3295 RISK CONTRIBUTION: NEGLIGENCE CLAIM (FOR ACTIONS COMMENCED BEFORE FEBRUARY 1, 2011)

Question No. 1 of the verdict asks whether (plaintiff) "ingested" white lead carbonate. The word "ingest" means to take into the body by mouth.

[give Wis JI-Civil 1500 Cause]

Question No. 3 of the verdict asks whether the defendants produced and marketed the type of white lead carbonate ingested by (plaintiff). To answer this question "yes," you must conclude that the products are of such a kind or nature that one specimen (or part) may be used in place of another specimen (or equal part). This question asks whether the products are interchangeable or capable of mutual substitution.

Chemical identity of the products is not necessary. Instead, you should consider the following factors:

- The characteristic of the product's function at issue;
- The physical appearance of the product and the physical similarity of the product; and
- The risks posed by the product's use and whether such products have substantially identical defects which pose a uniformity of risk.

Question No. 4 asks whether the defendant has proved that it did not produce or market the white lead carbonate ingested by (plaintiff). Each defendant has the burden of proof to satisfy you that the answer to the question as to that defendant should be "yes."

A defendant may not be held liable for (plaintiff)'s injuries unless the defendant's product or conduct reasonably could have contributed to (plaintiff)'s alleged injury. A defendant could not reasonably have contributed to (plaintiff)'s injury if the defendant proves that its white lead carbonate pigment could not reasonably have reached the residence(s) where (plaintiff) lived.

In making this determination, you should consider the following factors, if any, established by the evidence:

- The time period during which the white lead carbonate pigments that allegedly injured (plaintiff) were produced or marketed.
- The time period in which each manufacturer defendant produced or marketed its white lead carbonate pigments.
- The geographic locations in which each manufacturer produced or marketed the product at the time the product that allegedly injured (plaintiff) was produced or marketed.
- Other relevant factors raised by the evidence in the case.

[In answering the questions on the verdict about each of the defendants, you should consider only the evidence that was received for or against that defendant.]

[For Question No. 5, give Wis JI-Civil 1005; for Question No. 6, give Wis JI-Civil 1007; for Question No. 8, see Wis JI-Civil 1580 and 3290.]

If you are required to answer Question No. 9, you will determine to what extent, if any, the conduct of each producer or marketer of white lead carbonate contributed to produce the injury. Taking the conduct of the remaining producers or marketers as a whole, determine whether each one made a larger, equal, or smaller contribution than the others. Considering this question, some factors which you may but are not required to consider are:

- Testing for safety of the product;
- The market share of the producer-distributor in the relevant area;
- The role of the defendant in producing or marketing the product;
- Whether the defendant issued warnings about the dangers of the product;

- Whether the defendant produced or marketed the product after it knew or should have known of the potential hazards the product presented to the public; and
- Whether the defendant took any affirmative steps to reduce the risk of injury to the public.

COMMENT

This instruction and comment were approved in 2009. The comment was updated in 2010 and 2011. A reporter's note was deleted in 2014.

The instruction is tailored for use in a trial involving the ingestion of lead paint. It can be adapted for other cases involving a fungible product. The instruction and verdict (Wis JI-Civil 3294) are tailored for a claim based on negligence. They will need to be modified for a risk contribution claim based on strict liability. For actions commenced after January 31, 2011, see Wis JI-Civil 3296.

Risk Contribution Theory. The risk contribution method of recovery was first adopted by the Wisconsin Supreme Court in Collins v. Eli Lilly Co., 116 Wis.2d 166 (1984). In Collins, the plaintiff's mother ingested a drug known as DES during her pregnancy. The plaintiff was diagnosed as suffering from full cell cancer of the vagina. The plaintiff was unable to identify the precise producer or marketer of the DES taken by her mother "due to the generic status of some DES, the number of producers or marketers, the lack of pertinent records, and the passage of time." Collins, supra, p. 177.

In Thomas v. Mallett, 2005 WI 129, 285 Wis.2d 236, 701 N.W.2d 523, the plaintiff claimed damages based on ingesting lead paint. The supreme court made rulings that permitted the plaintiff to proceed against the lead paint manufacturers on a risk contribution theory. The supreme court ruled that even though the plaintiff had sued landlords and made a recovery, this did not prevent the plaintiff from pursuing lead paint manufacturers. The court rejected the paint manufacturer's claim that because Thomas had a remedy, there was no need to apply the risk contribution theory to his case.

