Mike Kuglitsch

STATE REPRESENTATIVE • 84TH ASSEMBLY DISTRICT

DATE: December 10, 2015
RE: **Testimony on 2015 Assembly Bill 539**
TO: The Assembly Committee on Judiciary
FROM: Representative Mike Kuglitsch

Thank you Mr. Chairman and Committee Members for holding a public hearing on Assembly Bill 539.

Today, we will hear testimony from both sides of this bill. Those opposed to this legislation will argue that proper damages will not be given to a plaintiff in a personal injury case. However, should this legislation become law, a jury will now be able to see all evidence regarding the cost of health care in a personal injury case before establishing a damage award. By allowing jurors to see both the paid amount and the billed amount for the health care provided, we will allow our court system to determine the actual reasonable value of medical services. There are some states that only allow the paid amount to be considered. There are some states that allow only the billed amount, and there are states that allow jurors to see both the paid and the billed charges for health services when awarding damages in a personal injury case.

Assembly Bill 539 will move Wisconsin in the right direction as we continue to update our litigation standards to be more in line with many other states across the country. This bill revises Wisconsin's collateral source rule in personal injury cases and allows juries to have all the facts regarding the cost of medical care rendered to an injured party in a personal injury case.

Under current law, Wisconsin's collateral source rule prohibits evidence of the amount actually paid by the plaintiff or his or her health insurer in personal injury cases. This payment is usually substantially lower than the billed amount an injured party receives, as health insurance companies typically have negotiated deep discounts off of the prices charged for services offered by medical practitioners. What we see on our hospital bill is very likely not what was paid by our health insurer. As a result, plaintiffs and their attorneys, are often awarded a sum that is greater than what was actually paid to the medical practitioner. This has been the norm in Wisconsin for a number of years, and was most recently brought before the Wisconsin Supreme Court in 2012.

AB 539 allows for transparency in all personal injury cases and ensures that the amount actually paid by a collateral source, as well as the billed amount by the medical practitioner, are able to be submitted into the record as evidence. Jurors will be permitted to see both the billed and the paid amount before awarding a sum to the plaintiff in these cases. Many

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believe that this simple fix will shed light on a financial windfall that unfairly benefits plaintiffs and their attorneys. The bill does not change any rules on other non-economic damages such as pain and suffering.

I believe it is important to note that Wisconsin currently allows evidence of collateral source payments for medical malpractice claims, but not in personal injury cases. Not only will this legislation ensure that the proper payment is made to plaintiffs across the state, but it will also provide consistency within our statutes and put Wisconsin in line with many other states, including our neighboring states of Minnesota, Indiana, and Ohio.

Simply put, under current law, plaintiffs who never pay the full sticker price charged by their medical provider, are entitled to that total sum, even though a substantially lower amount of money was paid out. I believe we owe it to our state's property insurance customers, who in turn pay higher premiums due to these phantom damages, to change this policy in Wisconsin. While we continue to move our state forward in terms of financial responsibility and job creation, we must keep in mind the importance of litigation reform and transparency in Wisconsin's court system.

Thank you for allowing me to testify today and I thank you for your consideration of AB 539.

CHRIS KAPENGA
WISCONSIN STATE SENATOR

Testimony on Assembly Bill 539
Assembly Committee on Judiciary
December 10, 2015

Thank you Chairman Ott and committee members for holding a hearing today on Assembly Bill 539. I want to thank Representative Kuglistch for being the Assembly author of the bill.

In a recent survey by the U.S. Chamber of Commerce, 75% of respondents said that a state's litigation environment is likely to impact the decision on where to locate their business. Wisconsin has made great strides in recent years to improve our state's litigation climate, climbing to 15th overall in 2012.

However, in the most recent survey Wisconsin dropped to 20th overall. This was due to other states improving their environments more quickly than ours. One specific item mentioned that could significantly improve our standing is the elimination of "phantom damages" in personal injury lawsuits in Wisconsin.

"Phantom damages" relate to the cost of medical claims in an accident, and are specifically the difference between the list price of medical services and the actual payment for services. To be technical, it is the full value of a CPT code versus the negotiated rate that is actually paid by insurers or Medicaid. Wisconsin law does not allow the actual costs to be shown.

The difference can often be substantial. One case that illustrates the problem is *Orlowski v State Farm*. In this case the plaintiff and their insurance company incurred a total of $11,499 in medical costs. However, due to Wisconsin's "collateral source rule", an arbitration panel awarded the plaintiff the full retail value of $72,986 for medical costs because state law prohibits them from being able to see what the actual medical bills were. The inflated award in this situation of $61,287 was directly passed to customers through higher premiums.

Assembly Bill 539 simply allows both the list price and the amount actually paid to be entered as evidence for a jury to consider. Based on this evidence, a jury can then decide how much the plaintiff should be reimbursed for medical expenses. It is important to note that this has no impact on other damages that can be awarded, such as damages for pain and suffering or property damage.

A majority of states allow for collateral source payments to be entered into the evidence when determining damages. Many states, including California, Connecticut, Massachusetts, and Florida have gone a step further by only allowing the amount paid to be entered into evidence. This bill is an

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equitable solution that will give juries the information they need to make an informed decision on the amount of damages to award related to medical costs.

Assembly Bill 539 creates a fair and equitable process for a jury to determine damages related to health care costs in personal injury cases. I ask for your support of this common sense reform. Thank you Mr. Chairman, and at this time I will be happy to answer any questions from the committee.

WISCONSIN ASSOCIATION *for* JUSTICE
formerly the Wisconsin Academy of Trial Lawyers

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Testimony of Mark L. Thomsen
Wisconsin Association for Justice
Before the Assembly Judiciary Committee
December 10, 2015
Regarding
2015 Assembly Bill 539

Good morning/afternoon, my name is Mark Thomsen. I am a shareholder with the Brookfield law firm of Cannon & Dunphy, S.C. I am past president of the Wisconsin Association for Justice and a member of its board of directors. On behalf of the association, I am here to speak against AB 539 and I thank you for the opportunity to testify.

As others have indicated, other than the effective date which is now no longer retroactive, this is the same bill that saw no action last session. This bill hurts consumers and will cost the state and Wisconsin businesses millions in lost dollars every year. This bill also encourages more litigation by eliminating simple rules for how lawyers, judges and juries value medical treatment and any other payments made to injured victims in Wisconsin.

The Collateral Source Rule Protects Consumers

I will explain in a moment exactly how the collateral source rule works, but I want to emphasize from the start that the rule exists because it protects consumers and because it helps ensure fair recoveries for money paid by the state; by Wisconsin businesses and by health insurance plans.

It protects consumers by doing three important things:

1. Ensures the Negligent Person Pays The Full Cost of The Injuries They Cause.
2. Fully Compensates Injured Victims.
3. Ensures Injured Victims Get the Benefit of Insurance They've Paid For.

Current law also ensures that the state, businesses, and health plans are able to recover millions they pay for injuries caused by negligent drivers and other negligent parties.

Collateral Source Rule Recovers Millions for the State

AB-539 will result in millions in lost payments to the state of Wisconsin. Wisconsin recovers millions of dollars each year from personal injury verdicts and settlements because injured people repay the state for the money spent on their injury-related Badgercare payments. Total collections for the most recent available year, 2012 totaled $10 million. In 2011, the total was $6 million, and in 2010, it was nearly $9 million returned to the state's coffers.

Reported Collections for the past SFYs/CYs for Medicaid is as follows:

	State Fiscal Year State and Counties	Calendar Year HMOs	Total
2010	$ 4,934,923*	$ 4,002,689	$8,937,612
2011	$ 1,994,969	$ 4,050,535	$ 6,045,504
2012	$ 3,800,420	$ 5,257,489**	$ 9,057,909

Source: DHS, May 2013

* Amount has been adjusted by $1.7 million for collections related to SFY 2009.

**Not all collections have been reported as of this date.

AB-539 will greatly reduce the state's ability to recover funds paid by Medicaid to treat injured victims. When the victim obtains a verdict against the negligent party, a portion of that award is returned to the state, paying back what the state paid for medical treatment. This bill would reduce the amount owed by the person causing injury by the amount paid by Medicaid. In most cases, this would prevent the state from ever being able to recover these funds.

AB-539 Will Cost Health Plans and Self-Insured Businesses

Beyond the state of Wisconsin, businesses whose employees are injured will also see a major decrease in their ability recover the money they pay to provide medical treatment to injured parties. AB-539 will greatly reduce the amounts recovered for past medical expenses, and will drive up the cost of recovery. Similar to the state, health plans and self-insured businesses in Wisconsin will see the money they recover from at-fault persons decline greatly as a result of this proposal. Just like the state, every time an injured person receives a settlement or wins a jury verdict; they pay a portion back to the party who has paid for their medical treatment.

