WISCONSIN STATE LEGISLATURE COMMITTEE HEARING RECORDS

2005-06

(session year)

Senate

(Assembly, Senate or Joint)

Committee on Agriculture and Insurance (SC-AI)

File Naming Example:

Record of Comm. Proceedings ... RCP
- 05hr_AC-Ed_RCP_pt01a
- 05hr_AC-Ed_RCP_pt01b
- 05hr_AC-Ed_RCP_pt02

COMMITTEE NOTICES ...

- Committee Hearings ... CH (Public Hearing Announcements)
- **

- Committee Reports ... CR
- **

- Executive Sessions ... ES
- **

- Record of Comm. Proceedings ... RCP
- **

INFORMATION COLLECTED BY COMMITTEE CLERK FOR AND AGAINST PROPOSAL

- Appointments ... Appt
- **

- Clearinghouse Rules ... CRule
- **

- Hearing Records ... HR (bills and resolutions)
- **05hr_ab1072_SC-AI_pt01**

- Miscellaneous ... Misc
- **

Vote Record
Committee on Agriculture and Insurance

Date: 3-6-06

Moved by: Brown Seconded by: Kedzie

AB 1072 SB _____ Clearinghouse Rule _____

AJR _____ SJR _____ Appointment _____

AR _____ SR _____ Other _____

A/S Amdt _____

A/S Amdt _____ to A/S Amdt _____

A/S Sub Amdt _____

A/S Amdt _____ to A/S Sub Amdt _____

A/S Amdt _____ to A/S Amdt _____ to A/S Sub Amdt _____

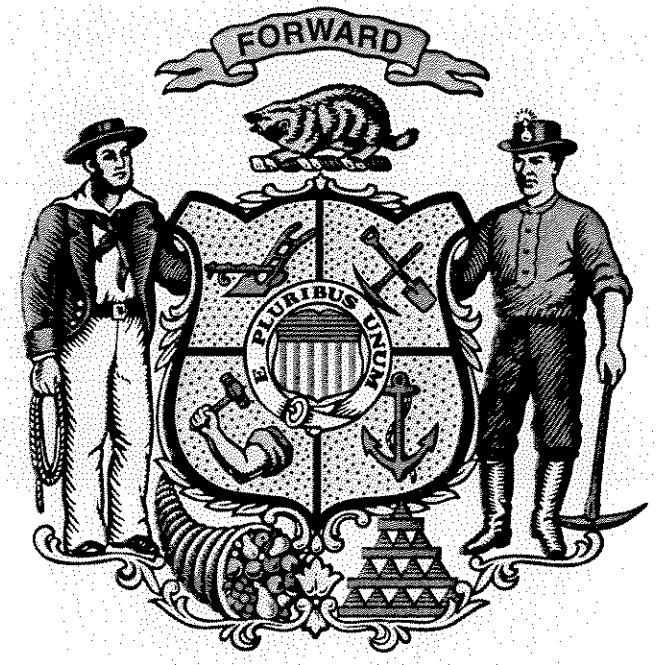
Be recommended for:

☐ Passage ☐ Adoption ☐ Confirmation ☒ Concurrence ☐ Indefinite Postponement

☐ Introduction ☐ Rejection ☐ Tabling ☐ Nonconcurrence

Committee Member	Aye	No	Absent	Not Voting
Senator Dan Kapanke, Chair	☒	☐	☐	☐
Senator Neal Kedzie	☒	☐	☐	☐
Senator Ronald Brown	☒	☐	☐	☐
Senator Luther Olsen	☒	☐	☐	☐
Senator Jon Erpenbach	☐	☒	☐	☐
Senator David Hansen	☐	☒	☐	☐
Senator Mark Miller	☐	☒	☐	☐
Totals:	4	3	____	____

☒ Motion Carried ☐ Motion Failed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Testimony of Daniel A. Rottier

on behalf of the

Wisconsin Academy of Trial Lawyers

before the

Senate Agriculture and Insurance Committee

Senator Dan Kapanke, Chair

March 6, 2006

2005 Assembly Bill 1072

Good morning, Senator Kapanke and committee members. My name is Daniel A. Rottier. I am the managing partner of Habush, Habush & Rottier, in Madison, WI. I serve as the President of the Wisconsin Academy of Trial Lawyers (WATL). On behalf of WATL, I thank you for the opportunity to appear to testify today against AB 1072 further limiting the collateral source rule in medical malpractice cases.

