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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2005-06

(session year)

Senate

(Assembly, Senate or Joint)

Committee on Judiciary, Corrections and Privacy...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
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INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
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- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
 - (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
 - (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (July 2012)



WISCONSIN

**Statement Before the
Senate Committee on Judiciary, Corrections and Privacy**

By

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

**Wednesday, February 23, 2005
Senate Bill 58**

Mr. Chairman, and members of the Committee, thank you for allowing me to make a brief statement in support of passage of Senate Bill 58.

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 58 is to our state's 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 issues 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, which of course impacts the economic growth 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.

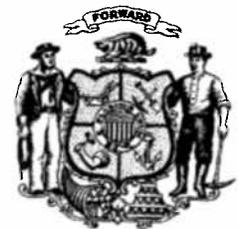
That's why we are especially pleased this legislation would, under certain conditions, limit the liability of sellers and distributors of products and would clarify that the 1995 changes to the doctrine of joint and several liability applies to product liability-related lawsuits.

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 58.**

Thank you.



WISCONSIN STATE LEGISLATURE



*Wisconsin Coalition
for Civil Justice*

TO: Members, Senate Committee on Judiciary

FROM: Bill Smith, President
Jim Hough, Legislative Counsel

DATE: February 23, 2005

RE: **Support for Senate Bill 58**

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 58 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 58 "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 58 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 58.

*Wisconsin Coalition
for Civil Justice*

WCCJ Members

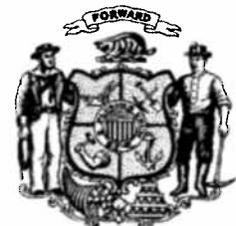
February, 2005

WCCJ Members:

- **American Council of Engineering**
- **American Insurance Association**
- **Associated Builders & Contractors of Wisconsin**
- **Associated General Contractors of Wisconsin**
- **Building Industry Council**
- **Civil Trial Counsel of Wisconsin**
- **Community Bankers of Wisconsin**
- **National Federation of Independent Business**
- **Petroleum Marketers Association of Wisconsin**
- **Professional Insurance Agents of Wisconsin**
- **Tavern League of Wisconsin**
- **Wisconsin Asbestos Alliance**
- **Wisconsin Association of Consulting Engineers**
- **Wisconsin Association of Manufacturers & Commerce**
- **Wisconsin Auto & Truck Dealers Association**
- **Wisconsin Builders Association**
- **Wisconsin Economic Development Association**
- **Wisconsin Federation of Cooperatives**
- **Wisconsin Grocers Association**
- **Wisconsin Health & Hospital Association**
- **Wisconsin Institute of CPA's**
- **Wisconsin Insurance Alliance**
- **Wisconsin Medical Society**
- **Wisconsin Merchants Federation**
- **Wisconsin Mortgage Bankers Association**
- **Wisconsin Motor Carriers Association**
- **Wisconsin Paper Council**
- **Wisconsin Petroleum Council**
- **Wisconsin Realtors Association**
- **Wisconsin Restaurant Association**
- **Wisconsin Society of Architects**
- **Wisconsin Society of Land Surveyors**
- **Wisconsin Transportation Builders Association**
- **Wisconsin Utilities Association**
- **Wisconsin Utility Investors**



WISCONSIN STATE LEGISLATURE





**WISCONSIN
LAWYERS**
STATE BAR of
WISCONSIN • EXPERT ADVISERS.
SERVING YOU.

MEMORANDUM

To: Members of the Senate Committee on Judiciary, Corrections and Privacy
From: State Bar of Wisconsin
Date: February 23, 2005
Re: Senate Bill 58 - OPPOSE

The State Bar of Wisconsin opposes Senate Bill 58 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.

The United States Chamber of Commerce ranked Wisconsin favorably in its 2004 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 10th best overall and 9th best in terms of overall treatment of tort and contract litigation.

