COMMENT

WISCONSIN IS OPEN FOR BUSINESS OR BUSINESS JUST AS USUAL? THE PRACTICAL EFFECTS AND IMPLICATIONS OF 2011 WISCONSIN ACT 2

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2011 Wisconsin Act 2, an omnibus tort reform bill, made the most substantial changes to Wisconsin's civil litigation system in over sixteen years. Historically, Wisconsin paved the way for legal innovation by creating unique legal doctrine and by refusing to accept other majority or federal approaches. Prior to Act 2, such innovative law included a relevancy standard for expert opinion testimony and a strict products liability standard based on what a reasonable consumer would contemplate. Act 2 completely reshaped these two areas of law to relieve Wisconsin businesses' fears of excessive litigation.

The purpose of Act 2 was to make Wisconsin "open for business" by shielding businesses from liability, thus incentivizing them to increase profits and hire employees. The sea change made to Wisconsin's strict products liability law seemingly complies with Act 2's goals. It implements a stricter reasonable-alternative-design standard that makes it more difficult to recover from defective products injuries. Additionally, four Wisconsin Supreme Court justices expressed a desire to adopt this more exacting test for strict products liability. But the judiciary branch did not anticipate additional safeguards such as affirmative defenses, a strict statute of repose, or a provision that will remove more Wisconsin cases to federal court, which may ultimately make it more difficult for plaintiffs to recover.

The "open for business" purpose of these legislative changes, however, failed to consider its effects on all areas of law. Specifically, Act 2's new expert opinion testimony standard applies to all actions, civil and criminal. This effect on criminal law does not necessarily comport with Act 2's goals. The Wisconsin State Legislature replaced the decades-old relevancy test for expert opinion testimony with the federal reliability standard based on the *Daubert* trilogy. The Wisconsin Supreme Court repeatedly rejected the *Daubert* standard because it was concerned with taking fact-finding functions away from the jury and adding expenses and time for trial judges and the state. Additionally, the legislature's actions may have violated the separation of powers by imposing the *Daubert* test upon Wisconsin courts despite their contrary will.

Wisconsin's strict products liability and expert opinion testimony standards have undergone a sea change. These changes, however, are not completely debilitating or out of step with widely accepted standards. Additionally, Act 2 may also be more of an ideological change than a substantive change because it has not greatly affected litigation practice in Wisconsin. This Comment first examines the law prior to Act 2 and the impetus

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for change. It then fleshes Act 2's changes and its practical implications. This Comment then proposes how practitioners and trial judges should interpret and implement these new standards in ways that will comport with legislative intent and simultaneously safeguard judicial efficiency and the right of plaintiffs to sue. It concludes that Act 2's sweeping changes will change Wisconsin's legal atmosphere in some respects but will not dramatically impact its civil justice system.

INTRODUCTION

"Wisconsin is open for business." The catchphrase of Governor Scott Walker's campaign referenced his pledge to create a quarter of a million jobs in Wisconsin.[1] To fulfill this promise, Governor Walker declared in his inaugural address that Wisconsin was in a state of economic emergency and called for a special session concerning job creation later that day.[2] Kick starting this special job creation session, Republican leaders introduced the Assembly version of 2011 Wisconsin Act 2 (Act 2 or "the Act"), a controversial omnibus tort reform bill.[3]

Act 2 generated the most significant changes in at least sixteen years to Wisconsin's civil litigation system[4] by limiting the applicability of "risk contribution" theory,[5] capping punitive damages,[6] and mandating damages for frivolous claims.[7] The Act most drastically changed the areas of strict products liability[8] and expert opinion testimony.[9] The general premise behind Act 2 was to incentivize Wisconsin businesses to increase profits and hire more employees by shielding businesses from excessive litigation costs and damages.[10]

Historically, Wisconsin has paved the way for important legal innovation.[11] For example, such open-mindedness led to Wisconsin's

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1. Todd Milewski, *Gov. Walker's Full Inaugural Address*, WIS. ST. J. (Jan. 3, 2011, 4:56 PM), http://host.madison.com/wsj/news/video/vmix_bff95ac-178c-11e0-8de5-001cc4c03286.html.

2. Clay Barbour & Mary Spicuzza, *As Walker Vows Job Creation, GOP Lawmakers Float Bills Focused on Social Issues*, WIS. ST. J. (Jan. 3, 2011, 7:30 PM), http://host.madison.com/wsj/news/local/govt-and-politics/article_14aa0cd0-176b-11e0-8702-001cc4c002e0.html.

3. Adam Korbitz, *Governor Signs Controversial Tort Reform Bill into Law*, WIS. ST. BAR ASS'N (Jan. 27, 2011), http://www.wisbar.org/am/template.cfm?section=legislative_advocacy&template=/cm/contentdisplay.cfm&contentid=100008; S.B. 1, 2011–12 Leg., Jan. 2011 Spec. Sess. (Wis. 2011).

4. Korbitz, *supra* note 3.

5. 2011 Wisconsin Act 2, § 30, 2011 Wis. Legis. Serv. 2, 7–8 (West).

6. § 23m.

7. § 28.

8. §§ 29, 31.

9. §§ 33–39.

10. Korbitz, *supra* note 3. Similarly, certain states have implemented medical malpractice tort reform to incentivize hospitals and physicians to increase their levels of performance. Lee Harris, *Tort Reform as Carrot-and-Stick*, 46 HARV. J. ON LEGIS. 163 (2009). "[S]tates consider treating tort reforms as a 'carrot' or incentive for positive behavior." *Id.* at 163.

11. JOSEPH A. RANNEY, TRUSTING NOTHING TO PROVIDENCE: A HISTORY OF WISCONSIN'S LEGAL SYSTEM 665–66 (1999).

> Throughout Wisconsin's history, its lawmakers have actively and constantly considered the need for change though they have often disagreed, sometimes bitterly so, on whether change was necessary and on its details.

distinctive, wide-open expert opinion testimony standard: the relevancy test.[12] Wisconsin legal theories have also been criticized because the state has "not felt constrained to follow changes adopted in other states, even wide-spread changes."[13] For example, Wisconsin was one of six states to apply the consumer contemplation test to strict products liability claims, unlike the majority of states that categorize particular claims as manufacturing defects, design defects, and failure to adequately warn.[14]

> They have not waited for other states to act when they felt change was needed. Nor have they felt constrained to follow changes adopted in other states, even widespread changes, if they disagreed with the reasoning behind the changes. Above all else, Wisconsin has "trust[ed] nothing to concession, nothing to time, nothing to Providence" in developing a legal system to provide social order and promote its vision of life, liberty, and the pursuit of happiness.

Id. (internal citation omitted); *see also infra* note 42 (illustrating criticism Wisconsin faced for its continuous adherence to the consumer contemplation test).

12. Daniel D. Blinka, *Expert Testimony and the Relevancy Rule in the Age of* Daubert, 90 MARQ. L. REV. 173, 174 & n.4 (2006); *see also State v. Walstad*, 119 Wis. 2d 483, 351 N.W.2d 469 (1984). Under *Walstad*'s relevancy test, expert opinion testimony is admissible if: (1) it is relevant, (2) the witness is qualified as an expert, and (3) the evidence will assist the trier of fact in determining an issue of fact. *Id.* at 516. Wisconsin was one of the first states to reject the "general acceptance test" from *Frye v. United States*, 293 F. 1013 (Ct. App. D.C. 1923). *Watson v. State*, 64 Wis. 2d 264, 274, 219 N.W.2d 398 (1974). More recently, Wisconsin courts have also refused to adopt the federal expert opinion testimony standard found in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *State v. Fischer,* 2010 WI 6, ¶ 7, 322 Wis. 2d 265, 778 N.W.2d 629. The Wisconsin legislature, however, used Act 2 to replace the relevancy test with the *Daubert* standard, hoping the newer, more stringent standard would protect Wisconsin businesses. Although evidentiary standards do not go to the heart of tort reform, the legislature thought it would limit liability of Wisconsin businesses during turbulent economic times. Korbitz, *supra* note 3. For more discussion, see *infra* Part I.B (discussing Wisconsin's law prior to Act 2's adoption of the *Daubert*) and Part II.B.2–3 (examining Wisconsin's new lay and expert opinion testimony standards, and the practical affects it will have one Wisconsin).

13. RANNEY, *supra* note 11, at 666.

14. *Godoy v. E.I. du Pont de Nemours & Co.*, 2009 WI 78, ¶ 95, 319 Wis. 2d 91, 768 N.W.2d 674 (Prosser, J., concurring). Wisconsin formerly relied on the consumer expectations test in strict products liability cases. *Id.* ¶¶ 76–86 (Prosser, J., concurring) (citing RESTATEMENT (SECOND) OF TORTS § 402(A) (1965)). Whereas, the majority of other states adopted a more updated standard that classified three types of claims under strict products liability law: manufacturing defect, design defect, and failure to provide adequate warnings. *Id.* ¶¶ 94–95 (Prosser, J., concurring) (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998)). Wisconsin's former view was widely criticized by judges and legal experts. See *infra* Part II.A and note 41 for more discussion regarding the Wisconsin Supreme Court's and other legal experts' disapproval of Wisconsin's adherence to the consumer expectation test, which was "akin to insistence upon a horse-and-buggy approach in a space-age era." *Horst v. Deere & Co.*, 2009 WI 75, ¶ 94, 319 Wis. 2d 147, 769 N.W.2d 536 (Gableman, J., concurring).

In response to such novel legal doctrine, the Wisconsin legislature sought to limit Wisconsin tort law through Act 2.[15] Because of its threat to some of Wisconsin's unique legal theories, Act 2 generated heated debate between parties, including a ten-hour public hearing that lasted until 11:00 P.M.[16] Nonetheless, it was quickly signed into law.[17] This rapid passage illustrated the Republican's newfound control over the Wisconsin State Legislature.[18] It also demonstrated the one-track nature of Act 2, which focused more on the business climate than its possible impact on Wisconsin law.[19]

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15. Korbitz, *supra* note 3.

16. *Id.* The Senate passed the bill by a 19-14 party-line vote, and the Assembly passed the bill by a 57-36 party-line vote. *See* WIS. SEN. ROLL CALL, S.B. 1, 2011–12 Leg., Jan. 2011 Spec. Sess. (2011), *available at* http://legis.wisconsin.gov/2011/data/votes/sv0022.pdf; WIS. ASSEMB. ROLL CALL, S.B. 1, 2011–12 Leg., Jan. 2011 Spec. Sess. (2011), *available at* http://legis.wisconsin.gov/2011/data/votes/av0038.pdf.

17. Korbitz, *supra* note 3. The bill was originally introduced January 4, 2011, the day after Governor Walker's inauguration, and was published by January 31, 2011 despite its opposition. *Id.*

18. *Id.* Act 2 also foreshadowed more turbulent political times that would soon consume Wisconsin. Shortly after Act 2's passage, Wisconsin gained national attention with the proposal of the controversial Budget Repair Bill, which required additional public employee contributions for health care and pensions, curtailed collective bargaining rights for most state and local public employees, and made various appropriations. Assemb. B. 11, 2011–12 Leg., Jan. 2011 Spec. Sess. (Wis. 2011); James B. Kelleher, *Up to 100,000 Protest Wisconsin Law Curbing Unions*, REUTERS (Mar. 12, 2011, 8:20 PM), http://www.reuters.com/article/2011/03/13/usa-wisconsin-idUSN1227540420110313. This bill brought thousands of people to the doors of the Wisconsin State Capitol to protest. *Capitol Shocker: GOP's Quick Maneuvers Push Bill through Senate; Thousands Storm Building, Yell 'General Strike!,'* WIS. ST. J., Mar. 10, 2011, at A1. The bill's passage eventually required an order from the Wisconsin Supreme Court. *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436 (ordering the circuit court's decisions to be vacated after finding them void *ab initio* because the court usurped the legislative power; also concluding that the legislature did not violate the Wisconsin Constitution's "Open Doors" requirement). In March 2012, a federal court struck down parts of the Budget Repair Bill's provisions as unconstitutional. *Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856 (W.D. Wis. 2012). In September 2012, a Dane County judge similarly struck down certain provisions of Act 10 as unconstitutional. *Madison Teachers, Inc. v. Walker*, No. 11-CV-3774, at 27 (Wis. Cir. Ct. Sept. 14, 2012) (finding the Budget Repair Bill violated the United States constitutional guarantees of free speech, freedom of association, and equal protection); *see also* Ed Treleven, *Judge Strikes down Walker's Collective Bargaining Law*, WIS. ST. J., Sept. 15, 2012, *available at* http://host.madison.com/news/local/govt-and-politics/judge-strikes-down-walker-s-collective-bargaining-law/article_ded3b708-feb5-11e1-a29a-001a4bcf887a.html (discussing the decision and its possible impact). The Budget Repair Bill further illustrates Wisconsin's controversial attempts to balance Wisconsin's budget, create jobs, and ensure the economic viability of Wisconsin's small business owners.

