Committee Name:
Senate Committee – Judiciary, Corrections and Privacy (SC–JCP)

Appointments

03hr_SC–JCP_Appt_pt00

Committee Hearings

03hr_SC–JCP_CH_pt00

Committee Reports

03hr_SC–JCP_CR_pt00

Clearinghouse Rules

03hr_SC–JCP_CRule_03–

Executive Sessions

03hr_SC–JCP_ES_pt00

Hearing Records

03hr_ab0000

03hr_sb0126

Misc.

03hr_SC–JCP_Misc_pt00

Record of Committee Proceedings

03hr_SC–JCP_RCP_pt00

State Senator
Robert T. Welch

WRITTEN STATEMENT OF SENATOR BOB WELCH ON SENATE BILL 126
January 23, 2004

Thank you for the opportunity to provide a statement in support of Senate Bill 126 relating to product liability of manufacturers, distributors, and sellers. I apologize that I could not be here in person; however, I hope that you will consider my statement and the testimony of those to follow me in support of this bill.

As you know, this bill will:

1. Establish the criteria to determine if a product manufacturer, distributor, or seller is liable to a person injured by the manufactured product.
2. Provide defenses against claims including a rebuttable presumption that the claimant's intoxication or drug use was the cause of his or her injuries and a rebuttable presumption that given evidence the product, at the time of sale, complied in material respects with relevant standards, conditions, or specifications adopted or approved by a federal or state law or agency the product is not defective.
3. Require 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.
4. Relieve 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.
5. Limits a defendant's liability for damage caused by a manufactured product to those products manufactured within 15 years.
6. 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.
7. Provides that 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.

--OVER--

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Email: Sen.Welch@legis.state.wi.us

You will have a substitute amendment before you that makes changes to Senate Bill 126 based on testimony heard at the Assembly hearing on its companion, Assembly Bill 317. If you adopt the substitute amendment to Senate Bill 126 you will be adopting changes that were suggested during testimony on AB 317, thus making the two bills the same. The substitute amendment clarifies that juries continue to have the same role that juries always have had as a trier of fact in products cases; provides an exception to the statute of repose for a disease that does not manifest itself until on or after three years before the 15 year period, provided that a cause of action is commenced within 3 years of the manifestation; and the substitute amendment clarifies that this bill relates to strict liability cases and does not eliminate or limit negligence suits against manufacturers, distributors or sellers.

Senate Bill 126 puts common sense back into the civil justice system. This legislation does not reduce a consumer's ability to hold businesses responsible for faulty products, but instead it offers consumers a more defined framework to follow when they are harmed by a faulty product. Given our litigious society, businesses need protection from unwarranted lawsuits costing hundreds of thousands of dollars. This legislation provides a balance between protection and safety for consumers and the costly and frivolous lawsuits filed against businesses. Senate Bill 126 reinforces that joint and several liability applies to products.

Thank you again for the opportunity to urge my support for Senate Bill 126.

WISCONSIN LAWYERS
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MEMORANDUM

To: Members of the Senate Committee on Judiciary, Corrections and Privacy

From: State Bar of Wisconsin

Date: January 23, 2004

Re: Senate Bill 126 - OPPOSE

The Litigation Section of the State Bar of Wisconsin opposes Senate Bill 126 because: (1) there is no demonstrated need for it; (2) consumers would find it more difficult, if not impossible, to recover for injuries sustained because of another's negligence; and (3) it creates a disincentive for manufacturers to implement product safety technology.

1. **No demonstrated need.**

Wisconsin has not experienced an explosion of product liability litigation. In 2001, only 85 product liability cases were filed in Wisconsin, down from 116 cases in year 2000, down from 150 cases in 1999.

Corporate America ranked Wisconsin's liability system 11th best overall and 9th best in terms of overall treatment of tort and contract litigation.

The United States Chamber of Commerce ranked Wisconsin favorably in its 2003 study of the reasonability and fairness of state tort liability systems. All interviews for the study were conducted among a nationally representative sample of senior attorneys at companies with annual revenues of $1 billion and over. Corporate America ranked Wisconsin's liability system 11th best overall and 9th best in terms of overall treatment of tort and contract litigation.

2. **Injured consumers will be denied recovery and left unprotected from unsafe products.**

The bill unfairly cuts off the right of injured consumers to obtain full recovery after the product has been in the marketplace for 15 or more years. This provision does not take into account the useful life of some products, like heavy machinery, or that some injuries, like lung disease from asbestos, are not discovered until many years after the exposure. Requiring a person to bring a claim before it is knowable is a denial of justice.

