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BILL ANALYSIS

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Senate Bill 344 (Substitute S-3)
Sponsor: Senator Joel D. Gougeon
Committee: Economic Development, International Trade, and Regulatory Affairs

Date Completed: 5-9-95

SUMMARY OF SENATE BILL 344 (Substitute S-3):

The bill would amend the Revised Judicature Act (RJA) to do the following in regard to product liability actions:

- **Provide that a manufacturer or seller would not be liable if a practical and technically feasible alternative production practice were not available, or if the product complied with Federal or state law or were approved by Federal standards.**
- **Create a presumption that a manufacturer or seller was not liable, if the aspect of production that allegedly caused the injury complied with Federal or State standards.**
- **Allow the admission in evidence, for certain purposes, of subsequent changes in theory, knowledge, technique, or procedure.**
- **Provide that a manufacturer or seller would not be liable if the harm were caused by alteration or misuse of a product that was not reasonably foreseeable; if the user were aware of, and voluntarily exposed himself or herself to the risk; or if the alleged harm were caused by an inherent characteristic of the product.**
- **Specify that a manufacturer or seller would not be liable for failure to warn if the product were provided for use by a sophisticated user.**
- **Specify that a defendant would not be liable for failure to warn of risks that should have been obvious to a reasonably prudent product user or that were a matter of common knowledge.**
- **Limit damages for noneconomic loss except in instances of gross negligence.**
- **Redefine "product liability action" to include injuries or death resulting from the performance or sale of a product.**

The bill would do the following in regard to all tort actions:

- **Establish criteria for expert witnesses.**
- **Provide that a novel form of scientific evidence could be admitted if it had achieved general scientific acceptance among experts in the field.**
- **Provide that it would be an absolute defense if the person who was injured or killed had an impaired ability to function due to the influence of intoxicating alcohol or a controlled substance and were 50% or more the cause of the accident or event; and require a reduction of damages if the percentage were under 50%.**
- **Require a court to include the fault of someone who had entered into a settlement, when determining the percentage of fault in a personal injury claim involving multiple tort-feasors.**
- **Eliminate joint liability except in medical malpractice actions, and delete provisions requiring a court to allocate an uncollectible amount among other parties to an action.**
- **Specify a client's right to compensate an attorney on an hourly, fixed, or contingent fee basis; restrict compensation for an attorney on a contingency fee who failed to file a demand for compensation with the allegedly liable party; specify procedures for a response and settlement offer from the allegedly liable party to a demand for compensation; and prohibit or restrict the use of**

contingent fee arrangements if the claimant had received a preretention or postretention offer.

In addition, the bill would limit malpractice actions against certified public accountants.

The bill would apply to actions filed after 90 days following the bill's effective date.

Product Liability Amendments

Venue. The bill provides that, for purposes of the RJA section governing venue in tort actions, in a product liability action, a defendant would be considered to conduct business in a county in which the defendant's product was sold at retail.

("Venue" refers to the particular county in which an action may be tried. The RJA generally provides that a tort action may be tried in the county in which all or part of the cause of action arose and in which either 1) the defendant resides, has a place of business, or conducts business, or 2) the registered office of a corporate defendant is located.)

"Product Liability Action". Currently, the RJA defines "products liability action" as an action based on a legal or equitable theory of liability brought for or on account of death or injury to person or property caused by or resulting from the manufacture, construction, design, formula, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, advertising, packaging, or labeling of a product or a component of a product. The bill, instead, refers to death or injury caused by the "production" of a product or product component. The bill would define "production" as the activities described above, as well as "selling".

Compliance with Nongovernmental Standards. Under the RJA, it is admissible as evidence in a product liability action that the manufacture, construction, design, etc. was done pursuant to the generally recognized and prevailing nongovernmental standards in existence at the time the product was sold or delivered by the defendant to the initial purchaser or user. The bill provides, instead, that a court would have to admit as evidence in a product liability action that production of the product was in accordance with the generally recognized and prevailing nongovernmental standards in existence at the time the specific unit of the product was sold or delivered by the defendant to the initial purchaser or user.

