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Proposed Changes in Wisconsin Comparative Negligence Law and What This Could Mean to Companies Doing Business in Wisconsin

By David B. Carr, Esq.

The 2009 Assembly Bill 75 (2009 A.B. 75), proposed on February 17, 2009, by the Joint Committee on Finance per the request of Governor Doyle, contains line items that change the joint and several liability provisions of Wisconsin's contributory negligence statute, Wis. Stat. § 895.045. The Bill also contains an amendment of Wis. Stat. § 805.13(4), regarding jury instructions in civil actions involving contributory negligence.

Since 1931, Wisconsin has been a "comparative negligence" state, wherein a plaintiff was not barred from recovery if he was contributorily negligent. A plaintiff's damages were simply reduced by the percentage of his or her own negligence. Wis. Stats. § 895.045(1). The statute, as it is currently written, provides for joint and several liability, and concerted action. The party found to be

responsible for 51% or more of the liability is jointly and severally liable for all of the damages allowed. That defendant can then sue the lesser-percentage defendants for contribution. Further, if two or more parties act in concert, those parties are jointly and severally liable for all of the damages resulting from their actions. Wis. Stat. § 895.045(2). The change proposed by Governor Doyle's budget bill would result in joint and several liability for *all* liable parties, as long as the injured party's negligence amounts to less than the sum of all of the others (2009 A.B. 75, Sec. 3270-1).

The result of the new law will be that *any* of the negligent parties whose percentage is more than the injured party's negligence would be jointly and severally liable for *all* of the damages allowed. Further, anyone with equal or greater fault than the plaintiff can be held 100% responsible ("joint and several"), even if only 1% at fault. *Id.* It will not matter how liable the "deep pocket" party is, as that party may have to pay the entire amount of damages allowed. Existing law requires a person to be at least 51% at fault before they can be held responsible for 100% of damages.

Additionally, a person who is less at fault than the plaintiff can be sued so long as the "combined" fault of all persons sued is greater than the plaintiff, whereas existing law requires the plaintiff to be less at fault than each defendant he or she is suing.

One other proposed change is that the provision for joint and several liability in a concerted action will be removed. (2009 A.B. 75, Sec. 3272).

Currently, Wisconsin courts are charged with providing the jury with "one complete set of written instructions providing the burden of proof and the substantive law to be applied to the case to be decided." Wis. Stat. § 805.13(4). The proposed amendment to Wis. Stat. § 805.13(4) will require courts to explain and enlighten the jury as to the implications of the percentage of negligence attributable to each party. Assembly Bill 75 amends § 805.13(4) to read: "In a civil action involving contributory negligence, the court shall explain to the jury the effect on awards and liabilities of the percentage of negligence found by the jury to be attributable to each party." (2009 A.B. 75, Sec. 3223). This would allow plaintiffs' attorneys to encourage juries to consider the effects of their decisions upon the sources of a plaintiff's recovery and target insured parties and those with "deep pockets." In turn, juries will have the ability to adjust fault determinations to ensure maximized awards to a sympathetic and mostly at fault plaintiff, when facing deep pocket businesses.

The provisions of the Bill will first apply to actions commenced

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on the effective date - not retroactively (2009 A.B. 75, Sec. 9309). This may be as soon as this summer.

The Wisconsin Civil Justice Council has publicly criticized these provisions, calling them a "repeal of fairness reforms previously passed to protect against predatory lawsuit abuse," and as a result, the Council plans to take further action in short order.

The Bill must be followed closely with regard to the above-referenced provisions, as they provide for significant changes in our practice moving forward. In particular, if the provision stating that "anyone with equal or greater fault than the plaintiff can be held 100% responsible, even if only 1% at fault" remains included in the Bill, the plaintiffs' bar will have the ability to target anyone connected to the event causing the injury. A plaintiff may discover that one defendant may be most at fault but with no assets. As such, the plaintiff would only be required to demonstrate 1% liability on behalf of another deep pocket defendant.

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