

# SENATE BILL No. 338

June 2, 1987, Introduced by Senators ENGLER, POSTHUMUS, DI NELLO, GEAKE, BINSFELD, ARTHURHULTZ, GAST, SEDERBURG, FREDRICKS. NICHOLS, SHINKLE, CARL, DILLINGHAM, EHLERS, CRUCE, DE GROW, WELBORN, SCHWARZ, CROUSEY, FESSLER and SMITH and referred to the Committee on Commerce.

A bill to amend sections 2945, 2946, 2947, 2948, and 2949 of Act No. 236 of the Public Acts of 1961, entitled as amended "Revised judicature act of 1961," being sections 600.2945, 600.2946, 600.2947, 600.2948, and 600.2949 of the Michigan Compiled Laws; and to add sections 2946a, 2946b, and 2949a.

## THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1       Section 1. Sections 2945, 2946, 2947, 2948, and 2949 of Act  
2 No. 236 of the Public Acts of 1961, being sections 600.2945,  
3 600.2946, 600.2947, 600.2948, and 600.2949 of the Michigan  
4 Compiled Laws, are amended and sections 2946a, 2946b, and 2949a  
5 are added to read as follows:

6       Sec. 2945. As used in sections 2946 to ~~2949~~ 2949A and  
7 section 5805: ~~—, "products—~~

1 (A) "CLEAR AND CONVINCING EVIDENCE" MEANS THAT MEASURE OR  
2 DEGREE OF PROOF THAT WILL PRODUCE IN THE MIND OF THE TRIER OF  
3 FACT A FIRM BELIEF OR CONVICTION AS TO THE TRUTH OF THE ALLEGA-  
4 TIONS SOUGHT TO BE ESTABLISHED. THE LEVEL OF PROOF REQUIRED TO  
5 ESTABLISH CLEAR AND CONVINCING EVIDENCE IS MORE THAN THAT  
6 REQUIRED UNDER PREPONDERANCE OF THE EVIDENCE, BUT LESS THAN THAT  
7 REQUIRED FOR PROOF BEYOND A REASONABLE DOUBT.

8 (B) "PRODUCTS liability action" means an action based on any  
9 legal or equitable theory of liability brought for or on account  
10 of death or injury to person or property caused by or resulting  
11 from the manufacture, construction, design, formula, development  
12 of standards, PERFORMANCE, preparation, processing, assembly,  
13 inspection, testing, listing, certifying, warning, instructing,  
14 marketing, advertising, packaging, or labeling of a product or a  
15 component of a product.

16 Sec. 2946. (1) ~~It shall be admissible as evidence~~ A PRE-  
17 SUMPTION SHALL ARISE in a products liability action that the man-  
18 ufacture, construction, design, formula, development of stan-  
19 dards, PERFORMANCE, preparation, processing, assembly, inspec-  
20 tion, testing, listing, certifying, warning, instructing, market-  
21 ing, advertising, packaging, or labeling OF A PRODUCT OR A COMPO-  
22 NENT OF A PRODUCT, WAS NOT DEFECTIVE IF THE MANUFACTURE, CON-  
23 STRUCTION, DESIGN, FORMULA, DEVELOPMENT OF STANDARDS, PER-  
24 FORMANCE, PREPARATION, PROCESSING, ASSEMBLY, INSPECTION, TESTING,  
25 LISTING, CERTIFYING, WARNING, INSTRUCTING, MARKETING, ADVERTIS-  
26 ING, PACKAGING, OR LABELING was done pursuant to the generally  
27 recognized and prevailing nongovernmental standards in existence

1 at the time the product was sold or delivered by the defendant to  
2 the initial purchaser or user. THIS PRESUMPTION MAY BE REBUTTED  
3 ONLY BY CLEAR AND CONVINCING EVIDENCE.