19. *See, e.g.*, *infra* Part II.B.1.

These concerns about Act 2's sweeping changes arose in several areas. The burdensome effect on the ability of injured Wisconsinites to sue worried plaintiffs' attorneys.[20] The changes to the expert testimony standard that not only affected civil litigation[21] but *criminal* litigation troubled judges and practitioners.[22] The considerable impact on criminal law deviates from Act 2's goal of protecting Wisconsin businesses. This change, however, aligned Wisconsin's standard with the *Daubert* standard.[23] Wisconsin is now among a majority of states where judges are gatekeepers of admissibility for expert opinion testimony, following the *Daubert* standard set forth in the Rule 702 of the Federal Rules of Evidence.[24]

Legislative overhaul of tort law is a recent trend.[25] Traditionally, common law sets tort law standards, where courts are at liberty to define the scope of concepts like negligence by restricting or expanding the meanings of duty, proximate cause, or contributory negligence.[26] But starting in the 1970s, tort reform flourished as health care insurers brought the medical malpractice insurance crisis to the attention of state

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20. *See, e.g.*, Michael End, *Perspective on Tort Reform: Law Makes It More Difficult for Injured Parties to Achieve Justice*, WIS. ST. B. ASS'N. (Mar. 2, 2011), http://www.wisbar.org/AM/Template.cfm?Section=Home&CONTENTID=100638&TEMPLATE=/CM/ContentDisplay.cfm ("Lawyers representing injured people will have a more difficult time achieving justice for their clients under the new law . . . ."). *But see* Bryce Tolefree, *Perspective of Tort Reform: Reforms Improve Wisconsin's Civil Liability System*, WIS. ST. B. ASS'N. (Mar. 2, 2011), http://www.wisbar.org/AM/Template.cfm?Section=Home&CONTENTID=100705&TEMPLATE=/CM/ContentDisplay.cfm (explaining that the changes made were not a radical departure from Wisconsin's former law, but instead aligned Wisconsin with majority standards in other states).

21. Daniel D. Blinka, *The* Daubert *Standard in Wisconsin: A Primer*, WIS. LAW., Mar. 2011, at 14.

22. *See infra* Part II.B.1.

23. Blinka, *supra* note 21, at 14, 17. The majority of states have now adopted the federal *Daubert* standard, with modifications. *Id.* at 14. For a discussion of the *Daubert* standard, see *infra* Part II.B.2–3.

24. *See* FED. R. EVID. 702 (amended in response to *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993)).

25. John F. Kuppens & Jay T. Thompson, *State Tort Reform in 2011*, NELSON MULLINS (Sept. 16, 2011), http://www.nelsonmullins.com/articles/state-tort-reform-in-2011. In addition to Texas and Wisconsin, seven other states (Alabama, Arizona, Florida, North Carolina, Oklahoma, South Carolina, and Tennessee) enacted tort reform legislation in 2011. *Id.* These other states, like Wisconsin, capped punitive damages, shielded sellers from strict products liability suits, or adopted the federal evidence standard for expert opinion testimony (Federal Rule of Evidence 702 or the *Daubert* standard). *Id.* Essentially, all nine states' tort reform actions intended "to decrease litigation burdens and protect product manufacturers and sellers in products liability lawsuits." *Id.*

26. David A. Kramer, *Issues and Ramifications of Texas Tort Reform*, 18 ST. MARY'S L.J. 713, 714 (1987).

legislators who responded by enacting stricter legislation to reduce the "number and size of medical malpractice settlements and judgments."[27] Legislative tort reform now expands beyond medical malpractice and limits expert testimony,[28] limits joint and several liability,[29] shortens statutes of limitations,[30] heightens standards of proof,[31] and restricts punitive damages.[32] Moreover, many states, like Wisconsin, have passed sweeping tort reform laws that align them with federal or widely adopted state standards and dealt with the repercussions.[33]

This Comment addresses the dramatic changes and practical effects Act 2 had on Wisconsin's legal system in an effort to make the state "open for business." It focuses on Act 2's overhaul of strict products liability and expert opinion testimony law. Part I examines the common or statutory law prior to Act 2 and explains the impetus for changing these two areas of law. Part II first details the current strict products liability and expert opinion testimony standards and then discusses the

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27. *Id.* Because more and more medical malpractice suits were being brought, health care insurers were paying out extraordinary sums of money, which led insurance premiums to skyrocket. *Id.* Wisconsin was among the forty-nine states to respond by creating a fund to pay medical malpractice awards and establish medical malpractice procedure. Michael S. Kenitz, *Wisconsin's Cap on Noneconomic Damages in Medical Malpractice Cases: Where Wisconsin Stands (and Should Stand) on "Tort Reform,"* 89 MARQ. L. REV. 601, 603 (2006). As early efforts at legislation proved unsuccessful, a second round of tort reform began in the mid-1980s. Kramer, *supra* note 26, at 714 n.6. The former, unsuccessful legislation was so widespread that "[e]very state legislature which met in regular session in 1986 considered changes to the civil liability system." *Id.* at 714.

28. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.2169 (West 2010) (codifying several restrictions regarding testimonial qualifications for expert witnesses in medical malpractice cases).

29. *See, e.g.*, GA. CODE ANN. § 51-12-33(b) (Supp. 2012) (providing that there "shall not be a joint liability among the persons liable").

30. *See, e.g.*, KAN. STAT. ANN. § 60-513(b) (2005) (setting a ten-year statute of limitations for tort claims).

31. *See, e.g.*, CAL. CIV. CODE § 3294(a) (West 1997) (adopting a standard of clear and convincing evidence for the award of exemplary damages).

32. *See, e.g.*, ALA. CODE § 6-11-21(a) (LexisNexis 2005) (limiting punitive damages to three times the amount of compensatory damages or $500,000, whichever is greater).

33. For example, in 2003, the Texas Legislature passed the most comprehensive tort reform laws to that date. David A. Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1, 4 (2007) (citing H.B. 4, 78th Leg., Reg. Sess. (Tex. 2003)). The legislation capped noneconomic damages at $250,000 in medical malpractice cases, "curtailed class actions, created a safe harbor for drugs . . . that meet government standards, barred punitive damages unless the jury is unanimous, and adopted fee-shifting rules." *Id.* The reform has led to "success" in that "[t]he number of civil jury verdicts . . . has declined more than 50% from 1985–2002." *Id.* (internal citation omitted). But it also "has had 'devastating' effects on both plaintiffs' and defense lawyers" and, according to some legislators, went too far. *Id.* n.14 (citing Terry Carter, *Tort Reform Texas Style*, A.B.A. J., Oct. 2006, at 30, 35).

practical effects Act 2 will have on these two areas. It then assesses the overall impact of these changes and proposes how practitioners and judges should interpret and implement them. Finally, this Comment concludes that despite Act 2's sweeping changes, it has yet to and may not drastically change the practices of Wisconsin's civil litigation system.

I. BACKGROUND: WISCONSIN LAW PRIOR TO 2011 WISCONSIN ACT 2

Act 2 significantly changed the face of strict products liability and expert opinion testimony law in Wisconsin. It also implemented changes in the areas of punitive damages,[34] "risk contribution" theory,[35]

34. The Wisconsin State Legislature changed the standard for punitive damages by providing that punitive damages may not exceed twice the amount of any compensatory damages or $200,000, whichever is greater. WIS. STAT. ANN. § 895.043(6) (West 2011). This change effectively shields Wisconsin businesses from excessive liability. It should also be noted that those who operate a motorized vehicle while under the influence of intoxicants are excluded from the cap. *Id.* These limits placed on punitive damages are likely to most drastically affect cases concerning egregious wrongdoing that award little compensatory damages. Interview with Michael End, President, Wis. Ass'n for Justice, Partner, End, Hierseman & Crain LLC, in Milwaukee, Wis. (Nov. 23, 2011). For example, if the factfinder determines that compensatory damages are less than $100,000, then the factfinder's determination of punitive damages gets cut off at $200,000. In effect, this amendment may not serve as an adequate deterrent for defendants' future egregious wrongdoing. *Id.* This change may also lead to more litigation and less settlement, because cases concerning a defendant's particularly egregious conduct are less likely to settle due to the fact that punitive damage awards are now limited by the caps placed by the statute. *Id.* That fact alone goes against Act 2's aim for Wisconsin to be "open for business," because it essentially encourages more litigation and less settlement. On the other hand, the cap on punitive damages is not radical, because it does not deny people access to their day in court. Tolefree, *supra* note 20. Instead, this cap ensures fairness to all litigants and also improves Wisconsin's "litigation environment," which addresses Justice N. Patrick Crooks' concerns in *Wischer*. *Id.*; *see also Wischer v. Mitsubishi Heavy Indus. America, Inc.*, 2005 WI 26, ¶ 65, 279 Wis. 2d 4, 694 N.W.2d 320 (2005) (Crooks, J., concurring) (stating he would review the constitutionality of the punitive damages award). In sum, the amendments to Wisconsin's punitive damages standard will create yet another hurdle for plaintiffs seeking punitive damages. Nevertheless, the legislation's impact may not be far-reaching, outside those few, unfortunate situations where an injured plaintiff's compensatory damages are limited, but the offense committed was heinous.

35. Injured parties are now required to prove that the "specific product" that caused the injury was manufactured, distributed, sold, or promoted by the defendant. WIS. STAT. ANN. § 896.046(3) (West 2011). This language implicitly overruled the former common law "risk contribution" theory that spread liability among all manufacturers marketing and producing the product at the relevant period of time. *See Thomas v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523. Under the previous common law standard, a manufacturer could be held liable for the injuries caused to a claimant even if the claimant could not prove that a particular manufacturer produced the injury-causing product. *Id.* ¶¶ 137–49. Importantly, *Mallett* allowed all

and damages for frivolous claims.[36] These components, though significant, do not fall within the scope of this Comment's analysis. This Section thus examines Wisconsin's standards for strict products liability and expert opinion testimony prior to Act 2 and the Wisconsin State Legislature's impetus for such changes.

A. Wisconsin's Pre-Act 2 Strict Products Liability Standard

Act 2 overturned over forty years of strict products liability precedent in Wisconsin.[37] Prior to Act 2, Wisconsin used the consumer expectations test, which followed the Restatement (Second) of Torts section 402(A).[38] Under the consumer expectations test, a product is "[u]nreasonably dangerous" if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases

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manufacturers to be held jointly and severally liable for such injuries. *Id.* ¶ 132. The court reasoned that manufacturers are generally in a better place to absorb the cost of injury from lead paint poisoning and that every person is entitled to a remedy for all injuries incurred. *Id.* ¶ 136. Wisconsin was formerly the sole state in the country to have a standard that circumvented traditional causation requirements. Tolefree, *supra* note 20. In response, Act 2 narrowed the scope by requiring "specific product" identification. *See* 2011 Wisconsin Act 2, § 30, 2011 Wis. Legis. Serv. 2, 7–8 (West). Many firms reject lead paint cases because they rarely succeed in court. Interview with Daniel Rottier, Partner, Habush, Habush, & Rottier S.C., in Madison, Wis. (Nov. 14, 2011). The codification of risk contribution theory makes it essentially impossible to bring this type of case. *Id.* In effect, the new statute will most likely lessen the chance of plaintiff recovery in lead paint cases given that it is more stringent.

