

January 27, 2011

Related Practices

Litigation

Wisconsin Tort Reform 2011

Governor Scott Walker signed the Omnibus Tort Reform Act (the “Act”) today, January 27, 2011. The Act addresses several areas of interest for Wisconsin companies.

Specifically, the Act:

- **Limits Punitive Damages.** Punitive damages are capped at to \$200,000 or double the amount of compensatory damages, whichever is higher. The cap does not apply to lawsuits related to operating a motor vehicle while intoxicated.
- **Raises the Standards for Expert Testimony.** This Act adopts the standard set forth in Federal Rule of Evidence 702, also known as the “Daubert standard.” The Daubert standard allows the admission of expert testimony only if it is based on sufficient factors or data and is the product of reliable principles and methods.
- **Limits the Application of the Risk Contribution Theory.** This provision is a response to the Wisconsin Supreme Court’s 2005 decision in *Thomas v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523, where the Court permitted a case to proceed against seven paint manufacturers despite the fact that the plaintiff could not prove who made the lead-based paints that he claimed poisoned him as a child. The Act limits the holding in *Thomas*. If the claimant can not identify the specific product that allegedly caused the injury, a manufacturer, distributor, seller, or promoter of a product may be held liable only if all of the following apply: (1) the claimant proves: (a) 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 manufactured product chemically and physically identical to the specific product that allegedly caused the claimant’s injury or harm; and (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; and (2) the action names, as defendants, those manufacturers of a product who collectively manufactured at least 80 percent of all products sold in this state 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.

- **Limits Strict Product Liability Claims.** Under the Act, Wisconsin is now in line with the majority of other states that have adopted the "reasonable alternative design" test instead of the broader "consumer expectation" test. Accordingly, a manufacturer will be liable for damages caused by the manufacturer's product based on a claim of strict liability only if the injured claimant proves that the product was defective, the defective condition made the product unreasonably dangerous, the defective condition existed at the time the product left the control of the manufacturer, the product reached the user or consumer without substantial change, and the defective condition caused the claimant's injuries. 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 any 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 shall be diminished by the percentage attributed to that injured party.
- **Toughens State Rules Relating to Damages for Frivolous Claims.** In civil cases, a party or his or her attorney may be liable for costs and fees for actions that are done (1) in bad faith, solely for the purpose of harassing or maliciously injuring another; or (2) was without a reasonable basis in the law. If the offending party withdraws or corrects the improper conduct within 21 days of receiving the other party's motion for fees, the court can decide whether to award actual costs taking into consideration the offending party's mitigating conduct. If the offending party does not timely withdraw or correct the conduct, actual costs shall be awarded. If the decision is appealed and the appellate court affirms the award of fees, the offending party must also pay the attorney fees incurred in the appeal.

In addition to the tort reform provisions outlined above, the Act includes several health care related provisions previously discussed in a client alert dated January 10, 2011.

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