Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986

Senate Bill 344 (as enrolled) **PUBLIC ACT 249 of 1995**
House Bill 4508 (as enrolled) **PUBLIC ACT 161 of 1995**
Sponsor: Senator Joel D. Gougeon (Senate Bill 344)
Representative Michael Nye (House Bill 4508)
Senate Committee: Economic Development, International Trade and Regulatory Affairs (Senate Bill 344)
Judiciary (House Bill 4508)
House Committee: Commerce (Senate Bill 344)
Judiciary and Civil Rights (House Bill 4508)

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RATIONALE

The term "product liability" refers to the body of law that governs the liability of manufacturers and sellers of products that are alleged to have caused personal injury or property damage. According to many, over the past several decades there has been an explosion of product liability litigation, resulting in unfair and excessive judgments against manufacturers and sellers, bankruptcies, reduced capacity of firms to compete internationally, curtailed innovation, reduced funding for research, higher consumer costs, and unaffordable or unavailable casualty insurance. These circumstances have led to considerable debate at both the Federal and state levels, which escalated in the mid-1980s and continues in the present. This debate has been fueled, in part, by various highly publicized cases, including those involving flammable baby pajamas, asbestos, the Dalkon Shield, exploding gas tanks, and silicone breast implants. In Congress and state legislatures, a number of proposals have been advanced to reduce manufacturers' and sellers' exposure to liability.

Among the most common recommendations are those that would establish a defense if a product met government standards; if a product were misused or modified by the consumer; if the harm were caused by an inherent characteristic of a product (one that cannot be removed if the product is to serve its function); or if a consumer exposed himself or herself to a known risk. Many also believe that a wholesaler or retailer should not be held liable unless the seller's negligence caused the injury; that the amount awarded for noneconomic damages (e.g., pain and suffering) should be limited; and that a product liability defendant should not have to pay more than its share of the total damages.

In addition, many advocate changes that would affect not just product liability cases but all civil suits involving death, personal injury, or property damage. Among other things, these recommendations would create a defense if the injured party were intoxicated, and would restrict the use of expert testimony. Other suggestions involve the allocation of fault among the parties: Under Michigan law (except in product liability cases and cases in which the plaintiff is not at fault), the court must determine each party's percentage of total fault and award damages accordingly. If one party's share is uncollectible, however, the court is required to reallocate that amount among the other parties. Also, the court may not consider the liability of someone who has entered into a settlement or anyone else who might have contributed to the injury. Further, in product liability cases, each defendant might be held liable for the entire damages, despite the fault of other parties (known as joint and several liability).

While product liability and tort revision continue to be debated at the Federal level, individual states have enacted many of the measures described above. According to the American Tort Reform Association, states enacting reforms in 1995 include Colorado, Hawaii, Illinois, Indiana,

Montana, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Wisconsin. Many believe that Michigan, too, should take steps to limit the exposure of product manufacturers and sellers, and reduce damages awards.

CONTENT

House Bill 4508 amends the Revised Judicature Act (RJA) to do the following in regard to actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death:

- **-- Eliminate joint liability and the reallocation of uncollectible amounts, except in medical malpractice actions.**
- **-- Require the trier of fact to consider the fault of nonparties, as well as parties, in determining the percentage of total fault in an action involving fault of more than one person.**
- **-- Provide that noneconomic damages may not be awarded to a party whose percentage of fault exceeds the aggregate fault of the other persons, and that the party's economic damages must be reduced.**
- **-- Require the trier of fact to allocate the liability of each person in direct proportion to the person's percentage of fault, regardless of whether the person was or could have been named as a party to the action.**
- **-- Revise provisions governing venue (the particular county in which an action may be commenced and tried).**

Senate Bill 344 amends the Revised Judicature Act to do the following in regard to product liability actions:

- **-- Provide that a manufacturer or seller is not liable if a practical and technically feasible alternative production practice was not available.**
- **-- Create 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 or was approved by a Federal or state agency.**
- **-- Allow the admission in evidence, for certain purposes, of subsequent Changes in theory, knowledge, technique, or procedure.**
- **-- Provide that a manufacturer or seller is not liable if the harm was caused by alteration or misuse of the product that was not reasonably foreseeable; if the user was aware of, and voluntarily exposed himself or herself to an unreasonable risk; or if the alleged harm was caused by an inherent characteristic of the product.**
- **-- Specify that a manufacturer or seller is not liable for failure to warn if the product was provided for use by a sophisticated user.**
- **-- Specify that 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.**
- **-- Provide that a manufacturer or seller is not liable for a drug that was approved by the Food and Drug Administration.**
- **-- Remove certain defenses for a defendant who had actual knowledge of a product's defect.**
- **-- Limit damages for noneconomic loss.**
- **-- Redefine "product liability action" to include injuries or death resulting from the sale of a product.**

