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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2005-06

(session year)

Senate

(Assembly, Senate or Joint)

Committee on Judiciary, Corrections and Privacy...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (July 2012)

Senate

Record of Committee Proceedings

Committee on Judiciary, Corrections and Privacy

Senate Bill 58

Relating to: product liability of manufacturers, distributors, and sellers.

By Senators Kanavas, Grothman, Stepp, Kapanke, Roessler and Reynolds; cosponsored by Representatives Huebsch, Nischke, Gundrum, Van Roy, Kestell, Hahn, Nerison, Gielow, Vos, Nass, Kreibich, Vrakas, Pettis, Ott, Petrowski, Gunderson, Hines, McCormick, F. Lasee and Musser.

February 15, 2005 Referred to Committee on Judiciary, Corrections and Privacy.

February 23, 2005 **PUBLIC HEARING HELD**

Present: (4) Senators Zien, Roessler, Grothman and Taylor.
Absent: (1) Senator Coggs.

Appearances For

- Ted Kanavas, Madison — Senator, State Senator
- Ralph Weber, Milwaukee
- James Mathie, Waukesha
- James Buchen, Madison — WMC
- Jim Mathie
- Bill Smith, Madison — National Federation of Independent Businesses

Appearances Against

- Dan Rottier — Wisconsin Association of Trial Lawyers
- Jill Rakauski, Racine
- Vicki Tatera, Greenfield
- Mike Riley, Madison — State Bar Association
- Kent Kutsugeras, Juneau
- Joanne Rica, Milwaukee — Wisconsin State AFL-CIO
- Carolyn Castore, Milwaukee — Wisconsin Citizen Action

Appearances for Information Only

- None.

Registrations For

- Don Esposito, Sun Prairie
- Dale Droboard, Oshkosh — Best Wesern
- John Stona, Oshkosh
- Bob Nadulske, Oshkosh — Oshkosh Chamber of Commerce

- John Casper, Oshkosh — Oshkosh Chamber of Commerce
- Rob Kleman, Oshkosh — WEDA
- Matt Hauser, Madison — Petroleum Marketers
- Matt Hauser, Madison — Wisconsin Association of Convenience Stores
- Kevin Kelly, Holmen — Insurance Industry
- Mark Benlcowski, Mukwanago
- Bryce Styza
- Bill Berndt, River Falls
- Brenda Newby, Almond
- Paul Heubner, Beaver Dam
- Steve Zich, Appleton
- Ken Joosnew, Appleton
- Dave Framke, Wausau
- Mike Wiltzius, Sheboygan
- Douglas Daun
- Daniel Daun, Sheboygan
- Melissa Wolf, Kenosha
- Elizabeth Ramsey, Union Grove
- Tim Hanson
- John Mau, Kaukauna
- Jim Wersal, Stoughton
- Jeff Mau, Kaukauna
- Michael Dawson, Racine
- Darryl Spang, Franksville
- Harold Smart, Union Grove
- James Mikla, Baldwin
- Christine Mikla, Baldwin
- Terry Larson, East Troy
- John Darrey, Racine
- Craig Rakowski, Wauwatosa
- Kerry Sutton, New Berlin
- David Hoffman, BlackRiver Falls
- Philip Fritsche, Beaver Dam
- Rob Bultman, Wauwatosa
- Jenny Bultman, Wauwatosa
- Gary Roehrig
- Greg Stellrecht, Onalaska
- David Turk, Onalaska
- Jon Olson, La Crosse
- Tom Thompson, Onalaska
- Steve Treu, Sparta
- Sandra Thompson, Onalaska
- Jane Hagman, Manitowoc

- Brandon Bartow, Manitowoc
- Robert Schuette, Manitowoc
- James Check, Manitowoc
- Julie Mancl, Wisconsin Rapids
- Carey Larson, Plover
- David Sowieja, Stevens Point
- Eric Englund, Madison — Wisconsin Insurance Alliance
- John Bakkestuen, West Salem
- Mark Camaigri, Amherst
- Mike Lotto
- Ken Nyhns, Bloomer
- Al Sundstrom, Eau Claire
- Neil Haselwander, Eau Claire
- Randall Knapp, LaCrosse
- Tom Wellnitz, Janesville
- Wayne Foster
- Kevin Dittmer, Milwaukee
- Steve Miazga, Pewaukee
- Dave Molenda, Brookfield
- Dan Riedel, Muskego
- Christine Howard Turowski, Waukesha
- Joe Behmke, Franklin
- Michael Kaerek, Pewaukee
- Darrell Jutz, Hartford
- Barbara Slack, Monona
- Michael Lester, Eau Claire
- Brad Gustafsow, Eau Claire
- Ann Pienkos, Lake Geneva
- Audrey Boss, Delavan
- Vicki Markussen, LaCrosse
- John Lautz, West Salem
- Mark Etrheim, Onalaska
- Dave Osborne, Oregon
- Greg Schaffer, McFarland
- Abe Degnau, DeForest
- Frank Maddeki
- Ron Derrick, New Richmond
- Mike Check, Manitowoc
- Nancy Caldwell, Lake Mills
- Brian McKee, Madison
- David Dawns, Neenah
- Paul Groskraut, Oshkosh
- Cory Sillars, Wausau
- Brandon Bergman, Waukesha

- John Sowle, Brookfield
- Stan Martensen, Menasha
- David Eisele, Tigerton
- Monica Sommerfeldt Lewis, Eau Claire
- Jim Lepplu, Appleton
- Jim Byers, Oconomowoc
- Heidi Zich, Appleton
- Bill Barry, Appleton
- Bob Romenesko, Little Chute
- Michael Wissel, Beaver Dam
- Dan Schneider, Kiel
- Pam Hyps, New Berlin
- Mike Mrdjenvich, Howards
- Andrew Palec, Wauwatosa
- Steven Davis, Oshkosh
- Pete Hanson, Madison — Wisconsin Restaurant Association
- Doug Johnson, Madison — Wisconsin Merchants Federation
- Bill Smith, Madison — Wisconsin Coalition for Civil Justice
- Peter Thillman, Green Bay — WEDA
- Kaman Hanna, Baraboo
- Jennifer Brown, Green Bay — WEDA
- Jennifer Brown, Green Bay — WEDA
- Jim Hough, Madison — Wisconsin Coalition for Civil Justice
- Jim Hough, Madison — Wisconsin Economic Development Association
- Jim Hough, Madison — Civil Trial Counsel of WI
- Wendell Willis, Milwaukee — WMCA
- Pamela Jones, Waterford — HNI Risk Services Inc.
- Don Notzing, Eau Claire — TRAC Inc
- Chris Tanke, Hartland — HNI
- Joe Malett, Wauwatosa — HNI Risk Services
- Steve Mueller, Sussex — HNI Risk Services
- Carolyn Wergin, Delafield
- Tom Howells — Wisconsin Motor Carriers Association
- Richard Jenkins, Racine — Diamond Transportation
- Donald Jerrell II, East Troy — HNI Risk Services Inc.
- Mahlon Gragen, Kenosha — ATC Leasing Co.
- Steve Setterlund, Richland Center — Setterlund Trucking Inc.
- Ron Kuehn
- Gary Manke — Midwest Equipment Dealers Association
- Michael Vaughan, Madison — Wisconsin Institute of CPA's
- Eric Parker, Waterford

<u>Registrations Against</u>

- Ruth Simpson, Madison
- Sue Moline Larson, Madison — Rev., Lutheran Office for Public Policy in WI
- Paul Sicola, Milwaukee — Wisconsin Academy of Trial Lawyers

April 5, 2005 EXECUTIVE SESSION - POLLING

Moved by Senator Zien that **Senate Bill 58** be recommended for passage as amended.