Background of collateral source rule:

With the passage of 1995 Wis. Act 10, the legislature created sec. 893.55(7), Wis. Stats., purporting to change the long-standing common law rule precluding the admission of "collateral source" evidence in medical negligence actions. That section provides that "(e)vidence of any compensation for bodily injury from sources other than the defendant to compensate the claimant for the injury is admissible in an action to recover damages for medical malpractice."

The "collateral source rule" is a statement of court-made public policy which holds that a tortfeasor should be obligated to pay the entirety of the loss caused by tortious conduct

without regard to the availability of public or private sources of benefits available to ameliorate the economic impact of the loss. In its recent decisions in *Ellsworth v. Schelbrock,* 2000 WI 63, 235 Wis. 2d 678, 611 N.W.2d 764. and *Koffman v. Leichtfuss*, 2001 WI 111, 630 N.W.2d 201, the Wisconsin Supreme Court reaffirmed the long-standing common law rule precluding the admission of evidence of benefits received by a tort victim from a "collateral source."

The last sentence of the statute provides that "[t]his section does not limit the substantive or procedural rights of persons who have claims based upon subrogation." However, it provides no guidance to the court or the jury as the consideration to be given "collateral benefits" evidence in light of these potential rights of recovery. Absence such guidance, the legislature delegated to each jury in each case the power to determine the public policy issue — with predictably unpredictable, arbitrary and uneven results.

***Lagerstrom* Case**

In any given case, the jury may elect to make no award for past medical expenses or past or future loss of earning capacity because the plaintiff benefited from workers compensation; or from private health insurance; or the benefits of an employer-established health benefit plan (subject to the pre-emptive effect of ERISA); or the benefits of Medical Assistance under Ch. 59; or the benefits of Medicare. In each case, the provider has common law or statutory rights of recovery or reimbursement. Yet the jury's "public policy" decision would effectively eliminate any source of such recovery. This is what happened in the *Lagerstrom v. Myrtle Werth Hospital- Mayo Health System*, 2005 WI 124 (2005). The estate of the deceased had made a malpractice claim and the jury was told that Medicare had covered all but $755 in costs. The jury then awarded only the $755 for past medical expenses, despite Medicare still having a right to reimbursement.

In *Lagerstrom*, the Supreme Court held that collateral source payments are allowed to be introduced into evidence of the injured or dead person's obligations of subrogation or reimbursement resulting from those collateral source payments. But, the court held that the obligation evidence can only be used to determine the reasonable value of those medical services, not to reduce the value of those medical services for the purpose of determining the amount of the damage award for those medical services.

The current proposal follows *Lagerstrom* in that it continues to allow the introduction of collateral source payments in a medical malpractice case as well as the introduction of evidence of the injured person's obligations of subrogation or reimbursement resulting from those collateral source payments. It goes one step further by requiring the finder of fact to determine the amount of collateral source payments made to compensate the claimant for the injury resulting from the medical malpractice and the amount that the claimant is obligated to reimburse the persons who made the collateral source payments. The bill then states the finder of fact "may subtract" some or all of that amount, reducing the amount of damages paid to the claimant.

What is unclear from the bill's language is what happens to money the finder of fact determines is needed for reimbursement? If the injured party does not receive it, how can the third party be reimbursed? Doesn't this contradict the statute's language that it doesn't "limit the substantive or procedural rights of persons who have claims based upon subrogation interfere with the right of reimbursement." Given this is something a jury may or may not do, it becomes even more unpredictable, arbitrary and with uneven results

Problems with the Proposal:

Reimbursement of government health care programs could be denied if this proposal passes. If injured people don't recover money for their medical bills, they won't be able to reimburse Medicare, Medicaid or any other government program. This shifts the burden of compensating someone fairly away from the person causing the wrong to the taxpayers who pay for the government programs. That is not fair.

