WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
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TO: SENATOR CHRIS LARSON

FROM: Anne Sappenfield, Senior Staff Attorney; and David Moore, Staff Attorney

RE: Provision of Motion #999, Relating to Changes to Product Liability Law

DATE: June 11, 2013

This memorandum describes the provisions of Motion #999, adopted by the Joint Committee on Finance, to amend 2013 Assembly Bill 40, the biennial budget bill, under which certain provisions of 2011 Wisconsin Act 2, relating to civil actions, would apply to pending actions. The memorandum also discusses retroactive laws and potential constitutional challenges to the provision as a retroactive law.

The motion would apply certain provisions of Act 2 to suits filed before the Act was enacted and is, therefore, retroactive legislation. Retroactive legislation must comport with the due process requirements of the 14th Amendment of the U.S. Constitution and Wis. Const. art. I, s. 1. In Wisconsin, courts determine whether retroactive legislation complies with these requirements by applying a balancing of interests test. Although it is impossible to predict how a court would apply this test in a particular circumstance, based on prior holdings of the Wisconsin Supreme Court, the retroactive elements of the motion raise constitutional concerns.

BACKGROUND

The motion amends certain provisions of Act 2, which made various changes to Wisconsin's product liability law. Among other changes, the Act limited the authority of courts to apply the risk contribution theory of liability. Very generally, risk contribution liability allows a claimant who has been harmed by a substance to recover from a manufacturer of that substance even though the claimant is unable to prove with certainty that the particular manufacturer made the substance that caused the claimant's injuries. The Wisconsin Supreme Court first applied this theory in *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166 (1984), to manufacturers of Diethylstilbestrol (DES), a drug often prescribed to pregnant women to prevent miscarriage. The court then extended this theory to lead pigment manufacturers in *Thomas v. Mallett*, 2005 WI 129.

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Current Law, as Affected by 2011 Wisconsin Act 2

The Act created s. 895.046, Stats., which requires a claimant in a product liability action to prove that a 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 the claimant cannot prove this, the Act specifies the circumstances under which a claimant may recover from a manufacturer, distributor, seller, or promoter that manufactured, distributed, sold, or promoted a chemically and physically identical product during the period, and in the geographic area, of the claimant's injury.

These circumstances under which an action may be brought if the claimant cannot identify the specific product that caused his or her injury are unlikely to apply to an action relating to lead poisoning from paint. For example, one of the circumstances is that "no other lawful process exists for the claimant to seek any redress from any other person for the injury or harm." In a case of lead poisoning, the claimant typically also has a claim against the owner of the property. In addition, the Act created a "statute of repose" for actions under this provision. Under the Act, no manufacturer, distributor, seller, or promoter of a product is liable if more than 25 years have passed between the date that the manufacturer, distributor, seller, or promoter of a product last manufactured, distributed, sold, or promoted a product chemically identical to the specific product that allegedly caused the claimant's injury and the date that the claimant's cause of action accrued.

The Act's provisions affecting risk contribution liability first applied to claims filed on the Act's effective date, which was February 1, 2011.

The Motion

The motion creates a statement of the Legislature's intent for s. 895.046, Stats. The statement is as follows:

> The legislature finds that it is in the public interest to clarify product liability law, generally, and the application of the risk contribution theory of liability first announced by the Wisconsin Supreme Court in *Collins v. Eli Lilly Company*, 116 Wis. 2d 166 (1984), specifically, in order to return tort law to its historical, common law roots. This return both protects the rights of citizens to pursue legitimate and timely claims of injury resulting from defective products, and assures that businesses may conduct activities in this state without fear of being sued for indefinite claims of harm from products which businesses may never have manufactured, distributed, sold, or promoted, or which were made and sold decades ago. The legislature finds that the application of risk contribution to former white lead carbonate manufacturers in

> *Thomas v. Mallet*, 285 Wis. 2d 236 (2005), was an improperly expansive application of the risk contribution theory of liability announced in *Collins*, and that application raised substantial questions of deprivation of due process, equal protection, and right to jury trial under the federal and Wisconsin constitutions. The legislature finds that this section protects the right to a remedy found in article I, section 9, of the Wisconsin Constitution, by preserving the narrow and limited application of the risk contribution theory of liability announced in *Collins*.

The motion provides that s. 895.046, Stats., applies to all actions, whenever filed or accrued, and first applies s. 895.046, Stats., to "actions or special proceedings pending or commenced on the effective date of this subsection."

DISCUSSION

As with any law, retroactive legislation enjoys a presumption of constitutionality, and the challenger bears the burden of overcoming that presumption beyond a reasonable doubt. However, retroactive legislation presents unique constitutional problems because it often unsettles important rights. Therefore, it is viewed with some degree of suspicion and analyzed differently from prospective legislation. [*Martin by Scoptur v. Richards*, 192 Wis. 2d 156, 200-01 (1995).]