Ayes: (3) Senators Zien, Roessler and Grothman.
Noes: (2) Senators Taylor and Risser.

PASSAGE AS AMENDED RECOMMENDED, Ayes 3, Noes 2

Moved by Senator Zien that **Senate Amendment 1** be recommended for adoption.

Ayes: (3) Senators Zien, Roessler and Grothman.
Noes: (2) Senators Taylor and Risser.

ADOPTION OF SENATE AMENDMENT 1 RECOMMENDED, Ayes 3, Noes 2

Moved by Senator Zien that **Senate Amendment 2** be recommended for adoption.

Ayes: (3) Senators Zien, Roessler and Grothman.
Noes: (2) Senators Taylor and Risser.

ADOPTION OF SENATE AMENDMENT 2 RECOMMENDED, Ayes 3, Noes 2

Brian Deschane
Committee Clerk

04-04-05

SB 58

- Moved by Senator Zien that this Senate Bill be recommended for PASSAGE AS AMENDED by Senate Amendment 1 and Senate Amendment 2:

Aye _____ No _____

Assembly Bill 90

Relating to: notice of appeal of a municipal court judgment and requesting a jury trial on appeal from that judgement.

By Representatives Gundrum, Cullen, F. Lasee, Gunderson, Staskunas, Hines, Albers and Vrakas.

- Moved by Senator Zien that Assembly Bill 90 be recommended for CONCURRENCE:

Aye _____ No _____

Senate Bill 70

Relating to: evidence of lay and expert witnesses.

By Senators Kanavas, Stepp, Olsen and Brown; cosponsored by Representatives Suder, Townsend, Hahn, Bies, Jensen, Hines, Van Roy, Gunderson, Ott, Albers, Hundertmark, F. Lasee, Davis, Kreibich and Lamb.

- Moved by Senator Zien that this Senate Bill be recommended for PASSAGE:

Aye _____ No _____

Assembly Bill 91

Relating to: noncompliance with a municipal court order.

By Representatives Gundrum, Bies, Krawczyk, Hines, Stone, Lothian, Albers, Pridemore and Vrakas.

- Moved by Senator Zien that Assembly Bill 91 be recommended for CONCURRENCE:

Aye _____ No _____

GLENN GROTHMAN

04-04-05

SB 58

- Moved by Senator Zien that this Senate Bill be recommended for PASSAGE AS AMENDED by Senate Amendment 1 and Senate Amendment 2:

Aye _____ No ✓

Assembly Bill 90

Relating to: notice of appeal of a municipal court judgment and requesting a jury trial on appeal from that judgement.

By Representatives Gundrum, Cullen, F. Lasee, Gunderson, Staskunas, Hines, Albers and Vrakas.

- Moved by Senator Zien that Assembly Bill 90 be recommended for CONCURRENCE:

Aye ✓ No _____

Senate Bill 70

Relating to: evidence of lay and expert witnesses.

By Senators Kanavas, Stepp, Olsen and Brown; cosponsored by Representatives Suder, Townsend, Hahn, Bies, Jensen, Hines, Van Roy, Gunderson, Ott, Albers, Hundertmark, F. Lasee, Davis, Kreibich and Lamb.

- Moved by Senator Zien that this Senate Bill be recommended for PASSAGE:

Aye _____ No ✓

Assembly Bill 91

Relating to: noncompliance with a municipal court order.

By Representatives Gundrum, Bies, Krawczyk, Hines, Stone, Lothian, Albers, Pridemore and Vrakas.

- Moved by Senator Zien that Assembly Bill 91 be recommended for CONCURRENCE:

Aye ✓ No _____

FRED RISSER

04-04-05

SB 58

- Moved by Senator Zien that this Senate Bill be recommended for PASSAGE AS AMENDED by Senate Amendment 1 and Senate Amendment 2:

Aye X No _____

Assembly Bill 90

Relating to: notice of appeal of a municipal court judgment and requesting a jury trial on appeal from that judgement.

By Representatives Gundrum, Cullen, F. Lasee, Gunderson, Staskunas, Hines, Albers and Vrakas.

- Moved by Senator Zien that Assembly Bill 90 be recommended for CONCURRENCE:

Aye X No _____

Senate Bill 70

Relating to: evidence of lay and expert witnesses.

By Senators Kanavas, Stepp, Olsen and Brown; cosponsored by Representatives Suder, Townsend, Hahn, Bies, Jensen, Hines, Van Roy, Gunderson, Ott, Albers, Hundertmark, F. Lasee, Davis, Kreibich and Lamb.

- Moved by Senator Zien that this Senate Bill be recommended for PASSAGE:

Aye X No _____

Assembly Bill 91

Relating to: noncompliance with a municipal court order.

By Representatives Gundrum, Bies, Krawczyk, Hines, Stone, Lothian, Albers, Pridemore and Vrakas.

- Moved by Senator Zien that Assembly Bill 91 be recommended for CONCURRENCE:

Aye X No _____

CAROL ROESSLER

-04-04-05

SB 68

- Moved by Senator Zien that this Senate Bill be recommended for PASSAGE AS AMENDED by Senate Amendment 1 and Senate Amendment 2:

Aye _____ No X

Assembly Bill 90

Relating to: notice of appeal of a municipal court judgment and requesting a jury trial on appeal from that judgement.

By Representatives Gundrum, Cullen, F. Lasee, Gunderson, Staskunas, Hines, Albers and Vrakas.

- Moved by Senator Zien that Assembly Bill 90 be recommended for CONCURRENCE:

Aye X No _____

Senate Bill 70

Relating to: evidence of lay and expert witnesses.

By Senators Kanavas, Stepp, Olsen and Brown; cosponsored by Representatives Suder, Townsend, Hahn, Bies, Jensen, Hines, Van Roy, Gunderson, Ott, Albers, Hundertmark, F. Lasee, Davis, Kreibich and Lamb.

- Moved by Senator Zien that this Senate Bill be recommended for PASSAGE:

Aye _____ No X

Assembly Bill 91

Relating to: noncompliance with a municipal court order.

By Representatives Gundrum, Bies, Krawczyk, Hines, Stone, Lothian, Albers, Pridemore and Vrakas.

- Moved by Senator Zien that Assembly Bill 91 be recommended for CONCURRENCE:

Aye X No _____

LENA TAYLOR

WISCONSIN STATE LEGISLATURE

REPRESENTING WISCONSIN BUSINESS

Wisconsin Manufacturers & Commerce

Memo

TO: Members of the Senate Judiciary, Corrections and Privacy Committee

FROM: James A. Buchen, Vice President, Government Relations

DATE: February 23, 2005

RE: Support SB 58 - Product Liability Reform

Product Liability Law in Wisconsin is based predominately on common law as interpreted by case law, with some specific statutory provisions. Product liability is a strict liability theory which does not require proof of negligent conduct but relates directly to product defect. Wisconsin Manufacturers and Commerce and the Wisconsin Coalition for Civil Justice Reform support legislation that is based on fairness and offers reasonable standards and defenses for determining liability of both manufacturers and sellers.

