



State of Wisconsin  
2011 - 2012 LEGISLATURE



LRB-0388/P2  
PJH/TKK/all:md

P3

↑  
stays  
BTJD

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

note

limiting noneconomic damages awarded

long-term care providers; actions against

Report

1 AN ACT to renumber and amend 895.043 (3), 907.01 and 907.02; to amend  
2 ~~230.85 (3) (b), 802.10 (7), 809.103 (2) (a), 814.04 (intro.), 814.29 (3) (a) and~~  
3 907.03; and to create 895.043 (3) (a), 895.043 (3) (b), 895.043 (6), 895.044,  
4 895.045 (3), 895.046, 895.047, 907.01 (3), 907.02 (1) (a), (b) and (c) and 907.02  
5 (2) of the statutes; relating to: actions against manufacturers, distributors,  
6 sellers, and promoters of certain products; evidence of lay and expert witnesses;  
7 damages for frivolous claims; and punitive damage awards.

insert relating

negligence in long-term care facilities

**Analysis by the Legislative Reference Bureau**

This bill makes several changes to current law regarding civil actions for product liability, actions in strict liability, punitive damage awards, and awards for defending a frivolous lawsuit.

**ACTIONS AGAINST MANUFACTURERS, DISTRIBUTORS, SELLERS, AND PROMOTERS OF A PRODUCT**

In *Thomas v. Mallett*, 2005 WI 129, the Wisconsin Supreme Court held that the manufacturers of white lead carbonate, which was used as a pigment in paint, were liable for the injuries caused to a child who had ingested paint that contained the white lead carbonate, although the child could not prove that a particular manufacturer produced the white lead carbonate that he ingested. The court made that decision based on the risk-contribution theory, saying that all of the

no ff The Bill also makes changes regarding the confidentiality and use of reviews and evaluations of health care providers and regarding criminal liability for certain acts or omissions by health care providers.

move

manufacturers' white lead carbonate were basically the same, the manufacturers created the risk of injury, and they should all contribute to the payment of the child's damages.

This bill provides that a manufacturer, distributor, seller, or promoter of a product generally may be held liable for damages only if the injured party proves, in addition to the causation, damages, and other elements of the claim, that the specific product that caused the injury was manufactured, distributed, sold, or promoted by the defendant. The bill also provides that if an injured party cannot prove that the defendant manufactured, distributed, sold, or promoted the specific product that caused the injury, the defendant may be held liable if, in addition to proving the other elements of the claim, the injured party names as defendants in the action those manufacturers of a product who, collectively, during the relevant production period, manufactured at least 80 percent of all products sold in this state that are chemically identical to the specific product that allegedly caused the claimant's injury or harm and proves all of the following:

1. That no other lawful process exists for the injured party to seek redress for the injury or harm.

2. That the injury could only be caused by a product that is chemically identical to the specific product that allegedly caused the injury.

3. That the defendant manufactured, distributed, sold, or promoted a product that was chemically identical to the specific product that allegedly caused the injury during the time period in which that specific product was manufactured, distributed, sold, or promoted.

The bill limits liability to products that were manufactured, distributed, sold, or promoted within 25 years before the date the injured party's cause of action accrues.

### **STRICT LIABILITY**

This bill establishes the criteria to determine if a product manufacturer, distributor, or seller is liable to a person injured by the manufactured product based on a claim of strict liability. Currently, a person injured by a manufactured product has three avenues to determine if the manufacturer, distributor, or seller is liable for the person's injury. The claimant may sue under a breach-of-warranty theory, under the common law negligence theory, and under the theory of strict liability. The doctrine of strict liability, as adopted in this state, applies to manufacturers, distributors, and sellers. That doctrine relieves the injured person from proving specific acts of negligence and protects that person from contractual defenses. However, the person must prove that the product was in a defective condition and unreasonably dangerous, the defective condition existed when it left the seller, the defect caused the injury, the seller was in the business of selling the product, and the product was one that the seller expected to and did reach the consumer without substantial change.

Under this bill, a manufacturer is liable for damages caused by the manufacturer's product based on a claim of strict liability if the injured claimant proves that the product was defective, the defective condition made the product unreasonably dangerous, the defective condition existed at the time the product left

the control of the manufacturer, the product reached the user or consumer without substantial change, and the defective condition caused the claimant's injuries. The bill specifies when a manufactured product is defective.

Under the bill, a distributor or seller is not liable for the claimant's damages based on a claim of strict liability unless the manufacturer would be liable for the damages and any of the following applies:

1. The distributor or seller contractually assumed one of the manufacturer's duties to manufacture, design, or provide warnings or instructions regarding the product.

2. Neither the manufacturer nor its insurer is subject to service of process within this state.

3. A court determines that the claimant would not be able to enforce a judgment against the manufacturer or its insurer.

The bill requires the dismissal of the distributor or seller as a defendant in an action if the manufacturer or its insurer submits itself to the jurisdiction of the court in which the suit is pending.

Under the bill, if a defendant proves that the injured person, at the time of his or her injury from a manufactured product, had a blood alcohol concentration of 0.08 or more or was under the influence of any controlled substance or controlled substance analog to the extent that he or she could not operate a motor vehicle safely, that proof creates a rebuttable presumption that the intoxication or drug use was the cause of the person's injury. The bill also creates a rebuttable presumption that the manufactured product is not defective if the product complied with relevant standards, conditions, or specifications under federal or state law. In addition, the bill reduces the manufacturer's, seller's, or distributor's liability by the percentage of causal responsibility for the claimant's damages caused by the claimant's misuse, alteration, or modification of the product.

The bill requires the court to dismiss a claimant's action if the damage was caused by an inherent characteristic of the manufactured product that would be recognized by an ordinary person who uses or consumes the product. The bill relieves a distributor or seller of liability if the distributor or seller receives the product in a sealed container and has no opportunity to test or inspect the product, unless the distributor or seller is liable under another theory.

Under the bill, evidence of remedial measures taken after the sale of the manufactured product is not admissible in an action for damages caused by the product based on a claim of strict liability for the purpose of showing a manufacturing defect, a design defect, or the need for a warning or instruction, but may be admitted to show that a reasonable alternative design existed at the time of the sale of the product. The bill limits a defendant's liability for damage caused by a manufactured product to those products manufactured within 15 years before the claim accrues unless the manufacturer specifies that the product will last longer or unless the action is based on a claim for damages caused by a latent disease.

Under the bill, in product liability cases, to determine the causal responsibility for the injury, the fact finder must determine what percentage of that causal responsibility is the result of the contributory negligence of the injured party, the

defective condition of the product, and the contributory negligence of any third person. The bill provides that, if the injured party's percentage of total causal responsibility for the injury is greater than the percentage resulting from the defective condition of the product, the injured party may not recover from the manufacturer or any other person responsible for placing the product in the stream of commerce. If the injured party does have the right to recover, the injured party's damages are diminished by the injured party's percentage of causal responsibility for the injury. Under the bill, after determining the percentage of causal responsibility for the injury that is the result of the defective condition of the product, the fact finder must determine the percentage of causal responsibility of each product defendant for the defective condition of the product. The judge, under the bill, multiplies this percentage by the percentage of causal responsibility for the injury that is the result of the defective condition of the product to determine an individual product defendant's percentage of responsibility for the damages to the injured party.

Under the bill, a product defendant whose responsibility for the damages to the injured party is 51 percent or more is jointly and severally liable for all of those damages. The liability of a product defendant whose responsibility for the damages to the injured party is less than 51 percent is limited to that product defendant's percentage of responsibility for the damages. The bill also allows the injured party to recovery from the product defendants even when the injured party's causal responsibility for the injury is greater than an individual product defendant's responsibility for the damages to the injured party.

#### **PUNITIVE DAMAGES**

Under current law, a person injured by a negligent person can recover the damages resulting from the injury. Damages include economic damages, such as the injured person's medical costs, and noneconomic damages, such as compensation or pain and suffering. In addition, under current law, as interpreted by the Wisconsin Supreme Court, in *Wischer v. Mitsubishi*, 2005 WI 26, 279 Wis. 2d 4 (2005), the plaintiff may recover punitive damages if he or she can prove that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

This bill changes the proof that the plaintiff must provide to recover punitive damages. Under the bill, the plaintiff must prove that the defendant either acted with intent to cause injury to a particular person or persons or that the defendant knew that the action of the defendant that resulted in injury to one or more persons was practically certain to result in injury to one or more persons. The bill also provides that a voluntarily produced intoxicated or drugged condition is not a defense to liability for punitive damages if, but for the intoxicated or drugged state of the actor, the actor would have known that his or her action was practically certain to result in injury to one or more persons.

#### **DAMAGES FOR FRIVOLOUS CLAIMS**

Under current law, every document submitted to a court in a civil case must be signed by a party or, if the party has an attorney, by the attorney. Current law provides that the person, by signing the document, is certifying that the document is not presented for any improper purpose, such as to harass or cause unnecessary

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delay, that the claims made in the document are warranted by existing law or a nonfrivolous argument for the extension, modification, or reversal of the law, that the allegations presented in the document are likely to have evidentiary support, and that any factual denials in the document are warranted by evidence or, if so identified, are reasonably based on a lack of information or belief. Currently, if the court determines that any of these certifications are not true, the court may impose an appropriate sanction on the responsible attorney or party. Under current law, the sanction must be limited to what is sufficient to deter repetition of the conduct, and may include payment of the reasonable attorney fees or other expenses resulting from the improper conduct. A court may not impose monetary sanctions upon a represented party for making a claim that is not based on existing law or a nonfrivolous argument for the extension, modification, or reversal of the law, and before the court imposes any monetary sanctions, the court must issue an order to show cause regarding the dismissal or settlement of the claim.