Corporate America ranked Wisconsin's liability system 10th 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

State Bar of Wisconsin

5302 Eastpark Blvd. u P.O. Box 7158 u Madison, WI 53707-7158
(800) 728-7788 u (608) 257-3838 u Fax (608) 257-5502 u Internet: www.wisbar.org u Email: service@wisbar.org

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.

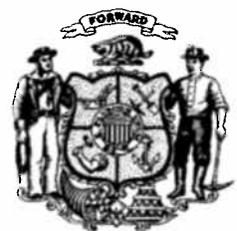
Continued liability serves as an incentive for companies to remain vigilant in locating and fixing product defects. Laws that shield a company from liability for a defective product manufactured 15 years ago remove this incentive to discover, publicize and fix defects. This in turn results in more injured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

For these reasons, the State Bar of Wisconsin urges committee members to oppose Senate Bill 58.

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



WISCONSIN STATE LEGISLATURE





Wisconsin Economic Development Association Inc.

TO: Members, Senate Committee on Judiciary

FROM: WEDA Board of Directors
Peter Thillman, President
Rob Kleman and Andy Lisak, Legislative Co-Chairs
Jim Hough, Legislative Director

DATE: February 23, 2005

RE: **Support for Senate Bill 58**

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.

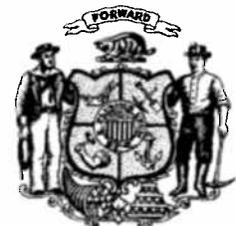
Wisconsin is currently among a distinct minority of states which uses the very loose "consumer expectation" test in determining strict liability of a manufacturer. This bill moves Wisconsin to requiring proof of a "reasonable alternative design" which would bring Wisconsin in line with the vast majority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

Senate Bill 58 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 58 and respectfully urges a recommendation for passage.



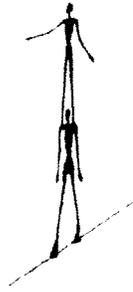
WISCONSIN STATE LEGISLATURE



GASS WEBER MULLINS LLC

139 N WATER ST MILWAUKEE WI 53202
TEL 414 224 7697 FAX 414 224 6716
WWW.GASSWEBERMULLINS.COM

FEB 28 2005



J. RIC GASS
DIRECT DIAL: 414 224-7697
gass@gasswebermullins.com

February 25, 2005

Senator David A. Zien
State Capitol
Room 15 South
P.O. Box 7882
Madison, WI 53707-7882

Re: SB 58 and SB 70

Dear Senator Zien and Members of the Senate Judiciary Committee:

Thank you for the opportunity to testify before your committee on February 23, 2005 in support of SB 70 regarding evidence of expert witnesses.

In Dan Rottier's testimony against the product liability bill he referenced me and a case he and I had together: *Gastrow v. Walmart*. Since the hearing was running late I thought it more efficient to respond to some of his comments on the products bill in writing and confine my oral presentation to SB 70.

The Number of Product Liability Suits

While at any time there may be only 80-100 product liability suits pending in state courts that ignores two important facts:

1. There are other products cases removed or started in the federal courts in which Wisconsin's law of products liability will be applied;
2. Actual filed suits are always the tip of the litigation iceberg. The statistics over the years are that 90% of all claims settle without the filing of a suit and 90% of lawsuits settle without a trial. If that rule of thumb is correct, at any point in time there are probably another 800-1000 products claims just related to the state lawsuits to which the bill would be applied to. In addition, there would be similar ratios to the products cases pending in the Eastern and Western federal district courts. In all of them, the current bad products law of joint and

several liability if a defendant is found even 1% at fault will be applied. Contrary to Mr. Rottier's assertion of only a few affected cases there are a substantial number of cases that are affected.

The Gastrow Case

Mr. Rottier referenced this as a case that settled under current law. What he did not comment on was that in that case an American company was sued for selling a sealed product and was faced with the potential for 100% liability if even found only 1% at fault because of the current bad Wisconsin products law.