The proposed product liability legislation would assist **manufacturers** by requiring proof of a "reasonable alternative design" to prove a defective design, moving Wisconsin away from the much broader and loose "consumer expectation" test. The proposal also excludes "subsequent remedial measures" from being introduced as evidence and imposes a 15 year statute of repose.

The proposed legislation would also remove **sellers** from strict (product) liability litigation whenever there is a viable manufacturer and also provides a sealed container defense.

The proposed legislation also addresses the **joint and several liability** issue created by a 2001 Supreme Court decision which held that the positive changes to joint and several liability adopted in the 1995 session do not apply to strict liability cases, including products cases.

The specific provisions of the bill:

- Define the basis for a manufacturer's liability;
- Require proof of a reasonable alternative design to prove a defective design;
- Provide a defense where damage arises from an inherent characteristic of the product that is open and obvious;
- Provide a defense where damage results from product misuse, alteration or modification;
- Preclude liability of a seller unless the manufacturer is not subject to service within the state or a judgment could not be enforced against the manufacturer;
- Preclude liability of a seller for negligence unless the seller failed to exercise reasonable care in assembling, inspecting or maintaining the product or in giving warnings or instructions;
- Provide defense for intoxication;
- Exclude from evidence remedial measures taken subsequent to the plaintiff's damages; and,
- Create a 15-year statute of repose.

For these reasons Wisconsin Manufactures and Commerce urges the committee to vote in **support** of SB 58.

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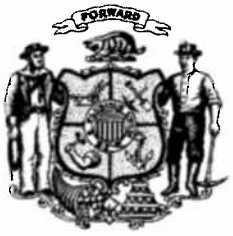
WISCONSIN STATE LEGISLATURE


FORWARD

WISCONSIN
CITIZEN ACTION

Testimony of Carolyn Castore of Wisconsin Citizen Action on
Senate Bill 58
to the
Senate Committee on Judiciary, Corrections and Privacy
February 23, 2005

Good morning, I am Carolyn Castore the legislative director of Wisconsin Citizen Action. Thank you, Chairman Zien, for the opportunity to speak.

As the state's largest public-interest voice, representing 65,000 household members and 200 diverse citizen groups, Wisconsin Citizen Action reflects its members' deep and intense concerns over consumer and worker rights in Wisconsin. Our members expect to see the state government acting fairly and efficiently to insure that the products we consume are safe and to protect our legal right to challenge potentially dangerous products introduced into the marketplace.

This is not an abstract, legalistic concern. We have seen again and again corporations knowingly, consciously introducing or keeping on the market, products and production processes extremely dangerous to public health. Examples are numerous, from flammable children's pajamas to flaming gas tanks in Ford Pinto's, citizens have looked to their government to provide protection from irresponsible corporations.

A list of well known examples is attached to my testimony. It is by no means an exhaustive list. In reviewing them, some common patterns become apparent:

- Unfortunately, some corporations have shown that they will sometimes place profit above risk to human lives, even those of children and infants. In a number of cases, corporations knowingly introduced dangerous products.
- Many of these dangers took decades to uncover because of industry reluctance to admit the hazards they were imposing on the public. Both government regulators and ordinary consumers were kept in the dark about the dangers revealed by corporations' product testing and internal memos discussing these hazards
- The setting of government standards lags behind reality due to corporations' closely-held secrets, the pace of technology's advances, and well-funded industry resistance that can delay regulation decades after the menace was known by manufacturers. Regulations, while vitally necessary, are not sufficient to ensure

corporate accountability and a proper level of concern for selling only safe products.

- The civil justice system has been the most effective part of government in recognizing and punishing corporate misconduct toward consumers.

Now, given what experience of recent years has taught all of us, how does SB 58 stack up? To be brief, very poorly.

First, SB 58 establishes a transparent but justice-proof shield of hypocritical "compliance." As long as corporate officials can claim that they were living up to the most current regulations, they have immunity. SB 58 is a giant step back from the current situation where corporate officials are at least forced to conceal the fact they fully knew the consequences of putting dangerous products in the marketplace. Under SB 58, proof that officials understood the perils in which it was placing the public would be irrelevant. They would no longer have to resort to the shredder to destroy damning internal studies and memos. This approach does not make sense and places corporate interests above the lives of regular people.

So think of this provision as the "invisible shield" bragged about in old TV ads: you can see what they're doing but they are still protected from the consequences of their actions.

Second, SB 58 directly undermines the role of juries in our civil justice system.

The record on tobacco shows that armies of highly paid corporate lobbyists and strategically directed campaign contributions can prevent protective laws and regulations from being passed or implemented. Again and again, it has been our civil justice system—most often, juries of ordinary citizens—that has stood up for the public interest when other branches of government failed to act. But SB 58 would severely weaken juries' vital role. SB 58 sets up a convoluted two-stage system that usurps the jury's role as the ultimate finders of fact, and relegates the jurors to deciding only the level of damages.

Third, SB 58 sets up one-sided time constraints on product liability that shift the risk entirely to consumers and workers, and away from manufacturers responsible for placing only safe products on the market.

This provision may be convenient for manufacturers but leaves consumers bearing all of the risk. Some products produce visible dangers only after years of exposure. Other products are intended to be used for longer than 15 years.

Finally, I want to stress that our membership is deeply concerned at this juncture about maintaining and creating jobs in Wisconsin.

It is in this context that we of Wisconsin Citizen Action say that SB 58 has nothing to do with job creation or job preservation. Product-liability cases are so rare that their cost has absolutely nothing to do Wisconsin's economic competitiveness. Just 85

product-liability lawsuits were filed in 2001--that amounts to ***.0003 of 1%*** of the 250,000-plus legal actions filed that year.

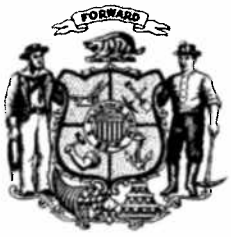
In contrast, the ***Wall St. Journal*** informs us, almost half of all legal actions 1985-1991 were filed by one corporation against one another. It is a bit hard for us to see how a tiny sliver of suits by consumers amount to such an economic threat to Wisconsin business while the lion's share of legal actions are perfectly acceptable.

SB 58 focuses exclusively on the miniscule number of cases filed by consumers and seems intent on wiping out many decades of hard-won consumer rights and safety protections. It grants immunity to the most irresponsible members of the business community. It shifts responsibility from the manufacturer to the consumer, bringing back the "buyer beware" mentality we thought left behind in the 19th century. We need to recognize that we need to promote higher—not lower-- standards of humane and responsible corporate citizenship

Thank you.

PRODUCT	PROBLEM	CORPORATE RESPONSE
Lead-based paint	1904 Sherwin-Williams memo calls lead paint "poisonous." Years of study confirm that lead paint results in permanent learning disabilities and severe health problems for children exposed to it.	US industry successfully fought merely disclosing of danger lead paint to children while almost all advanced nations enacted total bans by 1930. US firms succeeded in blocking a ban until 1978.
Children's pajamas	Pajamas were highly flammable, resulting in horrific, life-altering injuries and scarring or death.	Riegel Textiles knew of danger but avoided adding flame retardant to pajamas. Only a lawsuit forced it to remove flammable pajamas from the market.
Ford Pinto	Gas tanks exploded during even minor rear-end collisions, result in terrible burn injuries and death.	Ford internal memos weighed the cost of repairing the design defect against the cost of injuries and deaths.
Tobacco	Long-term devastating health effects including lung cancer	Industry resistance to restrictions on sales and advertising persisted for decades, shifting only after disclosure of internal memos and multi-billion lawsuits.
Ford transmission	Cars slipped suddenly into reverse	Ford knew of defect, but corrected it only after $4 million punitive damage award
Playtex super-absorbent tampon	Caused toxic shock syndrome, resulting in deaths	Playtex disregarded alarming findings of company's studies
Dalkon shield contraceptive device	Resulted in pelvic disease and septic abortions	AH Robins misled doctors on risks and suppressed poor test results.


WISCONSIN STATE LEGISLATURE


FORWARD

TED KANAVAS

STATE SENATOR

Testimony on Senate Bill 58—Product Liability
Committee on Judiciary, Corrections, and Privacy
Wednesday, February 23, 2005

Chairman Zien and members of the Committee on Judiciary, Corrections and Privacy, I appreciate the opportunity to speak on Senate Bill 58 (SB 58), which relates to changes in product liability of manufacturers, distributors, and sellers.

Under current product liability law, manufacturers, distributors, and point of sale retailers of products must pay damage awards even if they are not negligent, and even if the plaintiff's own negligence caused the injury. In the theory of strict liability, the focus is on the product and end user rather than the actions of the manufacturers, distributors, sellers or plaintiffs.

This bill will continue to allow recovery of damages for product defects while injecting a dose of fairness into the process by offering reasonable standards and defenses for determining liability.

SB 58 will institute clearer standards by requiring proof of a "reasonable alternative design" to show a product defect, rather than a broad and variable "consumer expectation" test. Further, it will provide a reasonable defense for the manufacturers, distributors and sellers when a plaintiff is injured while under the influence of drugs or alcohol.

There are also other segments of this bill that are important to understand. It will provide a defense if an injury was caused by an inherent characteristic of the product that was open and obvious. In other words, if it is sharp don't run your hands over it, or if the seal is broken, don't drink it. Moreover, it will provide a defense if the seller receives the product in a sealed container and unable to test or inspect the product.

The proposed legislation also addresses the *joint and several liability* issue created by a 2001 Supreme Court decision which held that the positive changes to joint and several liability adopted in the 1995 session do not apply to strict liability cases, including products cases.

One important piece of this bill relates to what is referred to as the 51% rule. Under this bill, a product defendant whose responsibility for damages to the injured party is 51% or more is jointly and severally liable for all of those damages. The liability of a product defendant whose responsibility is less than 51% is limited to the product defendant's percentage of responsibility for the damages. Furthermore, the bill also allows the injured party to recovery from the product defendants when the injured party's causal

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responsibility for the injury is greater than an individual product defendant's responsibility for the damages to the injured party.

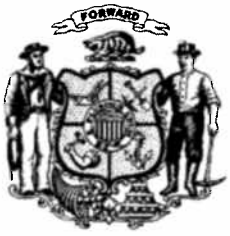
It should be noted that there is a defense if you can show that the sellers, distributors, and manufacturers applied reasonable standards when producing the product. Most of these manufacturers have lived within the reasonable standards set by the American National Standards (ANSI), who is represented by labor, manufacturers, government, business, and a wealth of others who have a vested interest in products being safe.

Finally, it will also create a 15-year statute of repose. Often times those that have designed or who played a significant part in the manufacturing of the product have no longer any ties with the company. Fifteen years is ample time, in my mind, to figure out whether the product is faulty or not.

In my view, SB 58 is a personal responsibility bill. Too often, we hear of ridiculous lawsuits from those who are only trying to strike it rich and take no responsibility for their own actions. The passage of this bill is common sense and is needed to stop such frivolous lawsuits.

Thank you for your consideration.


WISCONSIN STATE LEGISLATURE


FORWARD

Wisconsin State AFL-CIO ...the voice for working families.

David Newby, President • Sara J. Rogers, Exec. Vice President • Phillip L. Neuenfeldt, Secretary-Treasurer

TO: Senate Judiciary, Corrections and Privacy Committee

FROM: Phil Neuenfeldt, Secretary-Treasurer
Joanne Ricca, Legislative Staff

DATE: February 23, 2005

RE: **Opposition to Senate Bill 58**
Limits on Product Liability and Victims' Rights

The Wisconsin State AFL-CIO opposes SB 58 because the effect will be to deny workers just compensation for occupational deaths and injuries caused by defective products. The new harsh restrictions on victims' rights included in this bill would adversely affect consumers as well.

Unfortunately, deaths and injuries on the job seem almost invisible, but the numbers cannot be ignored. From 1997 to 2002, there were there were 624 deaths on the job in Wisconsin. We do not mean to imply that these deaths involved product liability, but they serve as an important reminder of hazards in the workplace. There continue to be hundreds of additional workplace injuries and illnesses as well. Workers deserve to have the protection of a strong liability law if a defective product is the cause of their death, injury or illness.

For example, a nurse at St. Joseph's Hospital in Milwaukee became seriously ill from an allergic reaction to certain latex medical gloves. Her lawsuit against the manufacturer resulted in the production of a safer glove. It is estimated that 5 to17 percent of health care workers are susceptible to an allergic reaction from latex, so this product liability case benefited a countless number of workers all over the country. Another case involved a plumber who suffered a severe knee injury when a step broke on a ladder designed with insufficient support rods under each step. We can't know how many workers were saved from future injury due to this lawsuit and the changes which were then made to the ladder design.

A strong system of liability law is necessary to promote workplace safety, encourage the design of safer machinery and production processes, and provide an incentive for the development of safer products. The labor movement wants just compensation for victims, whether they are workers or consumers – but above all we want there to be no more victims. That is why the deterrent effect of current product liability law is so vital and we oppose the gutting of victims' rights that SB 58 represents.

5333 West Blue Mound Road • Milwaukee, WI 53213 • 414.771.0700 • Fax 414.771.1715 • www.wisaflcio.org

Some of the major reasons we oppose SB 58 are:

(1) It would essentially absolve manufacturers of product liability if they complied with existing government regulations. This is no comfort to workers or consumers for the following reasons: (a) the regulatory process can lag far behind technological progress; (b) even current regulations are developed with minimal consensus and are strongly influenced by industry consultants; and (c) corporations can technically "comply" with existing regulations while their own confidential research indicates a potential health or safety threat from a product or chemical.

(2) It would place the burden on the injured party to essentially redesign the product in order to prove it was defective. Currently, the law recognizes that the consumer has an expectation of safety when buying a product, that the research and development arm of the manufacturer designed and tested the product with a foremost regard for safety and health. SB 58 changes that. A product would be defective only if "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the manufacturer and the omission of the alternative design renders the product not reasonably safe."