4 (2) IN ANY PRODUCTS LIABILITY ACTION BROUGHT AGAINST A MANU-  
5 FACTURER OR SELLER FOR HARM ALLEGEDLY CAUSED BY A PRODUCT DESIGN,  
6 A MANUFACTURER OR SELLER SHALL NOT BE LIABLE IF, AT THE TIME THE  
7 PRODUCT LEFT THE CONTROL OF THE MANUFACTURER, A PRACTICAL AND  
8 TECHNICALLY FEASIBLE ALTERNATIVE DESIGN WAS NOT AVAILABLE WHICH  
9 WOULD HAVE PREVENTED THE HARM WITHOUT IMPAIRING THE USEFULNESS OR  
10 DESIRABILITY OF THE PRODUCT TO USERS. AN ALTERNATIVE DESIGN IS  
11 PRACTICAL AND FEASIBLE IF THE TECHNICAL, MEDICAL, AND SCIENTIFIC  
12 KNOWLEDGE RELATING TO THE SAFETY OF THE PRODUCT WAS, AT THE TIME  
13 THE PRODUCT LEFT THE CONTROL OF THE MANUFACTURER, DEVELOPED,  
14 AVAILABLE, AND CAPABLE OF USE IN THE MANUFACTURE OF THE PRODUCT,  
15 AND ECONOMICALLY FEASIBLE FOR USE BY THE MANUFACTURER.

16 (3) ~~(2) It shall be admissible in evidence~~ A PRESUMPTION  
17 SHALL ARISE in a products liability action that the manufacture,  
18 construction, design, formula, development of standards,  
19 PERFORMANCE, preparation, processing, assembly, inspection, test-  
20 ing, listing, certifying, warning, instructing, marketing, adver-  
21 tising, packaging, or labeling OF A PRODUCT OR A COMPONENT OF A  
22 PRODUCT, WAS NOT DEFECTIVE IF THE MANUFACTURE, CONSTRUCTION,  
23 DESIGN, FORMULA, DEVELOPMENT OF STANDARDS, PERFORMANCE, PREPARA-  
24 TION, PROCESSING, ASSEMBLY, INSPECTION, TESTING, LISTING, CERTI-  
25 FYING, WARNING, INSTRUCTING, MARKETING, ADVERTISING, PACKAGING,  
26 OR LABELING was done pursuant to the federal and state law,  
27 rules, or regulations in effect at the time the product was sold

1 (C) THE LENGTH OF TIME THE EXPERT WITNESS HAS BEEN ENGAGED  
2 IN THE ACTIVE PRACTICE IN THE SUBJECT MATTER IN WHICH HE OR SHE  
3 IS TESTIFYING.

4 (D) THE RELEVANCY OF THE EXPERT WITNESS'S TESTIMONY.

5 (3) THIS SECTION DOES NOT LIMIT THE POWER OF THE TRIAL COURT  
6 TO DISQUALIFY AN EXPERT WITNESS ON GROUNDS OTHER THAN THE QUALI-  
7 FICATIONS SET FORTH IN THIS SECTION.

8 (4) IN A PRODUCTS LIABILITY ACTION, AN EXPERT WITNESS SHALL  
9 NOT TESTIFY ON A CONTINGENCY FEE BASIS. A PERSON WHO VIOLATES  
10 THIS SUBSECTION IS GUILTY OF A MISDEMEANOR.

11 SEC. 2946B. (1) IN A PRODUCTS LIABILITY ACTION, DAMAGES  
12 FOR NONECONOMIC LOSS WHICH EXCEEDS \$225,000.00 SHALL NOT BE  
13 AWARDED UNLESS 1 OR MORE OF THE FOLLOWING CIRCUMSTANCES EXIST:

14 (A) THERE HAS BEEN A DEATH.

15 (B) THE INJURY INVOLVES THE REPRODUCTIVE SYSTEM OF THE  
16 PARTY.

17 (C) THE DISCOVERY OF THE EXISTENCE OF THE CLAIM WAS PRE-  
18 VENTED BY THE FRAUDULENT CONDUCT OF THE DEFENDANT.

19 (D) THE PARTY HAS LOST A VITAL BODILY FUNCTION.

20 (2) IN AWARDING DAMAGES IN A PRODUCTS LIABILITY ACTION, THE  
21 TRIER OF FACT SHALL ITEMIZE DAMAGES INTO ECONOMIC AND NONECONOMIC  
22 DAMAGES.