The legislation also creates a rebuttable presumption that a product is not defective if the product complied with federal or state standards, regardless of whether those standards effectively

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protect consumers from death or injuries. It provides protection for the manufacturers of defective products even though broad government performance standards are not a reliable predictor of particular defective designs and should not shield companies from liability for their negligence, or intentionally making unsafe products. Here are just a few examples of defective products meeting federal standards that injured or killed consumers:

Firestone Tires. Firestone made the ATX and Wilderness tires for the Ford Explorer. Even though the tires passed the antiquated 30-year-old federal tire safety standard, the U.S. Department of Transportation documented at least 200 deaths and 700 serious injuries from crashes involving the tires.

Ford Pinto. A defective fuel tank that complied with minimal federal standards exposed consumers to serious injury or death in 20 to 30 mile-per-hour collisions. By the time these cars were recalled, Pinto fuel-fed fires had killed at least 27 people and injured many others.

Child Car Seats. Virtually all child car seats comply with federal standards. Yet there have been incidents where the carrier separates from the base, low shield boosters eject or paralyze kids, and convertible seats break at a couple of miles above the sled test.

By creating a defense to product liability based on compliance with certain standards, the legislation shifts the risk for a defective product to the unwary consumer, the person with the least amount of product knowledge to safeguard against injuries from a defect unknown to them.

3. **Product manufacturers will have a disincentive to implement product safety technology and to publicize and fix older products.**

Shielding those in the stream of commerce from liability for defective products creates a disincentive to make the safest possible product. Product liability lawsuits have prompted safety changes and made the marketplace safer for consumers. Here are a few examples:

Flammable children's pajamas taken off the market. A manufacturer of children's pajamas made of 100 percent untreated cotton flannelette stopped making the garment when the company was ordered to pay damages to a 4-year-old girl who had been severely burned when her pajama top caught on fire.
Gryc v. Dayton Hudson Corp., 297 N.W., 2d 727 (Minn. 1980), cert. denied, 101 S. Ct. 320 (1980).

Public notified of deadly crib defect. In 1983, a 13-month-old baby was found hanged to death on the headboard of crib made by Bassett Furniture. A jury awarded damages, which prompted the company to speed up the recall of the product and public notice.
Crusan v. Bassett Furniture Co., Cal., Sacramento Super. Ct., June 11, 1986.

Lamp explosions lead to warning. Carol Cable Company, the manufacturer of utility lamps used for work on cars and construction where the worker's hands must be free, began warning of the danger of explosion after a verdict for an auto body mechanic who suffered third-degree burns after the lamp exploded. The man was using the lamp while

removing the gas tank from a damaged car when gasoline vapors reacted with the electrical switch and light bulb filament, causing the explosion.
Queiros v. Carol Cable Co., N.J., Essex County Superior Court, No. L-51272-81, 1984.

Continued liability serves as an incentive for companies to remain vigilant in locating and fixing product defects. Laws that shield a company from liability for a defective product manufactured 15 years ago remove this incentive to discover, publicize and fix defects. This is turn results in more injured consumers who have no chance at recovery.

For these reasons, the State Bar of Wisconsin urges committee members to oppose Senate Bill 126.

If you have any questions, please contact Deb Sybell, Government Relations Coordinator with the State Bar of Wisconsin, at (608) 250-6128.

Wisconsin Economic Development Association Inc.

TO: Members, Senate Committee on Judiciary

FROM: WEDA Board of Directors
Peter Thillman & Rob Kleman, Legislative Co-Chairs
Jim Hough, Legislative Director

DATE: January 23, 2004

RE: **Support for Senate Bill 126**

The Wisconsin Economic Development Association (WEDA) is a statewide association of approximately 500 economic development professionals whose primary focus is the support of policies that create a climate conducive to the retention, expansion and attraction of businesses in and to Wisconsin.

A state's liability system has a significant impact on its economic development. Economic growth is greatly affected by the kind of legal environment in which businesses must operate.

For those reasons, WEDA has long been an advocate of civil justice reform that establishes a framework for resolving disputes that is fair to all litigants and discourages frivolous and costly litigation that is aimed at "finding someone to pay" rather than fairly finding the truth.

Wisconsin is currently among a distinct minority of states which uses the very loose "consumer expectation" test in determining strict liability of a manufacturer. This bill moves Wisconsin to requiring proof of a "reasonable alternative design" which would bring Wisconsin in line with the vast majority of states.

Senate Bill 126 also offers substantial protection to sellers (most often small businesses) without denying consumers the ability to seek legal remedy from someone in the chain. Further, the bill specifies that the 1995 changes to joint and several liability apply to products cases, which most of us thought was the Legislature's intention when the joint and several liability changes were adopted in the mid-nineties.

WEDA strongly supports SB 126 and respectfully urges a recommendation for passage.

PEOPLE • JOBS • PROFITS
P.O. Box 1230 Madison WI 53701 608-255-5666

Wisconsin Coalition for Civil Justice

TO: Members, Senate Committee on Judiciary

FROM: Bill Smith, President
Jim Hough, Legislative Counsel

DATE: January 23, 2004

RE: **Support for Senate Bill 126**

The Wisconsin Coalition for Civil Justice (WCCJ) (see attached list) has been at the forefront of seeking civil justice reform since the mid 1980's. The Coalition's broad based membership has as its goals a fair and equitable civil justice system in which "neither side" is advantaged by the "rules of the game" and a system that maximizes the ability to find the truth and resolve factual disputes.

Senate Bill 126 is an excellent piece of legislation that fits into those goals and also brings Wisconsin in line with the vast majority of states. This "common sense" Products Liability Bill is positive for manufacturers and sellers/retailers without depriving consumers of their day in court.

Senate Bill 126 "corrects" the application of joint and several liability to clarify that the 1995 changes do apply to strict liability cases, specifically products liability. It establishes a statute of repose and provides common sense defenses where there has been misuse, alteration or modification of a product or where an accident occurred while the claimant was legally intoxicated.

Senate Bill 126 is the type of legislation that also helps Wisconsin from an economic development standpoint in that it helps to signal a fair and common sense approach to resolving civil disputes.

WCCJ respectfully urges support for Senate Bill 126.

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: January 23, 2004

RE: Support SB 126 - 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 126.

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Statement Before the Senate Committee on Judiciary, Corrections and Privacy

By

Bill G. Smith
State Director
National Federation of Independent Business
Wisconsin Chapter

Friday, January 23, 2004
Senate Bill 126

Mr. Chairman, and members of the Committee, thank you for allowing me to make a brief statement in support of passage of Senate Bill 126.

You have already heard the legal community describe the provisions of this important legislation, but I also wanted you to know how important Senate Bill 126 is to our states' small business community.

According to a recent survey study by NFIB's Research Foundation, product or professional liability is the most common type of lawsuit filed against a small business.

As a result, small business owners spend an extraordinary amount of time and money on liability matters, especially compared to other important business functions.

For example, introducing technology is a very important function in any business, large or small. Innovation is the basis for increasing productivity which is essential to creating wealth and growing jobs. Yet, our study shows 23 percent of small business owners spend more time on liability problems than on introducing new technologies or processes. Some other interesting liability statistics from the study:

- 22 percent say they spend more time on liability than employee wages;
- 21 percent spend more time on liability matters than obtaining or repaying business loans.

It is clear small business employers devote considerable time, money and attention to liability issues affecting their business, and which impacts the economy of our state.

In fact, according to a report by the White House Council of Economic Advisors, the cost of tort litigation is equal to a 2.1 percent wage and salary tax for every citizen in the country.

The NFIB's liability study also revealed that small business owners (47%) are very concerned they will be dragged into a lawsuit where others are responsible, and believe they have little control over the possibility of being a defendant in a lawsuit.

That's why we are especially pleased this legislation would, under certain conditions, limit the liability of sellers, assemblers, and distributors of products and would clarify that the 1995 changes to the doctrine of joint and several liability applies to product liability-related lawsuits.

Mr. Chairman, thank you for holding the hearing today, and **it is on behalf of our states' small business community that I urge you to act favorably and promptly on Senate Bill 126.**

Thank you.

Keeping Wisconsin Families Safe

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Testimony of Lynn R. Laufenberg
on behalf of the
Wisconsin Academy of Trial Lawyers
before the
Senate Judiciary, Corrections and Privacy Committee
Rep. Dave Zien, Chair
on
2003 Senate Bill 126
January 23, 2004

Good morning, Senator Zien and members of the Committee. My name is Lynn R. Laufenberg. I am a partner in the Milwaukee law firm of Laufenberg & Hoefle and the Past President 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 Substitute Amendment 1 to Senate Bill 126.

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 126 and Substitute Amendment 1 is an attempt to roll back 40 years of common law and precedent. Wisconsin has a carefully crafted product liability system that has worked well for all parties. In an effort to obtain legislative protection for putting dangerous and defective products in the marketplace business interests have promoted what they want to call the "common sense" product liability bill. To paraphrase Voltaire, the problem with common sense is that it is not all that common.

This bill proves the point. The legislation should be called the "Defective Product Protection Act."

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

1. Contrary to myth, product liability cases are extremely rare and do not threaten the health of our economy. For example, a grand total of ***85*** product-liability cases were filed in Wisconsin courts in 2001. 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 US competitiveness, why then does SB 126 spotlight the tiny molehill of product-liability cases rather than the huge mountain of corporate vs. corporate lawsuits?

2. *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.

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 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.

5. *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."

Below is a more thorough discussion of our problems with SB 126.

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." 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.

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.

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.

SB 126 Represents a "Sea Change" in Strict Liability Actions in Wisconsin

It is crystal-clear that one of the main purposes of SB 126 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.

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 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 126

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 manufacture 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 reasonably 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 126 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 126 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

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.

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 supercedes the right of our citizens to be protected from and, if necessary, compensated for injuries they sustain by dangerous and defective products.

Vote Record

Committee on Judiciary, Corrections and Privacy

Date: 2-10-04

Moved by: Stepp Seconded by: Fitz

AB ____ SB 126 Clearinghouse Rule ____

AJR ____ SJR ____ Appointment ____

AR ____ SR ____ Other ____

~~A~~S Amdt 1

A/S Amdt ____ to A/S Amdt ____

A/S Sub Amdt ____

A/S Amdt ____ to A/S Sub Amdt ____

A/S Amdt ____ to A/S Amdt ____ to A/S Sub Amdt ____

Be recommended for:

☐ Passage ☑ Adoption ☐ Confirmation ☐ Concurrence ☐ Indefinite Postponement

☐ Introduction ☐ Rejection ☐ Tabling ☐ Nonconcurrence

Committee Member	Roll	Aye	No	Absent	Not Voting
Senator David Zien, Chair	☑	☑	☐	☐	☐
Senator Scott Fitzgerald	☑	☑	☐	☐	☐
Senator Cathy Stepp	☑	☑	☐	☐	☐
Senator Tim Carpenter	☑	☑	☐	☐	☐
Senator G. Spencer Coggs	☑	☑	☐	☐	☐
Totals:					

Hold Open

☐ Motion Carried ☐ Motion Failed

Vote Record

Committee on Judiciary, Corrections and Privacy

Date: 2-10-04

Moved by: Fitz Seconded by: Stepp

AB____ SB 126 as amd. Clearinghouse Rule____

AJR____ SJR____ Appointment____

AR____ SR____ Other____

A/S Amdt ____

A/S Amdt ____ to A/S Amdt ____

A/S Sub Amdt ____

A/S Amdt ____ to A/S Sub Amdt ____

A/S Amdt ____ to A/S Amdt ____ to A/S Sub Amdt ____

Be recommended for: Amended

☑ Passage ☐ Adoption ☐ Confirmation ☐ Concurrence ☐ Indefinite Postponement

☐ Introduction ☐ Rejection ☐ Tabling ☐ Nonconcurrence

Committee Member	Aye	No	Absent	Not Voting
Senator David Zien, Chair	☑	☐	☐	☐
Senator Scott Fitzgerald	☑	☐	☐	☐
Senator Cathy Stepp	☑	☐	☐	☐
Senator Tim Carpenter	☐	☑	☐	☐
Senator G. Spencer Coggs	☐	☑	☐	☐
Totals:	____	____	____	____

☐ Motion Carried ☐ Motion Failed

State Senator
Robert T. Welch

WRITTEN STATEMENT OF SENATOR BOB WELCH ON SENATE BILL 126

Thank you for the opportunity to provide a statement in support of Senate Bill 126 relating to product liability of manufacturers, distributors, and sellers. I apologize that I could not be here in person; however, I hope that you will consider my statement and the testimony of those to follow me in support of this bill.

As you know, this bill will:

1. Establish the criteria to determine if a product manufacturer, distributor, or seller is liable to a person injured by the manufactured product.
2. Provide defenses against claims including a rebuttable presumption that the claimant's intoxication or drug use was the cause of his or her injuries and a rebuttable presumption that given evidence the product, at the time of sale, complied in material respects with relevant standards, conditions, or specifications adopted or approved by a federal or state law or agency the product is not defective.
3. Require 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.
4. Relieve 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.
5. Limits a defendant's liability for damage caused by a manufactured product to those products manufactured within 15 years.
6. 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.
7. Provides that 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.