Production Practices/Governmental Standards. Currently, it is admissible as evidence that the manufacture, construction, design, etc. was done pursuant to the Federal and state law, rules, or regulations in effect at the time the product was sold or delivered by the defendant to the initial purchaser or user. The bill would delete this provision.

The bill specifies that in a product liability action brought against a manufacturer or seller for harm allegedly caused by a production defect, the manufacturer or seller would not be liable unless the plaintiff established that the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller and that, according to generally accepted production practices at the time the specific unit of the product left the control of the manufacturer or seller, a practical and technically feasible alternative production practice was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others. An alternative production practice would be practical and feasible only if the technical, medical, and scientific knowledge relating to the design of the product were, at the time the specific unit of the product left the control of the manufacturer or seller, developed, available, and capable of use in the production of the product, and economically feasible for use by the manufacturer. Technical, medical, or scientific knowledge would not be economically feasible for use by the manufacturer if use of that knowledge in production of the product would significantly compromise the product's usefulness or desirability.

In a product liability action brought against a manufacturer or seller, the manufacturer or seller would not be liable for failure to produce a reasonably safe product if, at the time the specific unit of the product was sold or delivered to the initial purchaser or user, the product that allegedly caused the injury was, under the oversight of a Federal or state agency, tested and found to be in compliance with standards set forth in a Federal or state statute that are relevant to the defect alleged to have caused the injury and/or standards, rules, or regulations promulgated by a Federal or state agency responsible for reviewing the safety of the product that were relevant to the defect.

In a product liability action brought against a manufacturer or seller, a presumption would arise

that the manufacturer or seller was not liable for failure to produce a reasonably safe product if, at the time the specific unit of the product was sold or delivered to the initial purchaser or use, the aspect of the production that allegedly caused the injury was in compliance with standards set forth in a Federal or state statute that were relevant to the defect alleged to have caused the injury, and/or standards, rules, or regulations promulgated by a Federal or State agency responsible for reviewing the safety of the product that were relevant to the defect.

A plaintiff could rebut a presumption with clear and convincing evidence proving that, regardless of the compliance or approval, the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller. Lack of testing or a finding of compliance or noncompliance with a standard, rule, or regulation would not raise a presumption of negligence on the part of a manufacturer or seller. Evidence of compliance or noncompliance with a regulation or standard not relevant to the event causing the death or injury would not be admissible.

Evidence of Subsequent Changes. Currently, evidence of a change in the philosophy, theory, knowledge, technique, or procedures of or regarding the manufacture, construction, design, etc. made, learned, placed in use, or discontinued after the death or injury is not admissible in a product liability action. The bill provides, instead, that with regard to the production of a product that was the subject of a product liability action, evidence of a philosophy, theory, knowledge, technique, or procedure that was learned, placed in use, or discontinued after the event resulting in the death of or injury to the person or property, that if learned, placed in use, or discontinued before the event would have made the event less likely to occur, would be admissible only for the purpose of proving the feasibility of precautions, if controverted, or impeachment.

Nonliability for Altered or Misused Product. Under the RJA, it is admissible in a product liability action that the cause of the death or injury was an alteration or modification of the product, or its application or use, made by a person other than, and without specific directions from, the defendant. The bill would delete this provision, and specify instead that a manufacturer or seller would not be liable in a product liability action for harm caused by an alteration of the product unless the alteration was reasonably foreseeable. Whether there had been an alteration of the product and whether an alteration was reasonably foreseeable would be legal issues to be resolved by the court. "Alteration" would mean a material change in a product after the product left the control of the manufacturer or seller and would include a change in the product's design, packaging, or labeling; a change to or removal of a safety feature, warning, or instruction; deterioration or damage caused by failure to observe routine care and maintenance or failure to observe an installation, preparation, or storage procedure; or a change resulting from repair, renovation, reconditioning, recycling, or reclamation of the product.

