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Promoting Fairness and Equity in Wisconsin's Civil Justice System

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TO: Members, Wisconsin State Senate
FROM: Wisconsin Civil Justice Council
RE: Liability Provisions in Budget
DATE: June 15, 2009

The Wisconsin Civil Justice Council asks that you concur in the Assembly's deletion of those provisions in the budget relating to joint and several liability, combined fault, and jury instructions.

Also, please be aware that the changes to these liability provisions by the Joint Committee on Finance worsen these policies to the detriment of the entire State, create legal traps never before seen in Wisconsin, and go far beyond reverting to Wisconsin law prior to the 1995 reforms. Specifically, if enacted, these laws would:

- Allow someone as little as 1% at fault to pay 100% of the damages.
- Allow someone more at fault to sue those less at fault.
- Create a legal fiction where someone 1% at fault in fact is 100% at fault under the law.

Here's how this would work under a scenario similar to an actual Wisconsin case.

An employee was injured on the job from a grinder that was modified on site making it unsafe. The employer is 92% at fault for the unsafe modifications, the injured employee 4%, the company that installed the grinder 2%, and the grinder manufacturer 2%. Under existing law, neither the installer nor the manufacturer could be sued by the more at fault employee. Existing law also considers the fault of all parties, even if not party to the suit, such as an employer.

Under the law before you, both the installer and manufacturer could be sued because the law combines their 2% fault and then compares to the plaintiff's 4% fault.

The law then throws out the actual 92% fault of the employer because under workers' compensation law they cannot be brought into the suit. This transforms the installer's and manufacturer's fault to 25% under the law, even if only 2% under the facts. (When making only the 8% from the three parties relevant, the 4% becomes 50%, and the two 2% parties become 25% each.)

Thus, both the 2% installer and the 2% manufacturer would be jointly and severally liable as they each breach the 20% threshold. Assuming \$1 million in damages, both would be on the hook for \$960,000 to a plaintiff who is twice at fault. (\$1 million less the 4% employee's fault.)

The above case is more than a hypothetical. It is not unusual that companies are beyond the legal reach of the courts, such as an employer with workers' compensation immunity or foreign manufacturers such as one from China. If the absent party is 99% at fault, the 1% Wisconsin company would be on the hook for 100% of the damages.

The certainty that 1% liability exists in such instances will drive unfair settlements that would not otherwise occur from innocent parties that don't want to take the risk of testing that 1% threshold in court. Having the court instruct the jury as to how the "lottery" would work substantially increases those risks.

While these issues appear complicated, certain things are clear. The goal here is to game the system beyond any concepts in place prior to the 1995 reforms by:

1. Combining the fault of all defendants to allow a more at fault plaintiff to sue;
2. Excluding parties most at fault in order to fabricate elevated fault levels under the law merely to manipulate the joint and several liability calculation; and,
3. Forcing reluctant courts to instruct the jury how the game works. (The Wisconsin Judicial Conference, composed of all of Wisconsin's trial and appellate judges, opposes the jury instructions provision.)

Wisconsin's civil justice system will be neither civil nor just; it would be an injustice to all those caught up in the tangled web spun for the benefit of a few personal injury lawyers.