How the Collateral Source Rule Works

Let's first talk about the history of the law and why it benefits all consumers in Wisconsin. Wisconsin courts have long recognized the simple principle that the wrongdoer pays for the injuries they cause. In practice, this means that an injured person has the right to recover from the wrongdoer the "reasonable value of the medical treatment reasonably required by the injury." The rule is based "Wisconsin's significant interest in fully compensating victims of ordinary negligence."

The collateral source rule says that if you are a responsible person who has purchased insurance, you should have the benefit of that insurance. It works this way - if a person is in a car accident and is hurt, the at-fault driver doesn't get a reduction in what they pay in damages because their victim has insurance. It is a rule of evidence - the at-fault driver is not allowed to introduce evidence of what their victim's health insurance paid on medical bills. The injured person can recover the reasonable value of the medical care required to treat injuries caused by the at-fault driver. The negligent driver doesn't get a discount because he had the good luck to run over someone with insurance. This makes sense – after paying premiums for years, *the benefit of the insurance you buy should be yours, not the person causing the injury.*

Longstanding

The collateral source rule is neither new nor controversial. In fact, Wisconsin has followed the collateral source rule for over a century. Specifically, AB-539 would overturn Wisconsin law that has stood since at least 1908. In that year, in the case *Gatzweiler v. Milwaukee Electric Railway & Light Co.*, the Wisconsin Supreme Court said that a casualty insurance contract "is an investment contract giving the owner or beneficiary an absolute right, independent of any right against any third party responsible for the injury covered by the policy." In 1927, our supreme court followed in *Campbell v. Sutliff* by holding that, "It is equally clear that the defendant is not entitled to have the damages reduced because the plaintiff had purchased and paid for the right to have indemnity in case he sustained accidental injuries." The court continued, "The sums paid for such insurance are in the nature of an investment, which, like other investments made by [a] plaintiff, ought not to insure to the benefit of the defendant." The court concluded that "The only parties interested in such a contract of insurance [like a health care plan], are the plaintiff and the insurer."

The logic of these cases continues to hold strong, even today in 2015. AB-539 would overturn *Orlowski v. State Farm Mutual Automobile Ins. Co.*, a 2012 Wisconsin Supreme Court case where all seven justices, including some of the court's most conservative members joined together in upholding the collateral source rule. In *Orlowski*, the court detailed three main consumer benefits of the collateral source rule has it has stood for 107 years, and which I noted for the committee at the outset. These benefits are:

1. Deterrence: The rule deters negligent conduct by placing the full cost of wrongful conduct on the wrongdoer.

2. Fully Compensates Injured Party: "the collateral source rule protects plaintiffs by guarding against potential misuse of collateral source evidence to deny the plaintiff full recovery to which he is entitled."
3. Ensures that injured party gets the full benefit of the insurance they worked hard to purchase.

It is important to note that the argument the court faced in *Orlowski* was the same argument made by supporters of AB-539 today. For 107 years, the Supreme Court of Wisconsin has held that the at-fault party cannot benefit from the fact that their victim has insurance.

AB-539 Punishes Those Who Work Hard to Obtain Insurance: An Example

Mary is a responsible person. Mary works 35 hours a week at her church. Mary's church keeps their overhead low and cannot afford to pay her health insurance benefits. To obtain benefits for her family, Mary also works an additional 20 hours each week sorting packages for a major delivery company. The benefit of Mary's hard work is that the company generously provides a health insurance plan that covers Mary and her family. The insurance plan that Mary has worked so hard to obtain has contracts with medical providers throughout the state. As our courts have stated, that is a benefit Mary has earned through her hard work and sacrifice.

Mary is injured by a drunk driver. Mary is transported from the scene, treated and ultimately released by the hospital. She continues her medical treatment by visiting a physical therapist twice weekly, as recommended by her doctors. The medical bills from her injuries total $250,000. Because Mary has insurance, her health insurer pays a negotiated rate of $150,000 to settle the bills.

Compare Mary's situation to Joe, who does not have health insurance. Joe is struck by the same drunk driver in the same place. He suffers the same injuries. Like responsible Mary, Joe is billed $250,000 for his medical care. Under current law, the damages the drunk driver owes each victim is the same: the reasonable value of the medical services required to treat the injuries they have caused.

The full benefit of Mary's hard work to obtain health insurance would go to the drunk driver under AB-539. *Under AB-539, the drunk driver would see the damages they owe to the victim drop by $100,000 when hitting responsible Mary.* The most fair way to honor Mary's hard work, as current law provides, is to have the jury weigh only the true value of the medical services she received. The benefits of Mary's insurance should go to Mary, not the drunk driver who ran her over.

Reductions in damage awards based on the payment of medical bills are not the only potential way for a drunk driver or other negligent individual may seek to benefit under AB-539. In a wrongful death case, should life insurance payments be introduced? How about payments made by family members, churches, and other charitable organizations. Why should a drunk driver or other negligent person pay less damages due to the kindness or foresight of others? The answer is they should not.

Why AB-539 Supporters' Arguments Fall Short

Those who support AB-539, as they have in past sessions, cite three main reasons why they believe this bill is necessary. As has been true in each of the past sessions when this bill was introduced, each of these reasons is wrong.

Current Law Provides No "Windfall," But Instead Rewards Hard Work

First, those who favor AB-539 argue that current law provides a "windfall" to injured victims. This is completely false. Those who see their medical bills paid by health insurance have worked hard for the benefits they receive, they spend hours working and pay millions out of pocket to make sure that coverage is there when they need it. They alone should benefit. A drunk driver or other negligent person should not benefit from somebody else's hard work and foresight. In a 2011 case, Justice Prosser explained the situation well. In Fischer v. Steffen, Fischer incurred $12,157 in medical expenses after being injured by Steffen in a car crash. Fischer's insurance paid $10,000, its limits. Steffen tried to argue that the only amount it owed Fischer was $2,157. As Justice Prosser rightly stated:

> The most striking fact about this case is that defendant Steffen caused $12,157.14 in medical expenses to the Fischers but has been relieved of the burden of paying all but $2,157.14 toward these expenses...As a result, the Fischers are being punished for their foresight in purchasing automobile insurance with coverage for medical expenses, [Steffen and his insurer] receives a $10,000 windfall.

Wisconsin Should Celebrate Low Insurance Rates Under Current Law

Secondly, supporters of AB-539 argue that current law results in "inflated judgements" and that those judgments drive increased auto insurance rates. The opposite is true. Wisconsin has some of the lowest auto insurance premiums in the country.

Insure.com: Wisconsin Has Among Lowest Auto Insurance Rates in Nation. A January 2015 study found that the average annual auto insurance premiums in Wisconsin ranked 46 out of 51 (50 states and D.C.) with an average annual premium of $930. That means that Wisconsin has the 6th lowest annual auto insurance premiums in the country. [Insure.com, January 2015]

Wisconsin Premiums Nearly $400 Below National Average. According to the above study, Wisconsin premiums, averaging $930 per year, fall below the national average of $1,311. [Insure.com, January 2015]
NOTE: *these figures are higher than NAIC b/c they use the 20 most popular cars as the baseline.*

NAIC (2012): Wisconsin Average Annual Auto Insurance Expenditures 5th Lowest In Nation. According to the National Association of Insurance Commissioners, Wisconsin auto insurance costs are the fifth lowest in the country. The average annual auto insurance expenditure in Wisconsin was $598.84 in 2012. [Insurance Information Institute]

- **National Average Expenditure $814.99 (2012)**. [Insurance Information Institute]
- **NOTE**: expenditure number assumes some drivers will not have collision or comprehensive coverage. This study for all vehicles, not most popular models.

This is not a new trend. Wisconsin has long had affordable car insurance rates. The Insurance Industry's own website confirms this. A document I found yesterday on the Wisconsin Insurance Alliance's website, a key

supporter of this bill, touted that 2010, Wisconsin had the fifth lowest auto insurance rates in the country. I just gave you the 2012 version of the same study. I would point out that lawsuit filings have declined since then and rates are holding stable.

Neighboring States Charge Higher Rates

Third, proponents of this bill like to argue that they are making a simple change to bring us in line with other neighboring states of Indiana, Minnesota and Ohio. This would take us backwards. Of those states, only Ohio has lower average rates in the most recent study. Being more like Indiana and Minnesota would mean that Wisconsin residents would be paying more.

The Value of Medical Services is the Amount Billed

The amount billed by a physician or health care provider should be presumed to be the reasonable value of the services provided under Wis. Stat. § 908.03(6m)(bm). Physicians are prohibited from charging excessive fees. If physicians in Wisconsin were regularly billing "phantom damages" as alleged by proponents of this bill, they would be violating several codes of medical ethics.

"Paid Amounts" do not reflect full value of medical services and are rightly ignored. Discounted fees do not constitute a measure of fair market value of medical services because they do not include full consideration received by health care providers when entering into discounted fee arrangements.