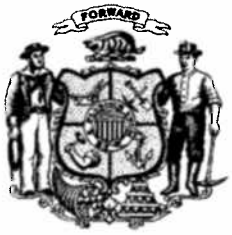
(3) It would place an arbitrary time limit on product liability. Once the product has been in the marketplace for 15 years, its manufacturer gets automatic immunity from legal action no matter how terrible the injury or illness from a defective product may be. Machinery used on farms, in industries and on construction sites is often used far longer than 15 years. In addition, occupational illness can be latent for decades, as we have learned with exposure to asbestos.

Workers and consumers are more vulnerable due to deregulation and the severe budget cuts that are crippling government enforcement of existing workplace and consumer protections. A strong product liability law is even <u>more</u> crucial today.

We ask members of the committee to oppose Senate Bill 58.

PN/JR/mj


WISCONSIN STATE LEGISLATURE


FORWARD

Keeping Wisconsin Families Safe
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Testimony of Daniel A. Rottier
on behalf of the
Wisconsin Academy of Trial Lawyers
before the
Senate Judiciary, Corrections and Privacy Committee
Rep. Dave Zien, Chair
on
2005 Senate Bill 58
February 23, 2005

Good morning, Senator Zien and members of the Committee. My name is Daniel A. Rottier. I am the managing partner in the law firm of Habush Habush and Rottier and serve as the President-Elect of the Wisconsin Academy of Trial Lawyers (WATL). On behalf of WATL, I thank you for the opportunity to appear today to testify in opposition to Senate Bill 58.

WATL, established as a voluntary trial bar, is a non-profit corporation with approximately 1,000 members located throughout the state. The objectives and goals of WATL are the preservation of the civil jury trial system, the improvement of the administration of justice, the provision of facts and information for legislative action, and the training of lawyers in all fields and phases of advocacy.

Senate Bill 58 is an attempt to roll back 40 years of common law and precedent. The legislation should be dubbed the "Defective Product Protection Act." In an effort to obtain legislative protection for putting dangerous and defective products in the marketplace SB 58 effectively disarms Wisconsin citizens who are trying to exercise their Constitutional right to fight back and hold powerful institutions accountable. This bill takes away citizens' right to effective legal self-defense — the only effective weapon that ordinary citizens have against large corporations.

It is ironic that the hearing on this bill comes precisely at a time when alarm bells ought to be sounding and red lights flashing about the government's failure to protect us from the conduct of corporations that knowingly expose consumers and workers to dangerous products.

Two weeks ago, executives of WR Grace Co. were indicted for concealing the toxic effects from its asbestos mine in Libby, Montana. Many hundreds of miners, family members and town residents have died from exposure to asbestos particles, and an estimated 1200 people are ill from breathing in the asbestos fibers. In addition, countless individuals have been unknowingly exposed to vermiculite because it has been used for insulation in homes and gardening products. Corporate memos show executives discussed how to keep investigators from examining the miners' health, how to avoid having to put safety warnings on their products, and how to conceal the dangers of working with asbestos.

Yet just days before, on Feb. 2, our nation's president criticized "frivolous asbestos lawsuits." I make that comment not to score points against our president, but to emphasize how casually accepted is the notion that lawsuits are simply contrived, artificial and unrelated to any real harm experienced by real people. It is simply much more comfortable to assume lawsuits are frivolous than to confront the very frightening reality that corporate decision makers might knowingly expose fellow human beings, including children, to serious suffering and even death.

Another recent example is the Vioxx painkiller rushed on the market by Merck Pharmaceutical in 1999, and achieved annual sales of $2.5 billion by 2003. However, the evidence seems to indicate that Merck was aware of severe cardiovascular side effects and concealed full information from both the larger medical community and the Food and Drug Administration. As many as 55,000 deaths may be the result of strokes and heart attacks triggered by Vioxx.

Fortunately, as horrific as these cases are, they are extremely limited in number. These cases have a minimal financial impact on the financial health of Wisconsin business, but maintaining citizens' right to legal self-defense is vital to preserving the health and well-being of our citizens.

Still, I am sure that you will hear repeatedly that the SB 58 is vital to establishing a hospitable and competitive business climate in Wisconsin. However to counter the clouds of rhetoric, legislators should consider some important facts. Let me first point out that Wisconsin's legal system received a highly favorable ranking in a 2004 survey of corporate attorneys conducted by the U.S. Chamber of Commerce, ranking 10th most favorable in the country. This is defense attorneys speaking and they think Wisconsin's liability system is fair. Second, the chief representative of the Civil Justice Counsel, James Mathie, testified on Sept. 11, 2003 that Wisconsin did not have a crisis of product liability suits.

So why the rush to legally disarm our citizens, to take away their day in court if they feel that they have been harmed by defective products? We think that the "Defective Product Protection Act" heads in exactly the wrong direction

WATL has five major complaints with the "Defective Product Protection Act".

1) *Under the "Defective Product Protection Act" compliance with existing governmental regulations would virtually immunize corporations against any findings of liability.* The problem: history shows that corporations often cynically "comply" with existing regulations, all the while concealing explosive information on their products' threat to the health and safety of the public. Corporations have been well aware of severe threats to public health—asbestos, lead paint, the Ford Pinto gas-tank, tobacco, and others—but kept these findings secret from both the public and regulators, sometimes for decades. Meanwhile, they were technically "complying" with existing regulations. It was only the civil justice system that brought these and other abuses to light, and resulted in the removal of threats to public health and safety. In many cases, regulatory developments lag far behind safety technology and are opposed by industry. What exposed these defective products to public scrutiny? The American jury system. . Citizens more than ever need the right to fight dangerous products in court and to preserve the public's health and safety, because agencies like the FDA have too often been colonized by the big drug companies and fail to protect the public interest.

2) Contrary to myth, product liability cases are extremely rare and do not threaten the health of our economy. In its 2001 annual report, the US Consumer Product Safety Commission estimated that over 14 million emergency-room visits were the result of injuries from consumer products. Yet in that same year, only 85 product liability cases were filed in our state That amounts to an infinitesimal ***.0003 of 1%*** share of the 256,596 civil cases filed in Wisconsin that year. By comparison, according to the ***Wall St. Journal***, almost half of all legal actions 1985-1991 were filed by corporations suing each other. The Rand Institute for Civil Justice recently found that 47% of punitive damages occurred in business vs. business cases, compared with just 5% in product-liability cases. If the genuine concern is the impact of costly lawsuits on U.S. competitiveness, why then does SB 58 spotlight the tiny molehill of product-liability cases rather than the huge mountain of corporate vs. corporate lawsuits?

3) *Under the "Defective Product Protection Act," once a product has been in the marketplace for 15 years, its manufacturer automatically acquires immunity from product-liability legal action.* There is an arbitrary presumption that the responsibility for a product's safety can no longer be allocated to the corporation that designed, built, and sold the product. The risk of using the product is then arbitrarily shifted to the consumer or worker. The bill's door of immunity swings only one-way: The bill provides no notification to workers or consumers that the 15-year-old product bears a taint of questionable safety for which they would now bear any risk.

4) *The "Defective Product Protection Act" would turn back the clock several centuries to the old "buyer beware" law of the jungle that applied before protections on public safety were enacted.* The proposed legislation would codify the "open and obvious" defense, which

actually encourages defendants to remove safeguards. One particularly bizarre provision would require *the plaintiff* to demonstrate that there was a safer way of designing and producing a product that turns out to contain a hazardous design defect! This entirely abandons the notion that a manufacturer has the responsibility to sell a product only when it is certain that the product is safe. It also defeats the basic public policy reason for strict liability: the risk of the loss associated with the use of defective products should be borne by those who have created the risk and who have reaped the profit by placing a defective product in the stream of commerce."

5) *The changes proposed under this bill would defeat the entire purpose of common law products liability law in Wisconsin, which is to prevent the introduction of defective and dangerous products into the stream of commerce.* It is no secret that one of the main purposes of the "Defective Product Protection Act" is to reverse the Wisconsin Supreme Court's decision in *Fuchsgruber v. Custom Accessories,* 2001 WI 81, 244 Wis. 2d 758, 628 N.W.2d 833. The Court held that strict liability claims were not subject to joint and several liability under § 895.045, Wis. Stats., because strict liability was not based on negligence. The aim of this legislation is to make strict liability claims simply "garden-variety negligence" claims and undo the historic development of strict liability claims.

Below is a more thorough discussion of our problems with SB 58.

SB 58 Represents a "Sea Change" in Strict Liability Actions in Wisconsin

It is crystal-clear that one of the main purposes of SB 58 is to reverse the Wisconsin's Supreme Court's decision in *Fuchsgruber v. Custom Accessories,* 2001 WI 81, 244 Wis. 2d 758, 628 N.W.2d 833. The Court held that strict liability claims were not subject to joint and several liability under § 895.045, Wis. Stats.

Strict liability differs from negligence. Strict liability is liability in tort for injuries caused by defective and unreasonably dangerous products, as adopted in *Dippel v. Sciano,* 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

Under *Dippel,* pursuant to § 402(A), Restatement (Second) of Torts § 402(A) (1965), a plaintiff alleging a claim for strict product liability must prove the following five elements:

(1) that the product was in defective condition when it left the possession or control of the seller,
(2) that it was unreasonably dangerous to the user or consumer,
(3) that the defect was a cause (a substantial factor) of the plaintiff's injuries or damages,
(4) that the seller engaged in the business of selling such product or, put negatively, that this is not an isolated or infrequent transaction not related to the principal business of the seller, and
(5) that the product was one which the seller expected to and did reach the user or consumer without substantial change in the condition it was when he sold it. *Dippel,* 37 Wis. 2d at 460.

Justice Diane Sykes, speaking for a unanimous Supreme Court in *Fuchsgruber*, said applying § 895.045, Wis. Stats., to a products case "would bring about a sea change in strict product liability law, shifting burdens and altering the nature of the proofs, indeed, transforming the very nature of product liability from strict liability to garden-variety negligence." *Fuchsgruber* at ¶ 29, at p. 775.

Negligence has always been a foreign concept under the common law of products liability in Wisconsin. The Court in *Fuchsgruber* said,

> We do not consider a seller who is liable under *Dippel* to be guilty of negligence at all. Despite the somewhat misleading language of the cases, jury instruction and special verdict form, the defective condition of the product does not constitute "negligence" on the part of the seller. There is no defendant "negligence" to be apportioned against the plaintiff in a strict product liability action, either separately or in the aggregate with other defendants. There may be contribution rights to be determined, but that is always a separate question and has no bearing on the plaintiff's recovery, which is reduced only to the extent of his own negligent conduct.
>
> *Id.* at ¶ 23, p. 773.

The changes proposed to our jury system under this bill would defeat the entire purpose of common law products liability law in Wisconsin, which is to prevent the introduction of defective and dangerous products into the stream of commerce in this state. In the words of Justice Sykes:

> In strict product liability actions, 'the "act" to which [the seller's] responsibility attaches is not an act of negligence. If indeed it is an act at all, it is simply the act of placing or maintaining a defective product in the stream of commerce.' Therefore, the comparison in strict product liability actions is not a comparison of one party's conduct against another, but, rather, a comparison of the extent to which the plaintiff's injuries were attributable to his own contributory negligence as against the product's defective condition. *Fuchsgruber* at ¶ 24, p. 773.

It appears the aim of this legislation is to make strict liability claims simply "garden-variety negligence" claims and undo the historic development of strict liability claims under *Dippel*.

The concept of "contributory negligence" already stands a shield to liability in strict liability claims. Under current law if plaintiff's contributory negligence is greater than that of the product, there can be no recovery by the plaintiff.

Adding the concept of "comparative negligence" to strict liability claims adds a complexity to an already complex area of law. Moreover, the formula set forth in the bill to establish joint and several liability sets an unfairly high threshold. The formula is: product defendant percentage of negligence times causal responsibility of the product equals product defendants' causal liability of damages to the plaintiff. Under this test, if the defective product was 70% responsible for the

plaintiff's damages, and a particular product defendants' negligence in creating the defective the product was also 70% — both very high percentages in the scheme of things as they are now – this would lead to a finding of 49% responsibility on the part of that product defendant for the damages of the plaintiff. As such, joint and several liability would be ***extremely*** difficult to achieve in most cases involving more than one negligent defendant. There appears to be no rational basis for making the numbers this high by the multiplication of percentages of negligence. Perversely, it would also encourage manufacturers and retailers to add as many people to the case, which does not streamline litigation, but makes it more complex and difficult.

Section 895.045(3)(e) of the bill ostensibly allows recovery by the plaintiff against "minor" product defendants if the plaintiff is not otherwise barred from recovery by the court in the mini-trial. It appears that this section, combined with the Section 895.045(3) as a whole, demonstrates a legislative intent to move away from the concept of sharing or spreading the risk and move instead to a more punitive concept requiring an injured party to bear the burden if a manufacturer goes out of business, goes bankrupt, is uninsured, or is otherwise non-recoverable. This certainly reverses the whole public policy behind the development of strict liability. As the Court in *Fuchsgruber* said,

> Strict liability was justified because "the seller is in the paramount position to distribute the costs of the risks created by the defective product," by purchasing insurance or by passing the cost on to the consumer in the price of the product. *Dippel,* 37 Wis. 2d at 450. Further, "the consumer . . . has the right to rely on the apparent safety of the product and . . . it is the seller in the first instance who creates the risk by placing the defective product on the market." *Id.* at 450-51. Also, "where the manufacturer is concerned . . . the manufacturer has the greatest ability to control the risk created by his product since he may initiate or adopt inspection and quality control measures thereby preventing defective products from reaching the consumer." *Id.* at 451. Finally, "the imposition of strict liability avoids circuity of action. In a single suit the plaintiff may proceed against all or the most affluent member in the distributive chain." *Id.* ¶ 16, at p. 769.

There is certainly no articulated reason why the legislature feels this policy shift is justified. It is certainly very punitive and places the burden on the entity least able to afford it — the injured consumer.

Wisconsin Will Abandon the Consumer-Contemplation Test Under SB 58

Wisconsin has adopted a consumer-contemplation test for determining whether a product is unreasonably dangerous. The Supreme Court held in *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, 230 N.W.2d 794 (1975),

> [T]he test in Wisconsin of whether a product contains an unreasonably dangerous defect depends upon the reasonable expectations of the ordinary consumer

> concerning the characteristics of this type of product. If the average consumer would reasonably anticipate the dangerous condition of the product and fully appreciate the attendant risk of injury, it would not be unreasonably dangerous and defective. This is an objective test and is not dependent upon the knowledge of the particular injured consumer.