Under this bill, in civil actions, a party or his or her attorney may be liable for costs and fees for beginning, using, or continuing an action if that is done solely for the purpose of harassing or maliciously injuring another and the party or attorney knew that there was no reasonable basis in law for the conduct or no good faith argument for an extension, modification, or reversal of the law. The bill allows a party to an action to ask the court by motion to determine if another party has violated these provisions, and if, by clear and convincing evidence, the court so finds, the court must do one of the following:

1. If the offending party withdraws or corrects the improper conduct within 21 days or a time set by the court, decide whether to award the moving party the actual costs incurred as a result of the conduct, including reasonable attorney fees, taking into consideration the offending party's mitigating conduct.

2. If the offending party does not timely withdraw or correct the improper conduct, award the moving party the actual costs incurred as a result of the conduct, including reasonable attorney fees.

Under the bill, if an award of costs for violating these provisions is affirmed on appeal, the appellate court is required to send the action to the lower court to award the damages necessary to compensate the successful party for the actual reasonable attorney fees incurred in the appeal. In addition, if the appellate court finds that a party has committed a violation of one of these provisions in an appeal, the appellate court must, after completion of the appeal, send the action back to the lower court to award the damages necessary to compensate the offended party for the actual reasonable attorney fees incurred in the appeal.

#### **EXPERT AND LAY WITNESS TESTIMONY**

Under current law, if a witness is not testifying as an expert, the witness's testimony is limited to those opinions that are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or of a fact at issue in the case. This bill adds the additional limit that a nonexpert's testimony may not be based on scientific, technical, or other specialized knowledge of the witness.

Insert analysis

Current law allows the testimony of an expert witness if that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue in the case. This bill limits the testimony of an expert witness to testimony that is based on sufficient facts or data, that is the product of reliable principles and methods, and that is based on the witness applying those principles and methods to the facts of the case. The bill also prohibits the testimony of an expert witness who is entitled to receive any compensation contingent on the outcome of the case.

Currently, the facts or data in a particular case on which an expert witness bases his or her opinion may be made known to the expert at or before the case hearing, but if those facts or data are reasonably relied upon by experts in the field in forming opinions about the subject, they do not need to be admissible into evidence in the case. This bill adds that facts or data that are otherwise inadmissible may not be disclosed to the jury unless the court determines that their value in assisting the jury to evaluate the expert's testimony outweighs their prejudicial effect.

FE. SPL

Insert b.1

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1           SECTION 1. 230.85 (3) (b) of the statutes is amended to read:

2           230.85 (3) (b) If, after hearing, the division of equal rights finds that the

3 respondent did not engage in or threaten a retaliatory action it shall order the

4 complaint dismissed. The division of equal rights shall order the employee's

5 appointing authority to insert a copy of the findings and orders into the employee's

6 personnel file and, if the respondent is a natural person, order the respondent's

7 appointing authority to insert such a copy into the respondent's personnel file. If the

8 division of equal rights finds by unanimous vote that the employee filed a frivolous

9 complaint it may order payment of the respondent's reasonable actual attorney fees

10 and actual costs. Payment may be assessed against either the employee or the

11 employee's attorney, or assessed so that the employee and the employee's attorney

12 each pay a portion. To find a complaint frivolous the division of equal rights must

13 find that s. 802.05 (2) or 895.044 has been violated.

14           SECTION 2. 802.10 (7) of the statutes is amended to read:

1           802.10 (7) SANCTIONS. Violations of a scheduling or pretrial order are subject  
2 to ss. 802.05, 804.12 and, 805.03, and 895.044.

3           **SECTION 3.** 809.103 (2) (a) of the statutes is amended to read:

4           809.103 (2) (a) Is frivolous, as determined under s. 802.05 (2) or 895.044.

5           **SECTION 4.** 814.04 (intro.) of the statutes is amended to read:

6           **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, 100.195 (5m)  
7 (b), 100.30 (5m), 106.50 (6) (i) and (6m) (a), 111.397 (2) (a), 115.80 (9), 281.36 (2) (b)  
8 1., 767.553 (4) (d), 769.313, 802.05, 814.245, 895.035 (4), 895.044, 895.443 (3),  
9 895.444 (2), 895.445 (3), 895.446 (3), 895.506, 943.212 (2) (b), 943.245 (2) (d), 943.51  
10 (2) (b), and 995.10 (3), when allowed costs shall be as follows:

11           **SECTION 5.** 814.29 (3) (a) of the statutes is amended to read:

12           814.29 (3) (a) A request for leave to commence or defend an action, proceeding,  
13 writ of error or appeal without being required to pay fees or costs or to give security  
14 for costs constitutes consent of the affiant and counsel for the affiant that if the  
15 judgment is in favor of the affiant the court may order the opposing party to first pay  
16 the amount of unpaid fees and costs, including attorney fees under ss. 802.05 and,  
17 804.12 (1) (c), and 895.044 and under 42 USC 1988 and to pay the balance to the  
18 plaintiff.

