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Fine Print Reverses Trial Lawyer Amendment Budget Amendment Makes Liability Provision More Extreme

A Budget amendment developed behind closed doors and thought to be a compromise turns out to be created with smoke and mirrors. What appeared to be a ‘20% compromise’ is actually more extreme than the Governor proposed.

“Anyone who has ever been tricked by the fine print of a contract understands what was done at the Joint Finance Committee,” said Bill G. Smith, Director of the National Federation of Independent Business-Wisconsin. “The question is who was fooled and who was doing the fooling.”

The Governor buried a provision in the budget that allowed a party as little as 1% at fault to be forced to pay 100% of the damages in a civil suit as long as the party suing them was less at fault.

Joint Finance leaders emerged from backroom negotiations offering a ‘compromise’ that was said to allow a party 20% at fault to bear 100% of the claim. But, the fine print changed the calculation to maintain 100% liability for a party only 1% at fault.

“Even at 20%, Wisconsin would still have the most unfair liability law in the Midwest,” said Bob Fassbender of the Wisconsin Civil Justice Council. “Letting everyone believe they were going to 20% and adding language to keep it at 1% is the reason laws need to be made in the light of day.”

“Whoever was working behind those closed doors wasn’t content with keep the most extreme provision in the nation,” Fassbender added. “They made it worse.”

The provision that passed in a midnight debate could actually force a party 1% at fault to pay nearly 100% to a party with several times their fault. The only thing the 1% defendant would not have to pay is the actual liability of the party more at fault who is suing them.

“Imagine being 1% at fault and paying \$960,000 of a million dollar claim to a party 4% at fault,” said Smith. “That’s what late night, backroom policy in the budget gets you.”

“Every legislator who believed this amendment was some kind of compromise should demand that this confusing and misleading language be removed from the budget so it can be debated in the light of day with public participation,” said Smith.

Attached is a memo describing the Joint Finance amendment.



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Why the Joint Finance Changes are a Sham

On May 28, the Joint Committee on Finance amended Gov. Doyle's liability provisions contained in the State budget (AB 75) in a way only a trial lawyer could appreciate.

These changes are NOT a compromise; in fact, they worsen Gov. Doyle's budget provisions in a convoluted scheme that benefits only trial lawyers. These provisions create legal traps never before seen in Wisconsin and to say they merely revert to Wisconsin law prior to the 1995 reforms is false. Wisconsin citizens and businesses will be litigation targets in ways not seen in any other state.

The Joint Finance changes result in the following:

- A one-percent at fault defendant can still be forced to pay 100% of the damages.
- A less at fault defendant can be sued by an even more at fault plaintiff.
- Together the trial lawyers reach their nirvana – a business less at fault than those suing it could be jointly and severally liable.

These changes allow trial lawyers to cast a wide net to ensnare more litigation targets, including businesses in all sectors of Wisconsin's economy, as well as individuals, charities or anyone financially responsible enough to have savings, equity in homes or business buildings, insurance or otherwise have financial assets to make them "deep pocket" targets.

Joint & Several Liability. Anyone found to be 20% or more at fault can be held 100% responsible ("jointly and severally liable"). At that threshold, you would pay five times the level of your actual fault. Generally, existing law in Wisconsin and across the Midwest requires a person to be more than 50% at fault before he or she can be held responsible for 100% of damages. (See nearby chart)

But the Joint Finance changes render the so-called 20% compromise meaningless by giving the trial lawyers *carte blanche* to game the calculation.

How Wisconsin Compares to Other Midwest States

No Joint and Several Liability

(Pay percentage of fault)

Michigan
Indiana
Kansas
North Dakota

Limited Joint and Several Liability

(Requiring more than 50% fault)

Iowa
Minnesota
Ohio (only if intentional)
Missouri
Nebraska
South Dakota

Expanded Joint and Several Liability

(Pay 100% even if less than 50% at fault)

Illinois – 25% Threshold

Wisconsin – 20% False Threshold

In artful – but deceitful – drafting, the changes only allow those whom the trial lawyers pick to sue or settle with to be considered in the 20% calculation. That is, if they sue only a 1% deep pocket, that party is 100% at fault.

