WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System

Officers & Members
President - Bill Smith
National Federation of Independent Business

Vice President - James Buchen
Wisconsin Manufacturers & Commerce

Treasurer-Andy Franken
Wisconsin Insurance Alliance

Secretary - Pat Stevens
Wisconsin Builders Association

John Mielke
Associated Builder & Contractors

James Boullion
Associated General Contractors of Wisconsin

Michael Crooks
Wisconsin Defense Counsel

Beata Kalies
Electric Cooperatives

Gary Manke
Midwest Equipment Dealers Association

Nickolas George
Midwest Food Processors Association

Mary Ann Gerrard
Wisconsin Automobile & Truck Dealers Association

Peter Thillman
Wisconsin Economic Development Association

Eric Borgerding
Wisconsin Hospital Association Inc.

Mark Grapentine
Wisconsin Medical Society

Thomas Howells
Wisconsin Motor Carriers Association

Matthew Hauser
Wisconsin Petroleum Marketers & Convenience Store Association

Edward Lump
Wisconsin Restaurant Association

TO: Senate Committee on Judiciary, Utilities, Commerce, and Government Operations; Assembly Committee on Judiciary and Ethics

FROM: Robert Fassbender, Wisconsin Civil Justice Council

DATE: January 11, 2011

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

---

On election night, Governor-elect Scott Walker announced that "Wisconsin is open for business." As a major part of that pledge, the Gov.-elect announced he would propose significant changes to our civil justice system, adoption of which will send a signal that Wisconsin has a new litigation climate that restores fairness in our legal system by providing clear standards for liability and justice for all parties.

A recent report by the Chamber of Commerce's Institute for Legal Reform found that 67 percent of businesses surveyed responded that a state's litigation environment has an impact on such important decisions as where to locate or do business.

The Wisconsin Civil Justice Council believes all the concepts set forth in this legislation will improve our business climate and make Wisconsin a better place for existing businesses to stay and expand and for new businesses to move in. We are particularly supportive of those provisions that would:

- Eliminate the flawed "risk contribution" theory in manufacturing lawsuits. Wisconsin is currently **the only** state with the *Thomas* "risk contribution" doctrine;
- Adopt more reasonable product liability standards for manufacturers and sellers. Wisconsin is currently **one of only four** states using the "consumer contemplation test" in products cases;
- Adopt sound science principles relating to expert opinion evidence. Wisconsin is currently **one of only 14** states that have rejected the *Daubert* principles that require expert testimony be reliable;
- Revise punitive damage thresholds in response to Wisconsin Supreme Court decisions that **wrongly interpreted the meaning and intent of the Wisconsin Legislature** and weakened the standard for the award of damages whose only functions are punishment and deterrence;

Risk Contribution – This portion of the bill is a response to the Wisconsin Supreme Court's 2005 decision, *Thomas v. Mallett*, where the Court adopted the controversial "risk contribution" theory in cases involving lead-based paint. In an editorial titled, "Alabama North," *The Wall Street Journal* (Aug. 9, 2005) described the *Thomas* decision as:

> "The first of its kind in the country" establishing a dangerous precedent by dispensing with the "traditional legal standard for torts – which is to establish actual connections between wrongdoing and injury – and [replacing] it with a chain of speculation and conjecture."

10 East Doty Street • Suite 500 • Madison, WI 53703
www.wisciviljusticecouncil.org • info@wisciviljusticecouncil.org

According to Don Gifford, Professor of Law and former Dean of the University of Maryland School of Law, the Supreme Court's decision in *Thomas v. Mallett* is the single most radical departure from fundamental principles of tort law in recent decades. It is a decision that puts Wisconsin law dramatically out of line with the law of any other state in the country. (Dean Gifford is a nationally recognized expert on "mass torts" and, interestingly, a former plaintiff lawyer.)

More recently, a U.S. District Court held "that the imposition of liability under the 'risk contribution' rule adopted by the Wisconsin Supreme Court in *Thomas ex rel. Gramiling v. Mallett*, 701 N.W.2d 523 (Wis. 2005) would violate [defendant's] substantive due process rights" under the U.S. Constitution. *Gibson v. American Cyanamid*, No. 07 Civ. 864 (E.D. Wis. Nov. 15, 2010).

This bill is a moderate response to the aberrational decision of the Wisconsin Supreme Court in *Thomas v. Mallett*. Wisconsin would remain among the 18 or so states that recognize some version of market share liability under those limited circumstances where market share liability is feasible and realistic.

It essentially returns Wisconsin's law to the original boundaries of market share liability employed by the California Supreme Court in *Sindell v. Abbott Laboratories*, even though a majority of American states find market share liability in any form to be an unacceptable modification of the traditional requirement that the plaintiff prove all the elements of his or 49her case, including cause in fact.

Products Liability – Products liability is a strict liability theory that does not require proof of negligent conduct but relates directly to product defect. This legislation will assist **manufacturers** by requiring proof of a "reasonable alternative design" to prove a defective design, moving Wisconsin away from the much broader and loose "consumer contemplation" test.

> ***Wisconsin is currently one of only four states using the "consumer contemplation test" in products cases. This significant change will bring Wisconsin in line with 46 other states.***

The proposed legislation will remove **sellers** from strict (product) liability litigation whenever there is a viable manufacturer to sue and also addresses the **joint and several liability** issue created by a 2001 Wisconsin Supreme Court decision, which held that the positive changes to joint and several liability adopted in the 1995 session do not apply to strict liability cases, including products cases.

Expert Opinion (*Daubert* Principles) – The *Daubert* principles were set forth by U.S. Supreme Court Justice Blackmun in a 1993 case by that name. It is controlling law in federal courts in both civil and criminal cases. Thirty states have also adopted these principles to assure reliable evidence, including Indiana, Iowa, Michigan, and Ohio. All four states use *Daubert* in both civil and criminal cases. (Illinois and Minnesota have neither accepted nor rejected *Daubert*.) Wisconsin is the only Midwest state to reject *Daubert*, which means Wisconsin state courts do not require expert testimony to be reliable.

The premise underlying *Daubert* is quite simple. If a witness is holding him or herself out as an expert on "scientific, technical or other specialized knowledge," then justice requires that he or she be qualified as such and that the opinion be reliable. Under this bill and *Daubert*, reliable

means the opinion is "based upon sufficient facts or data" and is "the product of reliable principles and methods."

Our organization and Wisconsin businesses are primarily interested in avoiding civil liability based on junk science. But the committees should be aware that all of our Midwest neighbors adopting *Daubert*, do so also with respect to criminal cases, as it seems logical they would not want those accused of serious crimes to be convicted through use of unreliable testimony.

Punitive Damages – Punishment and deterrence are the only legitimate reasons for the assessment of punitive damages in civil cases. As with risk contribution, this portion of the bill addresses a misapplication of the law by the Wisconsin Supreme Court in 2005.

In *LeRoy M.Strenke v. Levi Hogner and Nau Country Insurance Company & Patricia Wischer, et. al v. Mitsubishi Heavy Industries America, Inc., et.al.)*, the Court ignored the law passed by the Legislature adopting a heightened standard for punitive damages and instead wrote a weaker standard.

Despite its recognition of the Legislature's intent to adopt a heightened standard, the majority on the Supreme Court actually used the opportunity to craft a standard, based on the Court's interpretation, that was *weaker* than that which existed prior to the Legislature's action in the 1995 session. The language in this bill restores the intent behind the 1995 changes consistent with established law.

By passing these four sensible civil justice reforms, along with the provisions in this bill, we can demonstrate to all that Wisconsin is truly open for business.