You will have a substitute amendment before you that makes changes to Senate Bill 126 based on testimony heard at the Assembly hearing on its companion, Assembly Bill 317. If you adopt the substitute amendment to Senate Bill 126 you will be adopting changes that were suggested during testimony on AB 317, thus making the two bills the same. The substitute amendment clarifies that juries continue to have the same role that juries always have had as a trier of fact in products cases; provides an exception to the statute of repose for a disease that does not manifest itself until on or after three years before the 15 year period, provided that a cause of action is commenced within 3 years of the manifestation; and the substitute amendment clarifies that this bill relates to strict liability cases and does not eliminate or limit negligence suits against manufacturers, distributors or sellers.

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Email: Sen.Welch@legis.state.wi.us

Senate Bill 126 puts common sense back into the civil justice system. This legislation does not reduce a consumer's ability to hold businesses responsible for faulty products, but instead it offers consumers a more defined framework to follow when they are harmed by a faulty product. Given our litigious society, businesses need protection from unwarranted lawsuits costing hundreds of thousands of dollars. This legislation provides a balance between protection and safety for consumers and the costly and frivolous lawsuits filed against businesses. Senate Bill 126 reinforces that joint and several liability applies to products.

Thank you again for the opportunity to urge my support for Senate Bill 126.

TESTIMONY OF JAMES J. MATHIE OFFERED ON BEHALF OF
CIVIL TRIAL COUNSEL OF WISCONSIN
WITH RESPECT TO SENATE BILL 126 RELATING TO
PRODUCT LIABILITY OF MANUFACTURERS, DISTRIBUTORS AND SELLERS

Comparative Fault

When § 895.045, Wis. Stats. was first drafted, its purpose was to "abolish" joint and several liability except with respect to certain specifically named exceptions. Product liability actions were not specifically excepted from the general abolition of joint and several liability.

The proposed legislation protects the plaintiff's advantage to compare his or her negligence to the defective nature of the product. If individual defendant manufacturers contribute to the defective nature of the product, their causal responsibility will be combined to determine whether the plaintiff may recover. However, the individual liability of each so-called "product defendant" will determine the amount that the plaintiff may recover against an individual product defendant.

For instance, if the plaintiff is 40 percent contributorily negligent and the defective nature of the product is 60 percent responsible for the accident, with three equally responsible product defendants. A straight comparison of the plaintiff to each defendant would result in the plaintiff being barred from recovery because the plaintiff's 40 percent negligence would exceed the 20 percent causal responsibility of any individual product defendant. Because the legislation preserves the plaintiff-product comparison, the plaintiff may still recover. However, the plaintiff's recovery against any individual product defendant is limited to the percentage of responsibility attributed to that product defendant. If a product defendant is 51 percent or more at fault, joint and several liability continues to apply to that defendant.

Definition and Proof of Product Defect

Currently, Wisconsin follows the consumer expectations test. Whether a product contains an unreasonably dangerous defect depends upon the ordinary consumer's reasonable expectations regarding the product. A defective product is unreasonably dangerous to the user or consumer when it is dangerous to an extent beyond which would be contemplated by the ordinary user or consumer possessing the knowledge of the product's characteristics which were common in the community.[i]

As a consequence of this test, Wisconsin juries are regularly instructed that a manufacturer of a product is regarded as negligent even though he or she has exercised all possible care in the preparation and sale of the product.[ii] The Wisconsin courts have held, in adopting the consumer expectations test that a product may be defective and unreasonably dangerous even though there are no alternative safer designs available.[iii]

The consumer expectations test is a decided minority position. Only four jurisdictions apply the test without requiring proof of a reasonable alternative design.[iv] Even the liberal California

courts have recognized that the consumer expectations test is simply inappropriate where the product at issue involves any degree of complexity.[v]

The majority position, as set forth by the American Law Institute defines a product as defective when 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. Thus, the plaintiff is required to offer proof of a reasonable alternative design in order to recover. Wisconsin should make this simple yet crucial change to its products liability law.

The proposed legislation addresses this by defining product defect, with reference to reasonable alternative design.

Distributor/Seller Liability

Currently, Wisconsin law treats the seller or distributor of a defective product in the same fashion that it treats the manufacturer of the product. Wisconsin law makes no provision for the practical reality that the seller or distributor, in many cases, has no means to inspect or test the products it sells (many of them arriving in sealed containers) and is simply not in a position to assure the safety of those products. The legislation provides a sealed container defense to address this unfairness.