Paybacks to Workers Compensation and Medical Insurers

Mr. Rottier made an undisguised pocketbook appeal to you arguing that current law is good because it allows money to be taken from manufacturers and put in the pockets of workers compensation and medical insurers. That ignores the fact that those dollars ultimately come out of everyone's pockets whether by increased product costs or insurance premiums. Liability and awards ought to follow logic and fairness and not personal pocketbook self-interest.

His suggestion is akin to the "tragedy of the commons" concept oft times used in environmental analysis. The allowance of grazing on public land (the commons) appears reasonable since any single animal would not likely degrade the common ground while adding to the apparent good of each owner. However, the tragedy occurs as each person is locked into a system that compels them to increase their usage of the common. On an individual case basis Mr. Rottier's argument is similarly facially appealing for individual claimants and claims.

Wisdom and judgment though recognize as every claimant secures money for themselves and the worker's compensation and medical insurers (who already have collected premiums to underwrite their claims payouts) from a defendant for more than that defendant's portion of liability that a similar tragedy on the commons. (In this case all consumers of products and all insureds.) will occur with higher costs for goods, services and insurance for all consumers.

Standards

Standards set by the American National Standards Institute (ANSI) are not minimum industry dictated standards. Rather, the ANSI committees always include labor unions, regulators, independent labs and all entities involved in a product or industry area. These are competent powerful voices that reflect the concerns of product users in the development of every ANSI standard.

Sympathy

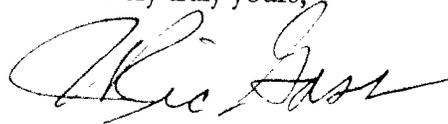
Senator David A. Zien
February 25, 2005
Page 3 of 3

While I was somewhat taken aback by the overt play for sympathy as the opponents to this bill put accident victims through discomfoting testimony, I hope you recognize two aspects to that. First, the opponents to this bill cannot stand alone on logic and fair and balanced analysis. They feel compelled to interject emotion into the calculus. Second, that raw emotion to which you were exposed can have a corrosive effect in the courtroom and force jurors to abandon their oath to set sympathy aside and end up reaching verdicts with their heart and not their head no matter how strongly instructed by the judge to the contrary.

Thank you again for listening and I urge you to recommend both bills to the Senate.

With best regards, I am

Very truly yours,

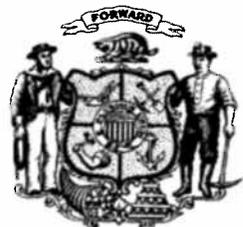
A handwritten signature in black ink, appearing to read "J. Ric Gass". The signature is fluid and cursive, with the first name "J." and last name "Gass" clearly legible.

J. Ric Gass

cc: James E. Hough
James Buchen
Ralph A. Weber



WISCONSIN STATE LEGISLATURE



February 2005

Vicki J. Tatera

My husband Walter (Bud) Tatera lost his 3-month courageous battle against Malignant Mesothelioma on Sept. 20, 2004.

Bud was only 60 years old when he died, and I became a widow at age 57. We had a lot more living to do together. I wanted to grow old with this man that I loved more than life itself. This May, we would have been married 37 wonderful years. I feel this disease took my heart and soul along with my wonderful husband who fought so hard to just live.

Bud never complained about the pain he was in, the shortness of breath, or having to be on oxygen 24/7. He never complained when he had to go for Chemotherapy, or couldn't eat or drink because it made him sick. Just the smell of food cooking would make him nauseous. So for my own meals, I had to order take-out meals or have someone cook for me. Many times I ate my meals alone outside, weather permitting, so he didn't have to smell the food. He never complained when he had to take up to 18 pills a day. He never complained when he developed oral thrush (mouth sores) every time he had Chemo. He never complained when he couldn't sleep in bed anymore because he couldn't breathe lying down no matter how many pillows he used. He had to sleep sitting upright in a recliner. And I slept on a couch next to him so I could hear him call if he needed me. Sometimes I would just lie there watching his chest rise and fall; that way I could tell if he was breathing OK or if he was struggling to get air into his lungs. He never once complained when he didn't have the strength to walk outside to get some fresh air or just walk from room to room, or walk to the bathroom without help. Bud never complained. He never once asked, "Why me?"