Constitutionality of Risk Contribution Theory. The Thomas v. Mallett decision reserved ruling on the defendants' claims of 14th Amendment due process violation holding that they were not ripe for adjudication on a summary judgment record. A federal district court has held that application of the risk contribution theory to a successor corporation of a lead paint manufacturer violated substantive due process. Gibson v. American Cyanamid, Case No. 07-C-864 (E.D., Wisconsin, June 15, 2010). The district judge found that imposition of liability on a successor corporation not directly involved in the manufacture of white lead carbonate was "arbitrary and irrational," because the tradition causation requirement for liability in tort was eliminated. In a subsequent decision in Gibson v. American Cyanamid, the federal district judge dismissed all lead paint manufacturers. The basis of the judge's decision was that elimination of the causation requirement under the risk contribution rule violates substantive due process. The case has been appealed. In April of 2011, a different federal judge in Milwaukee issued a decision that allowed a lawsuit based on risk contribution to proceed. Burton v. Sherwin-Williams Co., (U.S. Dist. Ct., E.D. Wis.)

The Gibson v. American Cyanamid ruling was footnoted by the majority's opinion in a 2010 decision of the Wisconsin Supreme Court, State v. Henley, 2010 WI 97, 328 Wis.2d 544, 787 N.W.2d 350, in which the court noted, at footnote No. 29:

> To support its expansive views of inherent authority, the dissent cites Article 1, Section 9 of the Wisconsin Constitution. See dissent, ¶¶111, 115, 120-21. This provision states in relevant part, "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character." Wis. Const. art. I, § 9.
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> But we have made clear that this provision does not entitle litigants to the remedy they desire, but only to their day in court. Wiener v. J.C. Penney Co., 65 Wis.2d 139, 222 N.W.2d 149 (1974).
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> . . . [W]e note that this court's unwarranted expansion of its own powers through Article 1, Section 9 has recently been checked. In Gibson v. American Cyanamid Co., the Eastern District of Wisconsin held that this court's holding in Thomas v. Mallett, 2005 WI 129, 285 Wis.2d 236, 701 N.W.2d 523, which created a new remedy under Article 1, Section 9, was arbitrary and irrational and violated the Fourteenth Amendment. Gibson, 2010 U.S. Dist. LEXIS 59378, slip op., *16-18 (E.D. Wis. June 15, 2010). Despite the dissent's broad description of our inherent authority, we simply do not have the authority to craft any remedy we want.

Applicability of the Doctrine. The committee believes that the applicability of the risk contribution doctrine is initially a matter for the court to decide.

Fungibility. According to the supreme court in Thomas v. Mallett, the word "fungible" means: 1) of such a kind or nature that one specimen or part may be used in place of another specimen or equal part in a satisfaction of an obligation; 2) capable of mutual substitution; interchangeable. In the committee's view, the fungibility (similarity) of the lead paint made by the various manufacturers is an issue of fact for the jury. See paras. 140-149 of the Thomas v. Mallett decision and footnote 47. Based on this analysis, the committee included Question 3 on the verdict, Wis JI-Civil 3294.

Elements of a Risk Contribution Claim. The court in Thomas v. Mallett laid out the requirements for the plaintiff's proof on both negligence and strict liability claims based on risk contribution in the following passage:

> ¶ 161. Thomas has brought claims for both negligence and strict products liability. **Applying the risk contribution theory to Thomas's negligence claim**, he will have to prove the following elements to the satisfaction of the trier of fact:
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> (1) That he ingested white lead carbonate;
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> (2) That the white lead carbonate caused his injuries;
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> (3) That the Pigment Manufacturers produced or marketed the type of white lead carbonate he ingested; and

(4) That the Pigment Manufacturers' conduct in producing or marketing the white lead carbonate constituted a breach of a legally recognized duty to Thomas.

Because Thomas cannot prove the specific type of white lead carbonate he ingested, he need only prove that the Pigment Manufacturers produced or marketed white lead carbonate for use during the relevant time period: the duration of the houses' existence.

¶ 162. **Applying the risk contribution theory to Thomas's strict products liability claim**, Thomas will have to prove the following elements to the satisfaction of the trier of fact:

(1) That the white lead carbonate was defective when it left the possession or control of the pigment manufactures;

(2) That it was unreasonably dangerous to the user or consumer;

(3) That the defect was a cause of Thomas's injuries or damages;

(4) That the pigment manufacturer engaged in the business of producing or marketing white lead carbonate or, put negatively, that this is not an isolated or infrequent transaction not related to the principal business or the pigment manufacturer; and

(5) That the product was one which the company expected to reach the user or consumer without substantial change in the condition it was when sold.

Defenses; Exculpation. The supreme court said a manufacturer could avoid liability based on risk contribution by proving that the "manufacturer did not produce or market white lead carbonate, either during the relevant time period or in the geographical market where the house is located." This issue is addressed in Question 4 of Wis JI-Civil 3294.

Contributory Negligence. Lead paint cases will not involve a question of contributory negligence because the age of children who ingest white lead carbonate is normally under seven years. Children under seven cannot be negligent.

Negligence of Others Not Producers or Marketers. If there are other defendants who did not produce or market a product, but whose negligence might have caused injury to the plaintiff, such as a parent or landlord in a lead paint case, then the verdict should include questions on the negligence, causation, and causal negligence comparison of these parties. The comparison question should include the defendant-companies and the parents, landlords, etc.