36. A party, a party's attorney, or both may be subject to liability for costs and fees for beginning, using or continuing a suit, cross-complaint, defense, counterclaim, or appeal if done solely for the harassment or malicious injury of another party with no reasonable basis in the law for the conduct or no good faith argument for an extension, modification or reversal of the law exists. WIS. STAT. ANN. § 895.044 (West 2012). In some states, strict standards for frivolous lawsuits are needed because of excessive litigation. Interview with Daniel Rottier, *supra* note 35. Wisconsin, however, is a particularly conservative state, because it has a modest amount of litigation. MARC GALANTER & SUSAN STEINGASS, UNIV. WIS. L. SCH., CIVIL JUSTICE IN WISCONSIN: A FACT BOOK WITH COMMENTARY 24, 34 (2009). Litigation has only increased in areas of small claims, family law, and contract law, but the number of cases involving tort law has fallen over the past few years. *Id.* at 14–17.

37. *Horst v. Deere & Co.*, 2009 WI 75, ¶ 85, 319 Wis. 2d 147, 769 N.W.2d 536 (Crooks, J., concurring) (noting that Wisconsin has been using the same standard for the past forty-two years following its adoption in *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967)).

38. *Id.* ¶ 28; RESTATEMENT (SECOND) OF TORTS § 402(A) (1965). To have a viable strict products liability claim, the injured party had to prove: (1) the product was unreasonably dangerous, (2) the seller or manufacturer was in the business of selling the product, (3) the product was defective before leaving the seller's control, (4) the product remained in the same condition when received by the injured party, and (5) the defect caused the alleged injury. *Id.*; *see also Godoy v. E.I. du Pont de Nemours & Co.*, 2009 WI 78, ¶ 16 n.7, 319 Wis. 2d 91, 768 N.W.2d 674.

it, with the ordinary knowledge common to the community as to its characteristics."[39] Act 2 heightened the strict products liability standard by codifying three different classifications of defects: manufacturing defects, design defects, and inadequate warnings or instructions.[40] By distinguishing between these types of defects, Act 2 effectively adopted the *Restatement (Third) of Torts*' approach to strict products liability.[41]

Though substantial, this change was not unanticipated.[42] The Wisconsin Supreme Court hinted at this shift in strict products liability law in two of its 2009 opinions.[43] Four justices expressed their desire to replace the consumer expectation test with the *Restatement (Third) of Torts*' approach.[44] They worried that the consumer contemplation test was insufficient to handle design defect and failure to warn claims.[45]

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39. RESTATEMENT (SECOND) TORTS § 402(A). Prior to Act 2, the consumer contemplation test applied to all strict products liability claims, including manufacturing defect claims, design defect claims, and failure to warn claims. Timothy D. Edwards & Jessica E. Ozalp, *A New Era: Products Liability in Wisconsin*, WIS. LAW., July 2011, at 8. Whereas, under Act 2, these types of claims are given their own standard as to how a product was rendered unreasonably dangerous. 2011 Wisconsin Act 2, § 31, 2011 Wis. Legis. Serv. 2, 8–9 (West). To claim that a design defect made a product unreasonably dangerous required proof that there was a reasonable alternative design that would have reduced the foreseeable dangers. *Id.* at 9. To claim that a product had inadequate warnings or instructions that rendered it unreasonably dangerous required proof that the foreseeable dangers would have been reduced by reasonable warnings or instructions. *Id.* The standard for the manufacturing defects test (i.e., consumer contemplation test) remains the same in Wisconsin. *Id.* at 8–9.

40. 2011 Wisconsin Act 2, § 31, 2011 Wis. Legis. Serv. 2, 8–9 (West).

41. Edwards & Ozalp, *supra* 39, at 8–10.

42. Wisconsin, by being one of the only states to use the consumer contemplation test, faced much criticism for being behind the times. *Horst*, 2009 WI 75, ¶ 94 (Gableman, J., concurring) (describing Wisconsin as "stubbornly stuck with the anachronistic consumer contemplation test despite voluminous ongoing and unanswered criticism"); *Green v. Smith & Nephew AHP, Inc.*, 2001 WI 109, ¶ 122, 245 Wis. 2d 772, 629 N.W.2d 727 (Sykes, J., dissenting) (arguing that Wisconsin was "seriously out of step with product liability law as it has evolved" since the adoption of the consumer contemplation test in 1967); James A. Henderson, Jr. & Aaron D. Twerski, *A Fictional Tale of Unintended Consequences: A Response to Professor Wertheimer*, 70 BROOK. L. REV. 939, 940–41 (2005) (calling Wisconsin "the lone star state," a "rogue," and "renegade" jurisdiction that marches to its "own, sometimes quite peculiar, drummer" with respect to its strict products liability standard).

43. *Godoy*, 2009 WI 78; *Horst*, 2009 WI 75.

44. Justice David Prosser first urged the adoption of the Restatement (Third) of Torts in *Godoy*, with Justices Michael Gableman and Annette Ziegler joining in his concurring opinion. *Godoy,* 2009 WI 78, ¶¶ 76–112 (Prosser, J., concurring). Justice Gableman reemphasized Wisconsin's need to adopt the Restatement (Third) of Torts section 2 in *Horst,* with Justices Prosser and Patience Roggensack joining in his concurring opinion. *Horst,* 2009 WI 75, ¶¶ 87–106 (Gableman, J., concurring).

45. For example, it would be difficult to ascertain what a consumer would contemplate for a reasonable alternative design or adequate warnings. *Horst,* 2009 WI 75, ¶¶ 89–92 (Gableman, J., concurring).

Given that these four justices still sit on the Wisconsin Supreme Court,[46] had the right case come before it, the *Restatement (Third) of Torts*' adoption would have been likely. Instead, the Wisconsin State Legislature beat the Wisconsin Supreme Court to the punch with Act 2.

B. Wisconsin's Former Relevancy Test for Expert Opinion Testimony

Prior to Act 2, Wisconsin had one of the most unique expert opinion testimony standards in the country: the relevancy test.[47] Generally speaking, three predominant expert opinion testimony standards developed over the last fifty years: (1) the *Frye* or general acceptance standard,[48] (2) the *Daubert* or reliability standard,[49] and (3) the relevancy standard.[50] These three competing approaches overlap with each other and each has its benefits and flaws.[51] The "best" test depends on one's ideological preference.[52]

In 1974, Wisconsin became one of the first states to adopt the Federal Rules of Evidence, doing so even before their formal adoption

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46. *Supreme Court Justices*, WIS. CT. SYS., https://www.wicourts.gov/courts/supreme/justices/index.htm (last visited Oct. 18, 2012).

47. Blinka, *supra* note 12, at 205.

48. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (holding that expert opinion testimony based on scientific findings and methods is admissible only where the technique is generally accepted as reliable in the relevant scientific community). This standard eventually became the predominant test for the admission of expert testimony in America. *See* Blinka, *supra* note 12, at 182 n.30 (citing PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 24.04, at 310, 312–13 (2d ed. 2006)).

49. FED. R. EVID. 702 (codifying the *Daubert* trilogy: *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993) (holding that "the Frye test was superseded by the adoption of the Federal Rules of Evidence" and the "baseline" for admissibility is the "liberal" relevancy rules (Rules 401 and 402) and Rule 702's assistance standard), *General Electric Co. v. Joiner*, 522 U.S. 136, 14142 (1997) (holding that the standard of review is abuse of discretion when looking at a district court's decision to exclude expert testimony), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (holding that the reliability standard extends to all experts, including those whose specialized knowledge arises from experience and is subsequently not limited to scientific experts)).

50. *State v. Walstad*, 119 Wis. 2d 483, 516, 351 N.W.2d 469 (1984) (holding that expert opinion testimony is admissible if: (1) it is relevant, (2) the witness is qualified as an expert, and (3) the evidence will assist the trier of fact in determining an issue of fact).

51. Interview with Stephen Hurley, Shareholder, Hurley, Burish & Stanton, S.C., Adjunct Professor of Evidence and Trial Advocacy, Univ. of Wis. Law Sch., in Madison, Wis. (Nov. 15, 2011) (explaining the various tests of admissibility are overlapping versions of each other).

52. *Id.*

by the federal judiciary.[53] Wisconsin adopted the Federal Rules of Evidence's innovative assistance standard, where expert opinion testimony was not limited to when it was necessary.[54] The assistance standard conformed to Wisconsin case law that had long welcomed expert opinion testimony whenever it might be helpful.[55] Later cases clarified that Wisconsin rejected the conservative *Frye* rule, which required an expert's methods be generally accepted, in favor of a relevancy rule.[56] Under the relevancy rule, expert testimony is admissible when: (1) the testimony is relevant, (2) the expert is qualified, and (3) the testimony assists the trier of fact.[57]

In 1995, the Wisconsin Supreme Court also rejected the federal *Daubert* standard and reaffirmed its trust in the relevancy approach: "[I]n Wisconsin, the reliability of expert testimony is an issue for the trier of fact, not the circuit court as a predicate for admissibility. Reliability of expert testimony is something that is subject to challenge on cross-examination in Wisconsin."[58] This rejection illustrates the court's "continuing faith in the adversary trial process, the skill of trial lawyers to expose weaknesses through cross-examination and impeachment, and the capacity of lay juries to comprehend expert testimony."[59]

Even before Act 2's existence, Wisconsin courts had refined the relevancy standard by nudging it closer to the *Daubert* standard, though formally rejecting *Daubert*'s adoption. For example, in *State v. Peters*,[60] the court of appeals adopted a limited gatekeeping role for trial judges.[61] Under *Peters*, "Wisconsin judges do serve a limited and indirect gatekeeping role in reviewing the admissibility of scientific evidence," and "may restrict the admissibly of such evidence through

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53. Wisconsin's adoption of the proposed Federal Rules of Evidence became effective in January 1974. Blinka, *supra* note 12, at 179 n.18 (citing Sup. Ct. Order, 59 Wis. 2d R1 (1973)).

54. *Id.* at 179.

55. *Compare* WIS. STAT. § 907.02 (1975) ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."), *with* FED. R. EVID. 702 (based on the holding in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)).

56. *State v. Walstad*, 119 Wis. 2d 483, 516–17, 351 N.W.2d 469 (1984); *see also* Blinka, *supra* note 12, at 179.

57. *Walstad*, 119 Wis. 2d at 516–17; *see also* Blinka, *supra* note 12, at 179.

58. *State v. Davis*, 2002 WI 75, ¶ 22, 254 Wis. 2d 1, 645 N.W.2d 913 (internal citation omitted).

59. Blinka, *supra* note 12, at 191.

60. 192 Wis. 2d 674, 534 N.W.2d 867 (Ct. App. 1995).

61. *Id.* at 688–90.

their limited gatekeeping functions."[62] In 2006, the Wisconsin Supreme Court, while also rejecting the *Daubert* standard, reaffirmed this limited gatekeeping function and further concluded that the relevancy standard required a showing that the expert's testimony was "reliable enough to be probative."[63] These refinements nudged the relevancy standard closer to *Daubert* to the point where it became "*Daubert* lite." Thus, the trinity of relevance, qualifications, and assistance, combined with unlimited cross-examination and a *Daubert*-like reliability determination ensured that sufficient adversary safeguards existed when admitting expert testimony prior to Act 2.

II. THE IMPACT OF 2011 WISCONSIN ACT 2

Act 2 launched Governor Walker's promise to make Wisconsin "open for business." The Act aimed to relieve Wisconsin businesses from excessive litigation costs through firewalls against more plaintiff-friendly laws.[64] But such sweeping legislation that is passed rapidly may have subsequent dramatic implications because Act 2 substantially changed Wisconsin's civil litigation system. Specifically, Act 2 dramatically changed the face of the strict products liability standard and the expert opinion testimony standard.[65] For example, Act 2's new evidentiary rules present changes not only for civil cases, but criminal cases as well.[66] The consequences of these changes may contradict Governor Walker's "open for business" promise, because more costly, drawn-out litigation may result. Yet Act 2 also follows widely adopted standards and was not necessarily unforeseen. Doctrinally, the change between the old and the new law might also be slighter than suggested, where Act 2 is more ideological than substantive.[67]

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62. *Id.* at 688, 690. *Peters* also offered six factors that judges could consider when deciding whether to restrict expert testimony, noting the list was nonexhaustive. *Id.* at 689. Wisconsin judges may exclude expert testimony if: (1) it is "superfluous," (2) it is a "waste of judicial time and resources," (3) the prejudicial effect of the testimony outweighs its probative value, (4) the "jury is able to draw its own conclusions without it," (5) "the evidence is inherently improbable," or (6) "the area of testimony is not suitable for expert opinion." *Id.* (internal citations omitted).

