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Wisconsin Civil Justice Reforms

*A Summary of the Watershed Reforms
Enacted During the 2011-12 Legislative Session*

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In a defining effort, the Wisconsin Legislature, with Gov. Walker's leadership, enacted sweeping civil justice reforms during the contentious 2011-12 Legislative Session. Landmark reforms relating to product liability, expert opinion testimony, risk contribution, and caps on punitive damages, among others, turned Wisconsin's souring litigation and business climate into one of the most competitive jurisdictions in the country from a litigation standpoint.

Introduction – Changing Perceptions by Changing the Legal Climate

Increasingly, states' civil justice systems constitute a critical component in creating jobs and enhancing economic development. There has been a concerted effort in Wisconsin for over 25 years to establish a civil justice system in the state that is based on common sense and fairness.

In the mid-1990s, Wisconsin made significant strides in advancing those goals by enacting landmark reforms to our joint and several liability laws, limiting punitive damages, and capping noneconomic damages in medical malpractice claims.

However, the Wisconsin Supreme Court overturned the caps on noneconomic damages in medical malpractice cases; weakened the standards for the assessment of punitive damages; and advanced the "risk contribution theory," making Wisconsin the only state in the nation to completely eliminate the traditional legal requirement to prove direct liability to allow recovery in a products liability claim.

These developments opened the door to a flood of litigation, and reversed recent public policy successes projecting Wisconsin as business friendly. Wisconsin was even branded "Alabama North" in a *Wall Street Journal* editorial.

During its 2005-06 session, the Wisconsin Legislature responded expeditiously by passing legislation that not only reversed the Supreme Court decisions, but also attempted to move Wisconsin into the mainstream in the areas of product liability law and the admission of expert opinion evidence. Unfortunately, Gov. Jim Doyle vetoed these vital liability reform measures, and Wisconsin's civil justice system remained in a state of crisis.

Wisconsin's 2011-12 legislative session was a historic step toward improving

Wisconsin's job creation and economic development environment through sensible reform of the state's litigation climate. In two separate special sessions focusing on job creation, the legislature passed sweeping civil justice reforms designed to bring Wisconsin's civil justice system back into the mainstream. The Wisconsin Civil Justice Council played a leading role in developing and passing each of these reforms.

Tort Reform I – Gov. Walker's First Special Session

Within minutes of taking the oath of office, Gov. Walker called the legislature into a special session focused on job creation.¹ The first bill he introduced was [Special Session SB 1/AB 1](#), which, ultimately, became [2011 Wis. Act 2](#).

Act 2 contains major civil justice reforms long sought by the Wisconsin business community:

- Changes to Wisconsin's product liability statutes;
- Elimination of the flawed "risk contribution" theory adopted by the Wisconsin Supreme Court in *Thomas v. Mallett* involving liability of lead-based paint manufacturers;
- Getting rid of junk science in courtrooms by adopting sound science principles known as *Daubert* standards;
- Caps on punitive damages of \$200,000 or two times compensatory damages, whichever is greater; and
- Sanctions on frivolous lawsuits.

Each of these provisions were passed by the Legislature in 2005-06, only to be vetoed by former Gov. Jim Doyle.² Below is a discussion of the provisions in Act 2.

Product Liability

Product liability is a strict liability theory that does not require proof of negligent conduct but relates directly to product defect. Product liability law in Wisconsin is based predominately on common law as interpreted by case law, with some specific statutory provisions. Act 2 made substantial changes to Wisconsin's existing product liability law to ensure that Wisconsin businesses do not suffer a competitive disadvantage.

The product liability reforms contained in Act 2 assist manufacturers by requiring proof of a "reasonable alternative design" to prove a defective design, moving Wisconsin away from the much broader and less commonly used "consumer expectation" test. This brought Wisconsin in line with 46 other states.