19           **SECTION 6.** 895.043 (3) of the statutes is renumbered 895.043 (3) (intro.) and  
20 amended to read:

21           895.043 (3) STANDARD OF CONDUCT. (intro.) The plaintiff may receive punitive  
22 damages if evidence is submitted showing that the defendant acted maliciously  
23 toward the plaintiff or in an intentional disregard of the rights of the plaintiff. did  
24 any of the following:

25           **SECTION 7.** 895.043 (3) (a) of the statutes is created to read:

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1           895.043 (3) (a) Acted with the intent to cause injury to a particular person or  
2 persons.

3           **SECTION 8.** 895.043 (3) (b) of the statutes<sup>✓</sup> is created to read:

4           895.043 (3) (b) Knew that the defendant's action that resulted in injury to one  
5 or more persons was practically certain to result in injury to one or more persons.

6           **SECTION 9.** 895.043 (6) of the statutes<sup>✓</sup> is created to read:

7           895.043 (6) UNAVAILABLE DEFENSE. A voluntarily produced intoxicated or  
8 drugged condition is not a defense to liability for punitive damages if, had the actor  
9 not been in that intoxicated or drugged condition, he or she would have known that  
10 his or her action that resulted in injury to one or more persons, done while in the  
11 intoxicated or drugged condition, was practically certain to result in injury to one or  
12 more persons.

13           **SECTION 10.** 895.044 of the statutes<sup>✓</sup> is created to read:

14           **895.044 Damages for maintaining certain claims and counterclaims.**

15           (1) A party or a party's attorney may be liable for costs and fees under this section  
16 for commencing, using, or continuing an action, special proceeding, counterclaim,  
17 defense, cross complaint, or appeal to which any of the following applies:

18           (a) The action, special proceeding, counterclaim, defense, cross complaint, or  
19 appeal was commenced, used, or continued in bad faith, solely for purposes of  
20 harassing or maliciously injuring another.

21           (b) The party or the party's attorney knew, or should have known, that the  
22 action, special proceeding, counterclaim, defense, cross complaint, or appeal was  
23 without any reasonable basis in law or equity and could not be supported by a good  
24 faith argument for an extension, modification, or reversal of existing law.

1           **(2)** Upon either party’s motion made at any time during the proceeding or upon  
2 judgment, if a court finds, upon clear and convincing evidence, that sub. (1) (a) or (b)  
3 applies to an action or special proceeding commenced or continued by a plaintiff or  
4 a counterclaim, defense, or cross complaint commenced, used, or continued by a  
5 defendant, the court:

6           (a) May, if the party served with the motion withdraws, or appropriately  
7 corrects, the action, special proceeding, counterclaim, defense, or cross complaint  
8 within 21 days after service of the motion, or within such other period as the court  
9 may prescribe, award to the party making the motion, as damages, the actual costs  
10 incurred by the party as a result of the action, special proceeding, counterclaim,  
11 defense, or cross complaint, including the actual reasonable attorney fees the party  
12 incurred, including fees incurred in any dispute over the application of this section.  
13 In determining whether to award, and the appropriate amount of, damages under  
14 this paragraph, the court shall take into consideration the timely withdrawal or  
15 correction made by the party served with the motion.

16           (b) Shall, if a withdrawal or correction under par. (a) is not timely made, award  
17 to the party making the motion, as damages, the actual costs incurred by the party  
18 as a result of the action, special proceeding, counterclaim, defense, or cross  
19 complaint, including the actual reasonable attorney fees the party incurred,  
20 including fees incurred in any dispute over the application of this section.

21           **(3)** If a party makes a motion under sub. (2), a copy of that motion and a notice  
22 of the date of the hearing on that motion shall be served on any party who is not  
23 represented by counsel only by personal service or by sending the motion to the party  
24 by registered mail.

1           (4) If an award under this section is affirmed upon appeal, the appellate court  
2 shall, upon completion of the appeal, remand the action to the trial court to award  
3 damages to compensate the successful party for the actual reasonable attorney fees  
4 the party incurred in the appeal.

5           (5) If the appellate court finds that sub. (1) (a) or (b) applies to an appeal, the  
6 appellate court shall, upon completion of the appeal, remand the action to the trial  
7 court to award damages to compensate the successful party for all the actual  
8 reasonable attorney fees the party incurred in the appeal. An appeal is subject to this  
9 subsection in its entirety if any element necessary to succeed on the appeal is  
10 supported solely by an argument that is described under sub. (1) (a) or (b).

11           (6) The costs and fees awarded under subs. (2), (4), and (5) may be assessed  
12 fully against the party bringing the action, special proceeding, cross complaint,  
13 defense, counterclaim, or appeal or the attorney representing the party, or both,  
14 jointly and severally, or may be assessed so that the party and the attorney each pay  
15 a portion of the costs and fees.

