Bricker & Eckler
ATTORNEYS AT LAW

COLUMBUS I CLEVELAND
CINCINNATI-DAYTON

BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215-4291
MAIN: 614.227.2300
FAX: 614.227.2390

Miranda C. Motter
614.227.4810
mmotter@bricker.com

OMA Government Affairs Committee
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I. Tort Reform

A. *The American Chemical Society v. Leadscope, Inc*., Ohio Supreme Court Case No. 2010-1335

The OMA joined with the Ohio Chamber of Commerce and the Ohio Council of Retail Merchants to file an amici curiae brief in support of The American Chemical Society (ACS) in *The American Chemical Society v. Leadscope, Inc*., Ohio Supreme Court Case No. 2010-1335. The amici curiae brief was filed on February 28, 2011.

Chemical Abstracts in Columbus is a division of ACS. ACS is asking the Court to reverse a $26.5 million judgment, which includes $7.5 million in punitive damages. The case stems from an intellectual property dispute between ACS and three former employees who left ACS in 1997 to start their own business. ACS filed suit for misappropriation of trade secrets and other claims. The employees' new company, Leadscope, Inc., filed a counterclaim for "malicious litigation," defamation, and tortious interference with business relations. The bulk of the award is premised on the defamation claim.

The two statements upon which the defamation damages are based are fairly routine types of statements, yet they supported a multi-million dollar defamation verdict. The first statement was in an internal memo sent by the company to all of its employees informing them that ACS had initiated a lawsuit against the former employees and their new company "who sought and received a patent for technology indistinguishable from a project on which they worked while employees of Chemical Abstract Service in the 1990's." The memo further advised employees not to comment on or communicate about the lawsuit. The second statement, made by legal counsel and published in *Business First,* was: "Our motivation in filing suit is to acquire back the protected information that they took from us." These are the only statements underlying the defamation claim that resulted in the multi-million dollar verdict.

The OMA is participating in this case due to its potential impact on OMA members and the broader business community.

Oral argument was held on September 7, 2011. The Court was very engaged and had many questions for both parties. The Court seemed particularly interested in the issues related to "malicious litigation" and whether such a claim exists in Ohio. The Ohio Attorney General made an appearance and participated in the oral argument to assert that no claim for "malicious litigation" exists or should be recognized in Ohio. The case awaits a decision by the Ohio Supreme Court.

B. **Punitive Damages - Bifurcation**

In S.B. 80, the Ohio General Assembly amended Ohio's punitive damage statute. One of the changes was to provide for the mandatory bifurcation of the compensatory damage phase of a trial and the punitive damage phase of a trial upon request of any party. See R.C. 2315.21(B). By enacting this provision, the General Assembly sought to ensure that evidence of a defendant's wealth or misconduct did not taint the jury's assessment of liability.

The constitutionality of this provision -- R.C. 2315.21(B) -- has been attacked in recent years. The Tenth District Court of Appeals was the first appellate court to consider the constitutionality of this provision and upheld it as constitutional. See *Hanners v. Ho Wah Genting Wire & Cable*, 10th Dist. No. AP-361, 2009-Ohio-6481. More recently, the Eighth District Court of Appeals considered this same issue and held that the statute violated the Modern Courts Amendment and, thus, was unconstitutional. See *Havel v. Villa St. Joseph*, 8th Dist.No. 94677, 2010-Ohio-5251. The Ohio Supreme Court certified a conflict among the district courts and will decide whether the statute requiring mandatory bifurcation of the punitive damage phase of a trial is constitutional. The case has been fully briefed and oral argument is scheduled for September 21, 2011.

The Ohio Alliance for Civil Justice, of which the OMA is a member, participated in this case by filing an amicus brief urging the Court to uphold the constitutionality of the statute.

C. **Statute of Limitations on Written Contracts (House Bill 170)**

Statute of Limitations on Written Contracts (House Bill 170). Earlier this year, former Representative Robert Mecklenborg (R-Cincinnati) introduced legislation that would reduce Ohio’s statute of limitations on written contracts from 15 years to six years. House Bill 170 conforms Ohio’s statute of limitations to a reasonable time period – a six year period that is utilized by a plurality of states (22). Currently, Kentucky stands with Ohio in liberally allowing 15 years to bring suit on a written contract.

Allowing suits on stale claims makes cases difficult and unfair to defend, increases the burden on an overtaxed court system and imposes unnecessary expenses on the cost of doing business in Ohio. House Bill 170 will modernize Ohio’s antiquated provision and sends a message to the nation’s economic drivers – that Ohio is open for business.

The Ohio House approved House Bill 170 in June by a vote of 86-8. Shortly after the bill's passage, Rep. Mecklenborg was arrested for drunken driving in Indiana and has since resigned his seat. It is unclear at this point who lead the charge in moving House Bill 170 through the Ohio Senate. The OMA, along with the OACJ, has been discussing these issues with legislative leaders.

House Bill 170 is current pending before the Senate Judiciary – Civil Justice Committee. Companion legislation was also recently introduced in the Ohio Senate (SB 224) to help move forward this important reform measure.

D. **A State False Claims Act (Senate Bill 143)**

In April 2011, Senators Jim Hughes (R-Columbus) and Scott Oelslager (R-North Canton) introduced legislation that would enact a state false claims act in Ohio. The bill, Senate Bill 143, is very broad in scope and could impose a significant cost on Ohio's businesses – costs associated with defending against allegations of fraud.

Senate Bill 143 provides for the recovery of treble damages and steep civil penalties for defrauding the state of money or property. Most significantly, Senate Bill 143 authorizes private individuals to bring *qui tam* civil actions in the name of the state to remedy the frauds. This legislation is modeled off the federal false claims law and if deemed "compatible" with the federal law, Ohio would be eligible to receive additional federal recovery dollars in relation to false claim actions. The recovery of additional federal dollars is the chief motivation to enact false claims law in Ohio.

Ohio Attorney General Mike DeWine publicly announced his support for the proposed law and recently testified as a proponent of the bill before the Senate Judiciary – Civil Justice Committee. General DeWine described the bill as necessary because he believes a false claims law is an effective tool to root out fraud committed by government vendors.

While the bill would allow the state's attorney general to independently pursue whistleblower claims, the real concern to Ohio's manufacturing community is the bill's *qui tam* provisions, which allows private individuals with knowledge of possible fraudulent activity to file suits in state courts against anyone doing business with public entities or other entities that receive state funds. If enacted into law, businesses of all types would be exposed to allegations of fraud by private citizens.

The OMA has been working diligently to communicate key concerns and unintended consequences to key policymakers. **The Senate Judiciary – Civil Justice Committee recently scheduled this bill for a hearing on September 21. The Committee's Chair, Senator Mark Wagoner (R-Ottawa Hills), intends to hold a series of interested party meetings and at least one additional hearing for opponents. The OMA, through the OACJ, is working to line up witnesses for that meeting.**

E. **Offers of Judgment (Senate Bill 52)**

Earlier this year, Senate Eric Kearney, a Democrat from Cincinnati, introduced legislation requesting the Ohio Supreme Court to amend Rule 68 of the Ohio Rules of Civil Procedure to reflect Federal Rule 68's offer of judgment. However, the legislation also asks the Court to extend Federal Rule 68's offer of judgment to plaintiffs.

Senator Kearney sponsored a similar bill last General Assembly. The Senator's original bill, SB 36, was supported by the OACJ because of its limited approach to the offer of judgment tool – extending it only to defendants. The OACJ withdrew its support when the bill was amended to request the Court to consider a bilateral offer of judgment rule, which would allow either a defendant or <u>a plaintiff</u> to utilize offers of judgment. SB 36 died in the Senate Rules Committee.

The manufacturing community, along with many other business groups, continues to be concerned with Senator Kearney's current bill and its bilateral offer of judgment approach. Senate Bill 52 is pending in the Senate Judiciary – Civil Justice Committee and has not been scheduled for another hearing since March.

F. **Employer Intentional Torts**

On July 6, 2011, the Ohio Supreme Court decided *Ward v. United Foundries, Inc.,* holding that there was no insurance coverage for employer intentional torts under the insurance policy at issue. The case is important to all employers and particularly to manufacturers.

In Ohio, employees injured on the job may receive benefits under Ohio's workers' compensation system. They can also sue their employer in court to recover damages for an employer intentional tort. Such lawsuits, which fall outside of the workers compensation system, can be very expensive to defend and can result in large damage awards against employers. For years, insurers have offered a "stop-gap" insurance endorsement to their commercial general liability policies in Ohio, and many employers have purchased them believing that this endorsement provided a duty to defend the insured in the event of an employer intentional tort suit against it.

Such was the case with United Foundries, Inc. until the Ohio Supreme Court held that United Foundries did not have the coverage it thought it had and, thus, its insurer, Gulf Underwriter's Insurance Company, did not have a duty to defend it in the employer intentional tort action. Thus, United Foundries was required to hire attorneys to defend it in the employer intentional tort suit. If the case is

resolved by judgment or settlement, United Foundries will be responsible for that payment as well.

This decision underscores the need for employers to understand their insurance coverage. As a result of this 7-0 decision (with Justice Pfeifer concurring in judgment only), employers with similar stop-gap endorsements should be prepared to handle employer intentional tort actions entirely on their own, including paying all defense costs (such as attorney fees), any settlement, or any judgment rendered in favor of the employee. For more information regarding this decision see the attached summary.