DATE: April 29, 2013

TO: Scott Fitzgerald

FROM: Eric J. Petersen

RE: Budget Issues

1. American Bail Coalition
   A. Representative Krug initiative
      - Reworked proposal
      - Court costs covered
      - Pilot program
      - Jobs/licensing fees
      - Wisconsin Institute of Leadership study

II. Lead paint

A. Major EP priority
B. Agreement in Fitzgerald's office
C. Tort package?
D. Who is going to lead this?

III. PFA/WHPC right of first refusal/veto language

IV. Rent-A-Center

A. Major EP priority
B. Who can we bring into this?
C. Jobs economic development
D. Grothman issue

V. Wisconsin Association of Distributors

- Tax stamping issue (issue paper)

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VI. Transportation

A. Compare notes
B. DOT plan and process

VII. DOT Building

- Legislative questions

2013 POSITION PAPER FOR WISCONSIN

THE ISSUE:

The legislature enacted 2011 Wisconsin Act 2 to reaffirm its commitment to the traditional product liability law requirements for plaintiffs to prove product identification and causation. The Act limited the aberrational risk-contribution theory, which eliminates those bedrock principles of law, to the exceptional circumstances of the DES cases discussed in Collins 116 Wis.2d 166, 342 N.W.2d 37 (1894). The Act was intended to overrule the Supreme Court's decision in Thomas v. Mallett, 701 N.W.2d 523 (Wis. 2005), which greatly expanded the potential applicability of the risk-contribution theory to former manufacturers of one type of lead pigment.

Since Act 2 became law, plaintiff lawyers have contended that it does not apply to their lawsuits against former lead pigment manufacturers. Just before the Act's effective date, plaintiff lawyers filed risk-contribution claims for 164 plaintiffs against former lead pigment manufacturers. Since the effective date, they have filed other lead pigment lawsuits. Plaintiff lawyers contend that Act 2 does not apply to the pre-enactment lawsuits because of their filing date and that the post-enactment suits are not covered because the plaintiffs' exposures to lead occurred prior to enactment.

We believe that the legislature intended to make it clear that Wisconsin law has always required proof of product identification and causation of injury, that the risk-contribution theory is limited to the unique circumstances set forth in Collins, and that the Thomas decision was incorrect and should not apply to any lawsuit filed at any time. Without express legislative language, plaintiff lawyers may disregard those legislative intentions and impose the wasteful burden of meritless litigation on the judicial system, which is already inundated with civil lawsuits and strapped with limited resources. In addition, one federal district court has ruled that the retroactive and highly disproportionate liability that plaintiffs seek to impose, under the risk-contribution theory, on former lead pigment producers that made and last sold a lawful product many decades ago violates federal constitutional principles of due process of law.

The Thomas opinion opened wide a door for future product liability lawsuits against many entire industries. The Wisconsin business community was appropriately concerned that without traditional tort requirements of

causation and specific product identification, the principles of Thomas could be applied to any Wisconsin company for any product manufactured or sold in the state. Act 2 announced the legislature's intention to remedy this danger and eliminate the State as the only jurisdiction in the nation to have such an expansive risk-contribution doctrine; however, without the additional application of Act 2 to claims that arose prior to its enactment, trial lawyers will continue to exploit this loophole in Act 2 to attack Wisconsin's business community for years to come.

In order to protect the proposed legislation from attack by trial lawyers, it is critical that the legislature provide the reviewing courts with a detailed explanation of the legislature's intent and purpose. Wisconsin courts require that the statute have a rational legislative purpose, intended to remedy a general economic or social issue, and this purpose must be expressed in legislative findings or statement of purpose. This proposed amendment provides reviewing courts with the statement of the rational legislative basis with which to uphold its constitutionality.

THE SOLUTION:

The attached proposed amendments to Act 2 explain that the legislature intends that the risk-contribution theory should at all times in all lawsuits be limited to the circumstances of Collins. This preamble provides the clear direction to Wisconsin courts on legislative intent and public policy rationale that will answer plaintiff lawyer contentions. The amendments state clearly that the limitations on the risk-contribution theory apply to all lawsuits whenever filed.

NL language

AN ACT ***to amend*** 895.046(2); and ***to create*** 895.046 (1)(g), of the statutes; ***relating to*** changes to product liability law and the law governing remedies against manufacturers, distributors, sellers, and promoters of a product.

Section 1. 895.046(1g) of the statutes is created to read:

> 895.046 (1g) LEGISLATIVE FINDINGS AND INTENT. The legislature finds that it is in the public interest to clarify product liability law, generally, and the application of the risk contribution theory of liability first announced by the Wisconsin Supreme Court in *Collins v. Eli Lilly Company,* 116 Wis. 2d 166 (1984), specifically, in order to return tort law to its historical, common law roots. This return both protects the rights of citizens to pursue legitimate and timely claims of injury resulting from defective products, and assures that businesses may conduct activities in this state without fear of being sued for indefinite claims of harm from products which businesses may never have manufactured, distributed, sold, or promoted, or which were made and sold decades ago. The legislature finds that the application of risk contribution to former white lead carbonate manufacturers in *Thomas v. Mallet,* 285 Wis. 2d 236 (2005), was an improperly expansive application of the risk contribution theory of liability announced in Collins, and that application raised substantial questions of deprivation of due process, equal protection, and right to jury trial under the federal and Wisconsin constitutions. The legislature finds that this section protects the right to a remedy found in article I, section 9, of the Wisconsin Constitution, by preserving the narrow and limited application of the risk contribution theory of liability announced in *Collins.*

Section 2. 895.046(2) of the statutes, as created by 2011 Wisconsin Act 2, is amended to read:

> 895.046(2) APPLICABILITY. This section applies to all actions in law or equity, <u>whenever filed or accrued</u>, in which a claimant alleges that the manufacturer, distributor, seller, or promoter of a product is liable for an injury or harm to a person or property, including actions based on allegations that the design, manufacture, distribution, sale, or promotion of, or instructions or warnings about, a product caused or contributed to a personal injury or harm to a person or property, a private nuisance, or a public nuisance, and to all related or independent claims, including unjust enrichment, restitution, or indemnification.

Section 3. Initial applicability.

The treatment of sections 895.046(1) and (2) of the statutes first applies to actions or special proceedings pending on or commenced after the effective date of this subsection.

AN ACT ***to amend*** 895.046(2); and ***to create*** 895.046 (1)(g), of the statutes; ***relating to*** changes to product liability law and the law governing remedies against manufacturers, distributors, sellers, and promoters of a product.

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Section 3. 895.046 (8) of the statutes is created to read:

895.046(8) ABROGATION OF COMMON LAW. This section establishes the elements of and requirements for causation and product identification in and defenses for product liability claims in this state, and supersedes common law doctrines that conflict with the elements, requirements, and defenses established in this section. Except as provided in this subsection, this section does not alter the other elements required to establish a product liability claim or a claim for misrepresentation or breach of warranty under common law.

Section 4. Initial applicability.
The treatment of sections 895.046(1) and (2) of the statutes first applies to actions or special proceedings pending on or commenced after the effective date of this subsection.