16           (7) This section does not apply to criminal actions or civil forfeiture actions.  
17 Subsection (5) does not apply to appeals under s. 809.107, 809.30, or 974.05 or to  
18 appeals of criminal or civil forfeiture actions.

19           **SECTION 11.** 895.045 (3) of the statutes is created to read:

20           895.045 (3) **PRODUCT LIABILITY.** (a) In an action by any person to recover  
21 damages for injuries caused by a defective product based on a claim of strict liability,  
22 the fact finder shall first determine if the injured party has the right to recover  
23 damages. To do so, the fact finder shall determine what percentage of the total causal  
24 responsibility for the injury resulted from the contributory negligence of the injured

1 person, what percentage resulted from the defective condition of the product, and  
2 what percentage resulted from the contributory negligence of any other person.

3 (b) If the injured party's percentage of total causal responsibility for the injury  
4 is greater than the percentage resulting from the defective condition of the product,  
5 the injured party may not, based on the defect in the product, recover damages from  
6 the manufacturer, distributor, seller, or any other person responsible for placing the  
7 product in the stream of commerce.

8 (c) If the injured party's percentage of total causal responsibility for the injury  
9 is equal to or less than the percentage resulting from the defective condition of the  
10 product, the injured party may recover but the damages recovered by the injured  
11 party shall be diminished by the percentage attributed to that injured party.

12 (d) If multiple defendants are alleged to be responsible for the defective  
13 condition of the product, and the injured party is not barred from recovery under par.  
14 (b), the fact finder shall determine the percentage of causal responsibility of each  
15 product defendant for the defective condition of the product. The judge shall then  
16 multiply that percentage of causal responsibility of each product defendant for the  
17 defective condition of the product by the percentage of causal responsibility for the  
18 injury to the person attributed to the defective product. The result of that  
19 multiplication is the individual product defendant's percentage of responsibility for  
20 the damages to the injured party. A product defendant whose responsibility for the  
21 damages to the injured party is 51 percent or more of the total responsibility for the  
22 damages to the injured party is jointly and severally liable for all of the damages to  
23 the injured party. The responsibility of a product defendant whose responsibility for  
24 the damages to the injured party is less than 51 percent of the total responsibility

1 for the damages to the injured party is limited to that product defendant's percentage  
2 of responsibility for the damages to the injured party.

3 (e) If the injured party is not barred from recovery under par. (b), the fact that  
4 the injured party's causal responsibility for the injury is greater than an individual  
5 product defendant's responsibility for the damages to the injured party does not bar  
6 the injured party from recovering from that individual product defendant.

7 (f) This subsection does not apply to actions based on negligence or a breach of  
8 warranty.

9 **SECTION 12.** 895.046 of the statutes is created to read:

10 **895.046 Remedies against manufacturers, distributors, sellers, and**  
11 **promoters of products. (1) DEFINITIONS.** In this section:

12 (a) "Claimant" means a person seeking damages or other relief for injury or  
13 harm to a person or property caused by or arising from a product.

14 (b) "Relevant production period" means the time period during which the  
15 specific product that allegedly caused a claimant's injury or harm was manufactured,  
16 distributed, sold, or promoted.

17 **(2) APPLICABILITY.** This section applies to all actions in which a claimant alleges  
18 that the manufacturer, distributor, seller, or promoter of a product is liable for an  
19 injury or harm to a person or property, including actions based on allegations that  
20 the design, manufacture, distribution, sale, or promotion of, or instructions or  
21 warnings about, a product caused or contributed to a personal injury or harm to a  
22 person or property, a private nuisance, or a public nuisance, and to all related or  
23 independent claims, including unjust enrichment, restitution, or indemnification.

24 **(3) REMEDY WITH SPECIFIC PRODUCT IDENTIFICATION.** Except as provided in sub.  
25 (4), the manufacturer, distributor, seller, or promoter of a product may be held liable

1 in an action under sub. (2) only if the claimant proves, in addition to any other  
2 elements required to prove his or her claim, that the manufacturer, distributor,  
3 seller, or promoter of a product manufactured, distributed, sold, or promoted the  
4 specific product alleged to have caused the claimant's injury or harm.

5 (4) REMEDY WITHOUT SPECIFIC PRODUCT IDENTIFICATION. Subject to sub. (5), if a  
6 claimant cannot meet the burden of proof under sub. (3), the manufacturer,  
7 distributor, seller, or promoter of a product may be held liable for an action under sub.  
8 (2) only if all of the following apply:

9 (a) The claimant proves all of the following:

10 1. That no other lawful process exists for the claimant to seek redress from  
11 another person for the injury or harm.

12 2. That the claimant has suffered an injury or harm that can be caused only  
13 by a product chemically identical to the specific product that allegedly caused the  
14 claimant's injury or harm.

15 3. That the manufacturer, distributor, seller, or promoter of a product  
16 manufactured, distributed, sold, or promoted a product that meets all of the  
17 following criteria:

18 a. Is chemically identical to the specific product that allegedly caused the  
19 claimant's injury or harm.