CONCLUSION

The collateral source rule is a rule of evidence that keeps litigation simple and plays a role in helping protect consumers by deterring bad behavior, ensuring victims get fully paid for their injuries, and it makes sure that those who have the foresight to buy insurance get the full benefit of their hard earned dollars. The only windfall anywhere near this bill is the one that AB-539 provides to liability insurers who will rob responsible citizens of the insurance benefits they have purchased and reap millions. In return, Wisconsin consumers lose important protections the collateral source rule provides while businesses and the state of Wisconsin face the loss of millions in payments recovered from negligent, at-fault parties. Protect the Wisconsin way, I urge you to oppose AB-539.

FALK
LEGAL GROUP

Testimony Presented to
Assembly Committee on Judiciary
In Opposition to Assembly Bill 539

Presented By
Matthew R. Falk
Managing Attorney/Owner
Falk Legal Group LLC

Thursday, December 10, 2015

❖ Introduction

Members of the Committee, Chairperson Ott, thank you for the opportunity to present testimony before the committee today. My name is Matthew R. Falk. I am an attorney with the law firm of Falk Legal Group. One of my specialties is insurance subrogation. That specialty includes health subrogation. I represent national insurers, including large health insurers, self-funded ERISA plans, third party administrators, Medicare Advantage Organizations, and local Wisconsin insurers like Group Health Cooperative of Eau Claire. I am presenting testimony today in opposition to AB 539.

I have been practicing in Wisconsin since 1994. I am certified by the National Association of Subrogation Professionals as a Certified Subrogation Recovery Professional. I also serve as the co-chair of the National Association of Subrogation Professionals Wisconsin Chapter. I am called to speak on the topic of insurance subrogation and my speaking engagements have included the State Bar of Wisconsin (Annual Torts Update on Subrogation) and the National Conference for the NASP (Health Track Past Chair and Current Speaker). I am a recognized expert in insurance subrogation.

❖ Subrogation and Reimbursement Claims Reduce Costs

The elimination of the collateral source doctrine will not benefit Wisconsin's business community. If subrogation recoveries go down, premiums go up. Wisconsin's business community does not want higher premiums.

Subrogation recoveries are an important component in calculating the cost of insurance premiums. An insurance company sets its rates based on historical net costs. For example, if a health insurer had one hundred policyholders in a given experience period, and experienced a total of $20,000 in claim costs, it will set its actuarial premiums at $200 per policyholder. By comparison, if the same insurance company experienced $20,000 in claim costs and received $5,000 in subrogation, it will set its actuarial premiums at $150 per policyholder. As a source of revenue, subrogation operates to reduce the actual past cost total used in the calculation of probable future insurable risk or loss on which future premiums will be based.

❖ **The Legislation will Cost Wisconsin Taxpayers.**

In 2013, financial data reveals that Wisconsin recouped over $24,041,025 between 2010 and 2012 in Medicaid recoveries. Attorneys for the DOJ and DHS/OLC have also historically reported that the recoveries would be **"significantly less"** if the legislature passed a AB 29, a prior and identical bill permitting the introduction of collateral source payment. These figures confirm that Wisconsin taxpayers will be burdened with higher costs since the costs of providing Medicaid services will go up when recoveries go down.

❖ **Liability Insurance Rates Remain Low.**

There is no evidence that the preclusion of collateral source evidence effects Wisconsin liability insurers. The evidence is the exact opposite: Wisconsin taxpayers enjoy low liability insurance rates. The National Association of Insurance Commissioners shows that Wisconsin auto insurance costs are the some of the lowest in the country. How low? According to www.insure.com the sixth lowest in the nation.

❖ **Average Family Premium Per Enrolled Employee for Employer-Base Health Insurance Near Most Expensive in Country**

While liability insurance remains low, The Henry Kaiser Family Foundation reports that Wisconsin average family premium for employees who obtain health insurance through their employee some of the highest in the country. See,www.kkg.org/statedata/. According to 2014 data, sixty nine percent of Wisconsin families obtain health insurance through an employer. The average employer contribution totals $13,418 – the fourth highest cost in the nation. The average employee contribution is $3,791 the 13th highest cost in the nation. This legislation, in turn, will only further burden Wisconsin Employers and Employees.

❖ **The Proposed Legislation Increases the Costs for Health Insurers doing Business in Wisconsin.**

Health insurers face the very significant risk of greater involvement in personal injury litigation as a result of expanded written discovery and depositions. In addition to the costs associated with this discovery, there is also substantial risk of unwanted disclosure of the confidential negotiations between health care providers and insurers that form the foundation for the contractually reduced payments. These additional costs and inconvenience will have an adverse impact on health insurers. In addition, the proposed legislation creates additional risk of reduced recovery of claims

in settlement or the extinguishment of subrogated claims after settlement. It does not stop with the health insurer.

Hospital and other medical care providers need to gear up to produce witnesses to justify their charges too. Although the legislation indicates that the bills and invoices, once submitted, create a presumption that the amount contained in the bill or invoice represents the reasonable value of the services provided, **this presumption is now easily rebutted by the admission of the amounts paid by collateral sources, evidence that is currently inadmissible.** Once evidence of collateral source payments is introduced in the litigation, any presumption of reasonableness of the amounts billed evaporates, and the issue of reasonableness becomes a question of fact in the litigation. The consequences for health care providers are significant.

First, health care providers will be subject to subpoena in every personal injury claim to testify as to the basis for the amount billed to the patient and also to testify as to the basis for the contractually negotiated reduced sum paid by the patient's insurer. In situations where there exists no health insurance or where the provider decides to forgo the submission of the bill to insurance or to government agencies for reimbursement, the health care provider lien will be subject to attack by both the defendant and the plaintiff regarding the reasonable value of the service. Evidence will now be admissible regarding amounts accepted by the provider from collateral sources such as insurance carriers and government funded health programs, such as Medicaid and Medicare. These adverse consequences will only increase costs to health care providers and reduce recoveries, which will naturally be reflected in additional increased costs of healthcare in Wisconsin.

From the context of the health insurer, both counsel for the injured party and counsel for the liability insurer will seek discovery of the commercial sensitive and proprietary agreements between health care providers and health insurers or self-funded plans and their third party administrators. Counsel for the injured party will use that information to claim that the charged amount, not the negotiated and discounted paid amount, represents the reasonable value of the care. Counsel for the liability carrier will attempt to use this protected information to show that the negotiated rates represent the reasonable value of the care. Hence, the health insurer will be required to present and to defend its proprietary networks.

- **The Legislation Eliminates the Financial Incentive for the Injured Party to Pursue Past Medical Care Claims**

Proponents of the bill mistakenly assume that counsel for the injured party will continue to bear the burden of proving past medical care claims in litigation in order to prove the nature and extent of the injuries suffered by the plaintiff. That is true where the medical experts and associated claims make that financially prudent. However, the proposed legislative change presents health insurers with a significant risk that the injured party will forego introducing evidence of past medical expenses at trial.

Typically, past medical expenses have been proven at trial by the plaintiff. In addition, the costs of introducing medical evidence to support a claim for past medical expenses have typically been borne by the plaintiff. The incentive on the part of the plaintiff to do so was the potential recovery of the full value of the medical bills incurred. The proposed legislation removes that incentive for

the plaintiff. As a consequence, the health insurer will likely bear an increased burden in proving up past medical care claims at trial, along with increased costs.

❖ **Health Insurers Face Increased Litigation Costs**

This scenario creates a big problem for health insurers since the proposed legislation will increase the cost necessary to proving up their subrogation claims while increase the exposure of losing their interest through a *Rimes* hearing – losing the interest and the increased costs.

If the injured party decides that the burden associated with procurement of the medical testimony is cost prohibitive, then the health insurer has a choice: forego the recovery or retain competent medical testimony to prove its claim. In those cases where the plaintiff decides that no incentive exists to prove past medical expenses, that burden will have to be assumed by the health insurance carrier. Any fees and costs associated with proving up these past medical expenses will now be shifted to the health insurer or other collateral source payer.

The health insurer can advance those costs and pursue a third party recovery. However, Wisconsin law, generally speaking, permits the injured party to compromise the claim, agree to hold the liability insurer harmless from the health insurer's claim, and seek a judicial determination that the injured party is not made whole. This results in the loss of the subrogation interest and the substantial costs, typically $3,000 to $4,000, associated with the production of the medical testimony.

❖ **Subrogation Recoveries Will Go Down**

The proposed legislation creates an argument for liability insurers to reduce the injured party's claim for past medical expenses. The argument creates an issue where one presently does not exist: whether the paid versus charged amounts reflect the reasonable value of the past medical care. The proposed legislation increases the risk of a made whole ruling. Under the proposed legislation, an injured party may enter into settlements for less than the value of the amounts billed for medical services in order to avoid the risk of a reduced recovery at trial. In a situation where the plaintiff chooses to settle a claim for past medical expenses for the amounts paid by the health insurance carrier, the plaintiff has the right to claim that she has not been made "whole" by the settlement based on this compromise. If the trial court agrees, the lien of the health insurance carrier may be substantially reduced or extinguished altogether. This significant impact on the right of subrogation is another adverse consequence not addressed by proponents of this legislation.