The proposal's constitutionality is questionable. Additional states have held set-offs are unconstitutional. In *O'Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995) the Kentucky Supreme Court held that a collateral source statute unconstitutionally abridged the separation of powers requirement, observing that the statute could only confuse a jury:

> ...[T]he present statute does nothing to enhance the jury's fact-finding function. It provides no framework for the jury to relate the information the jury is to receive to the decision the jury must make regarding the amount of damages the plaintiff has incurred as a result of the injury, and we can conceive of none. It serves only to confuse the issue the jury must decide with considerations regarding the plaintiffs lack of need to be reimbursed for out-of-pocket expenses. The plaintiff will still need a judgment against the defendant

covering such expenses if obligated to repay them because of contractual or statutory subrogation.

In *Denton v. Con-Way Southern Express,* 402 S.E.2d 269 (Ga. Ct. App. 1991), a Georgia statute permitting evidence of "all compensation, indemnity, insurance (other than life insurance), wage loss replacement" and other benefits was similarly held to be unconstitutional, the court observing:

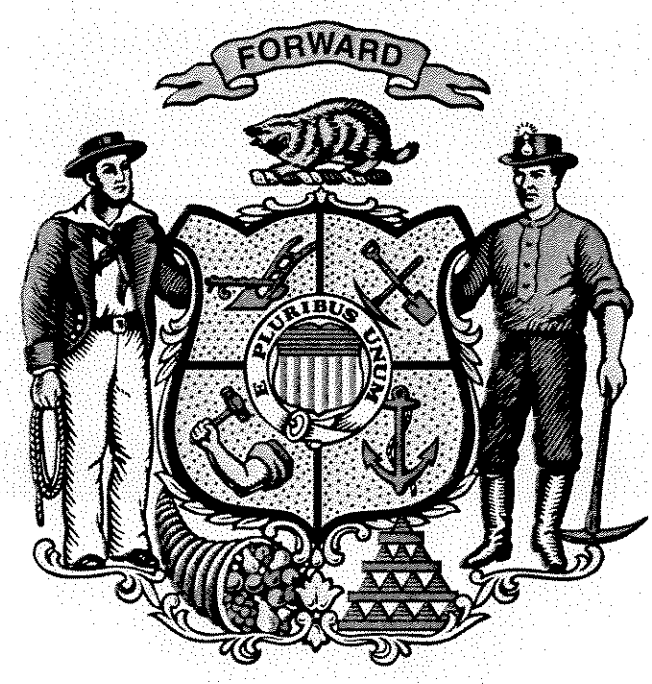
> ... OCGA § 51-12-1(b), allows a jury to consider inherently prejudicial evidence which could be misused. "There can be no equal justice where the kind of trial [or the damages] a man gets depends on the amount of money he has.'[Cit.]" ... Because inherently prejudicial evidence is allowed only to show the plaintiff's sources, juries will be misled.

In *State ex rel. Ohio Academy of Trial Lawyers,* 715 N.E.2d 1062 (Ohio 1999), a statute similarly provided that the trier of fact should consider evidence of certain collateral benefits, but it did not require the jury to deduct any amount of its verdict. Ruling that this statute violated the right of due process, the court reasoned:

> Present R.C. 2317.45 essentially gathers all evidence of collateral source payments, regardless of the category of harm for which it compensates and regardless of whether it compensates for past or future losses, tosses it in an indiscriminate heap along with all categories and items of compensatory damages, and authorizes, out of that, a general verdict replete with collateral benefit setoffs. Any prevention of double recovery that may result from this morass is fortuitous at best. Indeed, the relation between the purported goal of eliminating double recovery and the means employed in amended R.C. 2317.45 to achieve it is so attenuated that one could conclude that the primary goal of R.C. 2317.45 is simply to reduce damages generally.