This disease also took its toll on me. I had to find someone to stay with him at home or take him to his many doctor and Chemo appointments when I couldn't take off work for fear of losing my job. If I had errands to do after work, I had to find someone to stay

with him. I was up several times every night setting an alarm clock so I could give him his medication, which he needed around-the-clock.

Now I must maintain our house on my own. I have lost his income and am struggling just to pay everyday bills and his medical bills.

I can't tell you the anger, pain, and sadness I felt in my heart and soul just watching Bud struggle to do everyday things you and I take for granted. To watch this disease eat away at his once strong, healthy body, was at times more than I could bear.

Since we did not have children, Bud was passionately dedicated to our nieces and nephews (we called them "our kids"), from helping with school projects and driving lessons, to fixing bikes and attending sporting events—including baseball, volleyball, basketball, softball, and cross-country running. Many times we were going to seven or eight games a week. Bud and I were their avid cheerleaders.

The kids knew they could come to Bud for anything they needed, even just to talk. He helped two of our nephews deal with the death of their dad from cancer in 2003, and then helped those same nephews deal with their mom's breast cancer in the beginning of 2004—until Bud got too sick to help. We also have three nephews struggling with Cystic Fibrosis. One of those nephews just had a double lung transplant in November 2004. We have a niece who died of Cystic Fibrosis at age 16. So you see, our family has seen its share of heartache.

And now Bud's death is the greatest heartache of all. His death affected everyone who loved him. He was an incredibly kind, caring, loving, gentle man who loved life to its fullest. He especially loved his "Kids."

I loved being married to Bud. I guess you could say I made a career out of my marriage. I enjoyed being part of a couple and don't know how to be just half a couple.

Please do not silence the voice of the individual citizen because of the negligence of corporations and asbestos-manufacturing companies. My husband would be alive today if these companies had not hidden the fact that exposure to asbestos can be—and in Bud's case, WAS—deadly, and that it takes 30 to 40 years for Mesothelioma to rear its ugly head. And I would not have to be standing before you today, fighting for justice for my husband.

Bud was a Vietnam Veteran who loved and served his country. Please do not allow his country to fail him now.

My husband lost his life to Mesothelioma; and I lost my partner, my lover, and my best friend.

Thank you for taking the time to listen.

**Walter (Bud) and Vicki Tatera's
Wedding May 11, 1968**

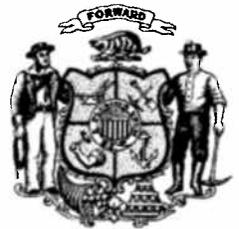


Our Nephew, a Marine saluting his Uncle one last time.





WISCONSIN STATE LEGISLATURE



no date

TESTIMONY OF JAMES J. MATHIE OFFERED ON BEHALF OF
CIVIL TRIAL COUNSEL OF WISCONSIN
WITH RESPECT TO SENATE BILL 58 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 or its insurer 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 are 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.

At the same time, the legislation includes an exception for latent diseases. This "asbestos exception" protects the consumer's ability to assert a claim after a latent disease is discovered.

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.

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.

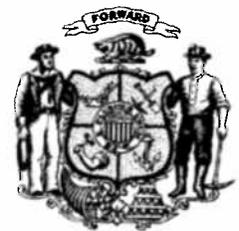
^x Colorado (7 years); Connecticut (10); Florida (12); Georgia (10); Illinois (10/12); Indiana (10); Iowa (15); Montana (10); Nebraska (10); North Carolina (6); Oklahoma; Oregon (8); Tennessee (10); Texas (15); Vermont (20); Washington (12); and Wyoming.

^{xi} Idaho (10 years); Kansas (10); Kentucky (5/8).

^{xii} § 893.89, Wis. Stats. sets an "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.



