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PRODUCT LIABILITY

House Bill 5371 as introduced
Sponsor: Rep. Laura Baird

House Bill 4048 (Substitute H-2)
Sponsor: Rep. William Callahan

First Analysis (12-3-97)
Committee: Judiciary

THE APPARENT PROBLEM:

Product liability cases, generally speaking, involve injuries to persons and/or property allegedly resulting from the use of products; these include injuries allegedly caused by faulty design, faulty production, or inadequate warnings or instructions. Some product liability cases are brought by workers injured on the job by machinery or other products. Prior to recent legislatively enacted changes in the law, the standard of care in product liability cases in Michigan was based on whether the injury or risk of harm to a consumer was reasonably foreseeable by the manufacturer or distributor of the product. In response to criticism of tort law in general and product liability law in particular, a number of product liability and tort law changes were legislatively enacted in 1995. In an effort to reduce the liability exposure of manufacturers and sellers, several limitations were placed on civil actions based upon product liability that severely restrict the likelihood of success in certain product liability cases. These limitations apply in all cases except where the defendant had actual knowledge that the product was defective, knew that there was a substantial likelihood that the defect would cause the injury that is the basis of a product liability action, and willfully disregarded that knowledge in manufacturing or distributing the product.

Some feel that the 1995 changes restricting product liability actions were excessive and have made it virtually impossible for a plaintiff to successfully bring a product liability case. It is argued that the changes to the law have, in essence, eliminated the duty of manufacturers and sellers to do anything more than meet the minimum standard of care, i.e., conform with the minimum governmental licensing or regulation standards, in producing any particular product. As a result, legislation has been introduced to make the law more protective of potential plaintiffs and less protective of manufacturers and sellers.

In addition, in 1993 in a case involving a pharmaceutical product, the Michigan Supreme Court ruled that "the statute of limitations begins to run when the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered a possible cause of action" (*Moll* v *Abbot Laboratories*, 444 Mich 1 [1993]). This ruling held that the statute of limitations begins to run when the plaintiff knew or should have discovered the possible cause of action. Although in most cases the statute of limitations begins to run at the time of the defendant's breach of conduct, the standard set for pharmaceutical cases in *Moll* is often used in types of cases where the actions of the defendant that caused the injury predate the plaintiff's awareness of the injury and of its cause. It has been asserted that this standard is too restrictive in pharmaceutical product liability cases and should be statutorily changed.

THE CONTENT OF THE BILLS:

The Revised Judicature Act of 1961 provides rules for civil actions based on product liability. Among other things, the act provides restrictions regarding when a manufacturer or seller can be found liable, the types of evidence that can be admitted, and the amount of damages that can be awarded.

Generally, under current law (added by Public Act 249 of 1995):

-- There is a rebuttable presumption that a manufacturer or seller is not liable if the aspect of production that allegedly caused the injury complied with federal or state standards.

-- A manufacturer or seller is not liable if the harm was caused by alteration or misuse of a product that was not reasonably foreseeable; if the user was aware of and

voluntarily exposed himself or herself to the risk; or if the alleged harm was caused by an inherent characteristic of the product.

-- There is a cap limiting damages for noneconomic loss, except in instances of gross negligence, to $280,000 or,
in cases of death or permanent loss of a vital bodily function, $500,000. (The limits do not apply in cases of gross negligence.)

-- A defendant is not liable for failure to warn of risks that should have been obvious to a reasonably prudent product user or that are a matter of common knowledge.

-- A manufacturer or seller is not liable for failure to warn if the product was provided for use by a sophisticated user.

Currently, however, these provisions do not apply where the defendant had "actual knowledge" that the product was defective and that there was substantial likelihood that the defect would cause the injury that is the basis of the lawsuit and willfully disregarded that knowledge.

House Bill 5371 would amend the act (MCL 600.2949a) to broaden the types of product liability cases where these restrictions would not apply. Specifically, these provisions would not apply in cases where the defendant had knowingly manufactured or distributed a defective product or knowingly caused a defective product to be manufactured or delivered. Instead of requiring that the defendant had "actual knowledge" of the defect and the likelihood of its causing injury, the bill would only require that the defendant had acted knowingly.

House Bill 4048. Under the Revised Judicature Act (RJA), in civil lawsuits, the statute of limitations begins to run from the time the claim "accrues" (that is, becomes an enforceable right). A claim accrues at the time the wrong upon which the claim is based was done, regardless of the time when damage results, unless otherwise provided in law. The RJA specifies when a claim accrues in certain cases, and House Bill 4048 would amend the act (MCL 600.5827 and 600.5828) to specify that in a pharmaceutical product liability action, the claim would accrue at the time the injured party knew of the injury and knew of the causal connection between the injury and its cause. In addition, the bill would delete a section of the RJA that precludes liability of a pharmaceutical manufacturer or seller in a product liability action, except in cases of fraud or bribery, where the drug was approved for safety and efficacy by the United States Food and Drug Administration (FDA) and the drug and its labeling are in compliance with the FDA.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

Product liability laws are an important fixture of American jurisprudence. They encourage manufacturers and sellers to create safer products for consumers and to recall or redesign unsafe products by imposing a duty upon the manufacturers and sellers to use reasonable care to reduce potential hazards. The changes made to product liability laws under Public Act 249 of 1995 significantly limited the accountability of manufacturers and sellers of defective products and made it nearly impossible for an injured Michigan consumer to recover damages from a manufacturer or distributor of an unsafe product.

