

2007 SENATE BILL 61

February 21, 2007 – Introduced by Senators KANAVAS, DARLING, LEIBHAM, KEDZIE, SCHULTZ, ROESSLER and LAZICH, cosponsored by Representatives HONADEL, HUEBSCH, LOTHIAN, LEMAHIEU, BIES, GUNDERSON, ROTH, JESKEWITZ, PRIDEMORE, ZIPPERER, ZIEGELBAUER, VUKMIR, NASS, J. OTT, HAHN, MURSAU, TOWNSEND, NYGREN, KRAMER, ALBERS and MUSSER. Referred to Committee on Judiciary and Corrections.

- 1 AN ACT *to create* 895.08 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, were 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 lawful process exists for the injured party to seek redress for the injury or harm.
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 action names the defendant manufacturers who collectively, during the relevant production period, manufactured at least 80 percent of all products sold in this state that were chemically identical to the specific product that allegedly caused the injury or harm.

The bill limits liability to products chemically identical to the specific product that allegedly caused the injury or harm that were manufactured, distributed, sold, or promoted within 25 years before the date that the injury occurred.

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

1 **SECTION 1.** 895.08 of the statutes is created to read:

2 **895.08 Remedies against manufacturers, distributors, sellers, and**
3 **promoters of products. (1) DEFINITIONS.** In this section:

4 (a) “Claimant” means a person seeking damages or other relief for injury or
5 harm to a person or property caused by or arising from a product.

6 (b) “Relevant production period” means the time period during which the
7 specific product that allegedly caused the claimant’s injury or harm was
8 manufactured, distributed, sold, or promoted.

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

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1 **(3) REMEDY WITH SPECIFIC PRODUCT IDENTIFICATION.** Except as provided in sub.
2 (4), the manufacturer, distributor, seller, or promoter of a product may be held liable
3 in an action under sub. (2) only if the claimant proves, in addition to any other
4 elements required to prove his or her claim, that the manufacturer, distributor,
5 seller, or promoter of a product manufactured, distributed, sold, or promoted the
6 specific product alleged to have caused the claimant's injury or harm.

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

11 (a) That no other lawful process exists for the claimant to seek redress from
12 another person for the injury or harm.

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

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

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

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

24 (d) That the action names, as defendants, those manufacturers of a product
25 who collectively, during the relevant production period, manufactured at least 80

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1 percent of all products sold in this state that are chemically identical to the specific
2 product that allegedly caused the claimant's injury or harm.

3 **(5) LIMITATION ON LIABILITY.** No manufacturer, distributor, seller, or promoter
4 of a product is liable under sub. (4) if more than 25 years have passed between the
5 date that the manufacturer, distributor, seller, or promoter of a product last
6 manufactured, distributed, sold, or promoted a product chemically identical to the
7 specific product that allegedly caused the claimant's injury and the date that the
8 claimant's cause of action accrued.

9 **(6) APPORTIONMENT OF LIABILITY.** If more than one manufacturer, distributor,
10 seller, or promoter of a product is found liable for the claimant's injury or harm under
11 subs. (4) and (5), the court shall apportion liability among those manufacturers,
12 distributors, sellers, and promoters, but that liability shall be several and not joint.

13 **SECTION 2. Initial applicability.**

14 (1) This act first applies to actions commenced on the effective date of this
15 subsection.

16 **SECTION 3. Effective date.**

17 (1) This act takes effect on first day of the 2nd month beginning after
18 publication.

19 (END)