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Tort Reform in Wisconsin: What It Means for Your Business

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On Friday, January 21, 2011, the Wisconsin Assembly voted 57-36 to approve without amendment the Senate's version of a landmark omnibus tort reform bill that will have significant implications for companies doing business in Wisconsin. The legislation has been sent to Governor Scott Walker who, according to our Madison contacts, is expected to sign the bill very soon.

The bill will generally apply to actions filed on or after the Act's effective date, which according to Wis. Stat. § 991.11 is the day after the Act's publication date as determined by the Secretary of State. Under section 991.11, publication can occur any time from the day the governor signs a bill to not more than 10 working days later.

The following is a brief synopsis of modifications made under the new legislative reforms.

Punitive Damages:

- Places a cap where punitive damages received by a plaintiff may not exceed twice the amount of any compensatory damages recovered by the Plaintiff or \$200,000, whichever is greater. See Wis. Stat. § 895.043 (3).
 - However, this cap does not apply to a plaintiff seeking punitive damages from a defendant whose actions included the operation of a vehicle



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while under the influence of an intoxicant to a degree that rendered the defendant incapable of safe operation of the vehicle.

- Raises the threshold for winning punitive damages in lawsuits so that plaintiffs would have to prove that defendants acted "with intent to cause injury to a particular person" or with a knowledge that their action would lead to that result.

Expert Testimony:

- In addition to the requirements under Wis. Stat. § 907.02 for expert testimony,[1] an expert may testify if:
 - The testimony is based upon sufficient facts or data;
 - The testimony is the product of reliable principles and methods; and
 - The witness has applied the principles and methods reliably to the facts of the case.[2]

Risk Contribution Theory:

The new law effectively reverses the Wisconsin Supreme Court's lead paint liability decision in *Thomas v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523 by enacting the following provisions: [3] [4]

- "Claimant" is redefined as "a person on whose behalf a claim of damages or other relief for injury or harm to a person or property caused by or arising from a product or other relief is asserted."
- Manufacturers, distributors, sellers, or promoters of a product may be held liable only if the claimant proves, in addition to any other elements required to prove his or her claim, that the manufacturer distributor, seller, or promoter of a product manufactured, distributed sold, or promoted *the specific product* alleged to have caused the claimant's injury or harm.
- If the claimant cannot prove that the manufacturer, distributor, seller, or promoter manufactured, distributed, sold, or promoted *the specific product*, the manufacturer, distributor, seller, or promoter may be held liable under this provision only if the claimant proves all of the following:
 - That no other lawful process exists for the claimant to seek *any* redress from *any other* person for the injury or harm.

- That the claimant has suffered an injury or harm that can be caused only by a product chemically identical to the specific product that allegedly caused the claimant's injury or harm.
- That the manufacturer, distributor, seller, or promoter of a product manufactured, distributed, sold, or promoted *a complete integrated product, in the form used by the claimant or to which the claimant was exposed*, and that meets all of the following criteria: (i) is chemically *and physically* identical to the specific product that allegedly caused the claimant's injury or harm; (ii) was manufactured, distributed, sold, or promoted in *the geographic market where the injury or harm is alleged to have occurred* during the time period in which the specific product that allegedly caused the claimant's injury or harm was manufactured, distributed, sold, or promoted; *and* (iii) was *distributed or sold without labeling or any distinctive characteristic that identified the manufacturer, distributor, seller, or promoter*.
- The action names as defendants those manufacturers of a product who collectively manufactured at least 80% of all products sold in Wisconsin during the relevant production period by all manufacturers of the product in *existence during the relevant production period* that are chemically identical to the specific product that allegedly caused the claimant's injury or harm.
- If more than one manufacturer, distributor, seller, or promoter of a product is found liable for the claimant's injury or harm, the court must apportion liability among those manufacturers, distributors, sellers, and promoters, but that liability is *several and not joint*, meaning that each party's liability is separate and distinct from the liability of any other party.

Long-Term Care Providers:

- Limits non-economic damages - payments for loss of companionship, mental distress and pain and suffering - to \$750,000 in medical malpractice cases at nursing homes, hospice centers, assisted living facilities, and other long term care facilities.
- Prevents reports required by state regulators, or statements from employees of a health care provider, from being used as evidence in civil and criminal actions.
- Applies a three-year statute of limitations to lawsuits against long-term care providers.

- Effectively immunizes a health care provider from criminal prosecution for death or bodily harm to a patient resulting from essentially negligent conduct.

[1] Wis. Stat. § 907.02 states "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[2] The amendment, in effect, eliminates language requiring parties to prove that proffered evidence is "true," but still imposes the *Daubert* standard. This language is identical to the language of Rule 702 of the Federal Rules of Evidence. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[3] The Wisconsin Supreme Court in *Thomas* extended the risk contribution theory to a case where a minor (through his guardian ad litem) brought claims of strict liability, negligence, civil conspiracy, and enterprise liability against lead carbonate manufacturers to recover damages for serious neurological disorders caused by ingestion of pain pigmented with white lead carbonate. 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523.

[4] These provisions apply to all actions in *law or equity*.

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