In fact, if the manufacturer or seller merely meets the minimum governmental licensing or regulation standards, many of which are already low and often decades old (the safety standards for tires, for example, are 26 years old), then the plaintiff's case is finished unless he or she can prove that the defendant had "actual knowledge" of the defect and willfully disregarded its consequences. Reportedly, such a standard is much more difficult to meet, as it requires producing documents, such as internal company memos, that show an intent to harm.

The bill would restore some balance to the law by changing the standard to one that is easier for a plaintiff to meet. The bill's language is actually the language that was part of the 1995 legislation when it was passed by the House; it is argued that the provision in question was changed to the current language in conference committee without discussion of and a vote upon its particular merits. There is no good reason to allow a defendant to who knows that his or her product is defective to benefit from the caps, defenses, and limitations on liability that the 1995 legislation made available to a defendant in a product liability action.

Against:

The bill will essentially reinstate the old system of product liability and place an unjust burden upon businesses, forcing them to deal with increasing numbers of lawsuits for increasingly frivolous claims. The proposed legislation will encourage illegitimate claims, discourage businesses from distributing and marketing their products in Michigan, and increase insurance rates for businesses, leading to increased costs for consumers.

The standard set by the bill, that the defendant acted "knowingly," does not clearly distinguish, as the current language does, what the defendant knew, when he or she knew it, and what the defendant did with that knowledge. It is a much broader standard than the current one and a potentially unfair one. In fact, it is possible that the bill's standard could be interpreted to provide for strict liability. The fact that the product proved defective and that the defendant knowingly produced the product could be deemed sufficient to create liability.

Furthermore, the bill removes the restriction that the court must make the determination as to whether the defendant meets the current standard.

For:

The harmful effects of a pharmaceutical product can take years, possibly decades, and in some cases a generation, to be discovered. For example, some of the problems resulting from the use of the drug diethylstilbestrol (DES) took effect on the offspring of the women who used the drug (a form of synthetic estrogen taken by some pregnant women to avoid miscarriage). Daughters of women who had used the drug were found to have unusually high incidences of uterine deformities and cancers (often cervical). However, these problems were not detected until the daughters reached childbearing age, and some of the deformities were not apparent until the women had miscarriages. Although current law delays the running of the statute of limitations in such cases until the plaintiff discovers or should have discovered a possible cause of action, this is not enough. A consumer should not face being barred from legal recourse until he or she knows of the injury and there is some level of knowledge about the connection between the manifestation of the injury and the drug that he or she used.

Against:

There is good reason for the existence of statutes of limitation. They require plaintiffs to bring their cases in a timely fashion so that defendants are not placed at an unfair disadvantage of having to defend against untimely claims where evidence may be lost, making it more difficult to offer an adequate defense. The use of a purely subjective test, when the plaintiff knows of the injury and the causal connection between the injury and its cause, destroys the statute of limitations because the plaintiff is the only one who can say when it was that he or she knew these things. The removal of the objective standard of when the plaintiff should have known makes the statute of limitations moot and will essentially leave the pharmaceutical companies perpetually vulnerable to legal actions. In its analysis in the *Moll* case, the Michigan Supreme Court specifically rejected the type of standard that House Bill 4048 would introduce because it recognized that such a standard would undermine the statute of limitations.

For:

House Bill 4048 would remove the blanket exemption from liability for pharmaceutical products that have been approved by the FDA. Under the 1995 legislation, government standards were treated as the be-all and end-all of product safety. But these standards are often minimum standards. They are the product of lobbying by industry and of compromise. They can become outdated and irrelevant. Under the bill, compliance with such standards could still be admissible as evidence for a jury to consider when evaluating all the circumstances surrounding an incident. But such compliance should not be an absolute defense.

Against:

Drug companies spend large sums of money and expend enormous energy getting approval for their products. Many valuable products never reach the market or are withdrawn because of successful lawsuits (or the threat of future lawsuits) even though there is no medical evidence that they are harmful.

POSITIONS:

The Michigan Consumer Federation supports the bills. (12-2-97)

The Michigan Trial Lawyers Association supports the bills. (12-2-97)

The Michigan AFL-CIO supports the bills. (12-2-97)

The Detroit Regional Chamber of Commerce opposes the bill. (12-2-97)

The Michigan Chamber of Commerce opposes the bills. (12-2-97)

The Pharmaceutical Research and Manufacturers Association opposes the bills. (12-3-97)

The Michigan Farm Bureau opposes House Bill 5371. (12-3-97)

The Small Business Association of Michigan opposes House Bill 5371. (12-3-97)

The National Federation of Independent Business opposes House Bill 5371. (12-2-97)

The Michigan Manufacturers Association opposes House Bill 5371. (12-2-97)

Analyst: W. Flory

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.