❖ **Wisconsin Should Reject an Insurance Penalty: The Collateral Source Rule Makes Sense**

Wisconsin law has long recognized that an injured party has a right to recover from the wrongdoer "the reasonable value of the medical treatment reasonably required by the injury." *Orlowski v. State Farm Ins. Co.,* 212 WI 21, ¶21, 339 Wis.2d 1, 810 N.W.2d 775. This rule is based on "Wisconsin's significant interests in fully compensating victims of ordinary negligence." *Id.* at

¶26. Some proponents of the legislation incorrectly characterize this law as allowing a "windfall" because it permits an injured party to recover past medical expenses that exceed the amount actually paid by the injured party's insurer. No one disputes that the law does not apply to uninsured citizens of Wisconsin. Instead, it would only apply to folks that pay premiums in order to obtain health insurance to cover care for injuries caused by a wrongdoer. Alas, is there something unfair about a rule that prohibits a wrongdoer from benefitting from the injured party's purchase of insurance?

❖ **Proponents of the Bill Believe that Hospital and Other Medical Charges Are Excessive**

Wisconsin liability insurers contend that liability insurers are being forced to pay "excessive amounts" for the injured party's past and future medical care. The bases for that premise is the contention that hospitals, doctors and other medical care professionals charge too much for their services. The casualty insurers, in turn, want to benefit from the proprietary and negotiated rates that help reduce premiums for Wisconsin businesses. Liability insurers want to enjoy a reduction in its exposure at the cost of health insurers. Of course, health insurers will have to pass this cost on to Wisconsin businesses.

Under Wisconsin law, a liability insurer can retain experts to challenge the reasonableness and necessity of the medical charges associated with a plaintiff's past medical care. As a result, if the liability insurer thinks that provider X's charges are too high, the law entitles the insurance company to offer expert testimony to challenge those charges. What the law prohibits is the liability insurer from using, as a basis for its opinion testimony, the negotiated rates of the health insurance or government entity that paid for the care.

In truth, if liability insurers want to negotiate discounted rates with providers, the law permits them to do just that. What the law should not permit is the liability insurer getting something for nothing, i.e. getting the benefit of the negotiated rates from the health insurer without the corresponding cost obligation.

❖ **Wisconsin Businesses That Self Insure Will Also Be Losers if the Proposed Legislation Becomes Law.**

The proposed legislation equally effects self-funded ERISA plans and others whose subrogation interests trump the application of Wisconsin's made whole rule. If no financial incentive exists to procure medical testimony, then that burden will have to be borne by the self-funded or federally-funded plan. Although the subrogation recovery may not be affected, the costs of obtaining that recovery will certainly increase. In addition, self-funded and government funded plans will also be subject to discovery regarding the basis of the reduced rates paid to the provider, in the same manner as an insured health plan. The increased costs of pursuing subrogation liens, whether they be incurred on the part of self- funded, government-funded or insured plans cannot be ignored.

❖ **Any Analogy to Medical Negligence Cases Misses the Mark**

Any analogy to medical negligence cases as a window for how collateral benefits will be handled in the context of other personal injury litigation misses the mark. In medical negligence cases, the defense may introduce evidence of collateral payments. However, that admission must be relevant and supported by competent expert testimony. I have been involved in tort litigation for nearly twenty years, including numerous medical negligence trials. I have yet to hear doctors or a hospital representative claim that their own charged medical care is unreasonable in amount and that the jury should accept the discounted rate, not the hospital's charge. It simply does not happen. As a result, the admission of this testimony is rare.

As the son of a doctor and the brother of another, I know that doctors, hospitals and other medical care providers believe strongly in the oath they take to care for the injured. Collateral source legislation is not the proper method for address rising medical costs. Instead, they should engage in a dialog with these professionals and not infringe on the proprietary rights of Wisconsin's health insurers.

WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System

TO: Members, Assembly Committee on Judiciary

FROM: Wisconsin Civil Justice Council

DATE: December 10, 2015

RE: **Support for AB 539 (Collateral Source/Phantom Damages)**

The Wisconsin Civil Justice Council (WCJC) respectfully encourages you to support AB 539 relating to phantom damages in personal injury cases.

Despite nationally recognized civil justice reforms in recent years, businesses perceive Wisconsin's litigation climate as getting worse. Top attorneys from major companies partaking in a recent U.S. Chamber survey dropped us five spots to 20th in the nation for litigation climate.* This perception handicaps our ability to retain and grow existing businesses and attract new jobs to Wisconsin.

A key reason for our decline is the ability of plaintiffs and their attorneys to collect "phantom damages" that are reimbursement of expenses that the plaintiff never incurred.

Under current Wisconsin law, plaintiffs and their attorneys reap significant windfalls in personal injury cases because the jury never gets to see evidence of the amount actually paid to the medical provider for the plaintiff's injuries. Instead, due to a number of Wisconsin Supreme Court decisions, the jury is only allowed to see the billed amount, which is typically significantly more than what was actually paid.

In a recent case cited by the U.S. Chamber, the Wisconsin Supreme Court ruled juries can only consider the amount plaintiffs were initially billed for their medical care even if they paid significantly less to the healthcare provider. In this case, the phantom damages were a $61,487 windfall, but such damages can amount to hundreds of thousands of dollars.

AB 539 is a fair middle-ground for the following reasons:

- Many businesses prefer California law that requires the jury to consider only the actual amount paid. AB 539 allows juries to see both the amount billed and the amount paid when determining reasonable medical expenses.
- AB 539 retains the current law that billing statements or invoices are presumed to state the reasonable value of the health care services.
- Wisconsin law currently allows the jury in medical malpractice cases to see both billed and paid expenses when determining the plaintiff's medical expenses. AB 539 merely extends the law to all personal injury cases.
- AB 539 does not affect the law relating to non-medical economic damages such as lost wages, non-economic damages such as pain and suffering and emotional distress, or punitive damages.

This legislation is fair to all parties and aligns Wisconsin with many states, including California, Indiana, Minnesota, Ohio, and Texas. Passage will make Wisconsin a more competitive place to do business.

WCJC respectfully requests you support AB 539.

*2015 Lawsuit Climate Survey – Ranking the States, U.S. Chamber ILR (Sept. 2015).

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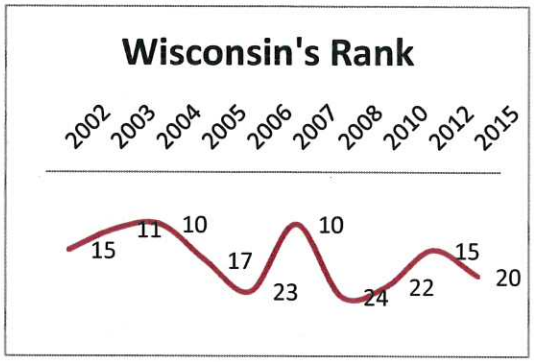
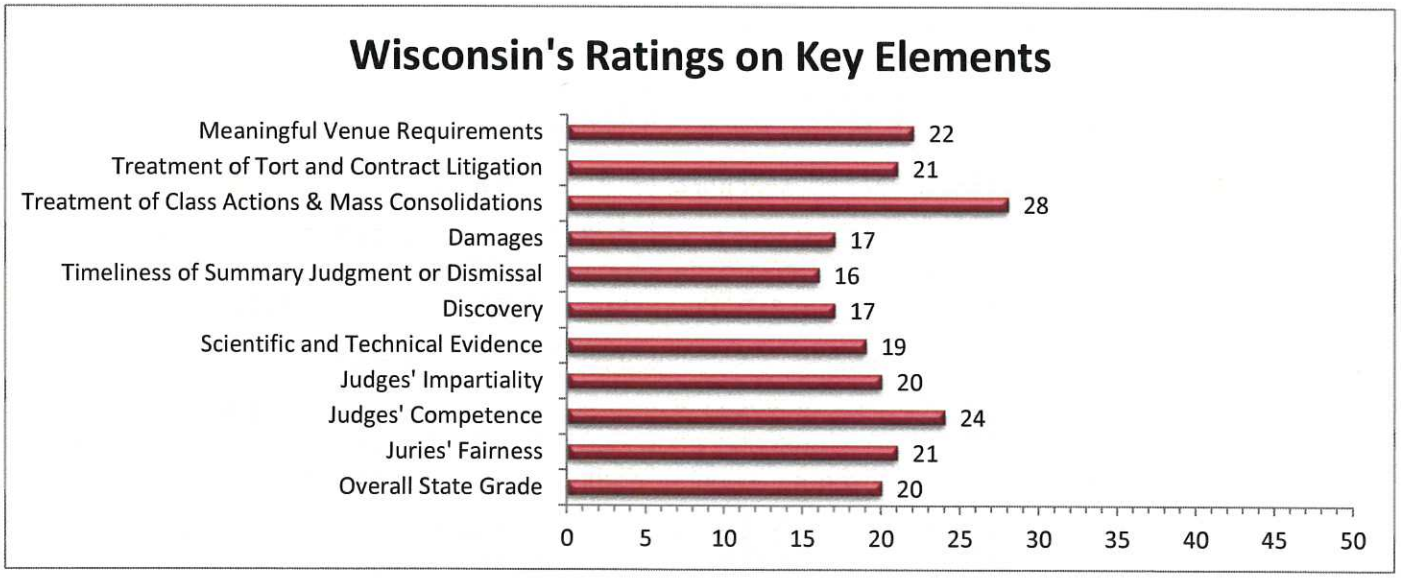
20 Wisconsin

Overall Ranking Fell 5 from 2012

Wisconsin has made significant progress in improving its civil justice system. The state took a leap forward in 2011 when it enacted a comprehensive civil justice reform package. These reforms passed just prior to the last survey, which may have led 2012 respondents to be especially optimistic about the state's future. Soon thereafter, the state's high court dealt a blow to this progress when it allowed plaintiffs to collect "phantom damages." Several other liability-enhancing decisions followed. The legislature has continued to make progress, even as the state's high court has become increasingly dysfunctional.