In addition, the bill specifies that a manufacturer or seller would not be liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable would be legal issues to be resolved by the court. "Misuse" would mean use of a product in a materially different manner than the product's intended use. Misuse would include uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances.

Assumption of Risk/Inherent Characteristic. A manufacturer or seller would not be liable in a product liability action if the purchaser or user were aware that use of the product created a risk of personal injury and voluntarily exposed himself or herself to that risk. This provision would not relieve a manufacturer or seller from a duty to use reasonable care in a product's production. In addition, a manufacturer or seller would not be liable if the alleged harm were caused by an inherent characteristic of the product that could not be eliminated without substantially compromising the product's usefulness or desirability and that was recognized by a person with the ordinary knowledge common to the community.

Seller's Defense. In a product liability action, a seller other than a manufacturer would not be liable for harm allegedly caused by the product unless either of the following applied: 1) the seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries; or 2) the seller made an express warranty as to the product, the product

failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm.

Product Warnings. Currently, it is admissible as evidence that, before the death or injury, there were provided written warnings that gave notice to foreseeable users of the material risk of injury, death, or damage connected with the foreseeable use of the product or provided instructions as to the foreseeable uses, applications, or limitations of the product that the defendant knew or should have known.

The bill would add that a defendant would not be liable for failure to warn of material risks that were or should be obvious to a reasonably prudent product user and material risks that were or should be a matter of common knowledge to persons in the same or similar position as the plaintiff.

In a products liability action brought against a manufacturer or seller for harm allegedly caused by a failure to provide adequate warnings or instructions, the manufacturer or seller would not be liable unless the plaintiff proved that the manufacturer knew or should have known about the risk of harm based on the scientific, technical, or medical information that was reasonably available at the time the specific unit of the product left the control of the manufacturer. This provision, however, would not limit a manufacturer's or seller's duty to use reasonable care in relation to a product after the product had left the manufacturer's or seller's control.

Except to the extent a state or Federal statute or regulation required a manufacturer to warn, a manufacturer or seller would not be liable in a product liability action for failure to provide an adequate warning if the product were provided for use by a sophisticated user. "Sophisticated user" would mean a person or entity that, by virtue of training, experience, a profession, or legal obligations, was or generally was expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect.

Damages for Noneconomic Loss. In a product liability action, damages for noneconomic loss could not be awarded in an amount that exceeded $280,000. If, however, the defect in the product caused either the person's death or loss of a vital bodily function, the maximum award for noneconomic losses would be $500,000. The State Treasurer would have to adjust the maximum amounts at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index. In awarding damages in a product liability action, the trier of fact would have to itemize damages into economic and noneconomic losses. Neither the court nor counsel for a party could inform the jury of the maximum limits on the awards. The court would have to adjust an award of noneconomic loss to conform to the statutory maximums.

The limitation on damages for noneconomic loss for death or loss of a vital bodily function would not apply to a defendant if the trier of fact determined by clear and convincing evidence that the death or loss was the result of the defendant's gross negligence. "Gross negligence" would mean conduct so reckless as to demonstrate a substantial lack of concern for whether injury resulted.

"Noneconomic loss" would mean any type of pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, or other nonpecuniary damages. "Economic loss" would mean objectively verifiable pecuniary damages arising from medical expenses or medical care, rehabilitation services, custodial care, loss of wages, loss of future earnings, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, or other objectively verifiable monetary losses.

Expert Witnesses/Scientific Evidence

The bill specifies that in an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert would not be admissible unless the court determined that the opinion was reliable and would assist the trier of fact. In making that determination, the court would have to examine the opinion and the basis for it, including the facts, technique, methodology, and reasoning relied on by the expert, and would have to consider all of the following:

-- Whether the opinion and its basis had been subjected to scientific testing and replication, and peer review publication.
-- The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis were consistent with those standards.
-- The known or potential error rate of the opinion and its basis.

