addresses a fairness issue by taking the burden of the costs to care for severely injured people off of society and onto the people at fault," said Carla Vigue, deputy press secretary with the Doyle administration.

Wisconsin Capital Times

Legislature set to change limits in personal injury cases

April 7, 2009

In 1995, with Gov. Tommy Thompson at the height of his popularity and a Republican majority in the Legislature, Wisconsin drastically changed its law to limit awards in personal injury cases.

Riding a national wave of "tort reform" -- spurred by lavish judgments such as the McDonald's coffee spill case -- and amid claims of "legal extortion" by trial attorneys seeking to win huge out-of-court settlements in product liability cases, a bill moved quickly to Thompson's desk.

With support of the insurance industry, doctors and business groups, Thompson signed the measure amid much fanfare.

Now, with Democrats firmly in control of the statehouse, Wisconsin is poised to roll back those 1995 changes in the name of protecting consumers and taxpayers.

A line item in Gov. Jim Doyle's 2009-2011 budget could drastically change the outcome of civil court cases in the state, including claims involving injuries in serious auto accidents. If signed into law, it would redefine the state's provision for "joint and several liability" -- a legal term where multiple parties can be deemed liable.

The existing law says a defendant must be at least 51 percent at fault to be found 100 percent liable in a lawsuit. But Doyle's budget proposes that a defendant, whether an individual or corporation, could be held liable even if only partly at fault for an accident, the same as before 1995.

"This is simply about the trial lawyers seeking out those who have the deepest pockets," said Bob Fassbender of the Wisconsin Civil Justice Council Inc., a coalition representing Wisconsin employers that was formed earlier this year to fight such legislation. "But it's going to have a chilling effect on the state's business climate at exactly the wrong time."

Fassbender gave an example where someone is injured in a bicycle crash. He warns if a jury finds the bike manufacturer just 1 percent responsible, the company and its insurer could be required to pay 100 percent of the damages.

"To any reasonable person, that just isn't fair," he said.

But those backing the Doyle budget initiative say returning to the pre-1995 law is needed to ensure that working people and consumers are adequately compensated when injured in an accident.

The Wisconsin Association for Justice, which represents trial lawyers, contends that the playing field has tipped too far in the wrong direction, leaving individuals and in many cases their health insurance providers picking up the costs for their injuries.

Groups supporting the change -- including Citizen Action of Wisconsin -- note that most property and casualty insurers in the state are sitting on healthy surpluses, including \$4.1 billion for American Family, \$510 million at West Bend Mutual and \$744 million at General Casualty (QBE).

"We've had years of windfall benefits going to liability insurers," said Mark Thomsen, president of the lawyers group. "It's time to start making those responsible pay their share."

Thomsen said when liability insurers don't pay to cover someone injured in an accident, those costs are eventually shifted to that person's health insurer. And in cases where the person doesn't have adequate health coverage, the costs ultimately fall upon the government through Medicare, BadgerCare or other public sector safety nets.

A spokeswoman for Gov. Doyle agreed with Thomsen.

"The provision addresses a fairness issue by taking the burden of the costs to care for severely injured people off of society and onto the people at fault," said Carla Vigue.

Whether those costs have been shifted remains open to debate. Andy Franken of the Wisconsin Insurance Alliance, an industry trade association, notes that the non-partisan fiscal bureau has said the provision would have little or no impact on Doyle's \$67.2 billion budget.

In addition, he said, the state's private sector health insurers have not been pushing for the change. "The fact that health insurers aren't supporting this shows how bogus the (cost-shifting) argument is," said Franken.

But Thomsen, an attorney with Cannon & Dunphy of Brookfield, recounts several cases where people were injured and were unable to recover their medical costs because of the changes made in 1995.

One case involved the 2006 explosion at the Falk Corp. plant in Milwaukee that killed three workers and injured 45 others, including Robert Kubiak.

Kubiak, who had to undergo nine surgeries related to injuries in the explosion, eventually sued the company owners. But Kubiak was unable to recover the cost of his medical bills, Thomsen said, because of technicalities in the law and the inability to determine that one party was 51 percent at fault.

"What we've done since 1995 is shift responsibility away from responsible parties to those who have been wronged," he said.

In either case, those opposing the Doyle provision say the issue should be debated as a separate piece of legislation rather than being "tucked" into the budget bill.

"All we're saying is let's have a full and open hearing on this and get input from the public," says Franken.

But Doyle spokeswoman Vigue says the issue does belong in the budget since the governor is trying to hold down Medicare and Medicaid costs in Wisconsin.

"People who are injured and can't cover the cost of their treatment usually end up in Medicare or Medicaid and those costs are pushed on to state taxpayers," she said.

Franken is not convinced. He says the only reason the issue is seeing the light of day is Doyle and the Democrats' long-standing ties to the legal profession.

"If the trial lawyers are so worried about consumers not getting fully compensated, let them drop their fees from one-third to one-tenth of any recovery," he said.