Wisconsin's General Business Climate

- Wisconsin underwent a transformation in 2011, moving to a more business friendly environment. Wisconsin has sustained this progress over the past four years.
    - CNBC placed Wisconsin in the top quarter (17th) of states in 2014, largely due to its strong education system and infrastructure. It has sustained this high position since 2012.
    - Chief Executive's annual survey of CEO's ranked Wisconsin 12th in 2015, declaring that the state's "business-friendly leadership… low taxes and minimal regulations are providing new business investment opportunities." This is an improvement from 20th place in 2012.
    - Forbes ranked Wisconsin 32nd among the states in 2014, largely as a result of its high business costs and labor supply challenges. Forbes found, however, that Wisconsin has strong growth prospects, noting that since its 2011 "open for business" reforms, "its jobs picture has improved dramatically." That year, Forbes ranked Wisconsin 40th overall.
    - Wisconsin has among the worst business tax climates, placing 43rd among the states in 2015, according to the Tax Foundation. Wisconsin's overall tax rank has not changed since 2012.

Potential Contributors to Wisconsin Placement in the Rankings

1. Significant Legislative Reform Has Reshaped the Litigation Environment

   - Wisconsin enacted sweeping changes to the state's tort law shortly before the last survey. The reforms and the priority that new state leadership placed on creating a business friendly environment likely boosted Wisconsin's rank from 22 in 2010 to 15 in 2012.
   - In 2011, Governor Scott Walker called the legislature into a special session focused on job creation. As a result, the legislature passed the Omnibus Tort Reform Act, which:
     - Overturned a Wisconsin Supreme Court decision imposing liability based on a company's share of the market;
     - Increased court scrutiny of expert testimony;
     - Adopted a 15-year statute of repose in product liability cases;
     - Provided a rebuttable presumption that a product is not defective when it complies with government safety standards;
     - Required plaintiffs to show a reasonable alternative design;
     - Provided liability protection for innocent sellers;
     - Reduced joint and several liability;
     - Limited punitive damages to $200,000 or twice the amount of compensatory damages;
     - Strengthened sanctions against frivolous lawsuits.
   - Later in 2011, the legislature passed additional reforms. The legislature:
     - Changed the state's excessive rate of judgment interest rate to track the federal rate;
     - Codified standards for a land possessor's liability to trespassers; and
     - Set standards for attorneys' fees in fee shifting cases, including a statutory cap.
   - Wisconsin has continued its progress. Recently enacted reforms include:
     - Asbestos trust transparency (enacted March 2014). The law requires plaintiffs to provide sworn statements identifying each claim the plaintiff filed or will reasonably file against an asbestos trust during litigation against solvent defendants.
     - Transparency in Private Attorney Contracting Act (enacted Dec. 2013). The law requires an agency to make a written determination that hiring private lawyers on a contingency fee basis is both cost-effective and in the public interest before engaging outside counsel, requires posting of contracts and payments online, places limits on attorneys' fees, among other safeguards.

2. A Significant Decline in Civil Litigation

   - Filings in major civil cases in state courts declined by nearly 40% since the 2011 reforms. Between calendar year 2011 and 2014:
     - Product liability filings dropped from 85 to 48 (44%).
     - Wrongful death filings dropped from 85 to 50 (41%).
     - Medical malpractice filings remained stable until 2013 (ranging between 117 and 140), then fell to 84 in 2014 (a 31% decrease from 2011).
     - There was a relatively small drop in auto accident cases (7%), intentional tort (11%), and other personal injury cases (15%).
   - Wisconsin's federal district court experienced a slight rise in the number of civil cases, but one that is consistent with other federal courts.

- Between March 2013 and March 2014, pending private civil cases in Wisconsin's federal court rose roughly 9% from 1,396 to 1,519.
- Civil filings in federal courts nationwide increased 12% in 2014, primarily because diversity of citizenship filings (which include tort and contract claims) jumped 30% over the prior fiscal year. Diversity of citizenship filings involving personal injury/product liability climbed 69% nationwide in 2014.

3. Wisconsin Courts Have Issued Liability-Enhancing Decisions

- Despite Wisconsin's success in adopting significant civil justice system reforms, the state's slight dip in the rankings may stem from a number of liability-enhancing court rulings:
- *Phantom Damages Allowed.* In 2012, the Wisconsin Supreme Court, in a unanimous decision, allowed plaintiffs to recover "phantom damages." The court held that juries, when awarding damages, may only consider the amount a plaintiff was initially billed for his or her medical care, even if the plaintiff or an insurer paid significantly less to the healthcare provider. Orlowski v. State Farm Mut. Auto. Ins. Co., 810 N.W.2d 775 (Wis. 2012).
  - ILR profiled this decision as an example of unsound, liability-expanding state supreme court decisions in its 2014 Laboratories of Tort Law report.
  - The ruling garnered op-eds calling for reform in the Milwaukee Journal Sentinel, The Cap Times, as well as the Wisconsin Law Journal and Wisconsin Defense Counsel Journal.
  - Repeated legislative attempts to overturn this decision have failed.
- *Lemon Law Exploited.* In 2012, the Wisconsin Supreme Court allowed car buyers to abuse the state's 30-day "lemon law" refund period. A car buyer waited until the car dealer was out of the office for the Thanksgiving holiday to request a refund, recognizing that the dealer would fail to process the refund in time. The court allowed the car buyer to use this strategy to recover damages far exceeding the car's value. Marquez v. Mercedes-Benz USA, LLC, 815 N.W.2d 314 (Wis. 2012).
- *Property Owner Liability Increased.* In 2014, the Wisconsin Supreme Court expanded the liability of property owners who hire independent contractors. Ordinarily, a property owner is not liable for an independent contractor's negligent acts, but a narrow exception to this rule is reserved for "inherently dangerous" activities performed on the property. The court found that an independent contractor's spraying of herbicide on a property was an inherently dangerous activity such that the property owner could be subject to liability if performed negligently. Brandenburg v. Briarwood Forestry Services, LLC, 847 N.W.2d 395 (Wis. 2014).
- *Wrongful Death Claims Expanded.* In 2015, the Wisconsin Supreme Court ruled that survival and wrongful death claims can accrue *after* a decedent's death. Estates of deceased workers who were allegedly exposed to hazardous substances filed lawsuits more than three years after the workers' deaths and after the statute of limitations for survival and wrongful death actions had expired. The court nevertheless allowed the claims, finding that they accrued years after the workers' deaths when their exposures were "discovered." Christ v. Exxon Mobil Corp., 2015 WI 58 (Wis. 2015).

4. Other Factors

- Most courts have upheld and are applying the 2011 reforms without issue. One trial court judge, however, found the state's statutory limit on noneconomic damages unconstitutional as

applied to a plaintiff with an exceptionally serious injury. Legal observers in Wisconsin predict this October 2014 ruling is likely to be reversed. The case (Mayo w. Wisconsin Injured Patients and Families Compensation Fund) is pending before the Wisconsin Court of Appeals.

- The Wisconsin Supreme Court has a narrow (4-3) conservative majority. It has become increasingly polarized and dysfunctional in recent years.
    - Voters approved a referendum on April 7, 2015 that amended the state constitution to allow the court to choose its own chief justice, rather provide that the court's senior member serves as its head.
    - Soon thereafter, the Wisconsin Supreme Court's conservative majority replaced longtime Justice Shirley S. Abrahamson, a member of the court's liberal bloc, with Justice Patience Roggensack as Chief Justice.
    - Abrahamson is challenging her removal through an action in federal court. She claims that her term as Chief Justice should run until 2019, when her 10-year term to which she was elected expires.
    - In May, a federal judge denied her request for a preliminary injunction that would have kept her fellow justices from replacing her. The U.S. Court of Appeals for the Seventh Circuit is expected to hear the case in the fall.

"101 Ways" Reforms that Wisconsin Might Consider

- Preclude recovery of "phantom damages" to ensure that damages for medical expenses reflect the plaintiff's actual costs.