-- The degree to which the opinion and its basis were generally accepted within the relevant expert community.
-- Whether the basis for the opinion was reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
-- Whether the opinion or methodology was relied on by experts outside the context of litigation.

A novel methodology or form of scientific evidence could be admitted as evidence only if its proponent established that it had achieved general scientific acceptance among impartial and disinterested experts in the field. In an action alleging medical malpractice, these provisions would be in addition to, and would not otherwise affect, the criteria for expert testimony specified in the RJA for medical malpractice cases.

Impairment Defense

In an action for the death of an individual or for injury to a person or property, it would be an absolute defense that the individual upon whose death or injury the action was based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, that individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual were less than 50% the cause of the accident or event, an award of damages would have to be reduced by that percentage. "Impaired ability to function due to the influence of intoxicating liquor or a controlled substance" would mean that, as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses were impaired to the point that his or her ability to react was diminished from what it would have been had the individual not consumed liquor or a controlled substance. An individual would be presumed to have an impaired ability to function due to the influence of intoxicating liquor or a controlled substance if, under a standard prescribed in the Michigan Vehicle Code for driving under the influence of intoxicating liquor or controlled substance, a presumption would arise that the individual's ability to operate a vehicle was impaired.

Allocation of Fault

The RJA currently specifies that in a personal injury action involving fault of more than one party to the action, including third party defendants, the court generally has to instruct the jury to answer special interrogatories or, if there is no jury, make findings indicating the total amount of each plaintiff's damages, and the percentage of the total fault of all of the parties regarding each claim as to each plaintiff, defendant, and third party defendant. The bill would change this requirement to specify that in an action for the death of or injury to an individual, regardless of the theory of liability, the court would have to instruct the jury to answer special interrogatories, or in the absence of a jury, determine the total amount of each plaintiff's damages, and the percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under Section 2925d of the RJA, regardless of whether the person was or could have been named as a party to the action. For the purpose of this provision, a court could determine that a person and that person's employee were to be considered a single person.

(Under the Michigan Court Rules, a third-party defendant is someone who is or may be liable to the defendant for all or part of the plaintiff's claim, and is served with a summons and complaint by a defending party. Under Section 2925d of the RJA, when a release or a covenant not to sue is given to someone liable in tort, it discharges that tort-feasor from liability for contribution to any other tort-feasor.)

The RJA also requires the court to determine the award of damages to each claimant in accordance with the findings required above, subject to any reduction under Section 2925d or 6303, and enter judgment against each party. The court may not enter judgment against a person who has been released from liability under Section 2925d. (Section 6303 requires the court in a personal injury action to reduce a judgment by the amount of the plaintiff's expense or loss that has been paid by a collateral source, e.g., insurance benefits.) The Act also requires the court to determine whether any part of a party's share of an obligation is uncollectible from that party and reallocate any uncollectible amount among the other parties according to their respective percentages of fault. Except for reallocated amounts, a person cannot be required to pay damages in an amount greater than his or her percentage of fault.

The bill would delete the requirement that the court reallocate uncollectible amounts. Under the bill, in actions involving multiple tort-feasors, liability would be separate, and a person could not be required to pay damages that exceeded his or her

percentage of fault. If an action included a medical malpractice claim against a person or entity described in Section 5838a(1), one of the following would apply:

-- If the plaintiff were determined to have no fault, the liability of each defendant would be joint and several, regardless of whether the defendant were a person or entity described in Section 5838a(1).
-- If the plaintiff were determined to have fault, upon motion made not later than six months after a final judgment was entered, the court would have to determine whether all or part of a party's share of the obligation was uncollectible from that party, and would have to reallocate any uncollectible amount among the other parties, whether or not another party was a person or entity described in Section 5838a(1), according to their respective percentages of fault. A party would not be required to pay a percentage of any uncollectible amount that exceeded his or her percentage of fault. The party whose liability was reallocated would continue to be subject to contribution and to any continuing liability to the plaintiff on the judgment.