Before the enactment of 2011 Wis. Act 2, a "consumer expectations test" was often used to determine product liability.³ This test asked whether an ordinary, reasonable consumer would find the product's design, manufacture, instructions or warning defective.⁴

¹ Gov. Walker's inaugural address outlined the governor's intent to call a special session and the focus on job creation. The text is available at <http://www.wisgov.state.wi.us/Default.aspx?Page=9b68f2e8-a356-402b-a3ce-52d118e5cac9>.

² Wisconsin Legislative Reference Bureau, Wisconsin Briefs No. 06-9, Executive Vetoes of Bills Passed by the 2005 Wisconsin Legislature from January 3, 2005, to May 30, 2006 (2006), available at <http://legis.wisconsin.gov/lrb/pubs/wb/06wb9.pdf>.

³ See, *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, 230 N.W.2d 794 (1975) (citing Restatement (Second) of Torts § 402(A) (1962)).

⁴ *Id.*

The Act encompasses a comprehensive re-write of Wisconsin product liability law. It covers manufacturing defects, defective designs, and products with inadequate instructions or warnings. Notably, the Act requires a claimant show that a reasonable alternative design could have been adopted by the manufacturer to reduce or avoid the harm posed by the product.⁵ The Act disallows the use of subsequent remedial measures as evidence of the product's defect, as well as damages for products manufactured 15 years or more before the claim.⁶

Act 2 provides benefits to others in the stream of commerce in addition to manufacturers. The liability of sellers or distributors is limited to instances in which the seller or distributor has assumed responsibility for some portion of the manufacturing or labeling of the product, or where the manufacturer is judgment proof.⁷

The purpose of the seller and distributor reforms is to inject fairness and common sense into the system. Middlemen, in most instances small businesses, will not be held responsible for defects only because they have money, assets, or insurance. They will be held accountable when their actions play a role in an injury or when recovery from the manufacturer is not possible.

In all product liability cases, recovery will be reduced based upon the injured person's share of responsibility for the injury.⁸ The injured person may not recover if he or she is found to be more responsible for the injury than the defective product.

Risk Contribution – Reversing Thomas

With the rarest of exceptions, the plaintiff must prove that she or he was injured by the product manufactured or sold by a specific manufacturer or other defendant. Virtually the only significant exceptions to this fundamental principle were lawsuits filed against pharmaceutical companies for the production and sale of the drug, DES (diethylstilbestrol).

Beginning with California in 1980, a substantial minority of all jurisdictions allowed the victim to recover on the basis of "market share" liability, or in Wisconsin, a variant of "market share liability" that the Wisconsin Supreme Court called "risk contribution" theory. However, market share liability in Wisconsin, and virtually everywhere else, was limited to DES cases. Hundreds of cases throughout the country for nearly 30 years rejected its expansion to other products; there were literally less than a handful of exceptions.

Then, in 2005, the Wisconsin Supreme Court greatly expanded the use of "risk contribution" theory to hold paint manufacturers collectively liable for the lead poisoning of a person after he ingested white lead carbonate.⁹ Although the claimant could not prove what type of white lead carbonate he had ingested, the court apportioned the liability to all manufacturers of paint containing white lead carbonate during the relevant time period in Wisconsin.¹⁰

In an editorial titled, "Alabama North," *The Wall Street Journal* described the *Thomas* decision as, "The first of its kind in the county" establishing a dangerous precedent by dispensing with the

⁵ Wis. Stat. § 895.047(1)(a).

⁶ Wis. Stat. §§ 895.047(4-5).

⁷ Wis. Stat. §§ 895.047(2-3).

⁸ Wis. Stat. § 895.045(3).

⁹ *Thomas v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523.

