WISCONSIN LEGISLATIVE COUNCIL
INFORMATION MEMORANDUM

2011 Wisconsin Act 2: Provisions Relating to Civil Actions and Testimony of Lay and Expert Witnesses

Act 2 contains changes to civil actions and testimony of lay and expert witnesses, which are described in this Information Memorandum, and changes relating to health care providers, as described in IM 2011-04.

The changes relating to civil actions and testimony of lay and expert witnesses: (a) modify current law relating to the risk contribution theory in product liability cases in which the plaintiff cannot identify the specific product that caused his or her injuries; (b) make changes relating to claims of strict liability of manufacturers, distributors, and promoters of a defective product; (c) place a cap on punitive damages; (d) create provisions that require damages for certain frivolous claims; (e) apply caps on medical malpractice noneconomic damage awards applicable to health care providers to long-term care providers; and (f) modify current law relating to opinion testimony of lay witnesses and testimony of expert witnesses.

2011 Wisconsin Act 2 was enacted as part of the Special Session Governor Walker ordered on January 3, 2011. It took effect on February 1, 2011.

PRODUCT LIABILITY ACTIONS

REQUIREMENTS TO IDENTIFY SPECIFIC PRODUCT OR IF SPECIFIC PRODUCT CANNOT BE IDENTIFIED

Act 2 creates a new provision that applies to all actions in which a claimant alleges that a manufacturer, distributor, seller, or promoter of a product is liable for an injury or harm to a person or property. This provision applies to actions based on allegations that the design, manufacture, distribution, sale, or promotion of, or instructions or warnings about, a product caused or contributed to a personal injury or harm to a person or property, a private nuisance, or a public nuisance, and to all related or independent claims, including unjust enrichment, restitution, or indemnification. The Act defines "claimant" as a person seeking damages or other relief for injury or harm to a person or property caused by or arising from a product, or a person on whose behalf a claim for such damages or other relief is asserted.

Under the Act, the manufacturer, distributor, seller, or promoter of a product may be held liable in such an action 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 a claimant cannot identify the specific product, a manufacturer, distributor, seller, or promoter may be held liable under this provision only if all of the following apply:

1. The claimant proves all of the following:

    a. That no other lawful process exists for the claimant to seek redress from another person for the injury or harm.

    b. 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.

    c. 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.

2. 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.

Act 2 creates a "statute of repose" for actions described above. Under Act 2, no manufacturer, distributor, seller, or promoter of a product is liable if more than 25 years have passed between the date that the manufacturer, distributor, seller, or promoter of a product last manufactured, distributed, sold, or promoted a product chemically identical to the specific product that allegedly caused the claimant's injury and the date that the claimant's cause of action accrued.

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.[1] [s. 895.046, Stats.]

The provisions relating to claims for which the claimant is unable to identify the specific product that caused his or her injury overturn the holding of the Wisconsin Supreme Court case, *Thomas v. Mallett*. In that case, the Wisconsin Supreme Court considered products liability in a case in which a person alleged that he had been injured by the ingestion of white lead carbonate in lead paint but could not prove the type of lead paint he had ingested. The court held that the plaintiff, under those circumstances, could use the risk contribution theory in a negligence or strict liability claim against manufacturers of lead paint. Under risk contribution theory, the plaintiff could recover from any manufacturer that produced or marketed the type of white lead carbonate he ingested unless the manufacturer could prove by a preponderance of the evidence that it did not produce or market the type of white lead carbonate during the period of the injury or in the geographic area where the plaintiff was injured. [2005 WI 129.]

These changes apply to actions commenced on or after the effective date of the Act.

STRICT LIABILITY ACTIONS

Background. Under current law, there are three categories of product liability claims: (1) breach of warranty; (2) common law negligence; and (3) strict liability in tort. To assert one of these claims, a plaintiff must establish all of the following: (1) the product was defective; (2) the defect existed at the time the manufacturer or seller relinquished control; and (3) the injury resulted from the use of the product. [See Wis. JI Civil, s. 3200.]

Act 2 modifies the law relating to strict liability claims in product liability actions. The doctrine of "strict liability" does not impose absolute liability on a manufacturer, distributor, seller, or promoter of a product, but it does relieve an injured "user" of a product from proving specific acts of negligence and protects him or her from contractual defenses such as notice or breach. [See Wis. JI Civil, s. 3200.]