(Section 5838a(1) refers to actions against a licensed health care professional, a licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment.) The bill would retain a current provision under which a governmental agency, other than a governmental hospital or medical care facility, is not required to pay a percentage of an uncollectible amount that exceeds the governmental agency's percentage of fault.

"Fault" would include an act, omission, conduct, breach of warranty, or breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that was a proximate cause of damage sustained by a party.

In addition, the Act specifies that, in a medical malpractice action, the court must reduce to the appropriate limit any damages award that exceeds the prescribed maximum amount. This provision, however, does not apply to a product liability action, or to an action in which a plaintiff is not at fault. The bill would delete these exceptions. The bill also would delete an exception for product liability actions to the requirement that the court determine the award of damages to each plaintiff according to the findings regarding each person's percentage of fault, and enter judgment against each party except a person released from liability.

Venue

The bill would amend the RJA's venue provisions to refer to the county in which "the injury occurred", rather than the country in which "all or part of the cause of action arose". The bill also would delete the requirement that venue be changed only to the county in which the moving party resides, when venue is changed based on hardship or inconvenience.

Certified Public Accountants

In an action for professional malpractice against a certified public accountant (CPA), the CPA would be liable for civil damages resulting from an act, omission, decision, or other conduct in connection with public accounting services performed by him or her only if the act, omission, decision, or conduct constituted fraud or an intentional misrepresentation or if the CPA were aware that a primary intent of the client was for the professional public accounting services to benefit or influence the person bringing the action for civil damages. If the CPA identified in writing to the client each person who was intended by the CPA to rely on the services and sent a copy of the writing or similar written statement to each person identified in the writing or written statement, the CPA and his or her employees, partners, members, officers, or shareholders could be held liable only to each identified person, in addition to each person who was a party to a contract with the CPA.

Attorney Fees/Settlement Offers

The following provisions would apply to an action filed against a person in this State based upon a cause of action including, but not limited to, negligence, strict or product liability, breach of implied warranty, or professional malpractice, in which damages were sought for personal injury, property damage, wrongful death, or economic or noneconomic loss. These provisions would not apply to a contingent fee agreement in which neither a preretention nor a postretention offer was made within the specified time requirements. Further, the provisions would not apply to an agreement between a claimant and an attorney to retain the attorney either on an hourly rate basis or fixed fee solely to evaluate a preretention offer, or to collect overdue amounts from an accepted preretention or postretention offer.

The bill specifies that a claimant who retained an attorney could elect to compensate the attorney's

services in connection with the claim on an hourly, fixed, or contingent fee basis. Further, at the initial meeting, the attorney would have to disclose to the claimant the claimant's right to elect the method of compensation. "Claimant" would mean an individual who, on his or her own behalf or vicariously, was seeking compensation for tortious physical or mental injury, property damage, or economic loss. "Contingent fee" would mean a fee negotiated in a contingent fee agreement that was payable only from the proceeds of a recovery on behalf of a claimant. "Fixed fee" would mean a fee negotiated in an agreement between an attorney and a claimant under which the attorney agreed to perform a specific legal task in exchange for a specific sum to be paid by the claimant. "Hourly fee" would mean a fee paid by a claimant to an attorney that was determined by multiplying an hourly rate, agreed to by the attorney and the claimant, by the number of hours that the attorney worked on behalf of the claimant in furtherance of the claimant's interest.

At any time after retention, an attorney charging a contingent fee would have to send, on behalf of the claimant, a demand for compensation by certified mail to the allegedly liable party or that party's attorney. "Allegedly liable party" would mean a person, an insurer of the person, or another individual or entity alleged by a claimant to be liable for a portion of the damages alleged by the claimant. The demand for compensation would have to include at least the factual basis of the claim, the legal theory on which it was based, and the names and, if known, addresses and telephone numbers of each person involved in the incident on which the claim was based, including witnesses.