WISCONSIN STATE LEGISLATURE



no date

TESTIMONY OF KENT KUTSUGERAS

~~AB 317~~ SB 58

GOOD MORNING. MY NAME IS KENT KUTSUGERAS FROM JUNEAU AND I AM HERE TO OPPOSE ~~ASSEMBLY BILL 317~~

~~SENATE BILL 58~~
IN NOVEMBER OF 1986 I WENT TO MY BROTHER-IN-LAW'S FARM NEAR HUSTISFORD, WISCONSIN TO HELP HIM GET HIS CORN CROP PICKED.

LIKE A LOT OF OTHER WISCONSIN FARMERS, MY BROTHER-IN-LAW HAD A JOB OFF THE FARM AND IT WAS HARD FOR HIM TO GET ALL THE FARM WORK DONE

I HAD BEEN LAID OFF FROM MY JOB IN MILWAUKEE AND WAS DOING MY BROTHER-IN-LAW A FAVOR BY HELPING HIM PICK CORN

LIKE A LOT OF OTHER PEOPLE IN HIS SITUATION, MY BROTHER-IN-LAW OWNED A USED PULL-TYPE CORN PICKER THAT HAD BEEN DESIGNED IN THE 1960'S

WHILE USING THAT PICKER, I FELL INTO THE GATHERING UNIT AND ONE OF MY HANDS GOT CAUGHT IN SNAPPING ROLLS

I WAS ALONE IN THE FIELD AND PRETTY FAR AWAY FROM THE BUILDINGS I YELLED FOR HELP, BUT NOBODY COULD HEAR ME

I TRIED TO GET MY HAND OUT, BUT THE HARDER I FOUGHT, THE MORE IT WAS PULLED INTO THE ROLLS

THERE WAS NO WAY FOR ME TO SHUT THE PICKER OFF BECAUSE THE ONLY POWER CONTROL WAS ON THE TRACTOR

I THOUGHT I WOULD DIE IN THAT FIELD, BUT I DID NOT WANT TO GIVE UP SO I CONTINUED TO FIGHT THE MACHINE

BEFORE I KNEW IT, BOTH OF MY LEGS HAD ALSO BECOME CAUGHT IN THE MACHINE

I WAS CAUGHT IN THE MACHINE IN FREEZING TEMPERATURES FOR MORE THAN AN HOUR

A PERSON DRIVING BY THE FIELD FINALLY NOTICED THE TRACTOR AND CAME TO SEE IF THERE WAS A PROBLEM

HE WAS ABLE TO SHUT OFF THE POWER, BUT IT TOOK RESCUE WORKERS A LONG TIME TO GET ME UNTANGLED FROM THE PICKER

FLIGHT FOR LIFE TOOK ME TO MILWAUKEE AND THE DOCTORS DID THEIR BEST TO TREAT ME

BUT I LOST MY ARM JUST BELOW THE ELBOW AND BOTH OF MY LEGS JUST BELOW THE KNEE

I HAD ALWAYS WORKED WITH MY HANDS AND RELIED ON MY PHYSICAL STRENGTH TO MAKE A LIVING

BECAUSE OF MY INJURIES, I HAD NO WAY TO SUPPORT MY WIFE AND MY 10 YEAR OLD SON

I HIRED A LAWYER AND WE BROUGHT A LAWSUIT AGAINST THE MANUFACTURER OF THE CORN PICKER

WE FOUND OUT THAT THE MANUFACTURER OF THIS CORN PICKER WAS AWARE THAT HUNDREDS OF FARMERS LIKE ME HAD BEEN CAUGHT IN ITS MACHINES OVER THE YEARS