63. *State v. Hibl*, 2006 WI 52, ¶52, 290 Wis. 2d 595, 714 N.W.2d 194 (internal citation omitted).

64. *See* Tolefree, *supra* note 20.

65. Korbitz, *supra* note 3.

66. *See* Blinka, *supra* note 21, at 14.

67. *See, e.g.*, *infra* Part II.A.3 (discussing that while Act 2 seems to favor businesses, in reality, it did not greatly change the practice of civil litigation in Wisconsin).

This Part discusses the strict products liability and expert opinion testimony standards under Act 2 respectively. Each Section initially discusses the current state of the law and then explains the practical effects and concerns of the new statutes. Finally, each Section addresses the overall impact the new statutes will have on Wisconsin litigation and proposes various remedies or methods of interpretation when practitioners or judges face uncertainties with the new laws.

A. Strict Products Liability

Prior to Act 2, Wisconsin was one of the few states still applying the consumer contemplation test.[68] Act 2 aligned Wisconsin with the widely adopted strict products liability standard by partially codifying the *Restatement (Third) of Torts*.[69] This Section first looks at the current strict products liability law and then examines its practical effects. It finally addresses the new law's implications by proposing how practitioners should interpret the law.

1. WISCONSIN'S CURRENT STRICT PRODUCTS LIABILITY STANDARD

Currently, there are three types of defective product claims: (1) manufacturing defects, (2) design defects, and (3) inadequate warnings or instructions.[70] A product contains a manufacturing defect if it "departs from its intended design even though all possible care was exercised in the manufactur[ing] of the product."[71] For a viable design defect challenge, a claimant must prove there was a reasonable alternative design that would have reduced the foreseeable dangers.[72] With an inadequate warnings or instructions claim, a claimant must prove that the foreseeable dangers would have been reduced by reasonable warnings or instructions.[73]

Once one of those three claims is alleged, a claimant must justify the imposition of strict liability by also showing: (1) the defect rendered the product unreasonably dangerous, (2) the defective condition existed at the time the product left the control of the manufacturer, (3) the product reached the user or consumer without substantial change in the

68. *See supra* Part I.A (discussing Wisconsin's former strict products liability standard).

69. Edwards & Ozalp, *supra* 39, at 9–10; *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

70. WIS. STAT. ANN. § 895.047(1)-(2) (Supp. West 2011).

71. § 895.047(1)(a).

72. *Id.*

73. *Id.*

condition in which it was sold, and (4) the defective product was the cause of the claimant's injuries or damages.[74]

Act 2 added a number of defenses to Wisconsin's strict products liability statute that did not exist prior to Act 2 and do not exist under the *Restatement (Third) of Torts*.[75] Such defenses include: (1) if at the time of the injury a claimant was under the influence of an intoxicant, there is a rebuttable presumption[76] that the claimant's intoxication caused the injury;[77] (2) if the product complied with federal or state standards, there is a rebuttable presumption that it was not defective;[78] (3) if the claimant misused, altered, or modified the product, then that action reduces the defendant's percentage of causal responsibility;[79] (4) if an inherent characteristic of the product reasonably recognizable to users caused the injury, the case is dismissible;[80] and (5) if a seller or distributor did not have reasonable time to inspect a sealed product they received, then the seller or distributor cannot be held liable.[81] The statute also changed the standard for the introduction of subsequent remedial measures by barring the introduction of such measures other than to prove the feasibility, which brings Wisconsin in line with the majority rule.[82] Finally, the statute now sets a strict fifteen-year statute of repose for all strict liability cases.[83] The entire statute, including the statute of repose, however, does not apply to negligence or breach of warranty claims.[84]

2. PRACTICAL IMPLICATIONS

This Section discusses the practical effects and implications of Act 2's overhaul of strict products liability law in Wisconsin. This Section first discusses the anticipated and minor changes to strict products liability law and concludes that Act 2 imposed more ideological than substantive changes in the practice of design defects claims. It then turns to Act 2's more onerous changes, where strict products liabilities

74. § 895.047(1)(b)-(e).

75. § 895.047(3); *see also* Edwards & Ozalp, *supra* note 39, at 11.

76. A "rebuttable presumption" is "[a]n inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence." BLACK'S LAW DICTIONARY 1306 (9th ed. 2009).

77. § 895.047(3)(a).

78. § 895.047(3)(b).

79. § 895.047(3)(c).

80. § 895.047(3)(d).

81. § 895.047(3)(e).

82. *Compare* § 895.047(4), *with* FED. R. EVID. 407. *See also* Interview with Stephen Hurley, *supra* note 51.

83. § 895.047(5).

84. § 895.047(6).

practitioners must be wary of undefined statutory terms and stricter rules for the admissibility of evidence.

a. Anticipated and minor changes: More smoke than fire?

The new strict products liability standard drastically changes the face of the statute, but does not completely change how practitioners dealt with design defect cases. Attorney Daniel Rottier, a nationally recognized plaintiffs' attorney, explained that, in the past, no attorneys would bring a defective design case without being in a position to prove an alternative reasonable design.[85] Prior to the statute's amendments, its text did not include the "reasonable alternative design" for design defects cases, but Wisconsin practitioners still introduced such evidence.[86] Thus, this change, though contested, will not have a huge impact on cases, especially the pleadings and expert testimony involved with producing a reasonable alternative design.[87]

Another change practitioners face is applying this rule in tandem with the new *Daubert* expert testimony standard also implemented by Act 2.[88] Yet expert testimony has been used in Wisconsin design defect cases prior to Act 2.[89] Practitioners can look to the wealth of federal or state case law on the *Restatement (Third) of Torts*' strict products liability standard and the *Daubert* standard, both which have been around for over a decade.

Finally, the statute of repose will impact strict products liability cases because fifteen years is a relatively short period of time for strict products liability cases.[90] The statute of repose, however, is not completely debilitating for claims because the statute expressly states that "[t]his section does not apply to actions based on a claim of negligence or breach of warranty."[91] Therefore, even if the statute of repose ran for strict products liabilities claims, claimants are not barred from bringing such other claims. In sum, this Section illustrates that Act 2 may be more smoke than fire, meaning that Act 2 imposed more ideological than substantive changes to design defects cases.

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85. Interview with Daniel Rottier, *supra* note 35. The introduction of a reasonable alternative design argues that the foreseeable risks of harm posed by the defective design could have been avoided by the adoption of this reasonable alternative design. Edwards & Ozalp, *supra* note 39, at 10–11.

86. Interview with Daniel Rottier, *supra* note 35.

87. *Id.*

88. *Id.*

89. *Id.* Granted, the admissibility of such expert opinion testimony was governed by the relevancy test. *See supra* Part I.B.

90. Interview with Daniel Rottier, *supra* note 35; *see also* WIS. STAT. ANN. § 895.047(5) (West 2011).

91. § 895.047(6).

Practitioners will not need to greatly alter their practice, absent Act 2's addition of affirmative defenses and other provisions.

b. Potential pitfalls of the new strict products liability statute

Generally, when a court adopts a new, drastic standard that is effectively a "sea change,"[92] it will take the time to parse out the details of the change, policy reasons for the change, and any other concerns that will provide guidance to lower courts. Courts writing opinions are arguably better equipped than legislators drafting statutes to provide detailed explanations of the intricacies and the policy rationale for such a change.[93] Yet the legislative branch makes laws and may be the best policymaker for its constituents. The Wisconsin State Legislature adopted the *Restatement (Third) Torts*,[94] as most other states have done, but it also included several other new, unanticipated safeguards against liability.

The new statute presents three major issues. First, section 895.0427(2)(a) of the Wisconsin Statutes does not allow plaintiffs to sue sellers or distributors unless: (1) they contractually assumed some of the manufacturer's duties to manufacture, design, or provide warnings; (2) the manufacturer cannot be served with process; or (3) the manufacturer is insolvent.[95] This provision will drive more cases into federal court, because plaintiffs sue sellers and distributers to destroy diversity of citizenship and keep their claims in state court.[96] The new statute diminishes this strategy. Plaintiffs' attorneys are concerned,

92. A "sea change" usually indicates any major transformation or alteration to the state of law. *See* Edwards & Ozalp, *supra* note 39, at 10–11 (describing the changes made to Wisconsin's strict products liability standards as a "sea change," meaning Act 2 made substantial changes to Wisconsin products liability law).

93. For example, the Wisconsin Supreme Court, when contemplating whether to retire the consumer expectations test, discussed the pros and cons of such a change and how it would effectively overturn over forty years of Wisconsin precedent. *Id.*

94. *Compare* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998), *with* § 895.047.

95. § 895.047(2)(a).

96. Interview with Daniel Rottier, *supra* note 35. However, plaintiffs' attorneys are now alleging breach of implied warranty as a common law cause of action against distributors. *Id.* They believe this cause of action will keep them out of federal court if the distributor is local, because only the strict liability claim against a distributor is limited under the new law. *Id.*; *see also* 28 U.S.C. § 1332(a) (2006) (providing that all parties on one side of the versus sign must be citizens of different states or countries than all parties on the other side of the versus in order to have diversity jurisdiction and be heard in federal court; if any plaintiffs or defendants are citizens of the same state, there will be no diversity within the meaning of the statute).

because federal courts are more conservative as they are more likely to dispose of cases by summary judgment than state courts.[97]

Second, the statute lacks definitions that could provide practitioners and courts some guidance when interpreting the new statutory provisions, such as the affirmative defenses. For example, it retains the "unreasonably dangerous" language, which carries over from the previous consumer expectation standard.[98] Act 2, therefore, did not completely eliminate the old standard. It is unclear as to whether courts will retain its former common law definition of "unreasonably dangerous" or interpret it solely under the *Restatement (Third) of Torts*' approach.[99] The statute also fails to define "rebuttable presumption" under its affirmative defenses section, which may also lead to some uncertainty as to how to define it.[100]

Finally, the statute overrules *Chart v. General Motors Corp.*,[101] which held that for strict products liability cases involving manufacturers of mass distribution of goods, subsequent remedial measures are admissible to prove liability because admitting such evidence does not violate the policy reasons behind the rule.[102] This

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97. Interview with Daniel Rottier, *supra* note 35. The perception of whether federal court is more or less plaintiff friendly is a subjective bias of some lawyers, given their amount and length of experience in federal court. *See* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction,* 41 AM. U. L. REV. 369, 409 (1992).

98. WIS. STAT. ANN. § 895.047(1)(b) (West 2011) ("That the defective condition rendered the product unreasonably dangerous to persons or property.").

99. Interview with Daniel Rottier, *supra* note 35.

100. § 895.047(3)(a) ("If the defendant proves by clear and convincing evidence that at the time of the injury the claimant was under the influence of any controlled substance . . . or had an alcohol concentration . . . of 0.08 or more, there shall be a rebuttable presumption that the claimant's intoxication or drug use was the cause of his or her injury."). Granted, rebuttable presumption is a commonly used term defined by *Black's Law Dictionary*. BLACK'S LAW DICTIONARY 1306 (9th ed. 2009). It is odd, however, that the term is not defined within the meaning of the statute. Moreover, section 895.047(2)(a) of the Wisconsin Statutes uses a clear and convincing standard, which is not typically the standard used in Wisconsin, which is a preponderance of the evidence standard. Interview with Daniel Rottier, *supra* note 35; *see* § 895.047(2)(a). Attorney Rottier pointed out that this fact alone made it seem that no plaintiffs' or even defense attorney had looked at this statute before it was proposed. Interview with Daniel Rottier, *supra* note 35. Most practitioners would immediately define "rebuttable presumption" or use the correct preponderance of the evidence standard. *Id.*

101. 80 Wis. 2d 91, 258 N.W.2d 680 (1977).

