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NEWS RELEASE

February 1, 2011

New Law Alters Wisconsin's Litigation Landscape

On January 27th, 2011, Wisconsin Governor Scott Walker (R) signed what is being referred to as the Wisconsin Omnibus Tort Reform Act (2011 Wis. Act 2). **The new law, which became effective on February 1st, brings changes that will affect litigation strategies for both in-house and outside counsel.**

The main provisions of the new law (each of which are discussed further below) include:

1. Imposition of a cap on punitive damages.
2. New defenses in strict products liability cases.
3. A scaling back of the risk contribution doctrine (an issue of particular interest to pharmaceutical, lead paint and asbestos-containing product manufacturers).
4. Measures limiting the liability of entities in a supply chain between manufacturer and end consumer.
5. Application of comparative negligence rules to strict product liability claims.
6. Provisions making the imposition of sanctions for frivolous claims and filings more likely.
7. Adoption of the federal *Daubert* standard for the admissibility of expert testimony.
8. New limitations on liability for nursing homes and other long-term healthcare industry members.

1. Punitive Damages Capped

Perhaps the most wide-ranging change to the litigation landscape, this amendment strictly limits punitive damages to the *greater* of either (a) twice the awarded compensatory damages, or (b) $200,000. The new cap, however, does not apply cases driving while under the influence of an intoxicant.

2. New Defenses in Strict Product Liability Cases

The Act creates a new statute of repose in strict products liability cases, providing that, if the product that caused the injury was more than 15 years old, the claimant's case is barred (unless certain exceptions exist, such as the manufacturer represented that the product would last for more than 15 years). There are also two new potential defenses in strict products liability cases: (a) one creates a rebuttable presumption that, if the defendant can prove the plaintiff was intoxicated, the intoxication was the cause of the plaintiff's injury; and (b) the other creates a rebuttable presumption that, if the defendant can prove that at the time of sale, the product was in compliance with applicable state and federal requirements, the product was not defective.

3. Limitations on the Common-Law Risk Contribution Doctrine

This amendment appears to be a direct reaction to the lead paint liability decisions handed down by the Wisconsin courts in recent years. The new provision contains detailed requirements that must be met by a plaintiff who is unable to identify the specific manufacturer or distributor of the product that caused the plaintiff's injury. In practice, the stringency of these requirements may effectively preclude successful future claims of this type.

The key curtailment of liability is that, absent specific identification of the injury-causing product, the plaintiff must prove: (a) the injury suffered could only have resulted from a product that is chemically and physically identical to that which the defendant manufactured, distributed, sold, or promoted, (b) the product was distributed or sold without labeling or any distinctive characteristic that identified the product manufacturer or distributor; **and** (c) there is no other legal means of redress available to the plaintiff. Additionally, the law creates a special statute of repose in risk-contribution cases cutting off liability after 25 years.

4. Reducing The Circumstances in which Distributors and Suppliers Can Be Held Liable.

The Act contains a significant move to limit the liability of those entities which fall between the manufacturer and the end user in the chain of distribution of a product. Sellers and distributors of products found to be defective now will **not** be subject to liability unless: (a) they contractually assumed from the manufacturer a duty to design or provide warnings or instructions regarding the product, **or** (b) it is shown by a preponderance of the evidence that it will not be possible to serve process upon the manufacturer and its insurer in Wisconsin—in other words, to establish jurisdiction over them by a Wisconsin court, **or** (c) a court concludes that a judgment against the manufacturer or its insurer could not be enforced.

5. Application of Comparative Negligence Principles to Strict Product Liability Claims.

The Act requires that the principles of comparative negligence be applied to strict product liability claims, and establishes rules as to how courts shall apply those principles in such cases. The rules are detailed, and as with all things related to comparative negligence, the details matter. The new rules are set forth in Wis. Stat. § 895.045(3). Overall, the new rules will make it more difficult for a plaintiff to recover from product manufacturers or distributors, and more difficult to hold them jointly and severally liable for the plaintiff's damages. For example, under the new rule, in a case in which an automobile accident occurs, and the jury finds the plaintiff's injuries were caused 31% by another driver's negligence, 34% due to a manufacturing defect in the other driver's car, and 35% by the plaintiff's own negligence, the plaintiff would be barred from recovering from either the other driver, or the manufacturer. In other words, where the share of blame allotted to the plaintiff is greater than that allotted to any of the defendants, the plaintiff will now not be able to recover from *any* party.

6. TOUGHER STANDARDS RELATING TO FRIVOLOUS CLAIMS AND FILINGS.

Any party may, as previously, file a motion at any point in proceedings asserting that another litigant is maintaining frivolous claims. However, should the court agree, under the amended statute, the offending party has 21 days from the date on which the motion was served to correct or withdraw the frivolous claims. In the event that it fails to do so, the statute mandates an award of actual costs incurred—including reasonable attorney fees—against the offending party, and counsel to that party.

7. ADOPTION OF THE FEDERAL *DAUBERT* STANDARD FOR THE ADMISSIBILITY OF EXPERT TESTIMONY.

In Wisconsin, the threshold for admitting expert testimony into evidence has been lower and less defined than under federal civil procedure. The Act adopts the federal standard of admissibility (the "*Daubert*" standard). This provision is likely to be favorable to defendants, but may also increase the costs of litigation, as parties spend more time fighting over the qualifications of experts and the admissibility of each of their opinions.

8. LIMITED LIABILITY FOR CERTAIN HEALTHCARE PROVIDERS.

This amendment limits the exposure of "long-term care providers"—nursing homes, hospices and assisted living providers—for non-economic damages for bodily injury arising from the care or treatment, or any omission thereof, to $750,000.

These new provisions provide both opportunities and challenges for businesses and in-house counsel, and have the potential to impact litigation strategy. Businesses should review the law and consider its general and any specific implications with counsel.

If we can assist you in such a review, contact Robert Gegios (rgegios@kmksc.com) or Alexander "Sandie" Pendleton (apendleton@kmksc.com) by e-mail, or at (414) 962-5110.

Please note that the above is an overview of some of the significant aspects of the Act. It is provided for general information purposes only and does not represent legal advice.

About Kohner, Mann & Kailas, S.C.

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