Challenges to the constitutionality of retroactive statutes are primarily based on the due process clauses of the U.S. and Wisconsin Constitutions, which protect individuals from being deprived of property without due process of law. [Wis. Const. art. I, s. 1; U.S. Const., Amendment XIV.] In Wisconsin, whether a retroactive statute comports with due process requirements entails applying a two-part test. The first step involves ascertaining "whether application of the statutes in question to the party challenging the statute actually has a retroactive effect." [*Meyer v. LIRC*, 2010 WI 68, ¶ 29.] "This inquiry turns on whether the challenging party has a 'vested' right." [*Id.*]

If the court finds a vested right, it then examines whether the retroactive statute has a rational basis. This entails "weighing the public interest served by retroactively applying the statute against the private interest that retroactive application of the statute would affect." [*Matthies v. Positive Safety Mfg. Co.*, 2001 WI 82, ¶ 27.] This analysis requires the court to consider the "unfairness created by the retroactive legislation." [*Id.*]

Whether the Statute has a Retroactive Effect

As stated above, the first step in determining whether legislation comports with due process requirements involves examining whether the statute actually has a retroactive effect. Although a court's application of the motion's provisions to a particular party is necessarily fact-specific, it is likely that a court would find that the motion retroactively affects vested rights.

The effect of Act 2, and the stated purpose in the motion's statement of legislative intent, is to modify the risk contribution theory of liability so that the theory can only be applied in a manner more limited than the Wisconsin Supreme Court allowed in *Thomas*. In other words, the motion makes explicit that its purpose is to preclude recovery in certain circumstances that would have been authorized by Wisconsin law prior to the Legislature's modification of risk contribution liability. Accordingly, a party that filed a product liability claim based on the Wisconsin Supreme Court's articulation of risk contribution liability prior to Act 2 could lose the basis for his or her suit if s. 895.046, Stats., as created by Act 2 were retroactively applied to that claim. [See, e.g., *Matthies* (application of statute requiring a defendant to be 51% negligent to be found joint and severally liable was unconstitutional in its application to a pending case).] If that party's claim was then eliminated by retroactively applying the Legislature's more narrow theory of liability, the statute would have a retroactive effect. It appears likely, based on the Court's prior holdings, that the effect would be characterized as an effect on a vested interest due to the loss of potential damages from manufacturers, distributors, sellers, or promoters.

Whether the Statute has a Rational Basis

As noted above, however, a court's conclusion that a statute has a retroactive effect on a vested interest is not dispositive of the statute's constitutionality. Rather, once a court determines that a statute disturbs a vested interest, it then determines whether the statute has a rational basis by applying the balancing test articulated in *Martin*.

Martin held that a retroactive application of a cap on noneconomic damages in medical malpractice actions violated due process. The *Martin* test weighs the public interest served by the retroactive law against the private interests that are overturned by it. Implicit within this analysis is a consideration of the unfairness created by the retroactive legislation. [*Id.* at 201 and *Matthies* at 744.] The Wisconsin Supreme Court has stated, "The public purpose supporting retroactivity under a due process analysis must … be substantial, valid and intended to remedy a general economic or social issue." [*Neiman v. American National Property and Casualty Co.*, 236 Wis. 2d 411, 613 N.W.2d 160, 166 (2000).]

When a test calls for a court to balance interests, any discussion of what a court is likely to find is necessarily speculative. Therefore, it is not possible to predict whether a court analyzing the retroactive application of s. 895.046, Stats., would find such an application to be constitutional. The following cases, however, provide some examples of how the court has analyzed the constitutionality of retroactive legislation using the *Martin* test. In each of these cases, the court found the retroactive application of the legislation to be unconstitutional.

- *Neiman v. American National Property and Casualty Co.* held that retroactively applying a statutory increase in damages for the loss of society and companionship for the wrongful death of a minor violated due process. The private interests in that case were the settled expectations of those individuals and insurers who had obtained and provided coverage based on the amounts that were set for damages at

the time of the injury. The claimed public purposes for the retroactive application were full compensation for loss of society and companionship, deterrence of negligent conduct, and adequate legal representation. In that case, the court stated, "All of the public interests identified would arguably support **prospective** application of an increase in damages for loss of society and companionship; however, these reasons provide weak support for **retroactive** increases in damages." (Emphasis added.) [*Id.* at 167.] The holding of this case was reiterated by the court in *Schultz v. Natwick*, 257 Wis. 2d 19, 653 N.W.2d 266, 268 (2002).

- *Matthies v. The Positive Safety Manufacturing Company* held that legislative modification of joint and several liability applied retroactively violated due process. In that case, the plaintiff was found to have an accrued or vested right to recover all of his damages from any defendant that was jointly and severally liable on the date of his injury. The defendant argued that the public interest in retroactivity was to make the apportionment of liability fairer by basing it on the degree of causal negligence. The court found that there was no need to apply the statute retroactively to assure fairness, especially since both the laws at the time of the injury and under the modification simply provided different means of apportioning liability.

- *Society Insurance v. Labor and Industry Review Commission* held that retroactively applying a statute shifting the burden of paying benefits and treatment expenses for traumatic work-related injuries from the Work Injury Supplemental Benefit Fund to the insurer or employer violated due process. In the case, Society Insurance's liability had expired 12 years after the worker's injury, and the statute shifting the burden for payments was enacted after the liability had expired. The private interest in that case was the vested right to a fixed exposure to liability. The court found that the statute exposed Society Insurance to potentially significant liability and prevented the company from the opportunity to recover its expenses through premiums. The claimed public purpose for the retroactive application was to maintain the solvency of the Work Injury Supplemental Benefit Fund. The court held that Society Insurance's private interests were more substantial than the public's interest. In making that finding, the court stated, "Shifting the burden of traumatic injury benefits or treatment expense to self-insured employers or insurers to maintain the solvency of the Fund, as Society contends, provides weak support for retroactive application of Wis. Stat. ss. 102.17 (4) and 102.66 (1)." [326 Wis. 2d 444, 477 (2010).]

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

AS:DM:ksm