

2007 ASSEMBLY BILL 128

March 5, 2007 – Introduced by Representatives HONADEL, JESKEWITZ, ALBERS, BIES, GUNDERSON, HAHN, HUEBSCH, KRAMER, LEMAHIEU, LOTHIAN, MURSAU, MUSSER, NASS, NYGREN, J. OTT, PRIDEMORE, ROTH, TOWNSEND, VUKMIR, ZIEGELBAUER and ZIPPERER, cosponsored by Senators KANAVAS, KEDZIE, DARLING, LAZICH, LEIBHAM, ROESSLER and SCHULTZ. Referred to Committee on Judiciary and Ethics.

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

Analysis by the Legislative Reference Bureau

In *Thomas v. Mallett*, 2005 WI 129, the Wisconsin Supreme Court held that the manufacturers of white lead carbonate, which was used as a pigment in paint, may be liable for the injuries caused to a child who had ingested paint that contained the white lead carbonate, although the child could not prove that a particular manufacturer produced the white lead carbonate that he ingested. The court made that decision based on the risk-contribution theory, saying that all of the manufacturers' white lead carbonate were basically the same, the manufacturers created the risk of injury, and they should all contribute to the payment of the child's damages.

This bill provides that a manufacturer, distributor, seller, or promoter of a product generally may be held liable for damages only if the injured party proves, in addition to the causation, damages, and other elements of the claim, that the specific product that caused the injury was manufactured, distributed, sold, or promoted by the defendant. The bill also provides that, if an injured party cannot prove that the defendant manufactured, distributed, sold, or promoted the specific product that caused the injury, the defendant may be held liable if, in addition to proving the other elements of the claim, the injured party proves all of the following:

1. That no other legal process exists for the injured party to obtain damages.
2. That the injury could only be caused by a product that is chemically identical to the specific product that allegedly caused the injury.

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3. That the defendant manufactured, distributed, sold, or promoted a product that was chemically identical to the specific product that allegedly caused the injury during the time period in which that specific product was manufactured, distributed, sold, or promoted.

4. That the defendants named in the action collectively, during the relevant production period, manufactured, distributed, sold, or promoted within this state at least 80 percent of all products that were chemically identical to the specific product that allegedly caused the injury sold in this state.

The bill limits liability to products that were manufactured, distributed, sold, or promoted within 25 years before the date on which the injury occurred and only if the product was manufactured for more than five years.

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

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

2 **895.046 Remedies against manufacturers, distributors, sellers, and**
3 **promoters of products. (1) DEFINITION.** In this section, “claimant” means a person
4 seeking damages or other relief for injury or harm to a person or property caused by
5 or arising from a product.

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

13 **(3) REMEDY WITH SPECIFIC PRODUCT IDENTIFICATION.** Except as provided in sub.
14 (4), the manufacturer, distributor, seller, or promoter of a product may be held liable
15 in an action under sub. (2) only if the claimant proves, in addition to any other
16 elements required to prove his or her claim, that the manufacturer, distributor,

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1 seller, or promoter of a product manufactured, distributed, sold, or promoted the
2 specific product alleged to have caused the claimant's injury or harm.

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

7 (a) That no other legal process exists for the claimant to obtain redress from
8 another person for the injury or harm.

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

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

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

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

20 (d) The manufacturers, distributors, sellers, or promoters of a product who are
21 named as defendants in the action collectively, during the relevant production
22 period, manufactured, distributed, sold, and promoted within this state at least 80
23 percent of all products chemically identical to the specific product that allegedly
24 caused the claimant's injury sold in this state.