102. *Id.* at 100–01. "[T]he underlying policy of sec. 904.07 . . . is to exclude such evidence so as not to deter a potential or present defendant from taking steps that will promote safety but at the same tend to be inculpatory." *Id.* at 101. Therefore, when a company recalls one of its products or creates a subsequent design that is less hazardous than the original version, that evidence is admissible, because it does not

change is problematic, because it is unrealistic that such a producer or manufacturer would forgo making changes to its hazardous products on the market because evidence of this subsequent act could be used later at trial.[103] There was a recent trend to allow such evidence to be used to prove liability, not just feasibility given the foregoing reasons.[104]

Although this dramatic change to strict products liability was foreseeable, the judiciary discussed only retiring the consumer contemplation test, not the adoption of affirmative defenses, a statute of repose, or stricter rules of admissibility. Moreover, the judicial adoption of the *Restatement (Third) of Torts* would not have left certain terms undefined as the statute does or make claims more susceptible to removal to federal courts. These changes signify that the Wisconsin legislature is concerned with protecting businesses and manufacturers from liability, as opposed to providing a sustainable legal atmosphere.

3. PROPOSED REMEDIES: HOW TO ADDRESS CONCERNS WITH THE CURRENT STRICT PRODUCTS LIABILITY STANDARD

The new strict products liability standard is a drastic change to the face of Wisconsin law, but will not completely debilitate a plaintiff's ability to recover. The overall strategy of practitioners specializing in products liability in Wisconsin will not be greatly altered. The introduction of "reasonable alternative designs" is not new to Wisconsin courts and the statute simply codifies the practice of Wisconsin attorneys.[105] But the new provisions that affect venue, fail to define terms, or set a strict statute of repose will affect practitioners and injured Wisconsinites. Attorneys must be prudent in this area and perhaps conduct more preliminary research when arguing strict products liability cases in Wisconsin.

If attorneys want their strict products liability claims in state court without the risk of removal to federal court, they must make sure the Wisconsin seller or distributer is party to the action by ensuring: the seller or distributer did not contractually assume the manufacturer's duties, the manufacturer can be served with process, or the manufacturer is not insolvent.[106] This statutory provision promotes procedural gamesmanship,[107] but also bolsters Act 2's thrust to shield

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conflict with the statute's underlying policy to protect those who have not put another reasonable alternative design on the market. *Id.*

103. Interview with Stephen Hurley, *supra* note 51.

104. *Id.*

105. Interview with Daniel Rottier, *supra* note 35.

106. *See* WIS. STAT. ANN. § 895.047(2) (West 2011).

107. Miller, *supra* note 97, at 403–05 (explaining that defense lawyers often employ procedural tactics to remove cases to federal court, put trials in more

Wisconsin businesses by protecting Wisconsin sellers and distributors who may not have as deep of pockets as large manufacturers.

Wisconsin products liability attorneys must also beware of the lack of statutory definitions and insufficient case law to decipher new terms within section 895.047 of the Wisconsin Statutes.[108] These undefined terms may bring more cases on appeal, but given the wealth of strict products liability case law, attorneys are not left in the wilderness without a survival kit. When trying to define these terms, practitioners should look to persuasive precedent outside of Wisconsin for guidance. Courts may also not dwell on such ambiguous terms because they are the result of poor drafting, as opposed to specific legislative intent.[109] Additionally, practitioners can avoid ambiguous terms by, for example, not taking a case where the plaintiff was intoxicated at the time of the injury.[110]

Finally, practitioners should be aware of new provisions such as the affirmative defenses, the change in the introduction of evidence of subsequent remedial measures in mass manufacturing cases, and the strict statute of repose.[111] These provisions will be most harmful to parties who fail to note the change in the less noticeable provisions, such as the new subsequent remedial measures provision that are buried within the text of the statute. Overall, the new strict products liability standard was not unanticipated in Wisconsin. Its impact, though seemingly drastic, will not completely debilitate a plaintiff's ability to recover. Doctrinally, Act 2 might be more ideological than substantive given that it will not greatly alter practitioners' overall strategy, at least with respect to design defects causes, because good trial lawyers were not bringing the kinds of cases ostensibly foreclosed by Act 2. The Act seemingly appeases both parties involved in that it provides more firewalls for businesses, while not drastically changing the practice of civil litigation in Wisconsin.

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inconvenient locations for plaintiffs, or draw out litigation to drain the plaintiff's ability to compensate his or her lawyers).

108. For example, the statute uses phrases such as "clear and convincing" and "rebuttable presumption" that lack statutory definitions and case law to provide practitioners and courts with guidance. Interview with Daniel Rottier, *supra* note 35.

109. *Id.* (explaining that the strict products liability statute does not seem like it was drafted by lawyers in the field, but was instead copied and pasted from other federal statutes without regard to Wisconsin standards or precedent).

110. § 895.047(3); *see also* Interview with Daniel Rottier, *supra* note 35 (explaining that given the small number of products liability cases brought in Wisconsin, no reasonable attorney would ever accept a plaintiff as a client who was intoxicated at the time the injury occurred).

111. *See* § 895.047(3) (affirmative defenses); § 895.047(4) (subsequent remedial measures); § 895.047(5) (statute of repose).

B. Expert Opinion Testimony in Wisconsin

Prior to Act 2, Wisconsin had a unique expert opinion testimony standard: the relevancy test.[112] In an attempt to limit expert opinion testimony, the Wisconsin legislature replaced it with the *Daubert* or reliability standard.[113] The reliability standard stems from three U.S. Supreme Court cases, which inspired subsequent amendments and interpretations of Rules 701 and 702 of the Federal Rules of Evidence.[114] Wisconsin adopted the identical rules through Act 2.[115]

This change affects all cases in Wisconsin, including both civil and criminal cases, which runs counter to Act 2's thrust.[116] This Section first discusses the staunch opposition the amended statute faced. It then details how the new rules distinguish between lay and expert opinion testimony. This Section then addresses the implications of separating lay and expert opinion testimony and other matters, such as procedural issues, types of expert opinion testimony, and the constitutionality of the Wisconsin State Legislature's adoption of *Daubert*.

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112. Blinka, *supra* note 12, at 174; *see State v. Walstad*, 119 Wis. 2d 483, 516, 351 N.W.2d 469 (1984) (holding that expert opinion testimony is admissible if (1) it is relevant, (2) the witness is qualified as an expert, and (3) the evidence will assist the trier of fact in determining an issue of fact). Though Wisconsin's relevancy test has been deemed unique, Wisconsin courts treated it as an evolving standard and subsequently nudged it closer to the *Daubert* standard. *See supra* notes 60–63 and accompanying text.

113. FED. R. EVID. 702 (codifying *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)); *see also* Blinka, *supra* note 21, at 14 (describing the *Daubert* test as "evidentiary porridge," meaning it is more liberal than the "general acceptance test ('too cold') yet more than demanding than the relevancy standard ('too hot') . . . [f]inding *Daubert* to be 'just right.'").

114. *See* FED. R. EVID. 701–02. These rules were based on *Daubert* and its progeny: *Daubert*, 509 U.S. at 587, 589 (holding that "the *Frye* test was superseded by the adoption of the Federal Rules of Evidence" and is thus no longer the basis for assessing expert opinion testimony, and that trial judges must serve as gatekeepers of admissibility in order to determine whether the expert opinion testimony is reliable and thus admissible); *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) (holding that the standard of review is abuse of discretion when looking at a district court's decision to exclude expert testimony); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (holding that the reliability standard extends to all experts, including those whose "specialized knowledge" arises from experience and is not confined to scientific experts).

115. WIS. STAT. ANN. §§ 907.01–.02 (West 2011).

116. *See infra* note 120 and accompanying text.

1. WISCONSIN'S OPPOSITION TO THE *DAUBERT* STANDARD

Before Act 2, the federal reliability standard was repeatedly rejected in Wisconsin.[117] Several unsuccessful legislative attempts were made to adopt Rules 702 and 703 of the Federal Rules of Evidence.[118] Wisconsin appellate courts also continuously refused to adopt the federal standard, subsequently reaffirming the trinity of relevance, qualifications, and assistance.[119]

After Act 2 proposed adopting the *Daubert* standard, organizations such as the Wisconsin District Attorneys Association (WDAA), the Legislative Committee of the Wisconsin Judicial Conference, and the State Bar of Wisconsin strongly opposed its adoption.[120] They were concerned with taking fact-finding functions away juries and adding time and expense in conducting *Daubert* hearings in both civil and criminal cases.[121] Initially, Act 2 proposed a "*Daubert* on steroids" standard—in addition to finding that the expert's principles and methods were reliable, the judge would also have to find that they were "true."[122] Nowhere in the Rule 702 of the Federal Rules of Evidence, its advisory committee notes, or in federal case law are such stringent standards proposed. In a letter to the Joint Judiciary Committee, the WDAA warned that this "true" standard would lead to "uncertain and unpredictable results" because the legislation failed to articulate "how the proponent would show that the principles and methods are 'true'

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117. *See supra* Part I.B; *see also* Blinka, *supra* note 12, at 189–91.

118. S.B. 49, 2003–04 Leg., Reg. Sess. (Wis. 2003) (adopting the 2000 version of Rules 701–03 of the Federal Rules of Evidence). This bill was passed by both houses of the Wisconsin State Legislature and ultimately vetoed by Governor Jim Doyle. S. JOURNAL, 2003–04 Leg., Reg. Sess. 740 (Wis. 2004) (Governor Doyle's veto message stated that there was no evidence that Wisconsin's relevancy test was flawed).

119. Blinka, *supra* note 12, at 189–91 (citing *State v. Peters*, 192 Wis. 2d 674, 687–88, 534 N.W.2d 867 (Ct. App. 1995)).

120. Letter from Winn S. Collins, President, Wis. Dist. Att'ys Ass'n, to Sen. Rich Zipperer, Chair, Comm. on Judiciary, Utils., Commerce & Gov't Operations, and Rep. Jim Ott, Chair, Assembly Comm. on Judiciary & Ethics (Jan. 11, 2011) [hereinafter WDAA Letter], *available at* http://www.law.wisc.edu/rcid/legislativeaction/2011act2_legislative_committee_memo.pdf; Letter from Nancy M. Rottier, Legislative Liason for the Wis. Court Sys., on behalf of Legislative Comm. of the Wis. Judicial Conference, to Sen. Rich Zipperer, Chair, Comm. on Judiciary, Utils., Commerce & Gov't Operations, and Rep. Jim Ott, Chair, Comm. on Judiciary & Ethics (Jan. 11, 2011) [hereinafter Wisconsin Judicial Conference Letter] (on file with author); Korbitz, *supra* note 3 (discussing the State Bar's opposition to adopting *Daubert*).

121. *See* WDAA Letter, *supra* note 120; Wisconsin Judicial Conference Letter, *supra* note 120 (also expressing concern that there was no advantage to adopting the federal rule, because Wisconsin's rule was not problematic).

122. WDAA Letter, *supra* note 120.

and by what criteria."[123] The WDAA succeeded in removing "true," but did not succeed in preserving the relevancy standard.[124]

Four judges from Dodge County wrote to the Joint Judiciary Committee advising against the *Daubert* standard because it was unnecessary, likely to bog down the courts with increased litigation, and likely to add to the expense of litigating cases—which is expressly at odds with Act 2's goal of relieving business owners from excessive litigation and lowering costs for Wisconsin's civil litigation system.[125] The judges also recognized that they themselves "are not any better qualified than juries to make intelligent decisions regarding the reliability of an expert's opinion."[126] Furthermore, if such power is taken from the jury and given to judges, then "another dozen judgeships" would be necessary in order to spread the increased hours of motion hearings needed to determine the admissibility of expert testimony.[127] Finally, the judges pointed out that the rules of evidence apply to *both* criminal and civil cases.[128] Changing them would thus increase the State's costs:

> In most criminal cases, it is frequently the State who is calling experts. This new law could certainly be used against the State in challenging the testimony of psychiatrists who are trying to predict dangerousness in Chapter 980 cases, of witnesses who are talking about the rape trauma syndrome in sex[ual] assault cases, as well as police officers who are often asked in fatal accidents about the point of impact between the vehicles. All of these types of testimony may be subject to attack by the defense if this provision becomes law. Thus criminal trials will probably be impacted the most. This will increase the cost of criminal litigation that is often paid for on

123. *Id.*

124. Adam Korbitz, *Senate Judiciary Committee Approves Omnibus Tort Reform Bill, Recommends Changes*, WIS. ST. BAR ASS'N (Jan. 14, 2011), http://www.wisbar.org/am/template.cfm?section=Legislative_Advocacy&ContentID=99618template=/CM/ContentDisplay.cfm.