NFIB
The Voice of Small Business.

Wisconsin

Statement Before the
Assembly Committee on Judiciary

By

Bill G. Smith
State Director
National Federation of Independent Business
Wisconsin Chapter

Thursday, December 10, 2015
Assembly Bill 539

Mr. Chairman, thank you for scheduling today's hearing, and thank you to members of the Committee for your consideration of Assembly Bill 539.

I appear today as President of the Wisconsin Civil Justice Council, an organization formed in 2009 to promote legislation that will help achieve fairness and equity within our judicial system, to reduce unnecessary litigation costs, and enhance Wisconsin's image as a rewarding place to live, work, start and grow a business. The Civil Justice Council speaks with one voice on behalf of 18 diverse statewide organizations that provide policy guidance and serve on our Board of Directors.

I also appear today as State Director for nearly 12,000 small and independent business owners who live and work in our state, and are members of the National Federation of Independent Business, in support of passage of Assembly Bill 539 on behalf of both these organizations.

Wisconsin has made great strides in reforming our civil justice system. Our progress has been widely noted in publications and organizations throughout the country including the Wall Street Journal, the Institute for Legal Reform, American Tort Reform Association, and the Wisconsin Civil Trial Journal.

However, according to a 2015 survey study by the Institute for Legal Reform, Wisconsin fell five spots in the national ranking for litigation climate. And while our state ranking dipped a little, 75 percent of the companies surveyed say the state's lawsuit environment is likely to impact decisions by the company as to where to locate or expand – an 18 percent increase from just eight years ago. A major reason for that dip in the ranking, according to the Institute, is a ruling by the Supreme Court that allows inflated phantom damage awards for non-existent medical expenses in personal injury cases.

That's why we need to continue to work to improve our state's litigation climate. Assembly Bill 539 is yet another critically important proposal that will bring transparency to the courtroom and fairness to those who access the civil justice system. Assembly Bill 539 simply says, "let the jury decide," and let's restore transparency in the courtroom by allowing juries all the information they need to determine a fair and just decision for plaintiff and defendant.

The bottom line is the critically important role the state's litigation climate plays in decisions to locate a manufacturer in our state, to expand an existing business, to retain a business, or to start and grow a business in our state. All decisions that create and grow jobs that ultimately drive our economy and grow our communities.

Mr. Chairman, again on behalf of the Wisconsin Civil Justice Council and the NFIB, thank you for today's hearing, and **I urge members of the Committee to support passage of Assembly Bill 539.**

I will be followed by attorneys with experience in litigation, and are prepared to respond to questions from members of the Committee.

Thank you.

GODFREY & KAHN S.C.

MEMORANDUM

TO: Assembly Judiciary Committee

FROM: James A. Friedman
Godfrey & Kahn, S.C.

DATE: December 8, 2015

RE: 2015 Assembly Bill 539 / Q&A

This memorandum, which we provide on behalf of our client, the Wisconsin Insurance Alliance, attempts to answer some of the questions, and respond to some of the concerns, raised concerning the pending collateral source legislation, 2015 AB 539.

1. **Q:** Why is the Wisconsin business community supportive of 2015 AB 539?

A: In 2007, the Wisconsin Supreme Court, in *Leitinger v. DBart, Inc.*, 2007 WI 84, 302 Wis. 2d 110, 736 N.W.2d 1, held that the "collateral source rule" prohibits parties in a personal injury action from introducing evidence of the amount actually paid by the injured person's health insurer (or other collateral sources) for medical treatment resulting from the accident to prove the reasonable value of past medical expenses. In their dissent to *Leitinger*, Justices Patience Roggensack and David Prosser described the result of the majority opinion as follows:

> [The majority] create[d] a new category of damages … by unnecessarily expanding the evidentiary component of the collateral source rule to prohibit the jury from hearing what was actually paid to cover all of [plaintiff's] medical care bills while admitting evidence of what was billed, even though no one will ever pay that amount.

The 2009-11 Budget Bill included Wis. Stat. § 908.03(6m)(bm), which creates an evidentiary presumption that invoices from health care providers state the reasonable value of health care

services and statutorily prohibits parties from presenting evidence of payments made by collateral sources. Based on these two rules of evidence, juries only see the billed amount for past medical expenses. In reality, the amount paid by health insurers and other collateral sources as full payment for health care services, in most instances, is substantially less than the billed amount.

Hence, the judicially-created collateral source rule and the legislatively-created presumption have led to unfair and irrational results. The amounts actually paid for past medical expenses are withheld from jurors. In other words, the rule virtually mandates that attorneys lie to juries. Jurors then award verdicts to plaintiffs for past medical expenses that far exceed the amounts actually paid. After subrogated parties are reimbursed for the actual payments they have made, the plaintiffs and their personal injury attorneys receive a windfall of these "phantom damages" – the difference between the amount awarded by juries for past medical expenses and the amount paid to reimburse the subrogated parties in full. And defendants and their insurers are forced to pay excessive amounts not rationally related to plaintiffs' actual damages. Of course, there are no similar rules in place for a plaintiff's other damages. If the plaintiff's car is damaged, for example, the jury gets to see the actual amount paid to fix the car, not a "phantom bill" that no one ever pays. The same rules should apply for past medical expenses.

2015 AB 539 attempts to prevent this unfair, irrational result. It would overturn the collateral source rule and, while leaving the statutory presumption in place, it would permit parties to present to a jury the amounts actually paid by collateral sources as full payment for health care expenses resulting from accidents. That reasonable compromise in the rules of evidence already is the law with respect to medical malpractice and long-term care negligence

claims, and it is the law in many other jurisdictions. Wisconsin's business community supports 2015 AB 539.

2. **Q:** Will 2015 AB 539 cause defense lawyers to seek in discovery information concerning rates negotiated between health care providers and health insurers?

A: No. The collateral source legislation will have no impact whatsoever on the rules of discovery in Wisconsin. Under current law, defense counsel are entitled to seek all of the plaintiff's health care records, including billing records and payment records. In other words, defense counsel already are entitled to discover the amounts paid for health care expenses. They simply cannot introduce that evidence at trial. There will be no need for discovery of agreements between health care providers and health insurers. Further, those agreements likely would be irrelevant and inadmissible. The legislation will have no impact on discovery.

3. **Q:** If 2015 AB 539 is passed, will plaintiffs forego introducing health care records into evidence at trials?

A: No. Plaintiffs still will be required to name all insurers and other collateral sources with subrogation interests as parties to personal injury lawsuits. Furthermore, in virtually all cases, it will be in plaintiffs' best interest to use treatment records, including invoices, to support their damage claims. It would be very difficult for a plaintiff to recover significant damages for pain and suffering without putting into evidence treatment records. In fact, plaintiff lawyers regularly ask juries to base their awards for pain and suffering on a multiple of past medical expenses.

4. **Q:** Will health insurers and other collateral sources have to pay for and introduce expert testimony to prove their subrogation claims?

A: No. In fact, the collateral source legislation should have just the opposite effect. The bill has no impact whatsoever on the admissibility of expert testimony. But it does permit any party to place into evidence, without the need for an expert, medical bills and payment information. At most, that would require a record custodian. If anything, expert testimony becomes less relevant under 2015 AB 539.

5. **Q:** Will subrogated parties recover less at trial?

A: No. Subrogated parties only are entitled to recover the amounts they actually have paid for health care expenses. The collateral source legislation does nothing to change that. Only plaintiffs and personal injury lawyers might recover less under the bill.

6. **Q:** Will subrogation attorneys seek higher contingency fees if 2015 AB 539 is passed?

A: No. Currently, subrogated parties only are entitled to recover the actual amounts they have paid for past medical expenses. That will not change under the collateral source legislation. Subrogation lawyers generally charge a percentage of the amount recovered. Because the potential recovery will not change, there is no reason to think that subrogation attorneys will seek higher contingency fees.

7. **Q:** Will the collateral source legislation have any impact on subrogation recoveries under self-funded employer health care plans or federally-funded health care programs?

A: No. Self-funded employer health care plans are covered by ERISA, which pre-empts state insurance laws, including Wisconsin's "made whole" doctrine. The same is true for federally-funded health care programs, including Medicare and federal employee health benefit plans. Hence, the payors under those plans are entitled to first dollar recoveries, and they

do not have to prove that the plaintiff is made whole before recovering the full amount of their payments. That will not change under 2015 AB 539.

8. **Q:** Will subrogated parties recover less in settlements under 2015 AB 539?

A: Probably not. The pending collateral source legislation would have no legal impact on settlement negotiations in personal injury actions. In fact, the only changes to the statutes would be in the evidence code. In other words, the proposed legislation should have no impact unless the case goes to trial. At trial, only plaintiffs and personal injury lawyers should recover less, because a jury verdict, by definition, makes a plaintiff whole. Hence, following a trial, a subrogated party usually is entitled to a full recovery.