A claimant's attorney would have to provide by certified mail a copy of each demand for compensation to the claimant and to each allegedly liable party or the party's attorney at the time the attorney sent the demand for compensation. If reproduction costs were significant relative to the size of the demand for compensation, the claimant's attorney could offer other forms of access to the materials convenient and at reasonable cost to an allegedly liable party's attorney. An attorney charging a contingent fee who failed to file a demand for compensation could not collect a fee greater than 10% of a settlement or judgment received by the attorney's claimant after reasonable expenses were deducted. An allegedly liable party would have 60 days after the date of the receipt of a demand for compensation to issue a response by certified mail stating a settlement offer to the claimant. The party and his or her attorney would have to include in the response copies of materials in their possession concerning the claim upon which the allegedly liable party relied in making the settlement offer, except for material that the party believed in good faith was not discoverable by the claimant during the course of litigation. If reproduction costs were significant relative to the size of the settlement offer, the allegedly liable party's attorney could offer other forms of access to the materials convenient and at reasonable cost to the claimant's attorney. The response would have to state whether it would expire within 30 days, whether it could be accepted for a longer definite period, or whether it could be accepted until notice of withdrawal. Even if a response provided for an expiration of less than 30 days, a claimant could accept the response within 30 days.

A settlement offer in a response could be increased during the 60-day period by sending an additional response. If an additional response were sent, the time for acceptance would be 10 days after the date of receipt of the additional response by the claimant's attorney or 30 days after the date of the receipt of the initial response, whichever was later, unless the additional response specified a longer period for acceptance.

An attorney retained after a claimant received a preretention offer could not enter into an agreement with the claimant for a contingent fee based upon or payable from the proceeds of a preretention offer that remained in effect. "Preretention offer" would mean an offer to settle a claim for compensation for damages made to a claimant not represented by an attorney at the time of the offer.

An attorney who was retained after a claimant received a preretention offer that the claimant did not accept, and who later received a postretention offer that the claimant accepted, could not enter into an agreement with the claimant for a contingent fee based upon or payable from the proceeds of that postretention offer that exceeded 20% of the excess of the postretention offer minus the preretention offer, after the deduction of reasonable expenses. "Postretention offer" would mean an offer in response to a demand for compensation made to a claimant who was represented by an attorney at the time of the offer, which was made within the time constraints and conformed to these provisions.

The retained attorney of a claimant who did not receive a preretention offer and who received a postretention offer that the claimant accepted could not enter into an agreement with the claimant for a contingent fee in excess of 10% of

the first $100,000 plus 5% of the amount above $100,000 of the accepted postretention offer, after the deduction of reasonable expenses.

If an allegedly liable party's postretention offer were rejected, but a later settlement offer were accepted, or if there were a judgment in favor of the claimant, the claimant, irrespective of a preretention offer, would not be obligated to pay a retained attorney a fee greater than the sum of the following:

-- The amount of the fee that would have been calculated had the postretention offer been accepted, but only as applied to the subsequent settlement offer or judgment up to the amount of the postretention offer.
-- The product of multiplying the contingent fee percentage by the amount by which the subsequent settlement or judgment exceeded the postretention offer, after the deduction of reasonable expenses.

MCL 600.919 et al.

Legislative Analyst: L. Burghardt
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FISCAL IMPACT

Provisions in the bill concerning the allocation of fault among multiple tort-feasors and absolute defense would have an indeterminate impact on State and local units of government. The amount depends on the number of lawsuits in which a unit of government is one of multiple defendants. Highway negligence cases account for the majority of tort payments by the State. Annual payments have averaged $15.7 million. The majority of cases against the Michigan Department of Transportation result from accidents in which more than one vehicle was involved.

The bill would have no fiscal impact on the courts.

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