Prior to Act 2, Wisconsin had adopted the theory of strict liability in tort as set forth in the Restatement 2nd, Torts, s. 402A (1965). [See *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).] The elements of a strict liability claim under that theory are: (1) the product was in a defective condition and unreasonably dangerous; (2) the product was defective when it left the possession or control of the seller; (3) the defect was a cause of the plaintiff's injuries; (4) the seller was engaged in the business of selling such products; and (5) the product was one which the seller expected to and did reach the consumer without substantial change. [See Wis. JI Civil, s. 3200.] Under this theory, a product is defective when it is in a condition not contemplated by the ordinary user or consumer, which is unreasonably dangerous to the ordinary user or consumer. [See *Green v. Smith and Nephew HAP, Inc.*, 245 Wis. 2d 772 (2001).]

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[1] "Joint liability" means that the liability is owed by two or more parties together so that each party is responsible for the entire liability. Under several liability, each party's liability is separate and distinct from the liability of another.

Liability of manufacturer. Under Act 2, in an action for damages caused by a manufactured product based on a claim of strict liability, a manufacturer is liable to a claimant if the claimant establishes ***all*** of the following by a preponderance of the evidence:

1. That the product is defective because it meets ***any*** of the following conditions:

    a. The product contains a ***manufacturing defect***, meaning that it departs from its intended design even though all possible care was exercised in the manufacture of the product.

    b. The product is ***defective in design***, meaning that the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the manufacturer and the omission of the alternative design renders the product not reasonably safe.

    c. The product is defective because of ***inadequate instructions or warnings***, but only if the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the manufacturer and the omission of the instructions or warnings renders the product not reasonably safe.

2. That the defective condition rendered the product unreasonably dangerous to persons or property.

3. That the defective condition existed at the time the product left the control of the manufacturer.

4. That the product reached the user or consumer without substantial change in the condition in which it was sold.

5. That the defective condition was a cause of the claimant's damages.

[s. 895.047 (1), Stats.]

Liability of seller or distributor. Act 2 provides that a seller or distributor of a product is not liable based on a claim of strict liability ***unless*** the manufacturer would be liable, as described above, and any of the following applies:

1. The claimant proves that the seller or distributor has contractually assumed one of the manufacturer's duties to manufacture, design, or provide warnings or instructions with respect to the product.

2. The claimant proves that neither the manufacturer nor its insurer is subject to service of process within this state.

3. A court determines that the claimant would be unable to enforce a judgment against the manufacturer or its insurer.

The court is required to dismiss a product seller or distributor as a defendant based on evidence that neither the manufacturer nor its insurer is subject to service of process within this state if the manufacturer or its insurer submits itself to the jurisdiction of the court in which the suit is pending. [s. 895.047 (2), Stats.]

Defenses and exceptions. Under Act 2, if the defendant proves by clear and convincing evidence that at the time of the injury the claimant was under the influence of any controlled substance or had an alcohol concentration of 0.08 or more, there is a rebuttable presumption that the claimant's intoxication or drug use was the cause of his or her injury.

Under Act 2, evidence that a product, at the time of sale, complied in material respects with relevant standards, conditions, or specifications adopted or approved by a federal or state law or agency creates a rebuttable presumption that the product is not defective.

Act 2 provides that the damages for which a manufacturer, seller, or distributor would otherwise be liable are reduced by the percentage of causal responsibility for the claimant's harm attributable to the claimant's misuse, alteration, or modification of the product.

Act 2 requires the court to dismiss the claimant's action if the damage was caused by an inherent characteristic of the product that would be recognized by an ordinary person with ordinary knowledge common to the community that uses or consumes the product.

Under Act 2, a seller or distributor of a product is not liable to a claimant for damages if the seller or distributor receives the product in a sealed container and has no reasonable opportunity to test or inspect the product. This exception does not apply: (1) if the seller or distributor may be liable because neither the manufacturer nor its insurer is subject to service of process within this state; or (2) if a court determines that the claimant would be unable to enforce a judgment against the manufacturer or its insurer. [s. 895.047 (3), Stats.]

Inadmissibility of evidence of subsequent remedial measures. Under Act 2, in an action for damages caused by a manufactured product based on a claim of strict liability, evidence of remedial measures taken subsequent to the sale of the product is not admissible for the purpose of showing a manufacturing defect in the product, a defect in the design of the product, or a need for a warning or instruction. This provision does not prohibit the admission of such evidence to show a reasonable alternative design that existed at the time when the product was sold. [s. 895.047 (4), Stats.]

