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*Promoting Fairness and Equity in Wisconsin’s Civil Justice System*

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## Wisconsin Business Groups Support SB 22/AB 29: Eliminating Phantom Damages

The purpose of AB 29/SB 22 is to allow juries in personal injury cases to see all the evidence when determining the amount owed to compensate the plaintiff for his or her medical expenses. Under current law, defendants in personal injury cases are not allowed to introduce evidence of payments made to the plaintiff by third parties (collateral sources) when determining the “reasonable value” of the medical expenses. As a result, plaintiffs and their attorneys unjustly receive windfalls, which some courts have referred to as “**phantom damages.**”

The Wisconsin Civil Justice Council **SUPPORTS** AB 29/SB 22 for the following reasons:

- It allows the jury to see all the evidence in a personal injury case to determine how much the plaintiff should be reimbursed for his or medical expenses.
- Wisconsin is currently among just a few remaining states that prohibit the jury from seeing all the evidence when determining “reasonable value” of medical expenses.
- Current Wisconsin law leads to significant overcompensation for plaintiffs and their attorneys by awarding the amount billed by the plaintiffs’ medical provider, rather than the amounts that were actually paid.
- Wisconsin law currently allows the jury in medical malpractice cases to see all the evidence in determining the plaintiff’s medical expenses. AB 29/SB 22 extends the law to all personal injury cases.

### Background

The Wisconsin Supreme Court has issued a number of decisions holding that defendants in personal injury cases are not allowed to introduce evidence of the amount of past medical bills actually paid by the plaintiff’s insurance company—or Medicaid or another government source if the person does not have private insurance—rather than the amount that was billed by the medical provider. (Health insurers typically have negotiated rates with health care providers and therefore the health insurer does not end up paying the full amount billed by the provider. The same occurs when the plaintiff’s medical expenses are paid by medical assistance.)

As a result, plaintiffs and their attorneys in Wisconsin continue to receive windfalls in situations where the plaintiff did not pay the full amount of his or her medical expenses.

Courts have referred to these payments to plaintiffs as “phantom damages”<sup>1</sup> because no one ever paid the plaintiff’s full medical expenses, yet the plaintiff received the

amount billed by the medical provider rather than the amount actually paid. In some cases plaintiffs receive tens or even hundreds of thousands of dollars in overcompensation.

A number of state Supreme Courts – including Indiana, Ohio, and most notably, California – have reached the opposite decision. The California Supreme Court specifically held that “an injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff in compensation for his or her insurer for the medical services...”<sup>2</sup>

### **AB 29/SB 22 Limits Phantom Damages**

Wisconsin should join the growing number of states limiting or prohibiting phantom damages by allowing defendants to introduce into evidence payments made by third parties, i.e., collateral sources. LRB-0986 does this by allowing the jury to see all the evidence – both the amounts billed by the medical provider and the amounts actually paid by the health – to determine the reasonable value of medical expenses.

### **Example of Phantom Damages in Wisconsin**

In *Leitinger v. DBart*,<sup>3</sup> the plaintiff suffered injuries working on a construction site. At trial the parties argued over the reasonable value of the plaintiff’s medical services. The trial court allowed both parties to introduce evidence of the amount billed (\$154,818.51) and the amount actually paid (\$111,394.73) to the medical provider by the plaintiff’s health insurance company (collateral source).

However, the Wisconsin Supreme Court reversed the lower court and held that only the amount billed (\$154,818.51) by the medical provider could be introduced, not the amount that was actually paid (\$111,394.73) by the plaintiff’s health insurer. As a result, the plaintiff received a windfall of \$43,424.

### **Conclusion**

It’s time for Wisconsin to join the numerous other states that have passed legislation or whose supreme courts have limited or prohibited phantom damages.

**Please support AB 29/SB 22.**

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<sup>1</sup> *Cooperative Leasing, Inc. v. Truman Roosevelt Domer*, 872 So. 2d 956, 959 (Fla. 2004).

<sup>2</sup> *Howell v. Hamilton Meats and Provisions, Inc.*, 52 Cal.App. 4<sup>th</sup> 541, 257 P.2d 1130, 120 Cal. Rptr. 3d 325 (Cal. 2011).

<sup>3</sup> 2007 WI 84.