



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

RESEARCH APPENDIX - **PLEASE DO NOT REMOVE FROM DRAFTING FILE**

Date Transfer Requested: 12/29/2010 (Per: CMH)

A ☞ The 2011 drafting file for
LRB-0358

E ☞ The 2011 drafting file for
LRB-0371

B ☞ The 2011 drafting file for
LRB-0368

F ☞ The 2011 drafting file for
LRB-0372

C ☞ The 2011 drafting file for
LRB-0369

G ☞ The 2011 drafting file for
LRB-0671

D ☞ The 2011 drafting file for
LRB-0370

☞ **Compile Draft – Appendix E**

has been copied/added to the drafting file for

2011 LRB-0388

(Jr1 Special Session Draft)

2011 DRAFTING REQUEST

Bill

Received: **11/09/2010**

Received By: **phurley**

Wanted: **As time permits**

Companion to LRB:

For: **Governor-elect**

By/Representing:

May Contact:

Drafter: **tkuczens**

Subject: **Courts - immunity liability
Courts - torts**

Addl. Drafters:

Extra Copies:

Submit via email: **YES**

Requester's email: **Kevin.Moore@wisconsin.gov**

Carbon copy (CC:) to: **tracy.kuczenski@legis.wisconsin.gov**

Pre Topic:

No specific pre topic given

Topic:

Manufacturer liability limitations

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	phurley 11/09/2010 tkuczens 11/12/2010	kfollett 11/12/2010		_____			
/P1			rschluet 11/15/2010	_____	lparisi 11/15/2010 lparisi 11/15/2010		

LRB-0371

11/15/2010 11:27:56 AM

Page 2

FE Sent For:

<END>

2011 DRAFTING REQUEST

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For: Governor-elect

By/Representing:

May Contact:

Drafter: tkuczens

Subject: Courts - immunity liability
Courts - torts

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Extra Copies:

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space - fixed

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/P1			rschluet 11/15/2010	_____	lparisi 11/15/2010		

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<END>

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TKuczars

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/?	phurley	MP/1/gf 11/12 11/20					

FE Sent For:

<END>

JF 11/15

Hurley, Peggy

From: Moore, Kevin E - GOT [Kevin.Moore@wisconsin.gov]

Sent: Tuesday, November 09, 2010 9:40 AM

To: Hurley, Peggy

Cc: Champagne, Rick

Subject: Drafting Request

Good Morning-

The Governor Elect would like the following bill drafted:

2005 LRB 3756/2 as amended by LRBa1244/3 as amended by LRBa1424/1

Thank you for your help.

Kevin Moore
Office of Governor-Elect Scott Walker

11/9/2010

0371/P1
LRB-37502
KJF:pg
TKK:kt
note
RMNR

LPS: fix request sheet please

2005 SENATE BILL 402

2011

in 11/12/10 wanted 11/15/10

October 24, 2005 - Introduced by Senators KANAVAS, SCHULTZ, S. FITZGERALD, DARLING, REYNOLDS, STEPP, LEIBHAM, GROTHMAN, HARSDFORF, KEDZIE, A. LASEE, COWLES, OLSEN and ROESSLER, cosponsored by Representatives WIECKERT, HUEBSCH, NISCHKE, HONADEL, JESKEWITZ, OTT, STONE, ALBERS, GUNDERSON, MUSSER, LOTHIAN, HAHN, NASS, F. LASEE, BIES, PETROWSKI, AINSWORTH and LEMAHIEU. Referred to Committee on Judiciary, Corrections and Privacy.

Reyen

- 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, 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 ^{and} proves all of the following:

lawful
x

- 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.

to seek redress for the injury or harm

Insert analysis from p. 2

SENATE BILL 402

Move to Analysis
p. 1

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.

as defendants / those manufacturers of a product who

Sold in this state

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

injured party's cause of action accrues

Claimants

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.

(3) (S)

(a) Claimant

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,

Insect 2-5

SENATE BILL 402

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

9 20 (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.

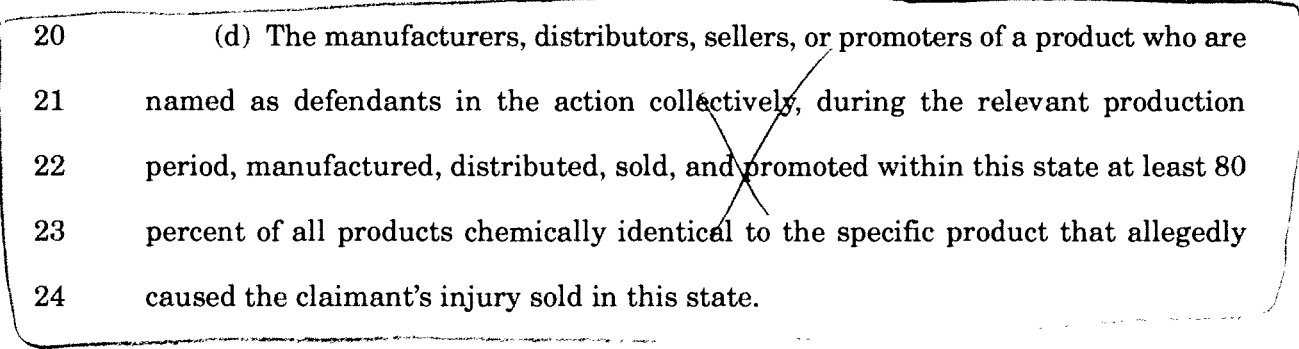
12 30 (c) That the manufacturer, distributor, seller, or promoter of a product
13 manufactured, distributed, sold, or promoted a product that meets all of the
14 following criteria:

15 40 (1) Is chemically identical to the specific product that allegedly caused the
16 claimant's injury or harm.

17 50 (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.

Insert 5-20



SENATE BILL 402

Insert
4-2

1 (5) LIMITATION ON LIABILITY. No manufacturer, distributor, seller, or promoter

2 of a product is liable under sub. (4) if any of the following conditions exist:

3 (a) More than 25 years have passed between the date that the manufacturer,
4 distributor, seller, or promoter of a product last manufactured, distributed, sold, or
5 promoted a product chemically identical to the specific product that allegedly caused
6 the claimant's injury and the date that the claimant's cause of action accrued.

7 (b) The period of the manufacturing of a product chemically identical to the
8 specific product that allegedly caused the claimant's injury was more than 5 years.

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.

SECTION 2. Initial applicability.

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

SECTION 3. Effective date.

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

17 (END)

D-Note

Insert 2 - 5

**SENATE AMENDMENT 1,
TO 2005 SENATE BILL 402**

November 1, 2005 - Offered by COMMITTEE ON JUDICIARY, CORRECTIONS AND PRIVACY.

1 At the locations indicated, amend the bill as follows:

2 **1.** Page 2, line 3: delete the material beginning with "DEFINITION" and ending
3 with "person" and substitute "DEFINITIONS. In this section:".

4 **2.** Page 2, line 4: delete that line and substitute:

5 "(a) "Claimant" means a person seeking damages or other relief for injury or
6 harm to a person or property caused by".

7 **3.** Page 2, line 5: after that line insert:

8 (b) "Relevant production period" means the time period during which the
9 specific product that allegedly caused ^{the} claimant's injury or harm was
10 manufactured, distributed, sold, or promoted".

11 **4.** Page 3, line 7: delete that line and substitute:

12 "(a) That no other lawful process exists for the claimant to seek redress from".

Insert 3-20

1 **5.** Page 3, line 20: delete lines 20 to 24 and substitute:

2 (b) “(dm) That the action names, as defendants, those manufacturers of a product
3 who collectively, during the relevant production period, manufactured at least 80
4 percent of all products sold in this state that are chemically identical to the specific
5 product that allegedly caused the claimant’s injury or harm.”

6 **6.** Page 4, line 7: delete lines 7 and 8 and substitute:
7 “(bm) The claimant has not established that the relevant production period was
8 less than 5 years.”
9 (END)

Insert 4-2

**SENATE AMENDMENT 1,
TO SENATE AMENDMENT 1,
TO 2005 SENATE BILL 402**

November 8, 2005 - Offered by Senator KANAVAS.

1 At the locations indicated, amend the amendment as follows:

2 1. Page 2, line 6: delete lines 6 to 8 and substitute:

3 ③ no 7 6 "6m. Page 4, line 2: delete lines 2 to 8 and substitute" of a product is liable under
4 sub. (4) if more than 25 years have passed between the date that the manufacturer,
5 distributor, seller, or promoter of a product last manufactured, distributed, sold, or
6 promoted a product chemically identical to the specific product that allegedly caused
7 ⑦ the claimant's injury and the date that the claimant's cause of action accrued. "."

8 ⑧

(END)

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-03717?dn
TKK:...

Date

Governor-Elect Walker:

In this bill, I redraft 2005 SB 402 to include Senate Amendment 1 to 2005 SB 402, as amended by Senate Amendment 1 to Senate Amendment 1 to 2005 SB 402. Please note the following changes:

1. The introductory paragraph to the LRB Analysis of 2005 SB 402 discussed the holding of *Thomas v. Mallett*, 2005 WI 129. I eliminated this introductory paragraph, as the District Court of the Eastern District of Wisconsin held that the Wisconsin Supreme Court's holding in *Thomas v. Mallett* was arbitrary and irrational and violated the Fourteenth Amendment of the United States Constitution. See *Gibson v. Am. Cyanamid Co.*, 2010 U.S. Dist. LEXIS 59378 (E.D. Wis. June 15, 2010); see also *State v. Henley*, 2010 WI 97, *P.75, fn. 29.

