

**SENATE SUBSTITUTE AMENDMENT 1,
TO 2003 SENATE BILL 126**

January 20, 2004 - Offered by Senator WELCH.

1 **AN ACT** *to create* 895.045 (3) and 895.047 of the statutes; **relating to:** product
2 liability of manufacturers, distributors, and sellers.

Analysis by the Legislative Reference Bureau

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 engaged in the business of selling such products, 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 that 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 damages. 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 defendants in an action if the manufacturer 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 injuries. 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 casual responsibility for the claimant's damages caused by misuse, alteration, or modification of the product by the claimant.

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 that 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.

Under the bill, evidence of remedial measures taken after the sale of the manufactured product are 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.

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 is required to 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% 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% 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.

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

1 **SECTION 1.** 895.045 (3) of the statutes is created to read:

2 895.045 (3) PRODUCT LIABILITY. (a) In an action by any person to recover
3 damages for injuries caused by a defective product based on a claim of strict liability,
4 the fact finder shall first determine if the injured party has the right to recover
5 damages. To do so, the fact finder shall determine what percentage of the total causal
6 responsibility for the injury resulted from the contributory negligence of the injured
7 person, what percentage resulted from the defective condition of the product, and
8 what percentage resulted from the contributory negligence of any other person.

9 (b) If the injured party's percentage of total causal responsibility for the injury
10 is greater than the percentage resulting from the defective condition of the product,
11 the injured party may not recover from the manufacturer, distributor, seller, or any

1 other person responsible for placing the product in the stream of commerce based on
2 the defect in the product.

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

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

22 (e) If the injured party is not barred from recovery from the product defendants
23 under par. (b), the fact that the injured party's causal responsibility for the injury is
24 greater than an individual product defendant's responsibility for the damages to the

1 injured party does not bar the injured party from recovering from that individual
2 product defendant.

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

5 **SECTION 2.** 895.047 of the statutes is created to read:

6 **895.047 Product liability. (1)** LIABILITY OF MANUFACTURER. In an action for
7 damages caused by a manufactured product based on a claim of strict liability, a
8 manufacturer is liable to a claimant only if the claimant establishes all of the
9 following by a preponderance of the evidence:

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

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

24 (c) That the defective condition existed at the time that the product left the
25 control of the manufacturer.

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

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

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

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

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

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

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

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

24 (b) Evidence that the product, at the time of sale, complied in material respects
25 with relevant standards, conditions, or specifications adopted or approved by a

1 federal or state law or agency shall create a rebuttable presumption that the product
2 is not defective.

3 (c) The damages for which a manufacturer, seller, or distributor would
4 otherwise be liable shall be reduced by the percentage of casual responsibility for the
5 claimant's harm attributable to misuse, alteration, or modification of a product by
6 the claimant.

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

11 (e) A seller or distributor of a product is not liable for damage to a claimant if
12 the seller or distributor receives the product in a sealed container and has no
13 reasonable opportunity to test or inspect the product.

14 **(4) SUBSEQUENT REMEDIAL MEASURES.** In an action for damages caused by a
15 manufactured product based on a claim of strict liability, evidence of remedial
16 measures taken subsequent to the sale of the product is not admissible for the
17 purpose of showing a manufacturing defect in the product, a defect in the design of
18 the product, or a need for a warning or instruction. This subsection does not prohibit
19 the admission of such evidence to show a reasonable alternative design that existed
20 at the time that the product was sold.

21 **(5) TIME LIMIT.** (a) In any action under this section, a defendant is not liable
22 for damage to a claimant if the product alleged to have caused the damage was
23 manufactured 15 years or more before the claim accrues, unless the manufacturer
24 makes a specific representation that the product will last for a period of time beyond
25 15 years.

1 (b) This subsection shall not bar a claim if the claimant establishes by a
2 preponderance of the evidence all of the following:

3 1. That the defective product caused a latent disease that did not manifest itself
4 until a date on or after 3 years before the expiration of the 15 year period.

5 2. That the claimant commenced the action within 3 years of the date of
6 manifestation of the latent disease.

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

9 **SECTION 3. Initial applicability.**

10 (1) This act first applies to causes of action occurring on the effective date of this
11 subsection.

12 (END)