¹⁰ *Id.*

“traditional legal standard for torts – which is to establish actual connections between wrongdoing and injury – and [replacing] it with a chain of speculation and conjecture.”¹¹

According to a nationally recognized expert on mass torts, the court’s decision in *Thomas* was the single most radical departure from the fundamental principles of tort law in recent decades. It was a decision that put Wisconsin law dramatically out of line with the law of every other state.¹²

Act 2 realigns the standard of proof for claimants with the majority of states; Wisconsin is no longer the only state following the “risk contribution” doctrine. The Act essentially returns Wisconsin’s law to the original boundaries of market share liability employed by the California Supreme Court in *Sindell v. Abbott Laboratories*,¹³ even though a majority of American states find market share liability in any form to be an unacceptable modification of the traditional requirement that the plaintiff prove all the elements of his or her case, including cause in fact.

The Act requires a claimant prove that the manufacturer made the specific product responsible for the injury. If the claimant cannot identify the manufacturer of the specific product, and no other method of recovery is available, the court may apportion the liability to more than one manufacturer of the specific product liable for the injury. Any manufacturer held liable must manufacture a product that is chemically and physically identical to the product liable for the injury.¹⁴

Expert Opinion Evidence (Daubert Standard)

Prior to Act 2, Wisconsin was among a distinct minority of states that did not require expert testimony to be reliable. Wisconsin’s law allowed the testimony of an expert witness if that scientific, technical, or other specialized knowledge would have assisted the trier of fact to understand the evidence or to determine a fact at issue in the case.

The entire federal system and the majority of other states have adopted the principles embodied in the U.S. Supreme Court decision *Daubert v. Merrell Dow Pharmaceuticals*.¹⁵ Act 2 adopts the *Daubert* standard for expert testimony, requiring an expert witness’s testimony be based on sufficient facts or data and be the product of reliable principles and methods.¹⁶

The court now acts as a “gatekeeper” for otherwise inadmissible evidence, weighing the probative value and prejudicial effect of the evidence.¹⁷ In addition, the new law prohibits expert witnesses from being compensated contingent on the outcome of the case.¹⁸

Wisconsin’s adoption of the *Daubert* standard brings the state’s evidence law in line with the federal system and 30 other states. Expert opinion evidence must now be reliable and based on a sound, analytical method, and it must be presented by a genuine expert. These standards will prevent Wisconsin state courts from being bogged down with cases based on “junk science,” and

¹¹ Editorial, *Alabama North*, WALL ST. J., Aug. 9, 2005.

¹² Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts*, 62 WASH. & LEE L. REV. 873 (2005).

¹³ 26 Cal. 3d 588 (1980).

¹⁴ Wis. Stat. § 895.046(4).

¹⁵ 509 U.S. 579 (1993).

¹⁶ Wis. Stat. § 907.02(1)

¹⁷ Wis. Stat. § 907.03

¹⁸ Wis. Stat. § 907.02(2)

will discourage cases of questionable merit from being brought in Wisconsin because of weaker expert opinion evidence standards.

Caps on Punitive Damages

Punishment and deterrence are the only legitimate reasons for the assessment of punitive damages in civil cases. An award of punitive damages does nothing to make a plaintiff whole – that is accomplished through the award of special/economic damages including medical expenses, property damage, lost wages, etc. and, in appropriate cases, noneconomic damages including pain and suffering.

Since the civil justice system (in lieu of the criminal justice system) is being used for the above referenced purposes, the bar for assessment of punitive damages must be set high and used in only the most egregious cases. Existing Wisconsin law allows a plaintiff to recover punitive damages if it is shown that the defendant acted maliciously, with intentional disregard for the plaintiff's rights.¹⁹

Act 2 preserves that standard for allowing punitive damages, but sets a cap on the amount that can be awarded. The cap is \$200,000 or twice the amount of compensatory damages awarded, whichever is greater.²⁰

Frivolous Lawsuits

Previously, damages were not available for a party tasked with defending against a frivolous claim. Under Act 2, the party bringing a frivolous suit and/or the party's attorney may be held liable for costs and fees for bringing a lawsuit, cross complaint, defense, counterclaim or appeal in bad faith, solely for the purpose of harassing or maliciously injuring another party.²¹