The language is vague and broad. There are significant questions as to the application of the statute in practice. What collateral benefits will "compensate the claimant for the injury or death?" Does the statute apply to a wrongful death claim? If so, does it apply to proceeds of retirement accounts, life insurance and social security benefits which are payable on death regardless of cause? Does it apply to the value of property held jointly which transfers by operation of law? In injury cases, does it apply to benefits, such as health insurance payments, which are paid directly to a health care provider rather than to the injured party? Does it apply to benefits received from private and governmental disability programs? Does it apply to an expectation of future benefits from any of these sources?

This proposal only acerbates the problems of the present statute and it should be rejected.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CURT GIELOW

State Representative

Testimony on AB 1072

Collateral Source Payments

Senate Committee on Agriculture and Insurance – March 6th, 2006

Mr. Chair and members: Thank you for hearing this proposal this morning.

One of the issues in the area of medical malpractice claims is collateral source payments. This issue was addressed in AB 764 which was passed by the Legislature but vetoed by the Governor. Sen. Scott Fitzgerald and I are introducing a slightly revised proposal to try to address this important issue before the end of this legislative session.

Collateral source payments occur whenever a plaintiff in a tort case (like a medical malpractice case) receives compensation or benefits from a party not involved with the medical malpractice litigation to compensate for the damages the plaintiff sustained. The "collateral source rule" in current law bars defendants from introducing evidence to show that a plaintiff has received collateral source benefits.

Total damage payments under the collateral source rule can in some cases greatly exceed actual incurred (or economic) damages, as well as the historical cap on noneconomic damage settlements that existed in Wisconsin until late 2005. Ultimately, consumers pay for these awards in the form of higher insurance premiums.

Current Wisconsin law does not allow information about collateral source payments in malpractice trials, which means it does not require a jury to reduce a medical malpractice award to a claimant (an injured party) to by the amount of a collateral source payment that the claimant might have received from another source.

AB 1072 would allow the introduction of collateral source payments in a medical malpractice case.

More . . .

State Capitol: P.O. Box 8952 • Madison, Wisconsin 53708-8952 • (608) 266-0486 • Toll-Free: (888) 534-0023 • Rep.Gielow@legis.state.wi.us
District: P.O. Box 504 • Mequon, Wisconsin 53092 • (262) 242-2728

Rep. Gielow testimony on AB 1072 **March 6th, 2006**

(Continued)

- The bill requires the finder of fact to determine the amount of collateral source payments made to compensate the claimant for the injury or death resulting from the medical malpractice;

- The bill also requires the court to determine if an obligation exists for the claimant to return to the payer of the collateral source payment, the amount of that collateral source payment from funds the claimant receives as the final payment for medical malpractice;

- Finally, the court is empowered but NOT obligated to subtract some or all of the amount of any such "pay-back amount" from the collateral source payments. THIS POINT IS A DIFFERENCE FROM AB 764, which read that the court SHALL subtract payments.

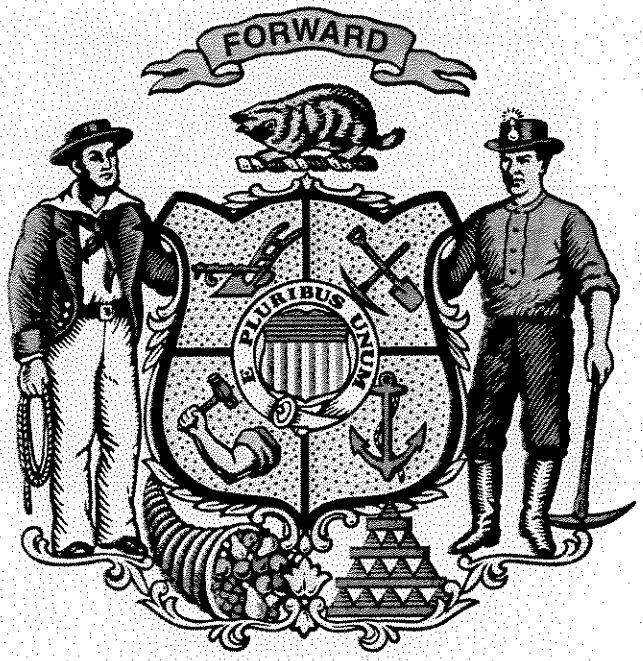
Several states have already taken the lead by enacting measures to either allow evidence of collateral source payments to be admitted at trial or to allow judges to offset awards by the amount of collateral source payments.

