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WINDS OF CHANGE: NEW BUDGET

SUBSTANTIALLY ALTERS CURRENT TORT AND INSURANCE LAW

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INTRODUCTION

In the last election, voters of this state overwhelmingly carried Democratic candidates into office as part of a national movement promising "change" at all levels of government. The Wisconsin 2009-10 budget is filled with provisions making good on that promise. 2009 AB 75 contains a number of substantial policy changes buried beneath the numbers, including several significant changes to tort and insurance law. These changes include new rules governing comparative negligence, joint and several liability, jury instructions, uninsured motorist (UM) coverage, underinsured motorist (UIM) coverage, stacking, and new mandatory minimum insurance policy limits, among other changes. In a nutshell, the new legislation vitiates most of the so-called "tort-reform" legislation from the mid-1990s and expands the liability of insurance companies and defendants in tort actions.

Changes to Comparative Negligence and Joint and Several Liability

Under current Wisconsin law, a plaintiff in a negligence action is allowed to recover so long as any negligence attributed to the plaintiff does not exceed the negligence of any one defendant. The plaintiff's contributory negligence is measured separately against each defendant found causally negligent. The plaintiff's recovery is reduced by the portion of contributory negligence attributed to him. A defendant is jointly and severally liable to the plaintiff only if the defendant's negligence is 51% or greater. Defendants who act in concert are also jointly and severally liable.

The budget bill changes the law to provide that a plaintiff's contributory negligence does not bar recovery if the plaintiff's negligence is "not greater than the combined negligence of all of the persons against whom recovery is sought." Therefore, under the new proposal, the plaintiff's negligence is

no longer compared separately to that of each defendant. Further, the provision governing joint and several liability is amended to provide that "[a]ny person found causally negligent whose percentage of causal negligence is equal to or greater than the negligence of the person recovering shall be jointly and severally liable for the damages allowed." As such, the current threshold for liability becomes the threshold for joint and several liability under the proposed change. The plaintiff's recovery is still diminished by the plaintiff's percentage of contributory negligence. Finally, the provision governing "concerted action" is deleted.

Jury Enlightenment

The budget bill also changes Wisconsin law governing jury instructions to require that "[i]n 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."

Increased Mandatory Minimum Insurance Policy Limits

Under Wisconsin's current Financial Responsibility Law, an insurance policy constitutes acceptable proof of "financial responsibility" if it contains liability limits of \$25,000 per person, \$50,000 per occurrence, and \$10,000 in property damage coverage. The budget bill raises the limits of an acceptable insurance policy to \$100,000 per person, \$300,000 per occurrence, and \$25,000 for property damage. In addition, the budget bill raises the minimum required level of UM coverage from \$25,000 per person to \$100,000 per person and from \$50,000 per occurrence to \$300,000 per occurrence. Moreover, the bill raises the level of required medical payments coverage from \$1,000 to \$10,000.

Mandatory UIM Coverage

Currently, Wisconsin law requires every insurer writing policies in this state to provide written notice of the availability of UIM coverage. The budget bill requires every automobile policy of insurance issued in Wisconsin to contain UIM coverage with limits of \$100,000 per person and \$300,000 per occurrence. Further, the budget bill changes the definition of "underinsured motor vehicle" to mean a vehicle involved in an accident where "[t]he limits under the bodily injury liability policy are less than the amount fully needed to fully compensate the insured for his or her damages."

"Hit-and-Run" Now Includes "Miss-and-Run"

The current law defines "uninsured motor vehicle" to include "[a]n unidentified motor vehicle involved in a hit-and-run accident." The budget bill changes the definition of "uninsured motor vehicle" to include an unidentified vehicle involved in an accident that does not make contact with the insured's vehicle

Prohibited Provisions: Stacking and Reducing Clauses

Some of the most significant changes to insurance law in the budget bill affect "stacking" and reducing clauses. Under the proposed change, no policy of automobile insurance may:

- Prohibit stacking of insurance coverage limits for a single person injured in any one accident regardless of the number of policies, persons, vehicles, or claims made;
- Limit UM/UIM coverage to persons not using a motor vehicle (e.g., a pedestrian) to any single limit of UM/UIM coverage for any vehicle with respect to which the person is insured;
- Limit medical payment coverage to persons not using a motor vehicle to any single limit of medical payments coverage for any vehicle with respect to which the person is insured;
- Reduce UM/UIM coverage by amounts paid by: 1) any person legally responsible for the bodily injury or death, 2) amounts paid under worker's compensation law, and 3) amounts paid under any disability law; or
- Deny coverage for a loss resulting from the use of a motor vehicle that is owned by a named insured or family member and that is not described in the policy and not covered as a newly acquired vehicle.