Tort Reform II – Gov. Walker's Second Special Session

Later in 2011, Gov. Walker called a second special session focusing on job creation, and once again tort reform was one of the governor's top priorities.²² Below are three of the bills that were passed by the legislature and signed into law:

- [2011 Wis. Act 92](#) – Creating criteria for setting attorneys' fees in fee-shifting cases (where the defendant pays the plaintiff's costs), and creating a rebuttable presumption that attorneys' fees shall be no more than three times compensatory damages.
- [2011 Wis. Act 69](#) – Resetting pre- and post-judgment interest rates from 12 percent to the Federal Reserve Prime Rate plus one percent.
- [2011 Wis. Act 93](#) – Protecting land possessors from courts adopting the new Restatement of Torts by codifying the current law as it relates to the duty of care owed to trespassers by a possessor of land.

Factors Determining Reasonable Attorneys' Fees – Act 92

Prior to Act 92, Wisconsin did not have a statutory cap on reasonable attorneys' fees or mandatory criteria for evaluating the reasonableness of attorneys' fee awards. In determining the reasonableness of attorneys' fee awards, courts were guided by Wisconsin Supreme Court Rule

¹⁹ Wis. Stat. § 895.043.

²⁰ Wis. Stat. § 895.043 (6).

²¹ Wis. Stat. § 895.044

²² Exec. Order No. 45 (2011) available at <http://165.189.60.210/Documents/22176.pdf>.

20:1.5, which prohibits the imposition of unreasonable fees and enumerates eight factors in determining the reasonableness of a fee.

Act 92 codified all of the 20:1.5 factors and added a few additional criteria courts are to consider when awarding attorneys' fees in fee-shifting cases. In accordance with the Act, Wis. Stat. §§ 814.045(1)(a-p) now contains the following factors that courts are to consider when awarding attorneys' fees:

- (a) The time and labor required by the attorney.
- (b) The novelty and difficulty of the questions involved in the action.
- (c) The skill requisite to perform the legal service properly.
- (d) The likelihood that the acceptance of the particular case precluded other employment by the attorney.
- (e) The fee customarily charged in the locality for similar legal services.
- (f) The amount of damages involved in the action.
- (g) The results obtained in the action.
- (h) The time limitations imposed by the client or by the circumstances of the action.
- (i) The nature and length of the attorney's professional relationship with his or her client.
- (j) The experience, reputation, and ability of the attorney.
- (k) Whether the fee is fixed or contingent.
- (L) The complexity of the case.
- (m) Awards of costs and fees in similar cases.
- (n) The legitimacy or strength of any defenses or affirmative defenses asserted in the action.
- (p) Other factors the court deems important or necessary to consider under the circumstances of the case.

The new law also includes a rebuttable presumption that attorneys' fees should be no more than three times compensatory damages.²³

Setting Reasonable Interest on Judgments – Act 69

Plaintiffs in Wisconsin who win favorable verdicts are usually entitled to recover interest on the damages awarded. Some of this is in the form of post-judgment interest, which is meant to compensate the plaintiff for loss of the use of money while a defendant appeals a judgment. Plaintiffs may also be awarded prejudgment interest, which runs from the date the plaintiff makes an offer of settlement, rather than the time damages are awarded by a court.

Wisconsin's existing law imposed an interest rate of 12 percent on both pre- and post-judgments, one of the highest rates in the nation. If the plaintiff offered a settlement that the defendant did not accept and the judgment was larger than the offer to settle, the plaintiff was entitled to pre-judgment interest from the time the plaintiff made the offer to settle at a rate of 12 percent.

Although well intended, Wisconsin's law had the unintended consequence of over-compensating the plaintiff, holding a defendant financially responsible for delays in the court process the defendant may have not caused, and ultimately impeding settlement.

²³ Wis. Stat. § 814.045(2).