A total of 24 states (Alabama, Alaska, Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Michigan, Minnesota, Missouri, Montana, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon and West Virginia) have passed laws to allow consideration of collateral source payments. Oklahoma and West Virginia approved collateral source payment reforms in 2004.

As you know, AB 1072 passed the State Assembly last week. The bill picked up two amendments en route to passage: ASA1 was a technical amendment to eliminate certain inconsistencies in the draft and is explained by a memo from Legislative Council. AA1 to ASA1 is a correction to the formula by which a settlement may be calculated: the use of the phrase "reasonable value" in regard to services rendered is intended to make the bill consistent with our intent. I believe that when attorney Dan Rottier, president of the Wisconsin Academy of Trial Lawyers, testified in the Assembly hearing that "the formula in the bill doesn't work" he was referring to the wording we corrected with AA1 to ASA1. AB 1072 passed the Assembly (as amended) on a final vote of 59-36 with 2 paired.

I believe that addressing the issue of collateral source payments is an important part of making sure that medical malpractice insurance is available, and is as affordable as possible, in Wisconsin. Where medical malpractice insurance is available and its cost is kept as low as possible, health care is more available and more affordable.

I hope the committee will recommend AB 1072 for passage. Thank you.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Wisconsin Medical Society

Your Doctor. Your Health.

TO: Members, Senate Committee on Agriculture and Insurance
Senator Dan Kapanke, Chair

FROM: Mark Grapentine, JD – Senior Vice President, Government Relations
Jeremy Levin – Government Relations Specialist

DATE: March 6, 2006

RE: **Support** for Assembly Bill 1072

On behalf of nearly 11,000 members statewide, thank you for this opportunity to provide written testimony supporting Assembly Bill 1072, allowing a jury to use the introduction of collateral source payments to a party in a medical malpractice suit and adjust any award for payments already made. Such evidence can be used so a jury can properly award an accurate amount for the plaintiff's total award; without such an opportunity, juries could artificially increase total awards, this adding to the costs borne by the medical liability system.

The Society supports this second legislative attempt to provide an answer to the Wisconsin Supreme Court following its decision in *Lagerstrom v. Myrtle Werth Hospital-Mayo Health System* (2005). The bill also responds to the concern expressed in the Governor's veto message about mandatory adjustments to awards, on the initial attempt to fix this situation (2005 Assembly Bill 764). The central issue in the case is whether it is appropriate for the circuit court to admit evidence of collateral source payments and instruct the jury that it may consider the collateral source payments in determining the reasonable value of medical services rendered.

In 1995, the Wisconsin Legislature created Wis. Stat. sec. 893.55(7) along with other tort reform measures. The statute allowed for the introduction of collateral source payments in medical liability cases. In *Lagerstrom*, the Court examined the text of the statute and its legislative history and noted that the statute clearly permits the admission of evidence of collateral source payments in medical liability cases. The Court concluded, however, that the statute fails to identify a purpose for which such evidence would be admitted. Because the statute does not expressly provide instruction for the jury about what to do with the evidence, the Court concluded that the circuit court must instruct the jury that it must not reduce the reasonable value of medical services on the basis of collateral source payments. As a result of the Court's decision, juries may use evidence of collateral source payments to determine the reasonable value of medical services, but may not reduce the amount of the damage award to the plaintiff because of the collateral source payments.

Assembly Bill 1072 solves the problem identified by the majority of the Supreme Court under the old statute. The new bill allows the admission of collateral source payments **and** informs the fact-finder of the purpose of the evidence. Under AB 1072, the fact-finder may use the evidence of collateral source payments to reduce the award, but is not required to do so. This permissive element of the bill responds directly to the veto message of AB 764. The Society supports this common-sense effort to allow juries to use all the facts available before issuing a medical liability award amount.

Thank you for your time and consideration. Please contact Mark Grapentine (markg@wismed.org) or Jeremy Levin (jeremyl@wismed.org) at (608) 442-3800 for further information.