In order to address this unfairness, the legislation provides that a product seller is not liable unless the manufacturer would be liable *and* either the manufacturer is not subject to service of process within the state or a court determines that the claimant would be unable to enforce a judgment against the manufacturer.

The legislation addresses the reality of the chain of distribution while protecting the claimant's right to a remedy.

Subsequent Remedial Measures

The Wisconsin rules of evidence currently provide that when, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event.[vi]

The Wisconsin courts have ruled that this exclusion applies to the negligence aspect of a product liability case, but also ruled that the exclusion does not operate to exclude such evidence in a claim asserting strict liability.[vii]

The federal rules of evidence have already addressed this anomaly. Rule 407 of the Federal Rules of Evidence provides[viii] that evidence of subsequent remedial measures is not admissible to prove a defect in a product, a defect in a product's design, or a need for a warning or instruction. At the very least, Wisconsin needs to make this change also. But an even more significant move is necessary.

Although the federal rule resolves the issue of the application of the subsequent remedial measures rule to product liability actions, it leaves open the possibility that changes in design that occur after the date of sale, but before the injury, are admissible to prove that the original design was defective. This oversight defeats part of the original purpose for the rule. The original rule was grounded in the social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.[ix] If that is truly the purpose of the rule, then changes subsequent to sale should likewise be excluded.

On balance however, the new rule does not prohibit the admission of such evidence to show a reasonable alternative design that existed at the time that the product was sold.

Statute Of Repose

At least 20 states recognize that no product lasts forever and therefore they have enacted statutes of repose that apply to product liability actions[x] or created a presumption that the useful life of a product has expired after a certain number of years.[xi] Currently, Wisconsin does not have a statute of repose applying to manufactured products.[xii] The new legislation creates one.

Miscellaneous Defenses

Finally, the proposed legislation provides for some common-sense defenses and codifies defenses that already exist.

The legislation recognizes, as the law should, that persons who are under the influence of intoxicants or controlled substances, are more often than not, the cause of their own injuries. The legislation creates a rebuttable presumption of causation in this circumstance.

The legislation recognizes the practical reality that a manufacturer should be rewarded for complying with all of the state and federal standards in existence with respect to the product. Therefore, a product that so complies is presumed to not be defective. However, the defense is also rebuttable, allowing the injured person to demonstrate through evidence that the product, though it complied with state and federal standards, was still defective.

And the legislation codifies the "open and obvious" defense, recognizing that if the damage or injury is caused by an inherent characteristic of the product that would be recognized by an ordinary person with ordinary knowledge common to the community that uses or consumes the product, then the product was not at fault.

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[i] Wis. J.I. Civil 3260 Strict Liability: Duty of Manufacturer to Ultimate User.
[ii] Id.
[iii] ***Sumnicht v. Toyota Motor Sales***, 121 Wis.2d 338, 370-71, 360 N.W.2d 2 (1984).
[iv] According to the American Law Institute, Restatement of Torts 3d, Product Liability.
[v] *See* ***Soule v. General Motors Corp.***, 882 P.2d 298, 308 (Cal. 1994).
[vi] Section 904.07, Wis. Stats.
[vii] *See* ***Chart v. GMC***, 80 Wis.2d 91, 258 N.W.2d 680 (1977).
[viii] Effective December 1, 1997.
[ix] See advisory committee notes to 1972 Proposed Rule 904.07, Wis. Stats.

[x] Colorado (7 years); Connecticut (10); Florida (12); Georgia (10); Illinois (10/12); Indiana (10); Iowa (15); Montana (10); Nebraska (10); North Carolina (6); Oklahoma; Oregon (8); Tennessee (10); Texas (15); Vermont (20); Washington (12); and Wyoming.

[xi] Idaho (10 years); Kansas (10); Kentucky (5/8).

[xii] § 893.89, Wis. Stats. sets an sets an "exposure period" of 10 years during which actions for injury resulting from improvements to real property must be brought. Some states have applied such statutes to product liability actions also.

Lautenberg = "Sealed container from China, nobody to sue!"

Mathie: "Untrue, falls to distributor"

→ The "sub" indicates 15 yrs, but if manuf claims product is expected to last more than 15 yrs, then they're liable

→ No crisis now. THIS is the time to make Δ's. 911 brought many bad bills.

- Δ's = clarify that if no ___ avail to sue, it falls on ___.