Vincer, 69 Wis. 2d at 332.

The legislation appears to want Wisconsin to disregard the consumer-contemplation test, in favor of a "danger-utility" test. In *Sumnicht v. Toyota Motor Sales, U.S.A., Inc.*, 121 Wis. 2d 338, 360 N.W.2d 2 (1984), the Wisconsin Supreme Court analyzed the danger-utility test by stating:

> Under [the danger-utility test] approach, a product is defective as designed if, but only if, the magnitude of the danger outweighs the utility of the product. The theory underlying this approach is that virtually all products have both risks and benefits and that there is no way to go about evaluating design hazards intelligently without weighing danger against utility. There have been somewhat different ways of articulating this . . . test. But in essence, the danger-utility test directs attention of attorneys, trial judges, and juries to the necessity for weighing the danger-in-fact of a particular feature of a product against its utility.

Id. at 367-68 (quoting Prosser & Keeton on the Law of Torts § 99 at 698-99 (W. Page Keeton et al. eds., 5th ed. 1984)) (footnotes and quotations omitted.)

The Wisconsin Supreme Court was recently asked to abandon the consumer-contemplation test in strict liability cases. The Court specifically rejected this request in *Green v. Smith & Nephew AHP, Inc.*, 2001 WI 1109, 245 Wis.2d 772, 629 N.W.2d 727, and reaffirmed "that Wisconsin is committed to the consumer-contemplation test in all strict products liability cases." *Id.* at ¶46.

The majority opinion, written by Justice Jon Wilcox, systematically reviews the reasons why Wisconsin should not abandon the consumer-contemplation test.

In addition, the defendants in *Green* had argued that "foreseeability" should be an element in strict liability cases. The Court rejected this argument, primarily on public policy grounds.

> Although products liability law is intended in part to make products safer for consumers, the primary "rationale underlying the imposition of strict liability on manufacturers and sellers is that the risk of the loss associated with the use of defective products *should be borne by those who have created the risk and who have reaped the profit by placing a defective product in the stream of commerce.*" (Citations omitted and emphasis added.)

Id. at ¶69.

The legislation clearly undoes 40 years of product liability law and changes the burdens and benefits to the detriment of consumers. Under § 895.047(1)(a) a product is only defective if it meets one of the following: 1) manufacturing defect; 2) defective design; 3) inadequate instructions or warnings. Manufacturing defect is defined as the product "departs from its intended design even though all possible care was exercised in the manufacturer of the product." What does that mean?

Would a manufacturing defect exist if a product runs improperly causing an accident? What if the manufacturer does not exercise all possible care in the manufacture of the product? In other words, if they are negligent does that mean that there is no manufacturing defect?

Design defect occurs if the "*foreseeable* risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design" ***and*** "the omission of the alternative design renders the product not reasonably safe." This appears to effectively mandate that the plaintiff re-design the machine. The plaintiff must, therefore, do that which the manufacturer would not – manufacture a reasonably safe machine. Could a manufacturer "negate" a "reasonable alternative design" by showing that it would have prevented this accident, but theoretically not prevented a different accident?

Defective instructions or warnings only exist if "*foreseeable* risks of harm posed by the product could have been reduced or avoided by provision of reasonable instructions or warnings" *and* omissions of those warnings or instructions rendered the product "not reasonable safe." Again, this is asking the plaintiff to do what the manufacturer obviously did not. Effectively, the plaintiff gains the responsibility for reworking warnings or instructions.

It appears as though the effect of this section is to shift the burden – at least for purposes of trial – of designing a reasonable safe machine, with good warnings and instructions, from the manufacturer to the plaintiff. The effect of this portion of the statute requires the plaintiff's experts, for purposes of the case only, to redesign the machine and/or warnings/instructions. The plaintiff's experts are then obviously placed on the defensive as the defendant's experts attempt to establish the flaws of this theoretical re-design, rather than having to defend their own design. The spotlight goes from the machine causing an actual injury to some theoretical, redesigned machine. In other words, it would appear as though the case heard by the Court in the mini-trial would not be a defense of the design of the actual machine, but rather a defense of the plaintiffs re-design of the theoretical machine and warnings/instructions.

SB 58 would launch us into a brave new, uncharted world, without any input from the Courts. It is good to keep in mind what Justice Sykes said about the state of law before *Dippel,* and ask why do we need to try something entirely new.

> Prior to *Dippel*, product liability actions generally resided in the field of warranty, and were therefore subject to various contract defenses; the adoption of the Restatement (Second) of Torts § 402A [in *Dippel*] planted them solidly in the realm of tort, although not as negligence actions. 'From the plaintiff's point of view the most beneficial aspect of the rule [adopted in *Dippel*] is that it relieves him of proving specific acts of negligence and protects him from the defenses of notice of breach, disclaimer, and lack of privity in the implied warranty concepts of sales and contracts.' *Dippel, 37 Wis. 2d at 460.*

Fuchsgruber, Id. at ¶ 17, at p. 769.

In the brave new world envisioned by the drafters of SB 58 the four decades of experience with *Dippel* will be thrown away. Far worse, there won't even be the old common law of pre-*Dippel* warranty law available to guide the courts. Instead, the courts will have to start anew to remake the wheel, when there was nothing wrong with the wheel in first place

Compliance With Government Standards Should Not Be a Defense

Section 895.047(3)(b) creates a rebuttable presumption of non-liability if government adopts or approves a "standard." **It is outrageous to use compliance with FDA or other government regulations as a defense when those very regulations have proven inadequate.** Government safety standards, at their best, establish only a minimum level of protection for the public. At their worst, they can be outdated, under-protective, or under-enforced. Congress should not reduce any incentives for industry to police itself above and beyond government regulation.

There are strong policy and statutory reasons why compliance with safety standards should not be a defense.

(1) Government standards are minimum thresholds that are not necessarily state of the art levels. Consequently, for example, the National Traffic and Motor Vehicle Safety Act does not exempt anyone from liability under common law. 15 U.S.C. § 1397(c).

(2) Government standards cannot cover all-important aspects of product performance because they do not focus on one manufacturer or company, but apply on an industry wide basis. For example, the 1968 and 1969 Ford Mustangs and Mercury Cougars complied with all applicable government seating standards, yet seat back brackets experienced numerous failures and had to be recalled.

(3) Standards remain unchanged for long periods of time and become outdated. For example, the original standards for hydraulic braking systems in autos were promulgated in 1967. Thereafter it took 6 years to upgrade this standard. Does this place an extraordinary burden upon state legislatures and/or the federal government, to keep up with changing standards and adopt safety changes and/or new "standards" as soon as every new product is introduced? Does this not punish the plaintiff for state or federal governments slow reaction in adopting or proving standards?

(4) Compliance with standards is monitored as of the time of manufacture. A product will change with usage and recognizing industry compliance as a defense will not safeguard a consumer using the product over its lifetime. A vehicle which complied with the standard at times of sale could be dangerously susceptible to fuel system leakage because of premature rusting of the tank.

(5) Manufacturers themselves play a large role in shaping the scope and applicability of government standards.

