

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0465/P2dn
MGD:jld:cph

February 14, 2003

Rep. Gundrum:

As I indicated in the previous drafter's note, current s. 940.09 (1m) contains an error. Until 1989 Wisconsin Act 105 was enacted, there were only two ways in which s. 940.09 could be violated. Thus, the last sentence of s. 940.09 (1) (c) read: "Paragraphs (a) and (b) each require proof of a fact for conviction which the other does not require." When Act 105 created s. 940.09 (1) (bm) (which created a new prohibition related to the operation of a commercial motor vehicle), it also renumbered s. 940.09 (1) (c) as s. 940.09 (1m) and amended the last sentence of that provision to read: "Subsection (1) (a), (b), and (bm) each require proof of a fact for conviction which the other does not require." That change, however, should have also replaced "other does" with "others do." Act 105's enactment produced the same error in s. 940.25 (1m).

The error in s. 940.09 (1m) was then compounded by the enactment of 1991 Wisconsin Act 277. Until then, s. 940.09 treated both homicide by intoxicated use of vehicle and homicide by intoxicated use of firearm in the same subsection (sub. (1)). Act 277 removed the references to homicide by intoxicated use of firearm from sub. (1) and created a new sub. (1g) to cover that conduct. At the same time, Act 277 amended sub. (1m). As a result of that amendment, the last sentence read: "Subsection (1) (a), (b), and (bm), and sub. (1) (a) and (b), each require proof of a fact for conviction which the other does not require." Since then, additional paragraph references have been added for each of those subsections.

As a result of these changes, the last sentence of s. 940.09 (1m) could be read as merely indicating that the prohibition against homicide by intoxicated use of vehicle requires proof of a fact for conviction that the prohibition against homicide by intoxicated use of firearm does not require, and vice versa. In other words, that subsection does not clearly specify that one version of homicide by intoxicated use of vehicle (such as the version prohibited under s. 940.09 (1) (a)) requires proof of a fact that the other versions of that offense do not.

Given the history of this provision and the fact that this bill creates new paragraphs to which this provision will refer (subs. (1) (am) and (cm) and (1g) (am) and (cm)), it makes sense not to perpetuate the problems described above. Instead, this bill amends s. 940.09 (1m) so that the last sentence of it reads: "Subsection (1) (a), (am), (b), (bm), (c), (cm), (d), and (e) each require proof of a fact for conviction which the others do not

require, and sub. (1g) (a), (am), (b), (c), (cm), and (d) each require proof of a fact for conviction which the others do not require.” (This is slightly different from what I suggested in the first drafter’s note; I had not yet noticed the Act 105 error.) The bill also amends s. 940.25 (1m) to replace “other does” with “others do” in the last sentence. These changes are consistent with the changes that Peggy Hurley has made in other parts of the draft. *See, e.g.*, s. 346.63 (1) (c).

I hope this information is helpful. Please let me know if you have any questions about it.

Michael Dsida
Legislative Attorney
Phone: (608) 266-9867