

MATTHIESEN, WICKERT & LEHRER, S.C.

A FULL SERVICE INSURANCE LAW FIRM

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TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

This monthly electronic subrogation newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of nationwide subrogation have, for many lawyers and insurance professionals, made keeping current with changing subrogation law in all fifty states an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this electronic subrogation newsletter, to assist in the dissemination of new developments in subrogation law and the continuing education of recovery professionals. If anyone has co-workers or associates who wish to be placed on or removed from our e-mail mailing list, please provide their e-mail addresses to Rose Thomson at rthomson@mwl-law.com. We appreciate your friendship and your business.

***** INSURANCE LITIGATION ALERT *****

INSURANCE SUBROGATION

WISCONSIN GOVERNOR HIDES RADICAL CHANGES TO INSURANCE LAW WITHIN BUDGET BILL



On February 17, 2009, Wisconsin Governor James Doyle unveiled his 2009 - 2011 Budget Bill, also known as Assembly Bill 75. If passed without modification, this bill will substantially change Wisconsin's comparative negligence laws as well as laws regarding automobile insurance coverage. Below is a summary of the proposed changes as well as the effect such changes would have on all liability insurance policies issued in the State of Wisconsin. The effects of this bill, if passed by the Wisconsin legislature, will have profound effects on the insurance industry in Wisconsin.

Under current law, the negligence of a person seeking recovery (hereafter "plaintiff") is measured **separately** against the negligence of each person whose negligence caused the damages (hereinafter "defendant"). If the causal negligence of the plaintiff is more than the causal negligence of any one defendant, the plaintiff would have no right of recovery as against that defendant. In addition, current law provides that if the causal negligence of any one defendant is less than 51% of the total negligence, that defendant's liability is limited to the percentage of negligence attributed to that defendant. In other words, if a defendant's casual negligence is 50% or less, that defendant is only liable to the plaintiff for their percentage of negligence. However, Assembly Bill 75 contains a provision which would change this law dramatically. First, a plaintiff would be allowed to recovery damages against all defendants as long as the plaintiff's negligence is not greater than the **combined** negligence of all the persons against whom recovery is sought. Furthermore, the bill provides that any person whose causal negligence is equal to or greater than the causal negligence of the plaintiff is jointly and severally liable for the damages awarded to the person seeking recovery, even if their negligence is less than 51% of the total negligence.

To further explain these proposed changes, examples are in order. Under current law, if a plaintiff is found to be 20% causal negligent in causing their own damages and two defendants are both found to be 40%

causal negligent, the plaintiff will be entitled to recover 40% of his damages as against each defendant. However, if the proposed changes become law, each defendant would be found jointly and severally liable for 80% of the damages since the negligence of the plaintiff is less than the negligence of either defendant. As a result, if one of the defendants is found to be uninsured, the other defendant would then be responsible to pay the entire 80% of the total damages even though they were only 40% at fault in causing the damages.



These results are even more dramatic if, for example, a Plaintiff is not found to be causal negligent, Defendant "A" is found to be 99% causal negligent and Defendant "B" is found to be 1% casual negligent. Under current law, Defendant "B" would be liable to Plaintiff for only 1% of the plaintiff's damages. However, under the proposed changes in law, Defendant "A" and Defendant "B" would both be jointly and severally liable for 99% of the damages. Furthermore, if Defendant "A" is uninsured, Defendant "B" would then be responsible for payment of 100% of the total damages despite the fact the causal negligence of Defendant "B" was only 1%.

In addition to the changes in Wisconsin's comparative negligence law, Assembly Bill 75 would also substantially effect the ability of insurance companies in contracting with their insureds on issues such as auto insurance policy limits and insurance coverage limitations and exclusions. For example, under current law, proof of financial responsibility includes coverage under a motor vehicle liability insurance policy with the following minimum limits of any single accident:

- \$25,000 for bodily injury to or death of one person;
- \$50,000 for bodily injury to or death of more than one person; and
- \$10,000 for property damage.

This bill, however, increases the minimum limits required under a policy that is acceptable for proof of final responsibility to \$100,000 for bodily injury to or death of one person, \$300,000 for bodily injury to or death of more than one person, and \$25,000 for property damage.

Likewise, under current law, all motor vehicle liability insurance policies must include uninsured motorist (UM) coverage of all least \$25,000 per person and \$50,000 per accident as well as medical payments coverage of at least \$1,000 per person. Assembly Bill 75, however, would increase the required level of UM coverage to \$100,000 per person and \$300,000 per accident, and increase the level of required medical payments coverage to \$10,000.

Furthermore, under current law, motor vehicle liability policies issued in the State of Wisconsin are not required to contain underinsured motorist (UIM) coverage assuming an insured has been provided with written notice of the availability of UIM coverage and such coverage is denied by the insured. However, under the proposed changes in law, every motor vehicle liability insurance policy issued in or to an insured located in the State of Wisconsin **must** include UIM coverage of at least \$100,000 per person and \$300,000 per accident.