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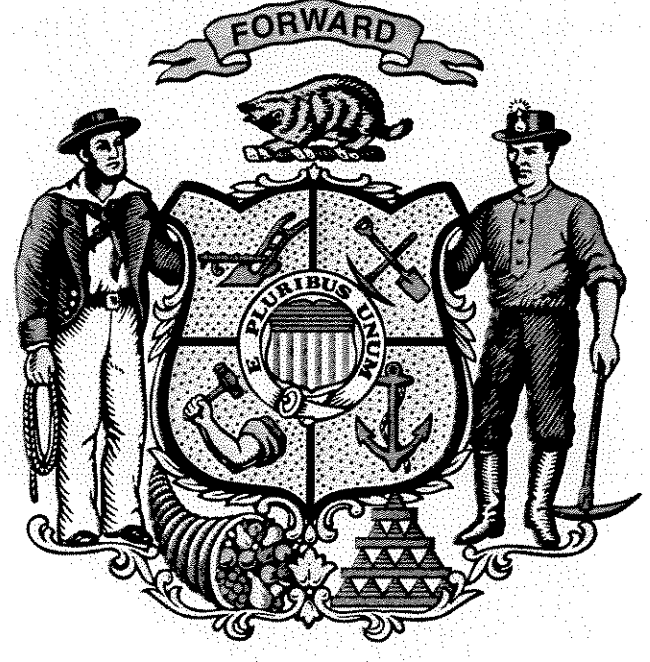
Phone 608.442.3800 • Toll Free 866.442.3800 • Fax 608.442.3802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WISCONSIN LAWYERS
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To: Members, Senate Committee on Agriculture and Insurance

From: State Bar of Wisconsin

Re: Position Statements on AB 1072 – collateral source rule, AB 1073 – caps on noneconomic damages and AB 1074 – caps on attorney fees.

Date: March 6, 2006

The State Bar of Wisconsin through its Board of Governors requests that you **vote against** Assembly Bill 1072 – collateral source rule, Assembly Bill 1073 – caps on noneconomic damages and Assembly Bill 1074 – caps on attorney fees. We again express disappointment that these proposals were rushed through the legislative process with little to no input from the public.

AB 1072 – (Collateral Source Rule) The State Bar of Wisconsin supports the collateral source rule which bars reduction of awards by payments from collateral sources that do not have subrogation rights. The fact that payments are received from a collateral source is irrelevant in the determination of negligence or the amount of damages. The responsibility of a tort-feasor to pay damages caused should not be lessened by the victim's prudence in planning for contingencies.

AB 1073 – (Caps) The State Bar of Wisconsin generally opposes legislatively set limits on non-economic damages. The Bar believes that caps on non-economic damages run counter to the right of obtaining justice "completely and without denial." Such caps set in place an arbitrary pretrial limit when those decisions are best decided by a jury and a court of law. In addition, caps on non-economic damages place an unnecessary hardship on the most seriously injured. Statutory caps are inconsistent with the nature of non-economic damages which are more difficult to quantify.

AB 1074 – (Contingent Fees) – Attorney fees are a matter of contract subject to judicial review and control; they should not be regulated by the Legislature. Furthermore, limits on contingent fees may adversely affect the ability of an impecunious victim to get representation to prosecute a claim. For many, the contingent fee is the key to the courthouse door.

If you have any additional questions, please contact State Bar of Wisconsin Public Affairs Director Lisa Roys at 609.250.6128 or lroys@wisbar.org.