X 2. Under 2005 SB 402, an injured party who cannot prove that a particular defendant manufactured, distributed, sold or promoted a specific product that caused an injury may nevertheless recover from a defendant if the injured party proves the elements of a claim and proves four additional elements, including that:

this — “the manufacturers, distributors, sellers, or promoters of a product who are named as defendants collectively ... manufactured, distributed, sold, and promoted within the state at least 80 percent of all products chemically identical to the specific product that allegedly caused the claimants injury...”

X Item 5. in Senate Amendment 1 to SB 402 substituted a requirement that the claimant prove that “the action names, as defendants, those manufacturers of a product who collectively, during the relevant production period, manufactured at least 80 percent of all products sold in this state that are chemically identical to the specific product that allegedly caused the claimant's injury or harm.”

X Is it your intent that the claimant prove that the action names manufacturers who manufactured the designated percentage of the chemical identical products? Or is it your intent that the claimant name in the action a sufficient complement of manufacturers such that the named manufacturers manufactured the designated percentage of chemically identical products?

I drafted the bill to accomplish the second alternative. Please let me know if I have proceeded incorrectly.

Tracy K. Kuczenski
Legislative Attorney
Phone: (608) 266-9867
E-mail: tracy.kuczenski@legis.wisconsin.gov

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-0371/P1dn
TKK:kjfrs

November 15, 2010

Governor-Elect Walker:

In this bill, I redraft 2005 SB 402 to include Senate Amendment 1 to 2005 SB 402, as amended by Senate Amendment 1 to Senate Amendment 1 to 2005 SB 402. Please note the following changes:

1. The introductory paragraph to the LRB Analysis of 2005 SB 402 discussed the holding of *Thomas v. Mallett*, 2005 WI 129. I eliminated this introductory paragraph, as the District Court of the Eastern District of Wisconsin held that the Wisconsin Supreme Court's holding in *Thomas v. Mallett* was arbitrary and irrational and violated the Fourteenth Amendment of the United States Constitution. *See Gibson v. Am. Cyanamid Co.*, 2010 U.S. Dist. LEXIS 59378 (E.D. Wis. June 15, 2010); *see also State v. Henley*, 2010 WI 97, *P.75, fn. 29.

2. Under 2005 SB 402, an injured party who cannot prove that a particular defendant manufactured, distributed, sold, or promoted a specific product that caused an injury may nevertheless recover from a defendant if the injured party proves the elements of a claim and proves four additional elements, including that:

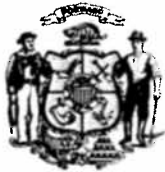
“the manufacturers, distributors, sellers, or promoters of a product who are named as defendants collectively ... manufactured, distributed, sold, and promoted within this state at least 80 percent of all products chemically identical to the specific product that allegedly caused the claimants injury...”

Item 5. in Senate Amendment 1 to SB 402 substituted a requirement that the claimant prove that “the action names, as defendants, those manufacturers of a product who collectively, during the relevant production period, manufactured at least 80 percent of all products sold in this state that are chemically identical to the specific product that allegedly caused the claimant's injury or harm.”

Is it your intent that the claimant *prove that the action names* manufacturers who manufactured the designated percentage of the chemically identical products? Or is it your intent that the claimant *name in the action* a sufficient complement of manufacturers such that the named manufacturers manufactured the designated percentage of chemically identical products?

I drafted the bill to accomplish the second alternative. Please let me know if I have proceeded incorrectly.

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Legislative Attorney
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E-mail: tracy.kuczenski@legis.wisconsin.gov



State of Wisconsin
2011 - 2012 LEGISLATURE



LRB-0371/P1
TKK:kjf:rs

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

- 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

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 names as defendants in the action those manufacturers of a product who, collectively, during the relevant production period, manufactured at least 80 percent of all products sold in this state that are chemically identical to the specific product that allegedly caused the claimant's injury or harm and 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.
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.

The bill limits liability to products that were manufactured, distributed, sold, or promoted within 25 years before the date the injured party's cause of action accrues.

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) 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 a claimant's injury or harm was manufactured,
8 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.

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

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 all of the following apply:

7 (a) The claimant proves all of the following:

8 1. That no other lawful process exists for the claimant to seek redress from
9 another person for the injury or harm.

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

13 3. That the manufacturer, distributor, seller, or promoter of a product
14 manufactured, distributed, sold, or promoted a product that meets all of the
15 following criteria:

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

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

21 (b) The action names, as defendants, those manufacturers of a product who
22 collectively, during the relevant production period, manufactured at least 80 percent
23 of all products sold in this state that are chemically identical to the specific product
24 that allegedly caused the claimant's injury or harm.

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

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

11 **SECTION 2. Initial applicability.**

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

14 **SECTION 3. Effective date.**

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

17 (END)