As we mentioned earlier, Vioxx is a prime example of a drug that the FDA allowed on the market despite evidence of a link between usage and increased heart attacks. This proposed bill

protects the makers of Vioxx. Monty Huggins, the husband of a 39-year-old woman who died a month after taking Vioxx recently testified before Congress on a similar proposal introduced in Congress. He related the following:

> Why do you want to protect companies that may have knowingly killed people? Especially at a time when we know that our own government is doing a lousy job of protecting us from dangerous drugs.
>
> When I heard about that guy from the Food and Drug Administration talking to the Senate it made me extremely angry. The way I understand it he's one of the top safety officials who approves drugs for the government. Here's one of the top safety guys telling the Senate that he and everyone else at the FDA can't do one thing to protect the American people from medicines that can kill you.
>
> Our own government can't protect us and now they want to give companies like Merck a free ride and protect them from accountability? People need to know about this. Because my wife is not the only one who has died from Vioxx—it could have potentially killed thousands of others too.
>
> I am not here before you just for me. I am here representing the tens of thousands that have been affected by this drug and more importantly to help make sure that we don't have another Vioxx. A defective drug does not discriminate. This affects everyone in this room. We all take prescription drugs for various ailments and over the last several years we have seen the failure of the FDA to protect us. There must be deterrents to make sure that pharmaceutical companies do not knowingly put defective drugs on the market all in the name of profits.
>
> This just isn't right. We depend on our government to protect us from things like this. And now that they can't do anything to get dangerous medicines off the market, it's just plain wrong to give the big drug companies this kind of legal protection.
>
> These pharmaceutical companies should be held accountable if their drug caused my wife's death and the deaths of others and not be allowed to escape responsibility. This proposed bill would prohibit anyone from punishing drug companies for bad conduct.
>
> As far as I'm concerned Merck took my wife away from me. They should be punished—not let off the hook.

Additionally, what happens if a case is being tried during the period of time when a bill is pending in the legislature of a state or federal government to adopt a new safety standard, that bill has yet to be passed, but ultimately does get passed after the conclusion of the trial? Does the language of the statutory provision mean that if a standard, condition, or specification is adopted or approved by ***any*** state law or agency, then the rebuttable presumption is created, or does it have to be by the Feds or a state law or agency of Wisconsin?

The recent conduct of a medical equipment maker provides a powerful example of why the courthouse doors need to remain open to product-liability lawsuits even if the product had FDA approval.

An August 3, 2003 article in the ***Mercury News*** reported a Guidant Corporation subsidiary pleaded guilty in California in June to 10 felonies and admitted that it concealed reports of thousands of malfunctions of a medical device used to repair bulges in the body's main artery.

While keeping one system of tracking malfunctions for secret internal use, the subsidiary maintained a second heavily-edited set of reports for the federal Food and Drug Administration. The second set of reports failed to report a large portion of the malfunctions. Among the cases unreported to the FDA were no fewer than 12 deaths.

Subsequent Remedial Measures Section Conflicts with Current Law

Section 895.047(4) deals with a substantial change with respect to the law on subsequent remedial measures relative to a product liability claim. This statute would essentially "overrule" the current evidentiary rules codified in Wis. Stat. § 804.07 in product liability cases. For example, if subsequent remedial measures are apparently admissible to establish "reasonable alternative designs" can those subsequent remedial measures be brought into play even if feasibility of subsequent remedial measures is uncontroverted? Under this section, are subsequent remedial measures ***not*** admissible to establish ownership or control, or in cases of impeachment? Wis. Stat. §895.047(4) and Wis. Stat. §904.07 could clearly be in conflict.

15-Year Statute of Repose Is Unconscionable

Section 895.047(4) provides for a 15-year statute of repose with respect to product liability. The Supreme Court has recently commented that the Legislature does not have a clear understanding of the difference between a statute of limitation versus a statute of repose. We hope to clarify these rather abstract legal matters by defining what we are and are not dealing with in this legislation.

Section 895.047(5) is not a statute of limitations, instead it establishes a new immunity from liability for a certain class of people. Statutes of limitations merely require injured persons to bring an action within a set period of time after an injury is incurred or is discovered. Statutes of repose bar an action from being brought after a specific period of time even when an injury occurs after that date. In this case, after 15 years have passed, the door is closed to all personal injury liability actions against product manufacturers no matter how justified an action may be on the merits.

Does Section 895.047(4) mean that the useful life of any product is 15 years? A key objectionable element of Section 895.047(4) is that the consumers would most likely be "unsuspecting" to the type of danger. Given the fact that the Legislature is apparently determining that there is a 15 year useful life on any and all products and that after that point in time the product may ***reasonably*** be unsafe, is the legislature providing warnings to workers and consumers that any product over 15 years old is presumptively dangerous?

Here is a concrete example of the dangers unsuspecting consumers face. According to the National Safety Council, agriculture is one of the most hazardous industries in the U.S. In 1999 it ranked as the second most dangerous occupation in the U.S. Tractors are involved in more farm fatalities than any other piece of equipment, and tractor rollovers are the most common type of tractor accident, according to the UW Center for Agricultural Safety and Health. Rollover deaths are preventable if a tractor is fitted with a Rollover Protection Structure. (ROPS). Protective supports have been standard on tractors since 1985, *but the average age of tractors on Wisconsin farms is 20 years.* That is the average age of a tractor in Wisconsin, so more than half of the tractors used by Wisconsin farmers are older than 20 years. Many tractors made before the mid to late 1960s cannot be fitted with ROPS because they cannot handle the structural stress that a ROPS can add.

If the manufacturer has no duty to warn of defects discovered to exist after 15 years, who is going to notify farmers they have no legal protections from a tractor older than 15 years? In other words, assuming that a manufacturer were to determine that a manufacturing defect on a tractor failed at a rate of 50 percent on the 16th year after manufacture, is there no obligation to recall the product or provide warnings of the danger of the product?

The immunity provided by this bill creates a disincentive to retrofit and recall defective products with long useful lives. Why would a manufacturer spend the money/time to inform consumers or workers of the problem if they had no potential liability after 15 years? Does the state then take on the responsibility for notifying all consumers/workers of the recognized defect? Who is responsible for the injuries that occur between the time that the state/government discovers the problem and the time when it, with reasonable knowledge provided by the manufacturer, should have been known?

In finding the 6-year statute or repose for improvements to real property unconstitutional in *Funk v. Wollin Silo & Equipment*, 148 Wis. 2d 59, 435 N.W.2d 244 (1989) a unanimous Supreme Court declared the statute in question was a grant of immunity masquerading as a statute of limitations. The Court said,

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before you ever marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff. (Quoting, *Dincher v. Marlin v. Firearms Co.*, 198 F.2d 821, 823 (2nd Cir. 1952)

In other words, this statute of repose would prevent the filing of a lawsuit even before the injury occurred. There is no logic in that.

Conclusion

One of the main questions to be addressed is the social/legislative policy behind shifting the burden of a catastrophic loss from insurers/manufacturers – who actually have control over the design, manufacture and warnings on the product – to the injured worker/consumer and/or the public for injuries caused by a product over which they truly have no control? What is the reasoning behind protecting a manufacturer from the defects of its product rather than the consumer from damages incurred by those defects? Wisconsin manufacturers have not demonstrated a need for this legislation, which effectively disarms our citizens from who are trying to exercise their Constitutional right to fight back and hold powerful institutions accountable for injuries they sustain by dangerous and defective products.