YET, THE MANUFACTURER NEVER SERIOUSLY CONSIDERED PUTTING AN EMERGENCY STOP ON THE MACHINE ITSELF,

AN EMERGENCY STOP WOULD ALLOW PEOPLE WHO GOT CAUGHT TO TURN OFF THE POWER IMMEDIATELY

THESE KIND OF EMERGENCY STOPS HAD BEEN USED IN MANUFACTURING PLANTS FOR MANY DECADES BEFORE THE CORNPICKER WAS BUILT

THEY WERE EVEN USED ON MACHINES IN THE FACTORIES WHERE THE CORN PICKERS WERE MADE

THE JURY DECIDED THAT I WAS RESPONSIBLE FOR FALLING INTO THE MACHINE, AND I ACCEPT THAT JUDGMENT

HOWEVER, THE JURY ALSO FOUND THAT THE MAKER OF THE CORN PICKER WAS RESPONSIBLE FOR NOT PUTTING THE SAME EMERGENCY STOP ON THE CORN PICKER THAT WAS ON THE MACHINES IN THE PLANT

THE JURY ALSO FOUND THAT 70% OF MY INJURIES COULD HAVE BEEN AVOIDED IF I HAD BEEN ABLE TO SHUT THE MACHINE OFF

BECAUSE I HAD A CHANCE TO PRESENT MY CASE TO A JURY, I HAVE BEEN ABLE TO PROVIDE FOR MY FAMILY AND PAY FOR MY PROSTHETICS

I HAVE NOT HAD TO RELY ON HELP FROM THE STATE

THE PEOPLE WHO OPERATE SMALL FAMILY FARMS CAN'T ALWAYS AFFORD THE NEWEST AND MOST MODERN MACHINERY

LIKE MY BROTHER-IN-LAW, THEY USE THE OLDER MACHINES WHICH ARE MADE TO LAST A LONG TIME

- YOU CAN STILL GET PARTS FOR THE CORN PICKER THAT CAUSED MY INJURY
- AND I STILL SEE CORNPICKERS JUST LIKE IT FOR SALE AT FARM MACHINERY DEALERS ALL OVER THE STATE

IF YOU PASS ^{SENATE BILL 58} ~~ASSEMBLY BILL 317~~, PEOPLE WHO HAVE NO REAL CHOICE BUT TO USE THESE MACHINES AND WHO ARE HURT BY THEM WILL NOT BE ABLE TO HAVE THEIR DAY IN COURT

IF THE MACHINE IS OLDER THAN 15 YEARS OLD AT THE TIME OF THE INJURY, THIS LAW WOULD SAY THAT THE MANUFACTURER CANNOT BE HELD RESPONSIBLE FOR INJURIES TO THE PEOPLE WHO USE IT

THIS IS NOT FAIR AND IT IS NOT RIGHT

I ASK YOU TO DO WHAT IS FAIR AND RIGHT FOR WISCONSIN FARMERS AND VOTE AGAINST ASSEMBLY BILL 317



WISCONSIN STATE LEGISLATURE



no date

TESTIMONY OF JILL A. RAKAUSKI

**Penn Rakauski
927 Main Street
Racine, WI 53405
(262) 636-0036
www.dustlaw.com**

**Attorney representing victims of
asbestos disease in Wisconsin**

INTRODUCTION

I am a Wisconsin attorney and I represent Wisconsin victims of asbestos-related diseases. This bill would unfairly affect victims of these diseases, especially the language which appears to impose time limits on claims. With me today is my client Vicki Tatera. Vicki's husband died at the age of 60 in September of 2004, from malignant mesothelioma a cancer almost always caused by asbestos exposure. Vicki's husband worked in Milwaukee as a machinist and he worked around asbestos-containing products in the 1960s and 1970s.

Malignant mesothelioma and asbestosis are latent diseases, meaning once you are exposed to the product, the disease will not manifest itself until at times 20, 30, 40 or 50 years later. There is no way of knowing after exposure to asbestos if you will eventually be stricken with disease. Statistics from the Division of Public Health in the Wisconsin Department of Health and Family Services show that mesothelioma deaths in Wisconsin are increasing. (Ex. A)

TIME LIMITS

Under the pending bill, Section 895.047(5) (TIME LIMIT) reads

In any action under this section, a defendant is not liable for damage to a claimant if the product alleged to have caused the damage was manufactured 15 years or more before the event on which the claim is based."

