State of Wisconsin
2005 – 2006 LEGISLATURE

LRB–4015/1
RPN:cjs:ch

ENGROSSED 2005 ASSEMBLY BILL 778

November 4, 2005 – Printed by direction of ASSEMBLY CHIEF CLERK.

AN ACT ***to create*** 895.046 of the statutes; **relating to:** actions against manufacturers, distributors, sellers, and promoters of products.

Analysis by the Legislative Reference Bureau

Engrossment information:

The text of Engrossed 2005 Assembly Bill 778 consists of the following documents adopted in the assembly on November 1, 2005: the bill as affected by Assembly Amendment 1 (as affected by Assembly Amendment 1 thereto), Assembly Amendment 4, Assembly Amendment 5 (as affected by Assembly Amendment 1 thereto), and Assembly Amendment 6.

Content of Engrossed 2005 Assembly Bill 778:

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, may be 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 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 if the other elements of the claim are proved.

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 proves all of the following:

1. That no other lawful (in place of legal, the term that appeared in the original Assembly Bill 778) process exists for the injured party to seek (in place of obtain) damages.

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.

4. That the action names as defendants those manufacturers who collectively, during the relevant production period, manufactured (in place of manufactured, distributed, sold or promoted) at least 80 percent of all products sold in this state that were chemically identical to the specific product that allegedly caused the injury or harm. This bill defines the "relevant production period" as the time period during which the specific product that allegedly caused the claimant's injury or harm was manufactured, distributed, sold, or promoted. The original Assembly Bill 778 did not define this term.

The bill limits liability to products that were manufactured, distributed, sold, or promoted within 25 years before the date the injury occurred but removes the language that appeared in the original Assembly Bill 778 that would also have required that the product was manufactured for more than five years.

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

SECTION 1. 895.046 of the statutes is created to read:

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

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

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

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

(3) REMEDY WITH SPECIFIC PRODUCT IDENTIFICATION. Except as provided in sub. (4), the manufacturer, distributor, seller, or promoter of a product may be held liable in an action under sub. (2) only if the claimant proves, in addition to any other elements required to prove his or her claim, that the manufacturer, distributor, seller, or promoter of a product manufactured, distributed, sold, or promoted the specific product alleged to have caused the claimant's injury or harm.

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

(a) That no other lawful process exists for the claimant to seek redress from another person for the injury or harm.

(b) That the claimant has suffered an injury or harm that can be caused only by a product chemically identical to the specific product that allegedly caused the claimant's injury or harm.

(c) That the manufacturer, distributor, seller, or promoter of a product manufactured, distributed, sold, or promoted a product that meets all of the following criteria:

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

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

(dm) That the action names as defendants 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.

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

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

SECTION 2. Initial applicability.

(1) This act first applies to actions commenced on the effective date of this subsection.

SECTION 3. Effective date.

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

(END)