

LEGISLATIVE HEARING CALENDAR

Positions to be taken by the City of Milwaukee on the following bills will be discussed by the

COMMITTEE ON JUDICIARY-LEGISLATION

MONDAY, NOVEMBER 7, 2005 AT 2:15 PM

Room 301-B City Hall

AB-778/
SB-402

Actions against manufacturers, distributors, sellers, and promoters of products

2005 ASSEMBLY BILL 778

October 20, 2005 – Introduced by Representatives WIECKERT, HONADEL, NISCHKE, HUEBSCH, JESKEWITZ, ALBERS, GUNDERSON, OTT, MUSSER, LOTHIAN, STONE, HAHN, NASS, LEMAHIEU and AINSWORTH, cosponsored by Senators KANAVAS, SCHULTZ, REYNOLDS, DARLING, STEPP, OLSEN, GROTHMAN, S. FITZGERALD, A. LASEE and HARS DORF. Referred to Committee on Judiciary.

- 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.

ASSEMBLY BILL 778

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 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,



WISCONSIN LEGISLATIVE COUNCIL
AMENDMENT MEMO

2005 Assembly Bill 778	Assembly Amendments 1, 4, and 5 and Assembly Amendment 1 to Assembly Amendment 5
<i>Memo published:</i> October 31, 2005	<i>Contact:</i> Don Dyke, Chief of Legal Services (266-0292)

Assembly Amendment 1

Assembly Bill 778 provides a remedy for a claimant, as defined in the bill, when the claimant is unable to prove that the manufacturer, distributor, seller, or promoter of a product manufactured, distributed, sold, or promoted the specific product alleged to have caused the claimant's injury or harm. Under the remedy, a manufacturer, distributor, seller, or promoter of a product may be held liable if the claimant proves all of the conditions specified in the bill. However, even if a manufacturer, distributor, seller, or promoter may otherwise be liable under that remedy, there is no liability if:

1. More than 25 years have passed between the date that the manufacturer, distributor, seller, or promoter of a product last manufactured, distributed, sold, or promoted a product chemically identical to the specific product that allegedly caused the claimant's injury and the date that the claimant's cause of action accrued; or
2. "The period of the manufacturing of a product chemically identical to the specific product that allegedly caused the claimant's injury was more than five years."

Assembly Amendment 1 attempts to clarify the second liability exception described above. The amendment provides a definition of "relevant production period": "the time period during which the specific product that allegedly caused the claimant's injury or harm was manufactured, distributed, sold, or promoted."

The liability exemption is then revised to read: "The claimant has not established that the relevant production period was less than five years." Thus, if the claimant does not establish that the relevant production period, as defined, was less than five years, there is no liability under the remedy provided in the bill.

Note that the definition of "relevant production period" is also pertinent to the market share requirement, which is addressed by Assembly Amendment 5, described below.

Assembly Amendment 4

Assembly Bill 778 provides that one of the conditions a claimant must prove is that “no other legal process exists for the claimant to obtain redress from another person for the injury or harm.”

Assembly Amendment 4 substitutes the term “lawful process” for the term “legal process”; the former is arguably broader than the latter and would include, for example, an administrative proceeding that provides redress from another person for the injury or harm. The amendment also substitutes the term “seek redress” for the term “obtain redress,” thus, as amended, the claimant must prove there no other lawful process for the claimant to seek redress.

Assembly Amendment 5, as Amended by Assembly Amendment 1 to Assembly Amendment 5

One of the conditions a claimant must prove in order to have a remedy under the bill is that “the manufacturers, distributors, sellers, or promoters of a product who are named as defendants in the action collectively, during the relevant production period, 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 claimant’s injury sold in this state.”

Assembly Amendment 5, as amended by Assembly Amendment 1 to Assembly Amendment 5, revises this market share requirement by only including manufacturers who are named as defendants. Thus, under the revised provision, the claimant must prove that the action names as defendants those manufacturers of a product who collectively, during the relevant production period [as defined in Assembly Amendment 1], manufactured at least 80% of all products sold in this state that are chemically identical to the specific product that allegedly caused the claimant’s injury or harm.

Legislative History

Assembly Amendments 1 and 4 were offered by Representative Wieckert and were recommended for adoption by the Assembly Committee on Judiciary by a vote of Ayes, 5; Noes, 3. Assembly Amendment 1 to Assembly Amendment 5 was offered by the Assembly Committee on Judiciary and recommended for adoption by a vote of Ayes, 5; Noes, 3. Assembly Amendment 5, offered by Representative Wieckert, was recommended for adoption, as amended, by a vote of Ayes, 5; Noes, 3.

DD:rv:ksm

2005 SENATE BILL 402

October 24, 2005 – Introduced by Senators KANAVAS, SCHULTZ, S. FITZGERALD, DARLING, REYNOLDS, STEPP, LEIBHAM, GROTHMAN, HARSDORF, 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.

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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.

SENATE BILL 402

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.

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