23 (3) "NONECONOMIC LOSS" MEANS DAMAGES OR LOSS DUE TO PAIN,  
24 SUFFERING, INCONVENIENCE, PHYSICAL IMPAIRMENT, PHYSICAL DISFIG-  
25 UREMENT, OR OTHER NONECONOMIC LOSS.

26 (4) THE LIMITATION ON NONECONOMIC DAMAGES SET FORTH IN  
27 SUBSECTION (1) SHALL BE INCREASED BY AN AMOUNT DETERMINED BY THE

1 STATE TREASURER AT THE END OF EACH CALENDAR YEAR TO REFLECT THE  
2 CUMULATIVE ANNUAL PERCENTAGE INCREASE IN THE CONSUMER PRICE  
3 INDEX. AS USED IN THIS SUBSECTION, "CONSUMER PRICE INDEX" MEANS  
4 THE MOST COMPREHENSIVE INDEX OF CONSUMER PRICES AVAILABLE FOR  
5 THIS STATE FROM THE BUREAU OF LABOR STATISTICS OF THE UNITED  
6 STATES DEPARTMENT OF LABOR.

7       Sec. 2947. (1) It shall be ~~admissible as evidence in~~ AN  
8 ABSOLUTE DEFENSE TO a products liability action that ~~the~~ A  
9 PROXIMATE cause of the death OF A PERSON or THE injury to A  
10 person or property was an alteration or modification of the prod-  
11 uct, or its application or use, made by a person other than, and  
12 without specific directions from, the defendant.

13       (2) IT SHALL BE AN ABSOLUTE DEFENSE TO A PRODUCTS LIABILITY  
14 ACTION THAT THE DEATH OF A PERSON OR THE INJURY TO A PERSON OR  
15 PROPERTY OCCURRED 15 OR MORE YEARS AFTER THE PRODUCT WAS SOLD OR  
16 DELIVERED BY THE DEFENDANT TO THE INITIAL PURCHASER OR USER.  
17 THIS SUBSECTION SHALL NOT APPLY TO A DRUG OR AN IMPLANTED  
18 DEVICE. AS USED IN THIS SUBSECTION:

19       (A) "DRUG" MEANS A SUBSTANCE RECOGNIZED AS A DRUG IN THE  
20 OFFICIAL UNITED STATES PHARMACOPOEIA, OFFICIAL HOMEOPATHIC PHAR-  
21 MACOPOEIA OF THE UNITED STATES, OR OFFICIAL NATIONAL FORMULARY,  
22 OR ANY SUPPLEMENT TO ANY OF THEM; A SUBSTANCE INTENDED FOR USE IN  
23 THE DIAGNOSIS, CURE, MITIGATION, TREATMENT, OR PREVENTION OF DIS-  
24 EASE IN HUMAN BEINGS OR ANIMALS; A SUBSTANCE OTHER THAN FOOD  
25 INTENDED TO AFFECT THE STRUCTURE OR ANY FUNCTION OF THE BODY OF  
26 HUMAN BEINGS OR ANIMALS; OR, A SUBSTANCE INTENDED FOR USE AS A  
27 COMPONENT OF ANY ARTICLE SPECIFIED IN THIS SUBSECTION.

1 AGREED BY ALL PARTIES TO THE ACTION, SHALL INSTRUCT THE JURY TO  
2 ANSWER SPECIAL INTERROGATORIES OR, IF THERE IS NO JURY, SHALL  
3 MAKE FINDINGS INDICATING BOTH OF THE FOLLOWING:

4 (A) THE TOTAL AMOUNT OF EACH CLAIMANT'S DAMAGES.

5 (B) THE PERCENTAGE OF THE TOTAL FAULT OF ALL OF THE PARTIES  
6 REGARDING EACH CLAIM AS TO EACH CLAIMANT, DEFENDANT, AND  
7 THIRD-PARTY DEFENDANT AND PERSON WHO HAS BEEN RELEASED FROM  
8 LIABILITY PURSUANT TO SECTION 2925D.