For the most part, settlement negotiations are driven by possible outcomes at trial. Under current law and under the collateral source legislation, subrogated parties only may recover amounts they actually pay. Hence, there is no reason to think that settlement negotiations will be significantly affected by 2015 AB 539. Those negotiations only will be affected if subrogation attorneys permit them to be.

JAF:jls

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Testimony Presented to
Assembly Committee on Judiciary
In opposition to Assembly Bill 539

Submitted by Peter Farrow
Chief Executive Officer,
Group Health Cooperative of Eau Claire
December 10, 2015

Thank you Chairperson Ott and members of the Committee for the opportunity to present written testimony in opposition to AB 539 on behalf of Group Health Cooperative and the Wisconsin Association of Health Plans (WAHP), of which I am the immediate Past Board President.

By way of background, Group Health Cooperative of Eau Claire (GHC-EC) is a non-profit cooperative that provides health insurance coverage to 70,000 residents of Western Wisconsin through both commercial and government coverage. We are a member-governed plan, meaning our board of directors is comprised completely of consumer members covered by Group Health Cooperative. I have been CEO and general manager of GHC-EC for 16 years. Prior to that, I served for five years as the Assistant Deputy Insurance Commissioner for the Wisconsin Office of the Commissioner of Insurance.

While the supporters of this bill will paint it as an issue of reining in "windfall lawsuits", the issue is more complex than that. This bill begs the answer to these questions:

Does it make sense to shift more than $50 million of liability expenses from liability insurers to health insurers? Why would the Legislature want to knowingly raise the cost of health insurance in Wisconsin?

Does it make sense to increase the budget of the Wisconsin Medicaid Program by reducing the liability covered by liability insurers?

Does it make sense to, in all likelihood, raise overall legal expenses related to these cases?

The relationship between health insurance coverage, liability insurance coverage for injuries, third party liability and subrogation is a very complex one. In the interest of brevity, I will not try to explain the intricacies of the issue. What I will attempt to do is

share the health plan perspective and share our opinion of what legislation like this would do to health insurance costs, and legal costs that would likely result from these changes.

The process for paying health insurance costs for an injury is different than many other liability situations. For example, most people assume that the economic damages, those actually incurred by the injured party, would be considered and paid before the non-economic damages such as pain and suffering. However, because of Wisconsin's made-whole law, the interests of the plaintiff, and whether they will be made whole for all of their economic and non-economic costs, is considered before the interests of a subrogated third party, such as the health insurer which has covered all of the plaintiff's medical costs related to the injury.

Further, the plaintiff has the right to determine the resolution of the claim. So, if the plaintiff decides to settle out of court for a lesser amount, subrogated interests may or may not be covered by the settlement because the claims of the subrogated insurer may be dismissed if the plaintiff is not made whole.

Let me start by saying that I do not doubt that the parties who support this legislation are attempting to change a process which they perceive to be broken, because they feel that if actual medical payments were considered, awards would be reduced and they would save costs. This is a very complex issue, and it is easy to overlook the downstream effect and net result.

I believe that the effect of this legislation would be to:

- Shift more than $50 million in expense to the Wisconsin businesses and individuals who purchase health insurance,
- Increase state budget costs by millions of dollars for Medicaid by all but eliminating subrogation recoveries in the Wisconsin Medicaid Program, and
- Increase overall legal expenses related to these cases.

Shift more than $50 million in expense to Wisconsin businesses and individuals who purchase health insurance.

Supporters of the legislation have stated that it would not affect the rights of health insurers. That is cleverly written and true, but it would greatly affect health insurers and ability to recover payments made in injury cases. Right now, on average, Group Health Cooperative collects about 60% of the costs of actual claims related to injuries where a third-party liability has primary responsibility for payment. That is our recovery rate operating in the current system where only billed charges are considered in evidence.

The reason health insurers don't recover full costs is two-fold:

1. Wisconsin's made-whole law requires that the plaintiff be made whole for any damages they incur, whether economic or non-economic, before considering the interests of subrogated parties, such as the health insurer that paid all the medical claims.

2. Most of these cases settle out of court for a lower amount, so the full cost is very rarely recovered by the plaintiff. As a result, actual medical expenses covered by health insurers often go only partially covered in today's process.

If this legislation were enacted, and the actual payments were considered, it would reduce indicated medical costs by perhaps 10 to 20% for commercial insurers, and far more for Medicare or Medicaid. Someone has to lose in that equation. It will likely be both the plaintiff and the health insurer. But, since the health insurer is last in line to recover, we will lose the most. If recoveries for insurers drop by 30 to 40%, I estimate that the net impact on Wisconsin health insurance consumers would be in excess of $50 million.

Increase state budget costs by millions of dollars for Medicaid by all but eliminating subrogation recoveries in the Wisconsin Medicaid Program.

AB 539 would reduce recovery awards for Medicaid by 60-80%, and since the awards will be cut dramatically, it is likely that attorneys will not pursue these cases, thus dramatically reducing the number of contested cases and as a result the recoveries for Medicaid. It is difficult for me to quantify the impact, but I expect it would increase net costs to the Medicaid program by more than $10 million. In short, taxpayers bear more of the burden of the injury.

Increase overall legal expenses related to these cases.

While supporters of AB 539 have suggested the change would decrease legal costs, as one of the parties involved in these cases, I expect it will actually increase costs. This effect will happen in two ways. First, because the potential upper limit of awards will be lower, it will become more difficult to settle these cases, meaning many more will go to trial or require more in depth discovery. Second, insurers and subrogated parties typically are in a cooperative position with plaintiffs and plaintiffs' counsel in these situations, and do not contest made-whole hearings very often (even though we recover far less than our actual expenses). As a result of this legislation, I expect that subrogated parties would find themselves contesting far more plaintiff made-whole hearings and would be investing far more actual legal expense to protect their interests to recover expenses.

Conclusion.

AB 539 is an attempt to reduce the costs of liability insurers – who write insurance for the purpose of covering third party liability – at the expense of health insurers, Wisconsin consumers and taxpayers, who will bear the burden of a reduction in costs for liability insurers.

At a time when health insurance costs continue to rise due to medical inflation, and the Affordable Care Act is raising overall insurance costs through expanded federal fees and expanded benefits, I do not believe the Legislature wants to further aggravate health care coverage costs for Wisconsin businesses and individuals. I urge you to oppose further consideration of AB 539.

I would be happy to answer any questions you may have at any time. Please feel free to contact me at 715-852-2070 at your convenience. Thank you for your consideration and your attention.

STATE BAR OF WISCONSIN

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MEMORANDUM

To: Chairman Ott and Members of the Assembly Committee on Judiciary

From: State Bar of Wisconsin

Date: December 9, 2015

Re: Comments on AB 539 – collateral source payments

The State Bar of Wisconsin opposes AB 539, affecting admissibility of evidence regarding collateral source payments in certain civil actions.

The State Bar of Wisconsin opposes changes to the collateral source rule which would allow for the 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.

As a result, the State Bar respectfully requests that you vote against AB 539.

If you have any questions, please do not hesitate to contact our lobbyist on these issues, Lynne Davis, ldavis@wisbar.org or 608.852.3603.

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Dean
HEALTH PLAN

1277 Deming Way | Madison, Wisconsin 53717

December 9, 2015

The Honorable Representative Jim Ott, Chairman
Honorable Members, Assembly Committee on Judiciary

Dear Chairman Ott and Members of the Assembly Committee on Judiciary,

Dean Health Plan (DHP) has over 420,000 members and has earned a very high retention rate and numerous quality awards, including being one of only 13 five-star Medicare plans in the US. DHP has operated as an HMO provider in Southern Wisconsin for over 30 years with recent expansion into North-Eastern Wisconsin.

DHP appreciates the opportunity to provide comments regarding Assembly Bill 539, relating to collateral source payments.

DHP opposes the legislation.

The legislation exposes DHP's proprietary rating information to discovery in open court. Previously confidential contracts (including pricing) between DHP and providers will be subject to the scrutiny of trial attorneys attempting to offset the Property & Casualty (P&C) carriers' introduction of DHP's discounted rates as evidence of the reasonable value of the medical bills. The legislation exposes DHP's business and its proprietary information.

DHP will see a substantial increase in the costs associated with obtaining subrogation recoveries. DHP will expend significant expense to fight disclosure of its proprietary information and this fight would be repeated in case after case. Current law allows the P&C carriers to challenge the reasonable value of the medicals bills; it just prohibits them from using the negotiated reduced rates of the health insurance carrier as evidence of reasonable value. Currently, P&C carriers rarely, if ever, challenge the reasonable value of medical bills, presumably because of the increase cost to litigate the issue. Under the proposed legislation, these additional litigation costs are transferred to the health insurance carrier because use of the rates as evidence of reasonable value subjects the rate determination, provider agreements, and other proprietary information to discovery by trial attorneys. Costs the P&C carriers have opted not to incur due to a risk benefit analysis under the current law, the new legislation thrusts on the health insurance carrier without the option to avoid the additional costs.