20 b. Was manufactured, distributed, sold, or promoted in this state during the  
21 time period in which the specific product that allegedly caused the claimant's injury  
22 or harm was manufactured, distributed, sold, or promoted.

23 (b) The action names, as defendants, those manufacturers of a product who  
24 collectively, during the relevant production period, manufactured at least 80 percent

1 of all products sold in this state that are chemically identical to the specific product  
2 that allegedly caused the claimant's injury or harm.

3 (5) LIMITATION ON LIABILITY. No manufacturer, distributor, seller, or promoter  
4 of a product is liable under sub. (4) if more than 25 years have passed between the  
5 date that the manufacturer, distributor, seller, or promoter of a product last  
6 manufactured, distributed, sold, or promoted a product chemically identical to the  
7 specific product that allegedly caused the claimant's injury and the date that the  
8 claimant's cause of action accrued.

9 (6) APPORTIONMENT OF LIABILITY. If more than one manufacturer, distributor,  
10 seller, or promoter of a product is found liable for the claimant's injury or harm under  
11 subs. (4) and (5), the court shall apportion liability among those manufacturers,  
12 distributors, sellers, and promoters, but that liability shall be several and not joint.

13 **SECTION 13.** 895.047 of the statutes is created to read:

14 **895.047 Product liability.** (1) LIABILITY OF MANUFACTURER. In an action for  
15 damages caused by a manufactured product based on a claim of strict liability, a  
16 manufacturer is liable to a claimant if the claimant establishes all of the following  
17 by a preponderance of the evidence:

18 (a) That the product is defective because it contains a manufacturing defect,  
19 is defective in design, or is defective because of inadequate instructions or warnings.  
20 A product contains a manufacturing defect if the product departs from its intended  
21 design even though all possible care was exercised in the manufacture of the product.  
22 A product is defective in design if the foreseeable risks of harm posed by the product  
23 could have been reduced or avoided by the adoption of a reasonable alternative  
24 design by the manufacturer and the omission of the alternative design renders the  
25 product not reasonably safe. A product is defective because of inadequate

1 instructions or warnings only if the foreseeable risks of harm posed by the product  
2 could have been reduced or avoided by the provision of reasonable instructions or  
3 warnings by the manufacturer and the omission of the instructions or warnings  
4 renders the product not reasonably safe.

5 (b) That the defective condition rendered the product unreasonably dangerous  
6 to persons or property.

7 (c) That the defective condition existed at the time the product left the control  
8 of the manufacturer.

9 (d) That the product reached the user or consumer without substantial change  
10 in the condition in which it was sold.

11 (e) That the defective condition was a cause of the claimant's damages.

12 **(2) LIABILITY OF SELLER OR DISTRIBUTOR.** (a) A seller or distributor of a product  
13 is not liable based on a claim of strict liability to a claimant unless the manufacturer  
14 would be liable under sub. (1) and any of the following applies:

15 1. The claimant proves by a preponderance of the evidence that the seller or  
16 distributor has contractually assumed one of the manufacturer's duties to  
17 manufacture, design, or provide warnings or instructions with respect to the  
18 product.

19 2. The claimant proves by a preponderance of the evidence that neither the  
20 manufacturer nor its insurer is subject to service of process within this state.

21 3. A court determines that the claimant would be unable to enforce a judgment  
22 against the manufacturer or its insurer.

23 (b) The court shall dismiss a product seller or distributor as a defendant based  
24 on par. (a) 2. if the manufacturer or its insurer submits itself to the jurisdiction of the  
25 court in which the suit is pending.

**SECTION 13**

1           **(3) DEFENSES.** (a) If the defendant proves by clear and convincing evidence that  
2 at the time of the injury the claimant was under the influence of any controlled  
3 substance or controlled substance analog to the extent prohibited under s. 346.63 (1)  
4 (a), or had an alcohol concentration, as defined in s. 340.01 (1v), of 0.08 or more, there  
5 shall be a rebuttable presumption that the claimant's intoxication or drug use was  
6 the cause of his or her injury.

7           (b) Evidence that the product, at the time of sale, complied in material respects  
8 with relevant standards, conditions, or specifications adopted or approved by a  
9 federal or state law or agency shall create a rebuttable presumption that the product  
10 is not defective.

11           (c) The damages for which a manufacturer, seller, or distributor would  
12 otherwise be liable shall be reduced by the percentage of causal responsibility for the  
13 claimant's harm attributable to the claimant's misuse, alteration, or modification of  
14 the product.

15           (d) The court shall dismiss the claimant's action under this section if the  
16 damage was caused by an inherent characteristic of the product that would be  
17 recognized by an ordinary person with ordinary knowledge common to the  
18 community that uses or consumes the product.

19           (e) A seller or distributor of a product is not liable to a claimant for damages  
20 if the seller or distributor receives the product in a sealed container and has no  
21 reasonable opportunity to test or inspect the product. This paragraph does not apply  
22 if the seller or distributor may be liable under sub. (2) (a) 2. or 3.