Combined Fault. A person or business that is less at fault than the plaintiff can be sued so long as the "combined" fault of all persons sued is equal to or greater than the plaintiff's. Existing law requires the plaintiff to be less at fault than each defendant he or she is suing.

Another trial lawyer tactic that was part of the Joint Finance changes was to add additional parties to the pool – those being parties who settled as well as third parties sued by the defendant. This destroys the concept of fairness behind the existing law that bars those more at fault from suing those less at fault. Notably, these third parties are included when it helps the trial lawyers, but are excluded for calculating the 20% threshold.

Jury Instructions. As in the original budget, a court must inform the jury how its findings on fault affect responsibility for damages; that is, to allow the jury to adjust fault determinations to maximize awards.

Case Analysis – How the Amended Liability Provisions Work

These changes made by Joint Finance are complicated, one-sided, and were probably misunderstood by many on the Committee. Below are some examples how these changes make a bad idea worse:

The One-Percent Deep Pocket. This was the situation that the Joint Finance amendment was said to mitigate by moving to a 20% threshold. But under the changes, only parties selected by the trial lawyers can be considered when calculating this threshold. That is, by suing only the deep pockets, those greater at fault who are immune or without financial resources don't count.

City of Milwaukee Case: An actual case cited by the City occurred prior to the 1995 reforms:

Upon spotting a stolen vehicle, the police activated their lights and siren, which in turn "caused" the felon to flee down an alley and crash into and kill an innocent driver. Merely turning on their lights and siren caused the City to be found 1% at fault, with the fleeing felon 99% at fault.

Under the Joint Finance version of the law, the trial lawyer would sue only the City. The felon's fault would be irrelevant and the City is 100% at fault as a matter of law, if not under the facts.

The Legal Extortion Cases. The threat of being liable for 100% of the damages when as little as 1% at fault makes settlement often the only recourse. The Thomas Bus Company case is one example.

In 1991, a driver drove through a stop sign and collided with a school bus carrying the Burlington High School soccer team. The wife/passenger in the car was left in a coma from which doctors said she would never recover. The driver of the car was insured for \$100,000, and had few, if any, assets. In addition to the driver, the bus company, despite minimal or no fault was sued for \$11 million. During negotiations, the plaintiff's attorney warned the bus company that a jury verdict could well exceed the \$2 million insurance coverage. The bus company and its insurer settled for \$1.9 million.

Under the Joint Finance version of the law, the trial lawyer would sue only the bus company, and just as before, point out that he only needs to show 1% fault to cause them to pay more than \$2 million.

Under the Joint Finance provisions, the trial lawyers can sue up to five potential deep pocket defendants and guarantee if any are found 1% at fault, they would be 100% liable merely by excluding those most at fault but without financial resources. For example, if you don't sue a 95% judgment proof person, and instead target five deep pockets for legal extortion, if all five have 1% fault under the facts, each are 20% at fault under the law. If four are at 1% and one without fault, all four are at 25% fault, and so on.

The Grand Scheme & the More-at-Fault Plaintiff. Here's how this rigged system would work assuming a 1% at fault deep pocket, 4% at fault plaintiff, a 95% at fault actor with no financial resources, and \$1 million in damages. The plaintiff only sues the deep pocket, but the deep pocket files a third party complaint against the 95% party.

- Because the 95% is pooled with the deep pocket's 1%, and the total is now greater than the plaintiff's 4%, the more at fault plaintiff can sue the 1% deep pocket.
- Because the 95% is a third-party defendant (not sued by plaintiff), that percent is excluded by law when calculating the joint and several threshold; thus, the deep pocket's 1% becomes 20% (plaintiff's 4% equates to 80% fault).
- Being 20% under this scheme triggers joint and several liability for the 1% deep pocket who must pay the plaintiff, who is four times more at fault, \$960,000 (\$1 million less the plaintiff's 4%, or \$40,000).

Beyond those being sued under these unjust laws who will go broke or otherwise face debilitating legal costs, is everyone who will see higher insurance rates or more limited coverage. This isn't just big corporations, these provisions hurt all our businesses, local units of government, farming communities, charities, tourism destinations, hospitals and doctors, homeowners, and neighbors.