Act 69 changed Wisconsin's pre- and post-judgment interest rate from 12 percent to the prime rate set by the Federal Reserve Board, plus one percent.²⁴ This ensures that plaintiffs do not receive a windfall, while also ensuring that defendants have a financial incentive to pay the plaintiffs promptly

Trespasser Responsibility Act – Act 93

Act 93 codifies current case law as it relates to the duty of care owed to a trespasser by a possessor of land. Wisconsin has long maintained clear and sound rules regarding the liability of land possessors to those who trespass on their property. Like most other states, Wisconsin provides that a land possessor owes no duty of care to a trespasser, except in a few narrow and well-defined circumstances.²⁵ Wisconsin's current case law has been in place for a very long time and continues to be fair, workable, and predictable.

The newly rewritten Restatement (Third) of Torts reverses the traditional rule as it relates to trespassers. The revised Restatement imposes on landowners a duty to exercise reasonable care to all entrants, including unwanted trespassers.²⁶ The only exception to this new broad duty would be harms to "flagrant trespassers"—a concept that is not defined.²⁷ If Wisconsin courts were to adopt the revised Restatement, this exception could be sharply limited, barring recovery only for a very narrow category of trespassers, such as armed burglars.

Act 93 prevents the courts from adopting the new Restatement (Third) of Torts by codifying the existing case law. The Act:

- Follows Wisconsin's longstanding rule that a possessor of real property owes no duty of care to a trespasser except to refrain from willfully, wantonly, or recklessly injuring the trespasser.²⁸
- Ensures a possessor of real property may be liable for harm to a child trespasser caused by a dangerous artificial condition on the land that the child was too young to appreciate but was known to the possessor.²⁹ This exception is referred to as the attractive nuisance doctrine and has been part of Wisconsin case law since at least the 1930s.
- Clarifies that the legislation does not create or increase the liability of any possessor of real property and does not affect any immunities from or defenses to liability established by another section of the statutes or available at common law to which a possessor of real property may be entitled under circumstances not covered by the legislation.³⁰

Repeal of 2009 Wis. Act 20 – Eliminating Punitive and Compensatory Damages under the Wisconsin Fair Employment Act (SB 202)

²⁴ Wis. Stat. §§ 807.01 (4), 814.04 (4), and 815.05 (8).

²⁵ Like most other states, Wisconsin courts have followed what is known as the Restatement (Second) of Torts, which provides that if the person is a trespasser, the landowner only has a duty to refrain from willful and intentional injury. *Szafrański v. Radetzky*, 31 Wis. 2d 110, 125-26, 141 N.W.2d 902 (1966).

²⁶ Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm §51.

²⁷ *Id.*

²⁸ Wis. Stat. §§ 895.529(2), (3)(a).

²⁹ Wis. Stat. § 895.529(3)(b).

³⁰ Wis. Stat. § 895.529(4).

In 2009, Gov. Jim Doyle signed into law 2009 Wis. Act 20, which for the first time imposed punitive and compensatory damages in discrimination cases under the Wisconsin Fair Employment Act.³¹

After Act 20 went into effect, Wisconsin employers were forced to not only defend workplace discrimination claims in the administrative hearing process before the Department of Workforce Development, but also then re-litigate the same case in state court in a full jury trial (or in a new trial to the court) in defense of potential punitive and compensatory damages, and additional costs and attorneys' fees.³²

At the same time, Wisconsin employers were forced to defend simultaneously cross-filed claims under federal laws based on the same facts and alleged types of claims before federal agencies, and then in state or federal court under federal law.³³

[2011 Wis. Act 219](#), which repeals Act 20, protects Wisconsin businesses from meritless and costly lawsuits by returning the law to its pre-Act 20 status. Plaintiffs still have plenty of recourse under the law. They can seek reinstatement, back pay up to two years, and be awarded considerable attorneys' fees and court costs.³⁴

