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Promoting Fairness and Equity in Wisconsin's Civil Justice System

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To: Senate Committee on Judiciary, Utilities, Commerce, and Government Operation
 Assembly Committee on Judiciary and Ethics

From: Andrew Cook, Robert Fassbender
 Wisconsin Civil Justice Council

RE: Support for Amendments to Special Session SB/AB 1 – Civil Justice Reforms

Date: January 13, 2011

Wisconsin Civil Justice Council supports those amendments in Special Session SB 1/AB 1 that would:

1. Remove retroactive application of the civil action provisions.
2. Clarify that the *Daubert* provisions are to be identical to those comparable provisions in Federal Rules of Evidence 702.
3. Delete provisions setting forth new standards for the application of punitive damages and adding caps on punitive damages.

We continue to have reservations over the weakening of the punitive damages standard by the Wisconsin Supreme Court in *LeRoy M. Strenke v. Levi Hogner and Nau Country Insurance Company* and *Patricia Wischer, et. al v. Mitsubishi Heavy Industries America, Inc., et.al.*. However, reverting to existing law in this area removes any ambiguity arising out of the language in the bills as introduced; notably, the application of punitive damages in drunk/impaired driver cases. (Note that the Court in *Stenke* found punitive damages warranted in that drunk driver case, so this should no longer be an issue with adoption of this amendment.)

We offer for your consideration the following points on the caps on punitive damages:

- There are four states that do not allow punitive damages, including Michigan.
- Of the 46 states that allow punitive damages, 19 of those states have at one time or another had a statutory cap on the recoverable amount.
- There are a number of states that allow punitive damages, but only allow the plaintiff to keep a limited amount of the award. For example, in Indiana, 75 percent of the award goes to the treasurer of the state.
- At the federal level, the Supreme Court of the United States has issued several decisions that limit awards of punitive damages through the due process clauses of the Fifth and Fourteenth Amendments.
 - The Court has indicated that a 4:1 ratio between punitive and compensatory damages is high enough to find constitutional impropriety and any ratio of 10:1 or higher is almost certainly unconstitutional. See *BMW of North America, Inc. v. Gore* (1996), *State Farm Auto. Ins. v. Campbell* (2003).

In conclusion, we believe the amendments address the legitimate concerns raised at the hearings and that passage of this legislation will demonstrate to all that Wisconsin is truly open for business.