23           **(4) SUBSEQUENT REMEDIAL MEASURES.** In an action for damages caused by a  
24 manufactured product based on a claim of strict liability, evidence of remedial  
25 measures taken subsequent to the sale of the product is not admissible for the

1 purpose of showing a manufacturing defect in the product, a defect in the design of  
2 the product, or a need for a warning or instruction. This subsection does not prohibit  
3 the admission of such evidence to show a reasonable alternative design that existed  
4 at the time when the product was sold.

5 (5) TIME LIMIT. (a) In any action under this section, a defendant is not liable  
6 to a claimant for damages if the product alleged to have caused the damage was  
7 manufactured 15 years or more before the claim accrues, unless the manufacturer  
8 makes a specific representation that the product will last for a period beyond 15  
9 years. This subsection does not apply to an action based on a claim for damages  
10 caused by a latent disease.

11 (6) INAPPLICABILITY. This section does not apply to actions based on a claim of  
12 negligence or breach of warranty.

13 SECTION 14. 907.01 of the statutes is renumbered 907.01 (intro.) and amended  
14 to read:

15 **907.01 Opinion testimony by lay witnesses.** (intro.) If the witness is not  
16 testifying as an expert, the witness's testimony in the form of opinions or inferences  
17 is limited to those opinions or inferences which are rationally all of the following:

18 (1) Rationally based on the perception of the witness and ~~helpful~~.

19 (2) Helpful to a clear understanding of the witness's testimony or the  
20 determination of a fact in issue.

21 SECTION 15. 907.01 (3) of the statutes is created to read:

22 907.01 (3) Not based on scientific, technical, or other specialized knowledge  
23 within the scope of a witness under s. 907.02 (1).

24 SECTION 16. 907.02 of the statutes is renumbered 907.02 (1) (intro.) and  
25 amended to read:

inse  
17 13



1 to evaluate the expert's opinion or inference substantially outweighs their  
2 prejudicial effect.

Insert  
19.3

3 **SECTION 20. Initial applicability.**

4 (1) This act first applies to actions or special proceedings that are commenced  
5 or continued after the effective date of this subsection.

6 **SECTION 21. Effective date.**

7 (1) This act takes effect on the first day of the 2nd month beginning after  
8 publication.

9 (END)

Insert  
19.6

D-Note

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-0388/P3dn  
PJH:kjf:rs

December 17, 2010

Please review this draft to ensure that it is consistent with your intent. This draft compiles LRB 11-0358, -0368, -0369, -0370, -0371, -0372, and -0671.

Please review the initial applicability and effective date provisions of this draft. Some of the compiled drafts first applied to actions commenced or continued on the effective date of the act, while others first applied to causes of action that occur on the effective date. This draft keeps intact the initial applicability provisions found in LRB 11-0358 and makes the other provisions relating to most civil actions initially applicable to actions commenced or continued on the effective date of the act. A significant exception is that the draft makes the cap on noneconomic damages in actions against long-term care providers initially applicable to occurrences on or after the effective date of the act. Please let me know if you want any of the initial applicability provisions changed.

On a similar note, one of the compiled drafts took effect on the first day of the second month beginning after publication, one on the first day of the fourth month beginning after publication, and five took effect immediately. I chose to make the entire bill effective on the first day of the second month beginning after publication; please let me know if you want that changed.

As always, please do not hesitate to contact me, Tamara Dodge, or Tracy Kuczenski if you have any questions or would like to discuss this draft further.

Peggy Hurley  
Legislative Attorney  
Phone: (608) 266-8906  
E-mail: [peggy.hurley@legis.wisconsin.gov](mailto:peggy.hurley@legis.wisconsin.gov)

## Dodge, Tamara

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**From:** Gauger, Michelle C - DOA [Michelle.Gauger@Wisconsin.gov]  
**Sent:** Monday, December 20, 2010 2:54 PM  
**To:** Dodge, Tamara  
**Subject:** RE: Edits to Confidentiality of Health Care Services LRB-0358  
**Attachments:** image001.gif; image002.gif; image003.gif; image004.gif; image005.gif; image006.gif

Hi Tamara,

Can you compile the changes in the combined draft (LRB-0388) as well as in the standalone draft?

Tomorrow is fine.

Thanks, again!

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**From:** Dodge, Tamara [mailto:Tamara.Dodge@legis.wisconsin.gov]  
**Sent:** Monday, December 20, 2010 2:25 PM  
**To:** Gauger, Michelle C - DOA  
**Subject:** RE: Edits to Confidentiality of Health Care Services LRB-0358

I think most of the provisions to be changed are mine, so I will be handling this redraft. Do you want the changes made to the compiled LRB-0388 also, in addition to LRB-0358?