Jurisdiction in Cases Where the State is the Defendant – 2011 Wis. Act 61

[2011 Wis. Act 61](#) modifies Wisconsin's venue statutes in cases where the sole defendant is the state, a state board or commission, or certain state officers, employees, or agents. Instead of mandating that all cases against the state be held in Dane County, the new law allows the plaintiff in a case to designate the venue.³⁵

The law also changed the venue rule for appeals from circuit court cases. The appeal from an action against the state "shall be heard in a court of appeals district selected by the appellant, but the court of appeals district may not be the court of appeals district that contains the court from which the judgment or order is appealed."³⁶ This means an appellant must file its appeal in one of the three other court of appeals districts.

Felony Conviction Records (SB 207) Killed in Senate

[Senate Bill 207](#) would have removed felony conviction records as a protected class under the Wisconsin Fair Employment Act. Currently, Wisconsin is one of only six states that allows a convicted felon to sue an employer for discrimination if he or she was not hired for the job, or is let go by an employer.³⁷

The bill passed the Senate Labor Committee on a bipartisan vote, with Sen. Jessica King

³¹ 2009 Wis. Act 20.

³² See, 2009 Wis. Act 20 § 5 (creating Wis. Stat. § 111.397).

³³ Civil rights plaintiffs file most claims concurrently with the Wisconsin Department of Workforce Development's Equal Rights Division ("ERD") and the federal Equal Employment Opportunity Commission ("EEOC").

³⁴ Wis. Stat. § 111.39.

³⁵ Wis. Stat. § 801.50 (3)(a).

³⁶ Wis. Stat. § 752.21 (2).

³⁷ The other five states with similar state statutes include: Hawaii (Haw. Rev. Stat. Ann. § 378-2); Illinois (775 Ill. Comp. Stat. Ann. 5/2-103); Kansas (Kan. Stat. Ann. § 22-4710(f)); New York (N.Y. CORRECT LAW § 752); and Pennsylvania (19 Pa. Cons. Stat. Ann. § 9125).

(D-Oshkosh) supporting the bill.³⁸ Despite this bipartisan support, the bill was not brought to the Senate floor for a vote.

Phantom Damages – Ensuring Juries See All Evidence Pertaining to Medical Expenses in Tort Actions

In a recent decision, the Wisconsin Supreme Court added to the growing number of cases that have allowed plaintiffs to recover “phantom damages” in personal injury actions. These recoveries are for past medical expenses that were written off by the medical provider and never paid by the plaintiff or his or her insurer. Such awards are in effect windfalls to plaintiffs.

In a unanimous decision, the court in *Orlowski v. State Farm Mutual Auto. Ins. Co.* held that the collateral source rule precludes the defendant from introducing evidence of the amount actually paid for medical services in cases involving an underinsured motorist claim.³⁹ Based on the *Orlowski* decision and the previous line of Wisconsin Supreme Court cases, plaintiffs in personal injury cases are entitled to the full amount of past medical expenses – even those amounts that were written off by the medical provider as a result of contractual agreements between medical providers and health insurers.

This past session, various business groups worked on draft legislation that would have allowed juries to determine the “reasonable value of medical services” in civil actions to see evidence of the amount billed by a medical provider along with the evidence of the amount paid to the medical provider. While this legislation did not pass in the 2011-12 session, it is expected to resurface in future sessions.

Conclusion

Although 2011-12 was a remarkable legislative session, our work is by no means finished. The Wisconsin Civil Justice Council will continue to pursue additional civil justice reforms and protect this session’s positive changes in future legislative sessions and in the courts.

Feel free to contact [Andrew Cook](#), [Emily Kelchen](#), or [Bob Fassbender](#) with any questions.

³⁸ Senate Journal, Nov. 2, 2011, p. 1, available at <https://docs.legis.wisconsin.gov/2011/related/journals/senate/20111102.pdf>.

³⁹ 2012 WI 21.