125. Letter from the Hon. Brian A. Pfitzinger, the Hon. John R. Storck, the Hon. Andrew P. Bissonnette, and the Hon. Steven G. Bauer, Dodge Cnty. Circuit Court, to Sen. Scott Fitzgerald, Sen. Rich Zipperer, Rep. Jeff Fitzgerald, and Rep. Jim Ott (Jan. 10, 2010 [sic]) [hereinafter Letter from Dodge County Judges], *available at* http://legis.wisconsin.gov/lc/comtmats/files/ss1ab0001_20110112095206ss.pdf (reaffirming judicial confidence in the relevancy standard and how the adversarial process, as well as other rules of evidence, ensure expert opinion testimony is reliable: "[the relevancy standard] has been working for Wisconsin for 160 years...as they say, 'if it ain't broke, don't fix it'").

126. *Id.*

127. *Id.*

128. *Id.*

> both sides by the state, as now the experts as well as the prosecutor and public defender will have to be paid for coming to court to participate in an additional lengthy motion hearing.[129]

Though Wisconsin has grown comfortable with its relevancy test, closer scrutiny of expert testimony may increase the reliability of verdicts by ensuring evidence has been rigorously examined for reliability.[130] This "change may also make lawsuits more efficient by preempting lawsuits without sufficient scientific basis," which would evade the added time and expense of jury trials.[131] Moreover, Wisconsin courts continually modified the relevancy test to address concerns about reliability just short of adopting *Daubert*.[132] If the relevancy test is instead viewed as a *Daubert* lite test, then *Daubert*'s adoption would not be a radical change to the introduction of expert opinion testimony. Despite this rationale, most legal experts, judges, and practitioners in Wisconsin have almost unanimously opposed adopting the *Daubert* standard.[133] Nevertheless, *Daubert* is the current expert testimony standard. The next step is to interpret *Daubert* in a manner that will not overwhelm courts with added time and expense and will ensure credibility determinations are not taken away from the factfinder.

2. LAY OPINION TESTIMONY: WISCONSIN STATUTES SECTION 907.01

This Section first discusses the current lay opinion testimony standard under section 907.01 of the Wisconsin Statutes. It then discusses the implications of Wisconsin's new standard, where difficulty in distinguishing between lay and expert opinion testimony may ensue.

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129. *Id.* (internal emphasis omitted). The added costs to the state effectively contradicts Act 2's goal for Wisconsin to be "open for business."

130. Tolefree, *supra* note 20.

131. *Id.*

132. *State v. Peters*, 192 Wis. 2d 674, 688–90, 534 N.W.2d 867 (Ct. App. 1995) (adopting a limited gatekeeping role for trial judges); *State v. Hibl*, 2006 WI 52, ¶ 52, 290 Wis. 2d 595, 714 N.W.2d 194 (reaffirming judges' limited gatekeeping function and finding the relevancy test requires a showing that the expert's opinion was "reliable enough to be probative").

133. *See, e.g.*, Blinka, *supra* note 12, at 189–92, 222–27 (discussing the relevancy rule's success and evolution in Wisconsin, and describing the reliability rule as "fundamentally flawed").

a. Wisconsin's current lay testimony standard

Lay opinion testimony is conceptually distinct from expert opinion testimony.[134] As a preliminary matter, opinion witnesses' testimony must be clearly identified as either lay or expert opinion testimony.[135] This distinction is not between types of experts, but types of *testimony*.[136] This change "embodies the substantive sea-change wrought by the *Daubert* amendments: lay opinions *cannot* be based on 'specialized knowledge' that is now regulated by section 907.02's reliability requirements."[137] Thus, testimony must be classified as lay or expert, but not both.

Once testimony is classified as lay testimony, it is admissible if it is: (1) "[r]ationally based on the perception of the witness"[138] and (2) "[h]elpful to a clear understanding of the witness' testimony or the determination of a fact in issue."[139] "Perception" means that lay witnesses cannot base their opinions in whole or in part on hearsay evidence, but only on firsthand knowledge.[140] Additionally, the "helpfulness" of testimony rests within the trial judge's discretion.[141]

b. Implications of the new standard: What is lay opinion testimony and what is expert opinion testimony?

Distinguishing between lay and expert opinion testimony may create problems when witnesses such as "skilled lay observers" take the stand.[142] Such witnesses may mix personal knowledge with skill-based knowledge, making it difficult to classify their testimony as lay or expert.[143] The expert-lay distinction, however, "purportedly eliminates 'the risk that the reliability requirements set forth in [§ 907.02] will be

134. Blinka, *supra* note 21, at 16.

135. *Id.*

136. *Id.* The same witness can testify under section 907.01 as a lay witness *and* section 907.02 as an expert witness, so long as the testimony is classified as "lay" or "expert," but not both. *Id.* Thus, lawyers must be wary to lay the proper foundation if the same witness is giving both types of testimony. *Id.*

137. *Id.* ("In sum, all testimony is subject to a binary analysis: it must conform to section 907.01 as lay testimony or section 907.02 as expert testimony. There is no third way.").

138. WIS. STAT. ANN. § 907.01(1) (West 2011).

139. § 907.01(2).

140. 7 DANIEL D. BLINKA, WISCONSIN PRACTICE SERIES: WISCONSIN EVIDENCE § 602.1 (3d ed. 2012).

141. *Id.*

142. Blinka, *supra* note 21, at 16.

143. *Id.*

evaded through the simple expedient of proffering an expert in lay witness clothing.'"[144]

In an attempt to simplify this stark approach, the federal advisory committee explained that lay testimony involves "'reasoning familiar in everyday life' while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.'"[145] Yet, federal case law illustrates the difficulty in distinguishing between types of testimony.[146] Wisconsin courts may look to federal and state case law as well as federal advisory committee notes as persuasive guidance when determining whether a witness' opinion is either the product of common sense or of specialized knowledge that stems from experience or education.[147]

Common generalizations and "collective experiences" are still permissible under section 901.07 of the Wisconsin Statutes:

> The rule was not intended to affect the "prototypical example[s] of the type of evidence . . . relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.[148]

Examples of common generalizations or "collective experiences" include "he was drunk" or "she was speeding."[149]

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144. *Id.* (citing FED. R. EVID. 701 notes of advisory committee on 2000 amendments).

145. *Id.* (citing FED. R. EVID. 701 notes of advisory committee on 2000 amendments).

146. *See, e.g.*, *United States v. Graham*, 643 F.3d 885, 896 (11th Cir. 2011) (permitting a former real estate closing attorney to testify as a lay witness in a trial for mortgage fraud conspiracy, because he had participated in similar frauds and thus had personal knowledge); *United States v. Roe*, 606 F.3d 180, 185 (4th Cir. 2010) (noting that the distinction between lay and expert testimony is "not easy to draw" and holding that a police sergeant's testimony about qualifications for handgun permits in addition to conduct lawfully permitted by such permits fell within his personal knowledge and not "specialized knowledge"); *United States v. Caldwell*, 586 F.3d 338, 348 (5th Cir. 2009) (conceding that "case law is not completely clear on where to draw the line between expert and lay testimony" when trying to classify a witness' testimony about computer technology).

147. Blinka, *supra* note 21, at 16.

148. *Id.* (citing FED. R. EVID. 701 notes of advisory committee on 2000 amendments (quoting *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995))).

149. *Id.*

Finally, the new rule will mostly affect valuation expert testimony and police officer testimony.[150] Under Wisconsin's former rule, lay testimony by both groups was generally admissible.[151] The 2000 federal amendments retained common law that allowed business owners "to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert."[152] The advisory committee emphasized that this testimony is not "specialized knowledge," but "particularized knowledge" that the witness obtained from everyday business.[153] Even with these safeguards, courts have restricted such testimony because of an "owner's relative lack of personal knowledge of the property, hearsay and the 'complexity' of the market in question."[154]

Police officer testimony also falls in some sort of grey area between lay and expert opinion testimony, especially in drug- and gang-related cases.[155] Exhibiting the difficulties associated with "skilled lay observers," police officer testimony often mixes every day, personal knowledge with "specialized knowledge."[156] This mixture risks exclusion of such evidence because it is not clearly lay or expert testimony.[157] Federal case law illustrates this problem. For example, *United States v. Hicks*[158] involved a drug investigation where an agent described certain counter surveillance measures the defendant took.[159] The Seventh Circuit held that the agent's testimony was permissible lay opinion because the testimony involved "criminal or suspicious activity based on [his] personal observations" rather than his expert opinion in the field.[160] In this case, the Seventh Circuit unreflectively appears to equate personal observations with lay testimony. Yet the subject of drug

150. *Id.* at 16–17.

151. *Id.*

152. FED. R. EVID. 701, notes of advisory committee on 2000 amendment (citing *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1175–76 (3d Cir. 1993) (finding no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, because it was based on his knowledge and experience from daily business affairs)); *see also* Blinka, *supra* note 21, at 16 (citing *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co.*, 320 F.3d 1213, 1221–22 (11th Cir. 2003) (relying on the advisory committee note, stating "it would appear that opinion testimony by business owners and officers is one of the prototypical areas intended to remain undisturbed")).

153. FED. R. EVID. 701 notes of advisory committee on 2000 amendment.

154. Blinka, *supra* note 21, at 17 (internal citation omitted).

155. *Id.*

156. *Id.* at 16–17.

157. *See id.* at 17.

158. 635 F.3d 1063 (7th Cir. 2011).

159. *Id.* at 1065.

160. *Id.* at 1069.

investigations and counter surveillance measures can involve specialized knowledge forbidden to lay witnesses by Rule 701 and made the exclusive province of Rule 702. This case is thus illustrative of the inherent conflict of deciphering between personal observations and specialized knowledge, and the Seventh Circuit's attempt to rigidly categorize personal observation.

It is up to Wisconsin courts to develop case law that clarifies the distinction between lay and expert opinion testimony. Federal case law illustrates that such line drawing is difficult. However, recognizing potential problem areas brings target issues to the forefront, and guidance from the federal advisory comments and federal courts will be helpful with line drawing.

3. EXPERT OPINION TESTIMONY: WISCONSIN STATUTES SECTION 907.02

This Section first details Wisconsin's current expert opinion testimony standard under section 907.02 of the Wisconsin Statutes, which is analogous to the *Daubert* standard. It then discusses Wisconsin judges' new role as gatekeepers of admissibility under the *Daubert* standard. It then turns to procedural options trial judges may consider when acting as gatekeepers of admissibility. Finally, this Section examines the implications of ipse dixit, or because I said so testimony, under the new Wisconsin standard.

a. Wisconsin is now a Daubert *state*

Act 2 heightened Wisconsin's expert opinion testimony standard where any opinion testimony that relies on some form of "specialized knowledge" is now subject to the *Daubert* standard.[161] section 907.02 of the Wisconsin Statutes provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.[162]

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161. *See* Blinka, *supra* note 21, at 17.

162. WIS. STAT. ANN. § 907.02(1) (West 2011); Interview with Stephen Hurley, *supra* note 51. Additionally, section 907.02(2), which bars the testimony of an expert

Essentially, a trial judge finds expert opinion testimony admissible if: (1) the expert's opinion will aid the factfinder, (2) the testimony is based on sufficient facts or principles, (3) the testimony is product of reliable principles and methods, and (4) the expert witness has applied the principles and methods reliably to the facts of the case.[163] Judges wield broad discretion as "gatekeepers" of admissibility.[164]

Moreover, expert opinion testimony is admissible only when three foundational elements from pre-Act 2 law are also laid: (1) the testimony must be relevant, (2) the expert must be qualified, and (3) the testimony must assist the factfinder.[165] In sum, the reliability of the witness' testimony under the *Daubert* standard and the trinity of relevance, qualifications, and helpfulness must all be established for expert opinion testimony to be admissible.

b. Wisconsin judges as gatekeepers of admissibility

Act 2 charged Wisconsin trial judges with the new responsibility of acting as gatekeepers of admissibility to exclude unreliable expert testimony.[166] Judges are now required to conduct findings of fact and law relating to the expert's qualifications, the assistance the testimony would provide to the trier of fact, the reliability of the methods or principles the expert employs, and whether the expert applied his or her method to the facts in a reliable manner.[167] These inquiries lie within the sole discretion of the trial judge under section 901.04(1) of the Wisconsin Statutes and must be determined by a preponderance of the evidence.[168] This increases a judge's duties while simultaneously taking

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who is entitled to receive any compensation based on the outcome of a case or claim with respect to the testimony in which he or she is offering, is not in the federal rule. *Compare* § 907.02(2), *with* FED. R. EVID. 702.

