



## 2011 ASSEMBLY BILL 538

February 7, 2012 – Introduced by Representatives KOOYENGA and VOS, cosponsored by Senators GROTHMAN and S. FITZGERALD. Referred to Committee on Judiciary and Ethics.

1     **AN ACT** *to repeal* 895.047 (6); *to renumber* 895.046 (1); *to amend* 895.046 (2);  
2             and *to create* 895.046 (1g) and 895.046 (8) of the statutes; **relating to:** changes  
3             to product liability law and the law governing remedies against manufacturers,  
4             distributors, sellers, and promoters of a product.

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### ***Analysis by the Legislative Reference Bureau***

2011 Wisconsin Act 2 (Act 2) made a number of changes to the law governing civil actions involving product liability claims brought under a theory of strict liability and to civil actions against manufacturers, distributors, sellers, and promoters of products. This bill makes several changes to certain provisions enacted under Act 2.

### **PRODUCT LIABILITY**

#### **REQUIREMENTS FOR BRINGING A PRODUCT LIABILITY ACTION BASED ON A DEFECTIVE PRODUCT; DEFENSES AND EXCEPTIONS TO LIABILITY**

Act 2 created specific requirements for bringing a product liability action seeking damages under the theory of strict liability against manufacturers of the product and against sellers and distributors of the product. Act 2 included defenses and exceptions to strict liability for these types of parties. Finally, Act 2 included an inapplicability provision making the requirements for bringing a product liability action seeking damages under a theory of strict liability, the exceptions to strict liability, and the defenses to strict liability inapplicable to actions based on a claim of negligence or breach of warranty. This bill eliminates the inapplicability provision.

**ASSEMBLY BILL 538****RISK CONTRIBUTION THEORY: REMEDIES AGAINST  
MANUFACTURERS, DISTRIBUTORS, SELLERS, AND PROMOTERS OF  
A PRODUCT**

Under Act 2, a manufacturer, distributor, seller, or promoter of a product who is a defendant in a civil action generally may be held liable for damages only if an injured party proves, in addition to 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. Also under Act 2, in cases in which 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 under risk contribution theory if: 1) the injured party names as defendants in the action those manufacturers 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 and 2) the injured party proves certain other elements related to the cause of the injury and the right of the injured party to a recovery. These provisions of Act 2 were made applicable to actions or special proceedings commenced on or after the effective date of the Act.

This bill provides that the provisions of Act 2 governing remedies against manufacturers, distributors, sellers, and promoters of a product apply to all actions in law or equity, whenever filed or accrued. The bill includes a statement of legislative findings and intent which states, in part, that the portions of Act 2 governing remedies against manufacturers, distributors, sellers, and promoters of a product under risk contribution theory were enacted in response to the Wisconsin Supreme Court's decision in *Thomas v. Mallett*, 2005 WI 129. The bill also explicitly abrogates common law doctrines governing product liability claims that conflict with the elements, requirements, and defenses established under Act 2.

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

1           **SECTION 1.** 895.046 (1) of the statutes, as created by 2011 Wisconsin Act 2, is  
2           renumbered 895.046 (1r).

3           **SECTION 2.** 895.046 (1g) of the statutes is created to read:

4           895.046 (1g) LEGISLATIVE FINDINGS AND INTENT. The legislature finds that it is  
5           in the public interest to clarify product liability law, generally, and the application  
6           of the risk contribution theory of liability first announced by the Wisconsin Supreme  
7           Court in *Collins v. Eli Lilly Company*, 116 Wis. 2d 166 (1984), specifically, in order

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1 to return tort law to its historical, common law roots. This return both protects the  
2 rights of citizens to pursue legitimate and timely claims of injury resulting from  
3 defective products, and assures that businesses may conduct activities in this state  
4 without fear of being sued for indefinite claims of harm from products which  
5 businesses may never have manufactured, distributed, sold, or promoted, or which  
6 were made and sold decades ago. The legislature finds that the application of risk  
7 contribution to former white lead carbonate manufacturers in *Thomas v. Mallet*, 285  
8 Wis. 2d 236 (2005), was an improperly expansive application of the risk contribution  
9 theory of liability announced in *Collins*, and that application raised substantial  
10 questions of deprivation of due process, equal protection, and right to jury trial under  
11 the federal and Wisconsin constitutions. The legislature finds that this section  
12 protects the right to a remedy found in article I, section 9, of the Wisconsin  
13 Constitution, by preserving the narrow and limited application of the risk  
14 contribution theory of liability announced in *Collins*.

15 **SECTION 3.** 895.046 (2) of the statutes, as created by 2011 Wisconsin Act 2, is  
16 amended to read:

17 895.046 (2) APPLICABILITY. This section applies to all actions in law or equity,  
18 whenever filed or accrued, in which a claimant alleges that the manufacturer,  
19 distributor, seller, or promoter of a product is liable for an injury or harm to a person  
20 or property, including actions based on allegations that the design, manufacture,  
21 distribution, sale, or promotion of, or instructions or warnings about, a product  
22 caused or contributed to a personal injury or harm to a person or property, a private  
23 nuisance, or a public nuisance, and to all related or independent claims, including  
24 unjust enrichment, restitution, or indemnification.

25 **SECTION 4.** 895.046 (8) of the statutes is created to read:

