



WISCONSIN LEGISLATIVE COUNCIL
AMENDMENT MEMO

January 2011 Special Session
Senate Bill 1

Senate Amendments 1 and 9

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SENATE AMENDMENT 1, AS AMENDED BY SENATE AMENDMENT 1 TO SENATE AMENDMENT 1

Senate Amendment 1 makes changes to the bill relating to punitive damages, expert testimony, and the initial applicability of civil law provisions of the bill.

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.]

Under *the bill*, the plaintiff may receive punitive damages if evidence is submitted showing that the defendant did any of the following:

1. Acted with the intent to cause injury to a particular person or persons.
2. Knew that the defendant's action that resulted in injury to one or more persons was practically certain to result in injury to one or more persons.

The bill provides that a voluntarily produced intoxicated or drugged condition is not a defense to liability for punitive damages if, had the actor not been in that intoxicated or drugged condition, he or she would have known that his or her action that resulted in injury to one or more persons, done while in the intoxicated or drugged condition, was practically certain to result in injury to one or more persons.

Senate Amendment 1 deletes the provisions of the bill relating to punitive damages so that the circumstances under which a plaintiff may be awarded punitive damages are the same as under current

law. The amendment also creates a cap on punitive damages under which 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.

Senate Amendment 1 to Senate Amendment 1 provides that 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.

Expert Testimony

Under *current law*, if scientific, technical, or other specialized knowledge will assist the trier of fact (the judge or the jury) 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 regarding that knowledge in the form of an opinion or otherwise. [s. 907.02, Stats.]

Under *the bill*, an expert may testify, as described above, if all of the following are true:

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.

Senate Amendment 1 deletes “all of the following are true” from the above provision and instead provides that an expert may testify if the three conditions are met. This language is identical to the language of Rule 702 of the Federal Rules of Evidence.

Initial Applicability of Civil Law Provisions

The following provisions of the bill first apply to actions or special proceedings *commenced or continued* on the effective date of the legislation: changes to the criteria under which punitive damages may be awarded; damages for maintaining frivolous claims and counterclaims; changes to the risk contribution theory in product liability actions; changes to product liability statutes; and changes to current law relating to lay and expert witness testimony.

Under *Senate Amendment 1*, the above provisions first apply to an action or special proceeding that is commenced, instead of commenced or continued, on the effective date of the legislation. Thus, the provisions will not apply to pending cases.

SENATE AMENDMENT 9

Senate Amendment 9 modifies the provisions of the bill relating to the risk contribution theory as applied to product liability cases and removes the effective date provision from the bill.

Risk Contribution Theory

In *Thomas v. Mallett*, the Wisconsin Supreme Court held, a plaintiff may recover under a risk contribution theory if the plaintiff suffers an injury due to white lead carbonate (an ingredient of lead paint). In that case, the Court considered paint manufacturers' liability in a case in which a person alleged that he had been injured by the ingestion of white lead carbonate but could not prove the type of white lead carbonate 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 may recover from any manufacturer that produced or marketed the type of white lead carbonate he ingested unless the manufacturer can 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.]

The bill 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. For these actions, the bill 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.

Under the bill, 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 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 meets the conditions set forth in the bill.

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.

Senate Amendment 9 adds to the definition of "claimant" 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. Under the amendment, the new provisions apply to all actions **in law or equity**.

The amendment modifies the criteria that must be met in order for a plaintiff to hold a manufacturer, distributor, seller, or promoter liable if the plaintiff cannot prove that the manufacturer, distributor, seller, or promoter manufactured, distributed, sold, or promoted **the specific product**. Under the bill, as modified by the amendment (changes are in bold), these criteria are as follows:

1. The claimant proves all of the following:
 - a. That no other lawful process exists for the claimant to seek **any** redress from **any other** 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.

Effective Date

The bill contains a provision under which the bill takes effect on the first day of the second month beginning after publication.

Senate Amendment 9 deletes the effective date language so that the bill takes effect the day after publication.

Legislative History

The Senate passed January 2011 Special Session Senate Bill 1 on January 18, 2011. The Senate adopted Senate Amendment 1, as amended by Senate Amendment 1 to Senate Amendment 1, and Senate Amendment 9 on votes of Ayes, 19; Noes, 14; and passed the bill, as amended, on a vote of Ayes, 19; Noes, 14.

AS:jb:ty;jal