2011 Jr1 DRAFTING REQUEST

Assembly Amendment (AA-AB1)

Received: **01/10/2011**

Received By: **phurley**

Wanted: **As time permits**

Companion to LRB:

For: **Anthony Staskunas (608) 266-0620**

By/Representing: **Adrienne**

May Contact:

Drafter: **phurley**

Subject: **Courts - immunity liability**

Addl. Drafters:

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Staskunas@legis.wisconsin.gov**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Strict liability

Instructions:

Remove strict liability provisions from AB1

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
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/1	phurley 01/10/2011	jdyer 01/11/2011	phenry 01/11/2011	_____ _____	sbasford 01/11/2011	sbasford 01/11/2011	

FE Sent For:

<END>

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/?	phurley	1/11 jld	1/11 ph	1/11 ph			

FE Sent For:

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State of Wisconsin
2011 - 2012 LEGISLATURE

LRB-0368/1
PJH:wlj:ph

2011 BILL

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

Analysis by the Legislative Reference Bureau

This bill establishes the criteria to determine if a product manufacturer, distributor, or seller is liable to a person injured by the manufactured product based on a claim of strict liability. Currently, a person injured by a manufactured product has three avenues to determine if the manufacturer, distributor, or seller is liable for the person's injury. The claimant may sue under a breach-of-warranty theory, under the common law negligence theory, and under the theory of strict liability. The doctrine of strict liability, as adopted in this state, applies to manufacturers, distributors, and sellers. That doctrine relieves the injured person from proving specific acts of negligence and protects that person from contractual defenses. However, the person must prove that the product was in a defective condition and unreasonably dangerous, the defective condition existed when it left the seller, the defect caused the injury, the seller was in the business of selling the product, and the product was one that the seller expected to and did reach the consumer without substantial change.

Under this bill, a manufacturer is liable for damages caused by the manufacturer's product based on a claim of strict liability if the injured claimant proves that the product was defective, the defective condition made the product unreasonably dangerous, the defective condition existed at the time the product left the control of the manufacturer, the product reached the user or consumer without substantial change, and the defective condition caused the claimant's injuries. The bill specifies when a manufactured product is defective.

Under the bill, a distributor or seller is not liable for the claimant's damages based on a claim of strict liability unless the manufacturer would be liable for the damages and any of the following applies:

1. The distributor or seller contractually assumed one of the manufacturer's duties to manufacture, design, or provide warnings or instructions regarding the product.

2. Neither the manufacturer nor its insurer is subject to service of process within this state.

3. A court determines that the claimant would not be able to enforce a judgment against the manufacturer or its insurer.

The bill requires the dismissal of the distributor or seller as a defendant in an action if the manufacturer or its insurer submits itself to the jurisdiction of the court in which the suit is pending.

Under the bill, if a defendant proves that the injured person, at the time of his or her injury from a manufactured product, had a blood alcohol concentration of 0.08 or more or was under the influence of any controlled substance or controlled substance analog to the extent that he or she could not operate a motor vehicle safely, that proof creates a rebuttable presumption that the intoxication or drug use was the cause of the person's injury. The bill also creates a rebuttable presumption that the manufactured product is not defective if the product complied with relevant standards, conditions, or specifications under federal or state law. In addition, the bill reduces the manufacturer's, seller's, or distributor's liability by the percentage of causal responsibility for the claimant's damages caused by the claimant's misuse, alteration, or modification of the product.

The bill requires the court to dismiss a claimant's action if the damage was caused by an inherent characteristic of the manufactured product that would be recognized by an ordinary person who uses or consumes the product. The bill relieves a distributor or seller of liability if the distributor or seller receives the product in a sealed container and has no opportunity to test or inspect the product, unless the distributor or seller is liable under another theory.

Under the bill, evidence of remedial measures taken after the sale of the manufactured product is not admissible in an action for damages caused by the product based on a claim of strict liability for the purpose of showing a manufacturing defect, a design defect, or the need for a warning or instruction, but may be admitted to show that a reasonable alternative design existed at the time of the sale of the product. The bill limits a defendant's liability for damage caused by a manufactured product to those products manufactured within 15 years before the claim accrues unless the manufacturer specifies that the product will last longer or unless the action is based on a claim for damages caused by a latent disease.

Under the bill, in product liability cases, to determine the causal responsibility for the injury, the fact finder must determine what percentage of that causal responsibility is the result of the contributory negligence of the injured party, the defective condition of the product, and the contributory negligence of any third person. The bill provides that, if the injured party's percentage of total causal responsibility for the injury is greater than the percentage resulting from the

defective condition of the product, the injured party may not recover from the manufacturer or any other person responsible for placing the product in the stream of commerce. If the injured party does have the right to recover, the injured party's damages are diminished by the injured party's percentage of causal responsibility for the injury. Under the bill, after determining the percentage of causal responsibility for the injury that is the result of the defective condition of the product, the fact finder must determine the percentage of causal responsibility of each product defendant for the defective condition of the product. The judge, under the bill, multiplies this percentage by the percentage of causal responsibility for the injury that is the result of the defective condition of the product to determine an individual product defendant's percentage of responsibility for the damages to the injured party.

Under the bill, a product defendant whose responsibility for the damages to the injured party is 51 percent 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 percent is limited to that product defendant's percentage of responsibility for the damages. The bill also allows the injured party to recovery from the product defendants even when the injured party's causal responsibility for the injury is greater than an individual product defendant's responsibility for the damages to the injured party.

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

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

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

(b) 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, based on the defect in the product, recover damages from

the manufacturer, distributor, seller, or any other person responsible for placing the product in the stream of commerce.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Evidence that 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 shall create a rebuttable presumption that the product is not defective.

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

(d) The court shall dismiss the claimant's action under this section if the damage was 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.

(e) A seller or distributor of a product is not liable to a claimant for damages if the seller or distributor receives the product in a sealed container and has no reasonable opportunity to test or inspect the product. This paragraph does not apply if the seller or distributor may be liable under sub. (2) (a) 2. or 3.

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

(5) TIME LIMIT. (a) In any action under this section, a defendant is not liable to a claimant for damages if the product alleged to have caused the damage was manufactured 15 years or more before the claim accrues, unless the manufacturer makes a specific representation that the product will last for a period beyond 15 years. This subsection does not apply to an action based on a claim for damages caused by a latent disease.

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

SECTION 3. Initial applicability.

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

(END)

State of Wisconsin
2011 – 2012 LEGISLATURE

January 2011 Special Session

LRBa0008/1
PJH:...

ASSEMBLY AMENDMENT ,

TO ASSEMBLY BILL 1

1/10/11 soon

At the locations indicated, amend the bill as follows:

1. Page 20, line 9: delete the material beginning with that line and ending with page 21, line 21.

2. Page 24, line 1: delete the material beginning with that line and ending with page 27, line 2.

3. Page 30, line 22: delete "895.045 (3),".

4. Page 30, line 23: delete "895.047,".

(END)