163. § 907.02(1); Interview with Stephen Hurley, *supra* note 51.

164. *See* FED. R. EVID. 702 notes of advisory committee on 2000 amendments.

165. *See* Blinka, *supra* note 21, at 18.

166. *See id.* (including all expert testimony, not just scientific testimony, under the *Kumho* standard); Blinka, *supra* note 12, at 196–203 (discussing Wisconsin's repeated preference for the trial judge to act as "limited gatekeeper[s]" by limiting evidence through other rules of evidence such as authentication or Wisconsin Statutes section 904.03's balancing test).

167. *See* FED. R. EVID. 702.

168. Blinka, *supra* note 21, at 17; *see also* FED. R. EVID. 702 notes of advisory committee on 2000 amendments (citing *Bourjaily v. United States*, 483 U.S. 171, 175 (1987) (stating the admissibility of all expert testimony is governed by principles of Rule 140(a) and the proponent bears the burden of establishing proper foundation by a preponderance of the evidence)).

power away from the factfinder, who is now left to assess only the weight of the admissible evidence.[169]

Daubert also provided that judges may consider a nonexhaustive list of factors when assessing the reliability of scientific expert testimony.[170] Such factors include:

> (1) whether the expert's technique or theory can be or has been tested . . . ; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.[171]

The judge has discretion in deciding what the criteria of reliability will be, meaning other factors may be considered or certain factors may be weighed more heavily depending on the type of expert testimony at issue.[172] Additionally, such factors may be helpful in "assessing the reliability of nonscientific expert testimony, depending upon 'the particular circumstances of the particular case.'"[173]

Additionally, the federal advisory committee addressed one of the main concerns with *Daubert*: that the judge as gatekeeper would replace the role of the jury.[174] The comments concluded that the *Daubert* trilogy "did not work a 'seachange over federal evidence law,' and 'the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.'"[175] Post-*Daubert* case law thus indicates that rejecting expert testimony is "the exception rather than the rule."[176]

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169. *See* Blinka, *supra* note 21, at 17. Yet, Wisconsin judges have some experience acting as "limited gatekeepers" of admissibility so they are not completely in the dark. *See State v. Peters*, 192 Wis. 2d 674, 688–90, 534 N.W.2d 867 (Ct. App. 1995) (adopting a limited gatekeeping role for Wisconsin judges).

170. FED. R. EVID. 702 notes of advisory committee on 2000 amendments.

171. *Id.*

172. *Id.* For example, it may be that "general acceptance" will suffice, as where an expert witness testifies, "I was taught this method and have applied it in this manner for the last ten years." Additionally, in *State v. Peters*, the Wisconsin Court of Appeals provided a nonexhaustive list of six factors trial judges may consider when acting as limited gatekeepers. *Peters*, 192 Wis. 2d at 689. Thus, Wisconsin trial judges are not unfamiliar with applying a set of factors in determining whether expert opinion testimony is admissible.

173. FED. R. EVID. 702 notes of advisory committee on 2000 amendments (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999)).

174. *Id.*

175. *Id.* (citing *United States v. 14.38 Acres of Land Situated in Leflore Cnty., Miss.*, 80 F.3d 1074, 1078 (5th Cir. 1996)).

176. *Id.*

c. Procedural options for the gatekeepers of admissibility

The *Daubert* trilogy never set forth a fixed procedure for judges to follow when determining the admissibility of expert opinion testimony.[177] One of the main concerns with *Daubert* was the fear that it would lead to time-consuming and costly hearings when expert testimony is to be offered.[178] But federal trial courts have "considerable leeway" in determining how to test an expert's reliability, thus making it unnecessary to hold hearings for every case.[179]

Wisconsin courts can weigh the reliability of expert opinion testimony by review of paper record, such as affidavits, depositions, or expert reports.[180] Judges can even take judicial notice or statutory recognition of "reliable" expert testimony.[181] Federal courts have routinely determined admissibility by such review.[182] Thus, judges have wide discretion to determine whether expert opinion testimony is "reliable" under section 907.02. Judicial notice or paper review would take much less time than pretrial hearings and would also avoid concerns of excessive litigation or the appointment of more judges.[183]

d. Ipse dixit testimony

Another major *Daubert* concern revolves around ipse dixit testimony—the ill-fated "because I said so" testimony.[184] The *Daubert* standard mandates that expert witnesses be able to explain their methodology by demonstrating in some objectively verifiable way that they chose a reliable method and correctly applied it to the facts of the case.[185] Thus, expert witnesses face not one, but two potential pitfalls with respect to their testimony. First, expert witnesses must be able to

177. Blinka, *supra* note 21, at 17–18.

178. Letter from Dodge County Judges, *supra* note 125.

179. FED. R. EVID. 702 notes of advisory committee on 2000 amendments (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)); *see also* Blinka, *supra* note 21, at 17–18.

180. Blinka, *supra* note 21, at 17.

181. *See, e.g.*, WIS. STAT. §§ 902.01, 902.03 (2009–10).

182. *See, e.g.*, *In re Hanford Nuclear Reservation Litig.*, 292 F.3d 1124, 1138–39 (9th Cir. 2002) (holding evidentiary hearings are not required if the court has adequate factual record before it).

183. Blinka, *supra* note 21, at 17–18 ("When reliability is contested, the options include: [h]olding a pretrial evidentiary hearing featuring the expert's testimony; [h]olding a pretrial hearing based on a paper record, for example, affidavits, depositions, expert reports, memoranda by counsel (such motions often may accompany a motion for summary judgment in civil litigation); and [t]aking testimony at trial, subject to a motion to strike." (bullet points removed)).

184. *Id.* at 60.

185. *Id.*

explain their principles and methods.[186] Second, expert witnesses must testify that their principles or methods were correctly applied to the facts.[187] With the second requirement, experts may face challenges in situations where they creatively apply a well-known methodology in a novel manner, which may immediately prompt suspicion of improper application.[188]

Scientific, academic and technical experts who practice in fields inundated with textbooks and other scholarly material have less trouble explaining the underlying principles and application of their methodology to the court.[189] Difficulties tend to arise more so with experience-based expert testimony, such as law enforcement agents who testify as expert witnesses in drug- and gang-related cases.[190]

Though law enforcement agents have formal training, their expertise necessarily stems from the hundreds of cases they have handled in the field.[191] Law enforcement agents should "be prepared to discuss the acceptable methods employed by such investigators along with generalizations that arise from their experiences."[192] This logic stems from *Kumho Tire*, which allowed experience-based experts to testify under Rule 702 so long as they were able to articulate the underlying principles supporting their testimony.[193] The practical takeaway is that, when obtaining an expert, practitioners should make sure the expert is able to communicate his or her methodology and the application of said methodology in a comprehensible manner so it is admissible. In sum, Act 2 has created at least one new evidentiary rule: expert testimony will now be scrutinized for ipse dixit offenses, where the experts must explain their reasons and reliable methods, not just their credentials.[194]

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186. *Id.* at 60–61.

187. *Id.* at 60.

188. *Id.*

189. *Id.* at 60–61

190. *Id.* at 17, 60–61.

191. *Id.* at 61.

192. *Id.*

193. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999) ("In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.").

194. Blinka, *supra* note 21, at 60–61.

4. CONSTITUTIONAL IMPLICATIONS OF *DAUBERT*'S ADOPTION

Wisconsin's *Daubert* legislation may face a constitutional challenge for violating the separation of powers. This adoption contravened existing rules of evidence governing expert testimony, because Wisconsin courts repeatedly rejected replacing its relevancy standard with the *Daubert* standard.[195] Legal experts have questioned the constitutionality of Wisconsin's *Daubert* adoption but have not discussed the issue at length.[196]

Wisconsin courts have yet to face a constitutional challenge to *Daubert*'s legislative adoption. Arizona, however, can serve as an example, because its *Daubert* adoption directly parallels that of Wisconsin's adoption. In 2010, the Arizona legislature passed a bill to adopt *Daubert* into law, which replaced its version of the *Frye* test.[197] Like Wisconsin, the Arizona Supreme Court repeatedly rejected adopting the *Daubert* standard in place of its *Frye* rule.[198]

In *Lear v. Fields*,[199] the state challenged the constitutionality of Arizona's legislative adoption of *Daubert* in a sexual abuse case where the defendant sought to preclude expert testimony on Child Sexual Abuse Accommodation Syndrome.[200] The Arizona Court of Appeals upheld the trial court's finding that the statute violated separation of powers by usurping the Arizona Supreme Court's rulemaking authority, because the court had repeatedly rejected the adoption of *Daubert*.[201] The court held that the statute was unconstitutional because it

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195. Most recently, in 2010, the Wisconsin Supreme Court rejected the *Daubert* standard in *State v. Fischer*, 2010 WI 6, ¶¶ 19–25, 322 Wis. 2d 265, 778 N.W.2d 629.

196. *See, e.g.*, Blinka, *supra* note 21, at 14; JUDGE RUDOLPH T. RANDA, *DAUBERT* – A FEDERAL JUDICIAL PERSPECTIVE, WIS. CIVIL JUSTICE COUNCIL 10 (Jan. 11, 2012), *available at* http://www.wisciviljusticecouncil.org/wwcms/wp-content/uploads/2012/01/Daubert_A_Federal_Judicial_Perspective.pdf ("[I]t is unclear whether the amendment of §§ 907.01 and 907.02 by the Wisconsin legislature violated the separation of powers by imposing the Daubert approach upon the Wisconsin courts despite their contrary will.").

197. ARIZ. REV. STAT. ANN. § 12-2203 (2003); *see also* Tim Eigo, *New Standard for Scientific and Expert Testimony:* Daubert *Adopted in Arizona*, ARIZ. ATT'Y, July/Aug. 2010, at 3. Under Arizona's former *Frye* or general acceptance test, expert opinion testimony is admissible only where the technique is generally accepted as reliable in the relevant scientific community. *Logerquist v. McVey*, 1 P.3d 113, 132 (Ariz. 2000).

198. *See, e.g.*, Lear *v. Fields*, 245 P.3d 911, 917 (Ariz. Ct. App. 2011), *review denied*, No. CV-11-0038-PR, 2011 Ariz. LEXIS 83 (2011).

199. 245 P.3d 911 (Ariz. Ct. App. 2011).

200. *Id.* at 913.

201. *Id.* at 918.

"'engulf[ed]' and supplant[ed] the existing rule with which it conflicts and therefore . . . violate[d] the separation of powers doctrine."[202]

The case never reached the Arizona Supreme Court, because the court, acting pragmatically, used its rulemaking power to adopt the *Daubert* standard in September 2011, despite its earlier decisions rejecting it.[203] Essentially, the court sent the Arizona State Legislature a message that it could not force the court to adopt *Daubert* because it was doing so on its own accord. In its 2012 comments, the Arizona Supreme Court implicitly stated that it did not intend to greatly change Arizona law with the *Daubert* adoption and that courts should continue to admit the same kinds of expert testimony as they had under the *Frye* test.[204]

As for Wisconsin, the state constitution establishes three branches of government: the legislative, the executive, and the judicial.[205] Although not expressly stated, the separation of powers doctrine is created through several constitutional provisions.[206] While these three branches are separate, the constitution does not set exact boundaries when it comes to the division of power between branches and some overlap exists.[207] Specifically, article 7, section 3 of the Wisconsin Constitution provides that "[t]he supreme court shall have superintending and administrative authority over all courts."[208] section 751.12(1) of the Wisconsin Statutes also creates the Wisconsin Supreme

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202. *Id.*

203. ARIZ. R. EVID. 702; Petition to Amend Rules of Evidence and Rule 17.4(f), Arizona Rules of Criminal Procedure, Order 11-0022, 2011 Ariz. Legis. Serv. R-25, R-45–46 (West).