Required Umbrella and Excess Liability provisions

The budget bill requires any insurer that writes excess liability or umbrella policies to provide written offers of UM and UIM coverage at the time an insured applies for the policy. Applicants may reject either coverage, but must do so in writing. If coverage is rejected, an insurer need not offer it when the policy renews. If an umbrella or excess liability policy does not contain UM or UIM coverage and the insurer did not provide a written offer of such coverages, a court may, upon the request of the insured, reform the policy to provide such coverage with the same limits as the underlying liability limits in the policy.

CONCLUSION

As is evident, the 2009-10 budget contains a number of provisions that dramatically alter insurance law and the current tortlaw framework in Wisconsin. These changes will make it easier for plaintiffs to recover in negligence actions. Additionally, the higher mandatory minimum insurance coverages, mandatory UM/UIM, and the prohibition on anti-stacking and reducing clauses will substantially increase the risk exposure of insurance companies that write automobile coverage policies. As a result, Wisconsin insurers will wind up paying more to resolve claims and will face larger jury awards of damages. ■

CASE SUMMARIES

Umbrella Policy; UM Coverage: Wis. Stat. § 632.32(4)(a) did not require personal umbrella policy to include UM coverage. *Etter v. State Farm Mut. Auto. Ins. Co.*, 2008 WI App 168 (Oct. 15, 2008).

Governmental Immunity: Known danger exception to discretionary act immunity precluded summary judgment in personal injury action against state fair park employee who jumped on horse stall while aware that supporting chains had been removed and caused injury to inmate working on stall. *Pries v. McMillon*, 2008 WI App 167 (Oct. 28, 2008).

Unemployment Tax: Employer in border town was Wisconsin employer for the purpose of unemployment tax when construction services were performed by workers on both Illinois and Wisconsin sites and individuals classified as independent contractors were actually employees. *Gilbert v. LIRC*, 2008 WI App 173 (November 26, 2008).

Property Tax Assessment: Wis. Stat. § 74.39 does not authorize the court in a suit for refund of excess taxes to impose a greater tax burden on the taxpayer than the assessment established by the board of review. *Trailwood Ventures, LLC v. Vill. of Kronenwetter*, 2009 WI App 18 (Dec. 2, 2008).

Condemnation: Party with right of condemnation cannot lose right by waiver or estoppel. *Andrews v. Wisconsin Pub. Serv. Corp.*, 2009 WI App 6 (Dec. 2, 2008).

Breach of Contract; Tradename Infringement; Business Purchase Agreement: Seller breached noncompetition clause of asset purchase agreement and infringed buyer's tradename, supporting award of compensatory and punitive damages and attorneys' fees. *D.L. Anderson's Lakeside Leisure Co. v. Anderson*, 2009 WI App 15 (Dec. 2, 2008).

Smoking Ordinance; Constitutional Law: Municipal ordinance banning smoking in restaurants but not private clubs was supported by a rational basis and was constitutional, but restaurant charging \$1 membership fee was not a private club. *City of Wausau v. Jusufi*, 2009 WI App 17 (Dec. 2, 2008).

Dog Bite Statute: Under Wis. Stat. § 174.02, which holds a person who "own[s], harbor[s], or keep[s] a dog" strictly liable for damages the dog causes, statutory keeper was strictly liable for injuries dog caused when owner let dog out of keeper's house because keeper had not relinquished custody, care, and control of dog to owner at time of injury. *Pawlowski v. American Fam. Mut. Ins. Co.*, 2009 WI App 7 (Dec. 3, 2008).

UM Coverage: Section of automobile liability insurance policy entitled "uninsured motorist" that defined coverage in terms of "uninsured motor vehicle" was ambiguous and did not provide UM coverage for uninsured vehicle operated by allegedly negligent insured. *Blum v. 1st Auto & Cas. Ins. Co.*, 2009 WI App 19 (Dec. 4, 2008).

Retirement Benefits: City employee who retired in 2005 did not qualify for health insurance premium benefits because he had not reached the age necessary to qualify for the benefits and actually retired before the benefit plan was amended in 2004. *Loth v. City of Milwaukee*, 2008 WI 129 (Dec. 30, 2008).