Time limit. Act 2 provides that, in an action for damages caused by a manufactured product based on a claim of strict liability, a defendant is not liable for damages if the product alleged to have caused the damage was manufactured 15 years or more before the claim accrues, unless the manufacturer makes a specific representation that the product will last for a period beyond 15 years. This provision does not apply to an action based on a claim for damages caused by a latent disease. [s. 895.047 (5), Stats.]

Damages based on causal responsibility. Under Act 2, in an action by any person to recover damages for injuries caused by a defective product based on a claim of strict liability, the fact finder (the judge or the jury) must first determine if the injured party has the right to recover damages. To do so, the fact finder must determine: (1) what percentage of the total

causal responsibility for the injury resulted from the contributory negligence of the injured person; (2) what percentage resulted from the defective condition of the product: and (3) what percentage resulted from the contributory negligence of any other person.

If the injured party's percentage of total causal responsibility for the injury is ***greater than*** the percentage resulting from the defective condition of the product, the injured party may not, based on the defect in the product, recover damages from the manufacturer, distributor, seller, or other person responsible for placing the product in the stream of commerce.

If the injured party's percentage of total causal responsibility for the injury is ***equal to or less than*** the percentage resulting from the defective condition of the product, the injured party may recover, but the damages recovered by the injured party must be diminished by the percentage attributed to that injured party.

If multiple defendants are alleged to be responsible for the defective condition of the product, and the injured party is not barred from recovery, the fact finder must determine the percentage of causal responsibility of each product defendant for the defective condition of the product. The judge must then multiply that percentage of causal responsibility of each product defendant for the defective condition of the product by the percentage of causal responsibility for the injury to the person attributed to the defective product. The result of that multiplication is the individual product defendant's percentage of responsibility for the damages to the injured party. In other words, if, for example, 70% of the person's injury is attributed to the defective product, and manufacturer A is causally responsible for 50% of the injury from the defective product, manufacturer A is liable for 35% of the damages. As provided under current statutes relating to contributory negligence, a product defendant whose responsibility for the damages to the injured party is 51% or more of the total responsibility is jointly and severally liable for all of the damages to the injured party. If a defendant's responsibility for the damages is less than 51% of the total responsibility, the responsibility of that defendant is limited to that percentage of responsibility.

Under Act 2, the fact that the injured party's causal responsibility for the injury is greater than an individual product defendant's responsibility for damages does not bar the injured party from recovering from that individual defendant. [s. 895.045 (3), Stats.]

Initial applicability. The changes relating to strict liability claims in a product liability action apply to actions commenced on or after the effective date of the Act.

PUNITIVE DAMAGES

Under current law, a plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff. [s. 895.043 (3), Stats.] The purpose of punitive damages is to punish the defendant or to deter the defendant or others from engaging in similar conduct in the future. [See Wis. JI Civil, s. 1707.1.]

Under the Act, punitive damages are capped. Specifically, 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. The cap does not apply, however, to a plaintiff

seeking punitive damages from a defendant whose actions included the operation of a vehicle while under the influence of an intoxicant to a degree that rendered the defendant incapable of safe operation of the vehicle. [s. 895.043 (6), Stats.]

This change applies to actions commenced on or after the effective date of the Act.

DAMAGES FOR FRIVOLOUS CLAIMS

Act 2 created new provisions under which damages may be awarded for frivolous actions in a legal proceeding. Under Act 2, a party or a party's attorney may be liable for costs and fees for commencing, using, or continuing an action, special proceeding, counterclaim, defense, cross complaint, or appeal to which any of the following applies:

1. The action, special proceeding, counterclaim, defense, cross complaint, or appeal was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

2. The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense, cross complaint, or appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

Upon either party's motion made at any time during the proceeding or upon judgment, if a court finds, upon clear and convincing evidence, that either of the above conditions applies to an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense, or cross complaint commenced, used, or continued by a defendant, the court has the following authority:

1. If the party served with the motion withdraws, or appropriately corrects, the action, special proceeding, counterclaim, defense, or cross complaint within 21 days after service of the motion, or within such other period as the court may prescribe, the court ***may*** award damages to the party making the motion, in the amount of the actual costs incurred by the party as a result of the action, special proceeding, counterclaim, defense, or cross complaint, including the actual reasonable attorney fees the party incurred. Attorney fees include fees incurred in any dispute of the application of this provision. In determining whether to award, and the appropriate amount of, damages, the court must take into consideration the timely withdrawal or correction made by the party served with the motion.

2. If a withdrawal or correction is not made in a timely manner, the court ***must*** award to the party making the motion, as damages, the actual costs incurred, as described above.

