



# WISCONSIN CIVIL JUSTICE COUNCIL, INC.

*Promoting Fairness and Equity in Wisconsin's Civil Justice System*

## Special Session Legal Reforms Fact Sheet

### Risk Contribution

- This legislation is a response to the Wisconsin Supreme Court's 2005 decision, *Thomas v. Mallett*, where the Court adopted the controversial "risk contribution" theory in cases involving lead-based paint.
- In an editorial titled, "Alabama North," *The Wall Street Journal* (Aug. 9, 2005) described the *Thomas* decision as:

"The first of its kind in the country" establishing a dangerous precedent by dispensing with the "traditional legal standard for torts – which is to establish actual connections between wrongdoing and injury – and [replacing] it with a chain of speculation and conjecture."
- According to Don Gifford, Professor of Law and former Dean of the University of Maryland School of Law, the Supreme Court's decision in *Thomas v. Mallett* is the **single most radical departure from fundamental principles of tort law in recent decades**. It is a decision that puts Wisconsin law dramatically out of line with the law of any other state in the country. (Prof. Gifford is a nationally recognized expert on "mass torts" and, interestingly, a former plaintiff lawyer.)
- With the rarest of exceptions, the plaintiff must prove that she or he was injured by the product manufactured or sold by a specific manufacturer or other defendant. Virtually the only significant exception to this fundamental principle was lawsuits filed against pharmaceutical companies for the production and sale of the drug, DES (diethylstilbestrol).
- Beginning with California in 1980, a substantial minority of all jurisdictions allowed the victim to recover on the basis of "market share" liability or in Wisconsin, a variant of "market share liability" that the Wisconsin Supreme Court called "risk contribution" theory.
- But until the Supreme Court's decision in *Thomas v. Mallett*, market share liability in Wisconsin and virtually everywhere else was limited to DES cases. Hundreds of cases throughout the country for nearly thirty years rejected its expansion to other products; there were literally less than a handful of exceptions.
- This legislation is a moderate response to the aberrational decision of the Wisconsin Supreme Court in *Thomas v. Mallett*. Wisconsin would remain among the 18 or so states that recognize some version of market share liability under those limited circumstances where market share liability is feasible and realistic.
- It essentially returns Wisconsin's law to the original boundaries of market share liability employed by the California Supreme Court in *Sindell v. Abbott Laboratories*, even though a majority of American states find market share liability in any form to be an unacceptable modification of the traditional requirement that the plaintiff prove all the elements of her case, including cause in fact.