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

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

I have reviewed with this language and I do not know if I understand the effect of this section regarding latent diseases. All of my clients have latent diseases, most times the disease occurs 30 to 40 years after exposure. If this statute is read to mean that these asbestos victims have no right to file a claim if the exposure to an asbestos product occurred more than 15 or 18 years before, it is eliminating 95% of asbestos disease victims' right to a remedy. This would affect the rights of all people injured by asbestos and other latent disease causing agents like silica. As such it would negatively affect Wisconsin pipefitters, insulators, machinists, drywallers, painters, factory workers, laborers and many others.

Neither Vicki Tatera nor I can believe that this is what the legislature intends to make the law in the State of Wisconsin.

SELLER/ASSEMBLER/DISTRIBUTOR LIABILITY

Thirdly, addressing Section (2) LIABILITY OF SELLER, ASSEMBLER OR DISTRIBUTOR. This section limits the liability of a SELLER, ASSEMBLER OR DISTRIBUTOR unless they have contractually assumed a manufacturers duty, the manufacturer is not subject to service of process, or a court determines that the claimant would be unable to enforce a judgment against the manufacturer or insurer.

This section assumes that sellers, assemblers, and/or distributors are innocent victims of faults in manufacturers' products. However, in many cases, sellers and installers can be shown to almost as much knowledge of hazards in products as the manufacturers. For example, in asbestos cases, companies that were installing the asbestos products had several employees being examined, x-rayed, and diagnosed with asbestos diseases in the 1940s and 1950s. The employees were filing workers compensation claims alleging that the asbestos-containing products injured them. The sellers and installers continue to use the asbestos-containing products for many years without providing any sort of warning to the end user or general public exposed to their products.

Also the statute does not address the scenario as to what if the manufacturer is simply unknown?

An assumption that sellers/installers/distributors share no blame for the defective products will not promote product safety and fails to recognize that entities on the front line may have knowledge of these hazards and have the ability to prevent injury.

CONCLUSION

Wisconsin is not a state that is overburdened by asbestos claims. I contacted Robert Birch with the clerk of circuit courts office in Madison and he told me that in 2003, 15 asbestos cases were filed across the State of Wisconsin. They do not have the numbers for 2004 as of yet.

There has been and will be in the future many citizens in the State of Wisconsin that have and will develop asbestos disease and other latent diseases that are caused by products. This bill should not deny these citizens a right to a remedy for their injuries.

Mesothelioma deaths

Health Priority D: Environmental and Occupational Health Hazards

Objective D2c: By 2010, reduce occupational mesothelioma illness and death by 30 percent below the 2000 baseline.

2010 Target: Death rate of 0.7 deaths per 100,000 population

Indicator: Mesothelioma deaths

Wisconsin Deaths Due to Mesothelioma, by Sex and Age

Year	Total	Deaths per 100,000 Population	Males	Females	Under Age 65	Ages 65-74	Age 75+
2000	55	1.0	50	5	7	18	30
2001	65	1.2	51	14	17	22	26
2002	65	1.1	53	12	11	21	33
2003	67	1.2	54	13	22	19	26

Source: Resident death certificates, Bureau of Health Information and Policy, Division of Public Health, Department of Health and Family Services.

Note: Rates (deaths per 100,000 population) have been age-adjusted to the 2000 U.S. standard population. (See data documentation.)

Wisconsin Deaths Due to Mesothelioma, by Race/Ethnicity

Year	Total	African American*	American Indian*	Asian*	Hispanic	White*
2000	55	0	0	0	0	55
2001	65	2	0	0	0	63
2002	65	0	1	0	0	64
2003	67	0	0	0	0	67

Source: Resident death certificates, Bureau of Health Information and Policy, Division of Public Health, Department of Health and Family Services.

* Non-Hispanic

Prepared for Tracking the State Health Plan, 2010—State-Level Data

<http://dhs.wisconsin.gov/statehealthplan/track2010> (January 2005)

Bureau of Health Information and Policy

Division of Public Health

Wisconsin Department of Health and Family Services