If an award for damages is affirmed on appeal, the appellate court must remand the action to the trial court to award damages to compensate the successful party for the actual reasonable attorney fees the party incurred in the appeal.

If a violation applies to an appeal, the appellate court, upon completion of the appeal, must remand the action to the trial court to award damages to compensate the successful party for all the actual reasonable attorney fees the party incurred in the appeal. [s. 895.044, Stats.]

These provisions apply to actions or special proceedings that are commenced on the effective date of the Act.

LIMITS ON NONECONOMIC DAMAGES AND TIME LIMITS FOR COMMENCING MEDICAL MALPRACTICE ACTIONS

Act 2 creates provisions under which noneconomic damages in medical malpractice and wrongful death actions are limited and time limits for commencing medical malpractice actions are applied to medical malpractice actions brought against long-term care providers. These provisions are identical to the limits on noneconomic damages and time limits for commencing medical malpractice claims against health care providers. The bill defines a "long-term care provider" as an adult family home, residential care apartment complex, community-based residential facility, home health agency, nursing home, or hospice.

NONECONOMIC DAMAGES IN MEDICAL MALPRACTICE AND WRONGFUL DEATH ACTIONS

A person, or certain persons related to the person, who is injured by the medical malpractice of a long-term care provider may sue for economic and noneconomic damages. Act 2 contains limitations on noneconomic damages[2] in these cases. Specifically, the total noneconomic damages recoverable for bodily injury may not exceed $750,000 for each occurrence from all long-term care providers and all employees of long-term care providers acting within the scope of their employment and providing health care services who are found negligent and from the Injured Patients and Families Compensation Fund.

In a wrongful death action, noneconomic damages are limited, as well. Act 2 provides that damages not to exceed $500,000 per occurrence in the case of a deceased minor, or $350,000 per occurrence in the case of a deceased adult, for loss of society and companionship may be awarded to the spouse, children, or parents of the deceased, or to the siblings of the deceased, if the siblings were minors at the time of the death. [s. 893.555 (4) and (5), Stats.]

TIME LIMIT FOR COMMENCING ACTION FOR MEDICAL MALPRACTICE

Under Act 2, a person who is injured by the medical malpractice of a health care provider or certain persons related to the injured person may bring an action against the health care provider three years from the date of the injury or one year from the date the injury was discovered or, in the exercise of reasonable diligence should have been discovered, except that no action may be commenced more than five years from the date of the malpractice act or omission. If a health care provider conceals from a patient a prior act or omission which has resulted in injury to the patient, an action must be commenced within one year from the date the patient discovers the concealment or, in the exercise of reasonable diligence, should have

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[2] "Noneconomic damages" are defined as moneys intended to compensate for pain and suffering; humiliation; embarrassment; worry; mental distress; noneconomic effects of disability, including loss of enjoyment of the normal activities, benefits, and pleasures of life and loss of mental or physical health, well-being, or bodily functions; loss of consortium, society, and companionship; or loss of love and affection. [s. 893.55 (4) (a), Stats.]

discovered the concealment or by the date required under the general time limitation, whichever is later.

INITIAL APPLICABILITY

The changes relating to actions against long-term care providers apply to actions commenced on or after the effective date of the Act.

EXPERT AND LAY WITNESS TESTIMONY

OPINION TESTIMONY BY LAY WITNESSES

Under current law, if a witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to opinions or inferences which are both:

1. Rationally based on the perception of the witness.

2. Helpful to a clear understanding of the witness's testimony or the determination of the fact in issue.

Act 2 additionally provides that a lay witness's testimony in the form of an opinion or inference is limited to opinions or inferences which are not based on scientific, technical, or other specialized knowledge within the scope of an expert witness. [s. 907.01, Stats.]

EXPERT TESTIMONY

Under current law, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify regarding that knowledge in the form of an opinion or otherwise if scientific, technical, or other specialized knowledge would assist the trier of fact to understand the evidence or to determine a fact in issue.

Under Act 2, an expert testimony must meet all of the following conditions:

1. The testimony is based upon sufficient facts or data.

2. The testimony is the product of reliable principles and methods.

3. The witness has applied the principles and methods reliably to the facts of the case.

Under Act 2, facts or data on which an expert bases an opinion or inference that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect.

Act 2 provides that the testimony of an expert witness may not be admitted if he or she is entitled to receive any compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered. [s. 907.03, Stats.]

INITIAL APPLICABILITY

The changes regarding lay and expert witness testimony apply to actions that are commenced on or after the effective date of the Act.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

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