204. ARIZ. R. EVID. 702 comment to 2012 amendment ("The amendment is not intended to supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony, nor is the amendment intended to permit a challenge to the testimony of every expert, preclude the testimony of experience-based experts, or prohibit testimony based on competing methodologies within a field of expertise. The trial court's gatekeeping function is not intended to replace the adversary system. Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

205. WIS. CONST. art. IV, § 1; WIS. CONST. art. V, § 1; WIS. CONST. art. VII, § 2.

206. *See* WIS. CONST. art. IV, § 1 ("The legislative power shall be vested in a senate and assembly."); WIS. CONST. art. V, § 1 ("The executive power shall be vested in a governor . . . ."); WIS. CONST. art. VII, § 2 ("The judicial power of this state shall be vested in a unified court system consisting of one supreme court, a court of appeals, a circuit court . . . ."); *Id.* § 3(1) ("The supreme court shall have superintending and administrative authority over all courts."); *Id.* § 4(3).

207. *State v. Holmes*, 106 Wis. 2d 31, 315 N.W.2d 703 (1982) (discussing the separation of powers doctrine at length).

208. WIS. CONST. art. VII, § 3(1).

Court's rulemaking authority for practice and procedure.[209] This statute gives the legislature authority to enact, modify, or repeal statutes in those areas.[210] For example, regulations, such as jury instructions, "fall within the zone of shared legislative and judicial power to regulate practice and procedure in the courts."[211]

Yet the separation of powers doctrine substantially limits the legislature's actions within this zone of shared power.[212] The legislature is more limited because "[i]n Wisconsin the jurisdiction and power of the courts is conferred not by act of the legislature but by the constitution itself."[213] Therefore, when "the exercise of . . . legislative power ha[s] so far invaded the judicial field as to embarrass the court and impair its proper functioning, the court will be compelled to maintain its integrity as a constitutional institution."[214]

The legislative adoption of *Daubert* deals with this exact question because the Wisconsin Supreme Court repeatedly rejected adopting the *Daubert* standard, but the legislature went ahead and adopted it anyway. The *Daubert* standard imposes additional duties and responsibilities upon judges, which were repeatedly rejected. This legislative adoption seemingly infringes upon the court's superintending and administrative authority over courts. Therefore, the legislature may have exceeded its authority under section 751.12(4) and violated the separation of powers by usurping the Wisconsin Supreme Court's authority under article 7, section 3 of the Wisconsin Constitution.[215]

Although it is not certain at this point, Wisconsin courts may take the same route as the lower courts in Arizona and challenge the constitutionality of *Daubert*'s adoption. It may also leave the *Daubert* standard alone. If the challenge were to ever reach the Wisconsin Supreme Court, the court has several options: (1) accept *Daubert*'s adoption as-is, (2) declare that the *Daubert* adoption violates the separation of powers doctrine, or (3) act as the Arizona Supreme Court and adopt *Daubert* on its own accord and provide commentary explaining its adoption. No crystal ball can predict whether *Daubert*'s adoption will be challenged on constitutional grounds. Yet, since legal commentators question its constitutionality and Arizona challenged the same law on constitutional grounds, such a challenge would not be unanticipated.

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209. WIS. STAT. § 751.12 (2009–10).

210. § 751.12(4) ("This section shall not abridge the right of the legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure.").

211. *In re E.B.*, 111 Wis. 2d 175, 184, 330 N.W.2d 584 (1983).

212. *Holmes*, 106 Wis. 2d at 68.

213. *John F. Jelke Co. v. Beck*, 208 Wis. 650, 660, 242 N.W. 576 (1932).

214. *Holmes*, 106 Wis. 2d at 69 (internal citation omitted).

215. *Blinka*, *supra* note 21, at 14 & n.7.

C. Proposed Remedies: What Effect (or Lack Thereof) Will Daubert *Have on Wisconsin Courts?*

It is difficult to predict what effect Act 2's changes to expert opinion testimony will have on Wisconsin courts. This Section predicts how *Daubert* will impact litigation and proposes some methods of interpretation where trial judges can dilute the two main concerns with *Daubert*'s adoption: (1) added time and expense in conducting *Daubert* hearings, and (2) taking fact-finding functions away from the jury. Before getting to *Daubert*'s substantive impact, trial judges should consider whether *Daubert* is constitutional.

Daubert's constitutionality goes to the heart of concerns for added time and expense, because if courts declare it unconstitutional, would Wisconsin go back to its former relevancy standard? Questions loom as to whether that would be the most effective route because the new standard applies to all actions, civil and criminal, filed in Wisconsin courts on or after February 1, 2011.[216] On the one hand, the relevancy test has been in place for decades and trial judges are most comfortable with implementing that standard. On the other hand, like the design defect and failure to warn aspects of Act 2, the changes to evidence may not deeply affect litigation practice. Doctrinally, Act 2 represents more of an ideological affront to the court's power than a substantive, which would render court interference unnecessary.

Even without deciding whether the *Daubert* rules are constitutional, lawyers may not even need to change their practice, with the exception of rearranging their foundational questions in light of Act 2.[217] Such change is unneeded because the doctrinal difference between the relevancy standard post-*Hibl* and the *Daubert* rules was marginal. Despite Wisconsin courts' rebuke of *Daubert*, case law continually nudged the relevancy test closer to the federal standard to the point where it was *Daubert* lite.[218] As of this writing, some twenty months after Act 2's effective date, there have been no published decisions applying the new reliability standard in Wisconsin.[219] Perhaps

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216. Korbitz, *supra* note 3.

217. *See supra* Part II.B.3.a.

218. *State v. Hibl*, 2006 WI 52, ¶ 52, 290 Wis. 2d 595, 714 N.W.2d 194 (internal citation omitted); *State v. Peters*, 192 Wis. 2d 674, 688–90, 534 N.W.2d 867 (Ct. App. 1995).

219. As of publication, no Wisconsin cases have applied *Daubert*, yet several have discussed its adoption: *State v. Avery*, 2011 WI App 148, ¶ 25 n.12, 337 Wis. 2d 560, 807 N.W.2d 638 (declining to interpret *Daubert*'s reliability standard because it was not briefed); *260 N. 12th St., LLC v. State of Wisconsin DOT*, 2011 WI 103, ¶ 55 n.10, 338 Wis. 2d 34, 808 N.W. 2d 372 (concluding that the reliability test does not apply retroactively because the case was brought in 2005); and *State v. Kandutsch*, 2011 WI 78, ¶ 26 n.7, 336 Wis. 2d 478, 799 N.W.2d 865 ("Because we do not find

this silence symbolizes that the *Daubert* adoption was more ideological than substantive. If so, commentators predicting gloom, not necessarily doom,[220] should be happily disappointed with this result. *Daubert*'s adoption thus strikes a balance where it appears to shield Wisconsin businesses, while not dramatically changing Wisconsin's litigation environment.

Additionally, a lax interpretation of *Daubert* may also answer the question of why courts have been silent thus far on this issue. Because Wisconsin's former relevancy standard favored the admission of expert opinion testimony, trial judges can use the same rationale when determining the reliability of an expert's testimony. The majority of states use the *Daubert* standard and studies show jurisdictions can take a "lax" approach, a "strict" approach, or implement both standards depending on the type of case.[221] For example, trial judges tend to strictly scrutinize expert testimony in toxic tort cases,[222] while admissibility standards for criminal cases are relatively "unchanged."[223]

If Wisconsin now follows this approach of diverging between strict and lax scrutiny of expert testimony, trial judges will effectively merge the *Daubert* standard with the relevancy test, which is not all that different from the evolving relevancy rule. Indeed, if post-*Hibl* case law nudged the relevancy rule closer to *Daubert*, this lax interpretation of *Daubert* may be equivalent to the former relevancy rule. Thus, trial judges will be able to defend the current standard, while still preserving Wisconsin's preference for admitting expert testimony, just as the Arizona Supreme Court, when adopting *Daubert*, said the adoption would barely affect the admissibility of expert testimony. Therefore, this interpretation should please all parties: it can shield Wisconsin businesses from excessive litigation, thus incentivizing investment, while not adding extra time or taking the fact-finding duty away from the jury.

To combat against added time and costs and shifting the role of the jury to the trial judge, procedure can also play a large part.[224] As other federal courts have done, Wisconsin can review paper record to determine the reliability of the testimony or take judicial notice or statutory recognition of various tests.[225] Granted, the most daunting task

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expert testimony to be required, it is not necessary to consider the applicability of newly-amended § 907.02 to the facts of this case.").

220. *See generally* Blinka, *supra* note 21.

221. *Id.* at 61.

222. *Id.*

223. *Id.* (citing PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 24.04[C][4] (3d ed. 2010) (summarizing various studies)).

224. *See id.* at 17–18.

225. *Id.* at 17; *see also supra* note 182 and accompanying text.

for trial judges is to determine what factors apply under the new "reliable principles and methods" requirement.[226] They can, however, look to *Daubert* and its progeny, the federal advisory committee notes, the wealth of case law from the Seventh Circuit, and other courts for guidance. Additionally, Wisconsin judges are not unfamiliar with such gatekeeping tasks because Wisconsin case law charged them with limited gatekeeping functions where trial judges had to consider a wide array of factors in determining whether to restrict testimony.[227] The Wisconsin Supreme Court itself reaffirmed this limited gatekeeping function where trial judges must determine whether an expert opinion testimony is "reliable enough to be probative" and thus admissible.[228]

Therefore, *Daubert*'s adoption does not seem as radical as initially predicted because it is not a complete departure from Wisconsin's evolving relevancy rule. Both judges and practitioners were equipped with sufficient tools under the evolving relevancy rule because case law nudged the relevancy rule closer and closer to *Daubert.* This move perhaps facilitated Wisconsin's transition to becoming a *Daubert* state. Therefore, *Daubert*'s adoption does not drastically change the practice of Wisconsin law—Wisconsin courts and practitioners are able to lessen confusion, prevent added time and expense, protect the separate duties of juries and judges with their expertise from the evolving relevancy rule, and simultaneously preserve Act 2's legislative intent.

CONCLUSION

Act 2 dramatically changed the face of Wisconsin's civil litigation system. The Act overturns almost forty years of strict products liability precedent and nearly thirty years of expert opinion testimony precedent. These changes were aimed at making Wisconsin "open for business" by relieving Wisconsin businesses' fears of excessive litigation. Act 2, however, does not make Wisconsin a rogue state where plaintiffs can never recover. Most of the changes aligned Wisconsin with widely adopted standards in the areas of strict products liability and expert opinion testimony.

The largest challenge Wisconsin faces is how to interpret statutory nuances. The role of the judiciary in the next few years will become increasingly important as to how to interpret the *Daubert* standard in Wisconsin and how to apply new strict products liability standard.

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226. *Blinka*, *supra* note 21, at 18.

227. *State v. Peters*, 192 Wis. 2d 674, 688–90, 534 N.W.2d 867 (Ct. App. 1995).

228. *State v. Hibl*, 2006 WI 52, ¶ 52, 290 Wis. 2d 595, 714 N.W.2d 194 (internal citation omitted).

Moreover, it puts practitioners on notice of what challenges they may anticipate, such as more appeals or statutory interpretation. Yet Act 2 may be more ideological than substantive. The change between the old and new law is seemingly slighter than expected to the point where practitioners will not need to revamp their practices. For example, practitioners are not unfamiliar with introducing evidence of a reasonable alternative design for design defects cases in Wisconsin. Thus, Act 2's classifications of manufacturing defects, design defects, and failure to warn do not greatly impact the practice of strict products liability law. Additionally, Wisconsin courts had retuned the relevancy standard, which nudged it closer to *Daubert,* while ostensibly rejecting the federal standard. Thus, this change was not necessarily a radical departure from Wisconsin's innovative relevancy rule and will not likely transform the litigation practice. Therefore, Act 2's changes to tort law in Wisconsin will change the legal atmosphere in the next few years, but will not drastically alter the civil justice system.