Libel: In order to sustain a claim for libel, the libeled person must provide a reasonable opportunity to correct the libelous matter by written notice to the person responsible for the publication; failure to comply with the notice requirement necessitates dismissal of a libel lawsuit with prejudice and the person alleging libel is not entitled to an additional opportunity to comply with the notice requirement. *Debraska v. Quad Graphics, Inc.*, 2009 WI App 23 (Jan. 21, 2009).

Recreational Immunity: For the purpose of recreational immunity, the statutory chapter under which a corporation is organized is not dispositive as to whether a corporation qualifies as nonprofit, and fundraising activities by a nonprofit corporation do not convert it to a for-profit corporation. *De La Trinidad v. Capitol Indem. Corp.*, 2009 WI 8 (Jan. 23, 2009).

Occurrences; Continuous Trigger: Liability insurer was obligated to fully defend and indemnify insured in pending and future asbestos-related suits because: (1) each individual plaintiff's repeated exposure to asbestos-containing products manufactured or sold by the insured constituted an "occurrence" under liability policies; (2) statutory limitation on "other insurance" provisions when two or more policies promise to indemnify an insured against the same loss does not apply to successive policies; and (3) once liability policy was triggered by injury during policy period, insurer was responsible for all sums up to policy limits, even if alleged injury did not occur entirely within a policy period. *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 2009 WI 13 (Jan. 29, 2009).

Worker's Compensation: Employee who was awarded permanent partial disability benefits for loss of earning capacity was entitled to continue to receive those benefits from his employer, even after his employer rehired him, because the judgment awarding those benefits was final and could not be vacated. *Schreiber Foods, Inc. v. LIRC*, 2009 WL 305376 (Ct. App. Feb. 10, 2009).

Worker's Compensation: Employee who was injured when a vehicle fell off a hoist could not bring an action against his co-employee pursuant to the exception to the Worker's Compensation Act's exclusive remedy provision for the negligent operation of a motor vehicle; driving a vehicle onto a hoist is incident to repairing the vehicle, not operating it on a public roadway, which the exception requires. *Kuehl v. Sentry Select Ins. Co.*, 2009 WL 305452 (Ct. App. Feb. 10, 2009).

Easements: Deeds granting easements to power company that conveyed a "perpetual right, privilege and easement to construct, maintain and operate an electric transmission line, or lines which may be constructed or reconstructed at any time hereafter with the necessary poles, cross-arms, guys, braces, wires and appurtenances" authorized the power company to replace the existing power line with a high voltage power line. *Wisconsin Public Serv. Corp. v. Andrews*, 2009 WL 439309 (Ct. App. Feb. 24, 2009).

Homeowner's Insurance: Watercraft endorsement in a homeowner's policy providing coverage for "loading and unloading" applied only to passengers of the boat on the water and not the passenger in the vehicle during transport that was injured when the insured's boat came loose from the trailer and struck the cab of the vehicle. *Sass v. Acuity*, 2009 WL 454607 (Ct. App. Feb. 25, 2009).

UM Coverage: UM coverage and medical payments provisions in policy issued to employer does not provide UM coverage for employee's personal non-owned vehicle even when used in the course of employment, and Wis. Stat. § 632.32(3), which requires that every automobile liability policy issued in Wisconsin shall provide the same coverage to any person using any motor vehicle described in the policy, does not require that the policy provide such coverage to a vehicle not listed in the policy. *Mittnacht v. St. Paul Fire & Cas. Ins. Co.*, 2009 WL 529905 (Ct. App. Mar. 4, 2009).

Property Tax Assessment: Property owner failed to rebut the statutory presumption that the City's assessment was correct; assessor properly considered income generated by the land. *Allright Prop., Inc., v. City of Milwaukee*, 2009 WL 590165 (Ct. App. Mar. 10, 2009).

Scheduling Order Deadlines: The excusable neglect standard of Wis. Stat. § 801.15(2)(a) does not apply to an untimely motion to enlarge a scheduling order deadline. Requiring courts to utilize the excusable neglect standard would infringe upon a circuit court's broad discretion to control its calendar and decide motions regarding scheduling orders. *Parker v. Wis. Patients Comp. Fund*, 2009 WL 703199 (Ct. App. Mar. 19, 2009).

■ WISCONSIN INSURANCE LAW ALERT ■

by: Lori Lubinsky, Ena Seiler and Jodi Yin

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