I will try to get this to you tomorrow. Is that soon enough?  
Tami

## Tamara J. Dodge

Attorney  
Wisconsin Legislative Reference Bureau  
P.O. Box 2037  
Madison, WI 53701-2037  
(608) 267 - 7380  
tamara.dodge@legis.wisconsin.gov

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**From:** Gauger, Michelle C - DOA [mailto:Michelle.Gauger@Wisconsin.gov]  
**Sent:** Monday, December 20, 2010 12:56 PM  
**To:** Dodge, Tamara; Hurley, Peggy  
**Subject:** Edits to Confidentiality of Health Care Services LRB-0358

Hi Tammy and Peggy,

Can you incorporate the attached amendments into the Confidentiality of Health Care Services provisions in the tort reform draft? Please let me know if you have any questions or concerns with the changes.

As always, thanks!

Michelle Gauger

12/21/2010

**Dodge, Tamara**

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**From:** Gauger, Michelle C - DOA [Michelle.Gauger@Wisconsin.gov]  
**Sent:** Monday, December 20, 2010 12:56 PM  
**To:** Dodge, Tamara; Hurley, Peggy  
**Subject:** Edits to Confidentiality of Health Care Services LRB-0358  
**Attachments:** HC Peer Review Changes Dec 20 2010.doc; image001.gif; image002.gif; image003.gif

Hi Tammy and Peggy,

Can you incorporate the attached amendments into the Confidentiality of Health Care Services provisions in the tort reform draft? Please let me know if you have any questions or concerns with the changes.

As always, thanks!

Michelle Gauger

12/21/2010

Proposed changes to 2011 LRB 0358/1

1. Add a definition of “health care provider.”
  - Cross-reference the definition of health care provider in s. 146.81(1).
  - Also include any person working under the supervision of or in collaboration with a person specified in s. 146.81(1) to provide health care services. For example, certified nursing assistants, anesthesiologist assistants, surgical technicians, and other technicians should be included.
  - Also include a parent, subsidiary, or affiliate organization of a health care provider specified in s. 146.81(1).
2. Add another permissive release (in addition to the new “statistical form” permissive release):
  - (3X) Information acquired in connection with the review or evaluation of health care services may be disclosed, and the records of such a review or evaluation released, to a health care provider’s employer, or to the parent, subsidiary, or affiliate organization of the health care provider or the health care provider’s employer with the consent of the person authorizing or with the authority to authorize the review or evaluation.
  - Add a reference to the new section in s. 146.38(1m) (page 3, line 11) and 146.38(2) (page 4, line 9).
3. The permissive release of statistical information should be with the consent of the person authorizing or with the authority to authorize the review or evaluation.
  - Amend Page 5, line 2, to read “authorizing or with the authority to authorize the review or evaluation” instead of “*directing* the review or evaluation.”
4. Information or reports from one reviewing person, organization, or evaluator presented during a review by another person, organization, or evaluator should continue to be protected:
  - No such record or incident report may be used in any civil or criminal action ~~for personal injuries~~ against the health care provider or facility; however, except for incident reports and records from other persons, organizations, or evaluators reviewing or evaluating health care providers or facilities, information, documents, or records presented during the review or evaluation may not be construed as immune from discovery under s. 804.10(4) or use in any civil action merely because they were so presented.

And then a new subsection:

Any record or incident report disclosed either under subsection (3), (3m), and (3X) or in violation of this section remains confidential and may not be used in any civil or criminal action against the health care provider or facility.

5. Under the current statute and the proposed amendments, information disclosed and records released may not identify a patient unless the patient “has granted permission.” The language in s. 146.38(3) and (3m) should be consistent with Wisconsin’s medical record statute (and HIPAA):
  - “Information disclosed or records released under this subsection shall not reveal the identity of any patient except as permitted in s. 146.82 ~~unless the patient has granted permission.~~”
6. Health care providers refer to what the draft bill defines an “incident report” as either an “incident report” or an “occurrence report.” In section 1, allow providers to call the reports by either name.
7. In section 3, page 4, line 15, the bill should refer to both civil and criminal action.
8. The Wisconsin Department of Health Services has requested information from the federal government that would allow DHS staff to conduct quality reviews and evaluations of health care providers. In order to receive the information from the federal government, DHS must be able to protect the confidentiality of the information. In order to ensure that the information obtained by DHS is not subject to an open records request and is protected under s. 146.38, add the following subsection:
  - “Health care provider specific information acquired by an administrative agencies in order to help improve the quality of health care, to avoid the improper utilization of the services of health care providers or facilities, or to determine the reasonable charges for such services is exempt from inspection, copying, or receipt under s. 19.35(1).”
9. The Wisconsin Hospital Association would like to use additional data it collects under Ch. 153 for hospital specific quality reports (reported via WHA’s CheckPoint website):
  - Add a new provision in Ch. 153: “Notwithstanding the rules promulgated under ch. 153, 2001 stats., the entity may report quality indicators identifying individual hospitals based on data the entity collects under ch. 153.”