The legislation will reduce DHP's subrogation recovery and negatively affect premium rates. Subrogation recoveries are an important source of income to DHP and other health insurers. With enactment of this bill and the subsequent reduction in subrogation recoveries, health insurance premiums will necessarily rise.

Assembly Committee on Judiciary
Oppose AB 539

DHP has incurred significant costs to implement medical cost-containment provisions for its insureds through restrictions on treatment, negotiated rates with providers and prompt pay discounts. The P&C carriers have incurred no expense to procure the medical cost containment measures of DHP or other health insurers. AB 539, as introduced, not only allows the P&C carriers to benefit from DHP's business acumen, it does so by increasing costs and reducing recoveries for DHP.

Sincerely,

Dean Sutton
General Counsel

AHI

ALLIANCE OF HEALTH INSURERS, U.A.
10 East Doty Street, Suite 500
Madison, WI 53703
608-258-9506

Date: December 10, 2015

To: Members of the Assembly Committee on Judiciary

From: Alliance of Health Insurers

Subject: Opposition to Assembly Bill 539 - Collateral Source

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1. **Subrogation Recoveries for Health Plans Will Be Negatively Impacted Which Could Lead to Increased Costs for Insureds.**

This legislation is aimed at reducing damage awards in personal injury cases which will, in turn, reduce the amount of dollars available for health plans' subrogation recoveries. Under current law, health care providers' billing statements are presumed to state the reasonable value of health care services, and evidence of the amount a health plan paid a provider is not admissible. AB 539 proposes that evidence of "collateral source" payments, i.e., amounts paid to providers by health plans, would be admissible at trial before a jury. Negligent parties' liability carriers will then be able to argue that the paid amount, not the billed amount, represents the reasonable value of the health care services. With knowledge of both the billed and paid amounts, juries would likely be influenced to award an amount less than if they only had knowledge of the billed amount. If damage awards in personal injury actions are reduced, the overall pot of money from which all parties can share will be smaller.

Under Wisconsin law, health insurers are subject to the "made whole" doctrine, meaning they cannot recover unless an injured plaintiff is compensated for all his/her damages. If damages awarded in personal injury actions go down, there will be more cases where injured plaintiffs will claim they are not "made whole," ultimately resulting in more litigation between injured plaintiffs and their health plans to resolve how the overall pot of money is distributed. Self-funded non-ERISA plans (e.g., municipalities) may also be subject to the "made whole" doctrine and face reduced recoveries and additional litigation with their employees. While self-funded ERISA plans can contract around the "made whole" doctrine, if the overall pot of money from which all parties must share is smaller, from a practical perspective, these plans will also face reduced recoveries.

Reduced recoveries and increased litigation expenses for health plans could negatively impact premiums for all types of plans.

2. **Negligent Parties and Their Liability Carriers Should Not Benefit From Health Plans' Contractual Bargain With Providers.**

As proposed, the bill would allow a liability carrier to unfairly benefit from the contractual bargain between a health plan and a provider even though the liability carrier is not a party to that contract. Moreover, premiums charged by liability carriers are based upon a finite exposure (policy limits). Under PPACA, health plans no longer have lifetime maximums for many benefit categories. For some plaintiffs involved in personal injury cases, health plans can end up paying those plaintiffs' medical claims for years after the underlying lawsuit has been settled.

3. **The Legislation Will Have Other Unintended Consequences for Health Plans and Insureds**.

In order to prove that the amount paid by health plans is the reasonable value the jury should consider and award, defense counsel may serve extensive, burdensome discovery upon health plans to establish the basis upon which the paid amount was determined. While health plans can file motions seeking to limit or quash this type of discovery which would include proprietary information, this will increase health plans' litigation expenses in subrogation cases.

Health plans may also face increased requests for deposition or trial witnesses to address the reasonableness of payments made to providers. This again would seek proprietary information, be burdensome and increase litigation expenses. If health plan witnesses are required to testify at trial, it will also result in more complicated and lengthy personal injury lawsuits given the involvement of collateral sources. Currently, judges in personal injury cases generally prefer collateral sources are involved as little as possible, if at all.

The impacts of this legislation could result in a more complicated and time-consuming system for all parties involved. If health plans in Wisconsin face increased litigation expenses to obtain less subrogation recoveries, those costs will likely end up being passed along to the consumer.

AHI and its member companies urge you to oppose AB 539.

Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

To: Members, Assembly Committee on Judiciary
From: Jeffrey Leavell, President
Date: December 10, 2015
Re: Support for AB 539 (Collateral Source/Phantom Damages)

The Wisconsin Defense Counsel is a statewide organization of over 450 attorneys dedicated to the defense of Wisconsin citizens and businesses, the maintenance of an equitable civil justice system, and the education of its members. Our members are advocates for the rights of people or businesses sued. Our primary role is to provide a professional defense for people and businesses involved in civil lawsuits.

The Wisconsin Defense Counsel supports AB 539. It reflects a middle-ground that is fair to all parties and aligns Wisconsin with states such as California, Indiana, Minnesota, Ohio, and Texas.[1]

The collateral source rule generally provides benefits an injured person receives from sources that have nothing to do with the tortfeasor may not be used to reduce the tortfeasor's liability to the injured person. In Wisconsin, the rule for proper measure of damages for medical treatment rendered in a personal injury action is the reasonable value of the medical treatment reasonably required by the injury, a market kind of inquiry.

In civil litigation, these two concepts collide, because the treater's "retail" bill is an inflated number that is rarely paid. Instead, a health insurer or some other payer like medicare pays a fraction of it, and the rest of the bill is written off by the treater. Yet, the retail bill presently dictates the judge or jury's finding on damages because the collateral source rule has been interpreted to preclude admission into evidence of the amount actually paid for the treatment. This bill reconciles these conflicting rules in a way that is fair to all parties.

For example, note that Section 2 of the bill sets forth the current presumption relating to "the reasonable value of the health care services." That presumption is as follows:

> Billing statements or invoices that are patient health care records are presumed to state the reasonable value of the health care services provided and the health care services provided are presumed to be reasonable and necessary to the care of the patient.[2]

This legislation does not change that fundamental presumption. It does provide, however, that a party attempting to rebut this presumption may present "evidence of payments made or benefits conferred by collateral sources." Thus, the burden remains on the defendant to prove the

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reasonable value of health care services resulting from bodily injury was not the amount billed, but should more accurately and truthfully be the amount paid.

In what may be fairly described as WDC's position, former Wisconsin Supreme Court Justice Diane Sykes—who now sits on the United States Court of Appeals for the Seventh Circuit—stated in her dissent in *Koffman v. Leichtfuss*:

> The proper measure of medical damages is the amount reasonably and necessarily incurred for the care and treatment of plaintiff's injuries, not an artificial, higher amount based upon what the plaintiff might have incurred if he or she had a different sort of health plan or no health plan at all.[3]

Justice Sykes' guidelines describe the law in California, where the plaintiff is only entitled to recover as medical expense damage the amount actually paid to the medical provider, not the *phantom damages* reflected in the amount billed – the "retail" – which is seldom paid. The difference between what is billed and what is actually paid can be substantial, and in a serious personal injury claim, these phantom damages can run upwards of $200,000 to $300,000.

The ability of plaintiffs to collect phantom damages in Wisconsin was highlighted in the U.S. Chamber's 2015 lawsuit climate survey discussed in Wisconsin Civil Justice Council's testimony. The case referenced by the Chamber was *Orlowski v. State Farm Mut. Auto. Ins. Co.* The dispute in that case was over the $61,487.39 in medical expenses that were written off by Orlowski's medical provider. That is, the difference between the amount billed ($72,985.94) and the amount paid ($11,498.55). Orlowski was also awarded $2,325 for unreimbursed wage loss and $42,500 for past and future pain, suffering and disability.[4]

Unlike California, AB 539 allows juries to see both the amount billed and the amount paid when determining reasonable medical expenses. But as noted above, the presumption remains that the amount billed reflects the reasonable medical expenses.

This bill does not break new ground. Wisconsin law currently allows the jury in medical malpractice cases to see both billed and paid expenses when determining the plaintiff's medical expenses. AB 539 merely extends the law to all personal injury cases.

Finally, AB 539 does not affect the law relating to a jury's determination of non-economic damages (such as pain and suffering and emotional distress) or punitive damages.

The Wisconsin Defense Counsel respectfully requests you support AB 539.

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[1] Nineteen states permit recovery of phantom damages, 17 states limit recovery of such damages, and the remainder the states' positions are unclear. 101 Ways to Improve State Legal Systems, U.S. Chamber ILR, (Sept 2015).

[2] Wis, Stat. § 908.03 (6m) (bm).

[3] *Koffman v. Leichtfuss* 2001 WI 111, ¶ 69, 246 Wis. 2d 31, 630 N.W.2d 201.

[4] *Orlowski v. State Farm Mut. Auto. Ins. Co.*, 810 N.W.2d 775 (Wis. 2012).