In addition, an "uninsured motor vehicle" is defined in the bill as a motor vehicle that does not have a bodily injury liability insurance policy in effect at the time of the accident and has not furnished proof of financial responsibility. This definition also includes a vehicle whose insured has become insolvent but deletes the "hit and run" requirements for an unidentified vehicle. The effects of the "hit and run" deletion would require an insurer to cover accidents caused by "phantom" vehicles which may result in an increased possibility for fraud.

Furthermore, portions of Assembly Bill 75 substantially change what provisions can be included in UM and UIM coverage. For example, the bill, as currently drafted, would **prohibit** the following currently permissible provisions from being included in all motor vehicle liability insurance policies:

(1) A provision providing that regardless of the number of policies, persons, or vehicles involved, the limits for coverage under the policy may not be added to the limits for similar coverage applying to other motor vehicles to determine an overall limit of coverage available for a person in any one accident.

(2) A provision providing that the maximum amount of uninsured or underinsured motorist coverage available for bodily injury or death suffered by a person not using a motor vehicle in an accident (such as a pedestrian) is any single limit of uninsured or underinsured motorist coverage for any vehicle with respect to which the person is insured at the time of the accident.

(3) A provision providing that the maximum amount of medical payments coverage available for bodily injury or death suffered by a person not using a motor vehicle in an accident is any single limit of medical payments coverage for any vehicle with respect to which the person is insured at the time of the accident.

(4) A provision providing that the limits under the policy for uninsured or underinsured motorist coverage for bodily injury or death resulting from an accident are reduced by amounts paid or payable by or on behalf of a person or organization that is legally responsible for the bodily injury or death; amounts paid or payable under any worker's compensation law; or amounts paid or payable under any disability benefits laws.

(5) A provision providing that any coverage under the policy does not apply to a loss resulting from the use of a motor vehicle that is owned by the name insured or a spouse or relative of the named insured who lives in the named insured's household, that is not described in the policy, and that is not covered under the terms of the policy as a newly acquired or replacement motor vehicle.

In short, these proposed changes would prohibit the use of any "anti-stacking" provisions, "reducing clause" language or "driver other car" provisions which are currently contained in most, if not all, the insurance policies issued in the State of Wisconsin.

While these changes to Wisconsin law may be favorable from a subrogation standpoint, they are certainly anathema to the majority within the insurance industry and would be devastating to the industry from a defense perspective. The National Association of Mutual Insurance Carriers (NAMIC) has denounced the planned changes and indicated that the coverage minimum increases alone with cause premiums for Wisconsin residents to rise at least 40%. NAMIC is lobbying hard along with the Wisconsin Insurance Alliance and the Wisconsin Association of Mutual Insurance Companies to fight these proposals.



**Wisconsin State
Capital in Madison**

While the changes to Wisconsin's comparative negligence laws could be viewed as favorable to subrogation efforts within Wisconsin - making recoveries both bigger and easier - we must remember that it is better for the industry not to have paid out monies in the first place. So it is a mixed bag of results, but overall, both the insurance industry as a whole and every responsible resident who keeps their vehicles insured (something that is actually not mandatory in Wisconsin) would be the big loser. It will also lead to a drastically increased number of uninsured drivers on Wisconsin roads - something that will not be good for subrogation professionals.

Republican Senator Glenn Grothman, a friend of the firm's, has indicated that the bill will next head to the Finance Committee, which will hold hearings around the state. Wisconsin had gotten away from the despicable practice of sticking significant policy legislation within budget bills like this, but with the new

majority of Democrats in both the Assembly (53 of 99) and Senate (18 of 33), Grothman has indicated that this practice is once again rearing its ugly head as a means for Democrat legislators to vote for unpopular legislation. They can simply claim it was in the budget bill and we need a budget, so they had to vote for it.

Insurance companies should lobby hard with Democrat lawmakers to oppose this legislation. If we can peel off just four Democrats in the Assembly or only two in the Senate, the bill can be defeated if it remains the same after committee hearings and possible changes. What is worse, states often look across their borders at what lawmakers in neighboring states are doing. This sort of radical overhaul of our civil justice system - which is undoubtedly a payback by Democrats to trial lawyers for their support during the recent election - can become infectious and spread to other jurisdictions.

The law firm of Matthiesen, Wickert & Lehrer, S.C. will continue to keep you updated as this process unfolds. If any have any questions on any of the proposed changes as well as how they will affect the handling of subrogation claims, insurance defense claims and coverage issues claims in the future, please do not hesitate to contact Douglas Lehrer dlehrer@mwl-law.com or Gary Wickert at gwickert@mwl-law.com.

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