WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System

WISCONSIN TORT REFORM
2011 WISCONSIN ACT 2

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This memorandum provides an overview of the significant changes instituted by Act 2 to Wisconsin's civil liability law in areas of product liability, expert witness testimony, risk contribution, frivolous law suits, punitive damages, and health care quality improvement programs. The key changes are highlighted below.

PRODUCT LIABILITY

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

The Act encompasses a comprehensive re-write of Wisconsin product liability law [Sec. 31]. It covers manufacturing defects, defective designs, and products with inadequate instructions or warnings. Notably, the act requires a claimant to show that a reasonable alternative design could have been adopted by the manufacturer to reduce or avoid the harm posed by the product. It also limits the liability of sellers or distributors 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. The Act disallows use of subsequent remedial measure as evidence of the product's defect, as well as damages for products manufactured 15 years or more before the claim.

In addition, a recovery in a product liability case will be reduced based on the injured person's share of responsibility for the injury [Sec. 29]. The injured person may not recover if he or she is found to be more responsible for the injury than the defect in the product.

EXPERT OPINION EVIDENCE (*DAUBERT* STANDARD)

The Act adopts the *Daubert* standard for expert testimony that is already followed by a majority of other states and the federal courts [Sec. 33-39]. This standard requires that an expert witness's testimony be based on sufficient facts or data, and is the product of reliable principles and methods. The court now acts as a "gatekeeper" for otherwise inadmissible evidence, weighing the probative value and prejudicial effect of the evidence. In addition, the expert witness's compensation may not be contingent on the outcome of the case.

RISK CONTRIBUTION

Previously, products liability claimants in Wisconsin were allowed to recover based on a "risk contribution" theory. This meant that liability for an injury caused by a product was spread among all manufacturers marketing the product during the relevant time period. In 2005, the Wisconsin Supreme Court allowed the use of this theory to hold paint manufacturers collectively liable for the lead poisoning of a young man after he ingested white lead carbonate (*Thomas v. Mallet*, 2005 WI 129).

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.

The Act heightens the standard of proof for claimants. It requires a claimant to 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 [Sec. 30].

FRIVOLOUS LAWSUITS

A party and/or party's attorney may be held liable for costs and fees for bringing a lawsuit, cross complaint, defense, counterclaim or appeal in bad faith, and solely for the purpose of harassing or maliciously injuring another party. Previously, damages were not available for a party who was the target of a frivolous claim [Sec. 28].

CAPS ON PUNITIVE DAMAGES

Current Wisconsin law allows a plaintiff to recover punitive damages if is shown that the defendant acted maliciously, with intentional disregard for the plaintiff's rights (Wis. Stat. §895.043).

The Act leaves the standard for allowing punitive damages, but sets a cap for the amount that can be awarded. The cap is $200,000 or twice the amount of compensatory damages awarded, whichever is greater [Sec. 22m].

QUALITY IMPROVEMENT ACT

The Quality Improvement Act implements a system of quality review for health care providers, focusing on information sharing to improve the quality of care. The Act broadens the definition of "health care provider" to include all types of medical personnel. In addition, the Act addresses the confidentiality of reports prepared for the purpose of quality review, and disallows their use in most civil and criminal proceedings [Sec. 1-22].

For example, the Act provides that documents or records obtained during peer reviews may not be released if a patient invokes his or her right to medical records associated with treatment or the records are otherwise requested through discovery [Sec. 8].

Not all documents or records presented during the review or evaluation are necessarily immune from discovery in civil or criminal cases simply because they were presented as part of a peer review or evaluation. However, "incident or occurrence reports" are always immune from discovery in both civil and criminal cases [Sec. 7].

An "incident or occurrence report" is defined as a "written or oral statement that is made to notify a person, organization, or an evaluator who reviews or evaluates the services of health care providers or charges for such services of an incident, practice, or other situation that becomes the subject of such a review or evaluation" [Sec. 6].

There are certain exceptions to nondisclosure of information in connection with the review or evaluation of health care services. The information may be disclosed to:

- The health care provider whose services are being reviewed if the provider so requests;
- Any person who obtains the consent of the health care provider being reviewed; or
- The person requesting the review or evaluation to use solely for the purpose of improving health care quality, avoiding improper utilization of health care services, or determining reasonable charges for health care services [Sec. 11].

The term "health care provider" in the legislation includes: licensed physicians, physician's assistants, perfusionists, respiratory practitioners, nurses, chiropractors, podiatrists, pharmacists, optometrists, psychologists, dentists, physical therapists, athletic trainers, acupuncturists, social workers, marriage and family therapists, occupational therapists, professional counselors, massage or bodywork therapists, occupational therapists, speech-language pathologists or speech therapists, audiologists, emergency medical technicians, and first responders [Sec. 3].

OTHER HEALTH CARE MATTERS

The Act also adopts a cap for noneconomic damages for long-term care providers. The damages awarded cannot exceed $750,000 [Sec. 23].

In addition, the Act exempts health care providers from being charged with homicide by negligent handling of dangerous weapon, explosives or firearms if the health care provider was acting within the scope of his practice or employment [Sec. 40].

EFFECTIVE DATE AND INITIAL APPLICABILITY

Section 45 of the Act sets forth the initial applicability for each of the provisions. Under the original bill, the effective date of the legislation was the second month beginning after publication. However, this provision was stricken from the bill. Therefore, under Wis. Stat. §991.11, if a bill does not have an effective date, the legislation takes effect the day after publication. The bill was published on January 31, 2011, making the effective date of the legislation February 1, 2011.