9 (2) IN DETERMINING THE PERCENTAGES OF FAULT UNDER SUBSECTION  
10 (1)(B), THE TRIER OF FACT SHALL CONSIDER BOTH THE NATURE OF THE  
11 CONDUCT OF EACH PARTY AT FAULT AND THE EXTENT OF THE CAUSAL RELA-  
12 TION BETWEEN THE CONDUCT AND THE DAMAGES CLAIMED.

13 (3) THE COURT SHALL DETERMINE THE AWARD OF DAMAGES TO EACH  
14 CLAIMANT IN ACCORDANCE WITH THE FINDINGS UNDER SUBSECTION (1),  
15 SUBJECT TO ANY REDUCTION UNDER SECTION 2925D(B) OR 6303, AND  
16 ENTER JUDGMENT AGAINST EACH PARTY EXCEPT THAT JUDGMENT SHALL NOT  
17 BE ENTERED AGAINST A PERSON WHO HAS BEEN RELEASED FROM LIABILITY  
18 PURSUANT TO SECTION 2925D. EXCEPT AS PROVIDED IN SUBSECTION (4),  
19 A PERSON SHALL NOT BE REQUIRED TO PAY DAMAGES IN AN AMOUNT  
20 GREATER THAN HIS OR HER RELATIVE DEGREE OF FAULT.

21 (4) UPON MOTION MADE NOT LATER THAN 1 YEAR AFTER JUDGMENT IS  
22 ENTERED, THE COURT SHALL DETERMINE WHETHER ALL OR PART OF A  
23 PARTY'S EQUITABLE SHARE OF THE OBLIGATION IS UNCOLLECTIBLE FROM  
24 THAT PARTY, AND SHALL REALLOCATE ANY UNCOLLECTIBLE AMOUNT AMONG  
25 THE OTHER PARTIES, INCLUDING A CLAIMANT AT FAULT, BUT NOT INCLUD-  
26 ING A PERSON WHO HAS BEEN RELEASED FROM LIABILITY PURSUANT TO  
27 SECTION 2925D, ACCORDING TO THEIR RESPECTIVE PERCENTAGES OF FAULT

1 AS DETERMINED UNDER SUBSECTION (1). A PARTY SHALL NOT BE  
2 REQUIRED TO PAY A PERCENTAGE OF ANY UNCOLLECTIBLE AMOUNT WHICH  
3 EXCEEDS THAT PARTY'S PERCENTAGE OF FAULT AS DETERMINED UNDER SUB-  
4 SECTION (1). THE PARTY WHOSE LIABILITY IS REALLOCATED CONTINUES  
5 TO BE SUBJECT TO CONTRIBUTION AND TO ANY CONTINUING LIABILITY TO  
6 THE CLAIMANT ON THE JUDGMENT.

7 (5) ~~-(2)-~~ If the court determines that the claim or defense  
8 is frivolous, the court may award costs and reasonable attorney's  
9 fees to the prevailing party in a products liability action.

10 SEC. 2949A. IN ANY PRODUCTS LIABILITY ACTION IN WHICH, PUR-  
11 SUANT TO AN EXPRESS OR IMPLIED AGREEMENT, AN ATTORNEY'S COMPENSA-  
12 TION IS DEPENDENT OR CONTINGENT IN WHOLE OR IN PART UPON THE  
13 AMOUNT OF THE RECOVERY IN THE ACTION, THE ATTORNEY'S COMPENSATION  
14 OR FEE UNDER THAT AGREEMENT SHALL NOT EXCEED:

- 15 (A) FORTY PERCENT OF THE FIRST \$5,000.00 RECOVERED.  
16 (B) THIRTY-FIVE PERCENT OF THE NEXT \$20,000.00 RECOVERED.  
17 (C) TWENTY-FIVE PERCENT OF THE NEXT \$225,000.00 RECOVERED.  
18 (D) TWENTY PERCENT OF THE NEXT \$250,000.00 RECOVERED.  
19 (E) TEN PERCENT OF ANY AMOUNT OVER \$500,000.00.