State Bar of Wisconsin
5302 Eastpark Blvd. ◆ P.O. Box 7158 ◆ Madison, WI 53707-7158
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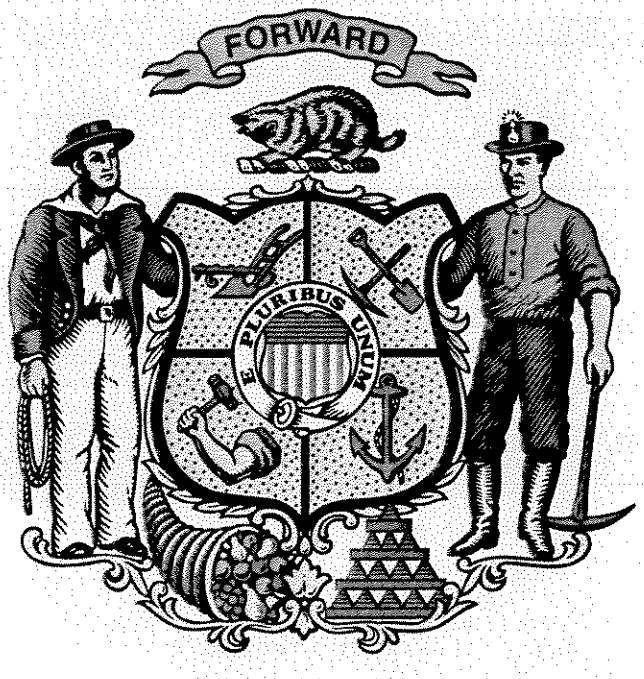
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WISCONSIN LEGISLATIVE COUNCIL
AMENDMENT MEMO

2005 Assembly Bill 1072	Assembly Substitute Amendment 1, as Amended by Assembly Amendment 1 to Assembly Substitute Amendment 1
Memo published: **March 6, 2006**	*Contact*: **Joyce L. Kiel, Senior Staff Attorney (266-3137)**

CURRENT LAW

Current statutes provide that, in a medical malpractice case, evidence of any compensation for bodily injury received by a plaintiff from a source other than the defendant (that is, from a collateral source) to compensate the claimant for injury is admissible in court. [s. 893.55 (7), Stats.] The Wisconsin Supreme Court recently held that if such evidence is admitted, then the injured party's obligations of subrogation or reimbursement to the collateral source (often a health insurer, an employer's self-funded health care plan, or a governmental plan providing health care coverage such as Medicare) also must be allowed as evidence. The court further held that evidence of collateral source payments for medical services could ***not*** be used to reduce the damage award for medical services in a medical malpractice case, even though that evidence could be used to determine the reasonable value of medical services.

2005 ASSEMBLY BILL 1072, AS AMENDED BY THE ASSEMBLY

2005 Assembly Bill 1072, as amended by Assembly Substitute Amendment 1, as amended by Assembly Amendment 1 to Assembly Substitute Amendment 1 (the amended bill), would codify the court's holding that the injured party's obligations of subrogation or reimbursement to the collateral source for its payments is admissible evidence in a medical malpractice case.

However, the amended bill would overturn the court's holding which prohibits a reduction in the amount of a medical malpractice damage award based on evidence of a collateral source payment. Specifically, the amended bill provides that if medical malpractice did occur, the finder of fact (the jury in a jury trial; the judge in a bench trial) must determine both of the following:

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http://www.legis.state.wi.us/lc

1. The reasonable value of services for which any payment was provided from collateral sources to compensate the claimant for injury resulting from the malpractice. (The substitute amendment referred to the "amount that was provided" from collateral sources to compensate the claimant for injury resulting from the medical malpractice. Assembly Amendment 1 to the substitute amendment changed this to "reasonable value.")

2. The amount that the claimant is obligated to pay the collateral sources for such compensation either through subrogation or by reimbursement.

The amended bill then allows the finder of fact to subtract "some or all" of the amount determined under item 2. from the amount determined under item 1. and then reduce the amount of damages awarded in the medical malpractice case by that difference. The bill does not require the finder of fact to make this reduction.

The amended bill would apply to medical malpractice acts or omissions that occur on or after the effective date of the bill.

Legislative History

Assembly Substitute Amendment 1 to the bill was offered by the Assembly Committee on Insurance which then recommended adoption of the substitute amendment on a vote of Ayes, 13; Noes, 1. The committee recommended the bill, as amended, for passage on a vote of Ayes, 9; Noes, 5.

Representative Gielow offered Assembly Amendment 1 to the substitute amendment. The Assembly adopted both amendments by voice vote. The Assembly then passed the bill, as amended, on a vote of Ayes, 59; Noes, 36; Paired, 2.

JLK:rv:ksm

WISCONSIN LEGISLATIVE COUNCIL
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