The bill does the following in regard to all tort actions:

- **-- Establishes criteria for expert witnesses.**
- **-- Provides that a novel form of scientific evidence may be admitted only if it has achieved general scientific acceptance among experts in the field.**
- **-- Provides that it is 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 was 50% or more the cause of the accident or event; and requires a reduction of damages if the percentage was under 50%.**
- **-- Provides that a defendant is jointly and severally liable for a crime involving gross negligence, or a crime involving the use of alcohol or a controlled substance that is a violation of a specific statute.**

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

Both bills will take effect on March 28, 1996, and apply to cases filed on or after that date.

The following is a more detailed description of the bills. In instances in which Senate Bill 344 changes amendments made by House Bill 4508, the provisions in Senate Bill 344 are described.

Product Liability Amendments

"Product Liability Action". Currently, the RJA defines "product liability action" as an action based on a legal or equitable theory of liability brought for or on account of death or injury to a 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. Senate Bill 344, instead, refers to death, injury, or property damage caused by the "production" of a product or product component. The bill defines "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. Senate Bill 344 provides, instead, that it is admissible as evidence 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. Senate Bill 344 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 is not liable unless the plaintiff establishes 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 that time, there was available a practical and technically feasible alternative production practice 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 is practical and feasible only if the technical, medical, and scientific knowledge relating to the production of the product, at the time the specific unit of the product left the control of the manufacturer or seller, was 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 is not 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.

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. Senate Bill 344 deletes this provision.

The bill provides that, in a product liability action brought against a manufacturer or seller for harm allegedly caused by a product, there is a rebuttable presumption that the manufacturer or seller is not liable if, at the time the specific unit of the product was sold or delivered to the initial purchaser or user, the aspect of the product that allegedly caused the harm was in compliance with standards relevant to the event causing the death or injury set forth in a Federal or state statute or was approved by, or in compliance with regulations or standards relevant to the event promulgated by, a Federal or state agency responsible for reviewing the safety of the product.

Noncompliance with a relevant standard set forth in a Federal or state statute or lack of approval by, or noncompliance with relevant regulations or standards promulgated by, a Federal or state agency does 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 is not admissible.

Drugs. Senate Bill 344 provides that, in a product liability action against a manufacturer or seller, a product that is a drug is not defective or unreasonably dangerous, and the manufacturer or seller is not liable, if the drug was approved for safety and efficacy by the United States Food and

Drug Administration (FDA), and the drug and its labeling were in compliance with the FDA's approval at the time the drug left the control of the manufacturer or seller. ("Drug" means that term as defined in the Federal Food, Drug, and Cosmetic Act, but does not include a medical appliance or device.)

These provisions do not apply to a drug that is sold in the United States after the effective date of an FDA order to remove the drug from the market or to withdraw its approval. These provisions also do not apply if the defendant at any time before the event that allegedly caused the injury does any of the following:

-- Intentionally withholds from or misrepresents to the FDA information concerning the drug that must be submitted under the Federal Food, Drug, and Cosmetic Act, and the drug would not have been approved, or the FDA would have withdrawn approval for the drug if the information were accurately submitted.
-- Makes an illegal payment to an FDA official or employee for the purpose of securing or maintaining the drug's approval.

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. Senate Bill 344 provides, instead, that with regard to the production of a product that is 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, is 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. Senate Bill 344 specifies instead that a manufacturer or seller is not liable in a product liability action for harm caused by an alteration or misuse of the product unless the alteration or misuse was reasonably foreseeable. Whether there was an alteration or misuse of the product and whether an alteration or misuse was reasonably foreseeable are legal issues to be resolved by the court.

"Alteration" is defined as a material change in a product after the product leaves the control of the manufacturer or seller, and includes 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. "Misuse" means use of a product in a materially different manner than the product's intended use. Misuse includes 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. Under Senate Bill 344, a manufacturer or seller is not liable in a product liability action if the purchaser or user was aware that use of the product created an unreasonable risk of personal injury and voluntarily exposed himself or herself to that risk, and the risk was the proximate cause of the injury. This provision does not relieve a manufacturer or seller from a duty to use reasonable care in a product's production.

Inherent Characteristic. Under Senate Bill 344, a manufacturer or seller is not liable if the alleged harm was caused by an inherent characteristic of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and that is recognized by a person with the ordinary knowledge common to the community.

Seller's Defense. Senate Bill 344 provides that, in a product liability action, a seller other than a manufacturer is not liable for harm allegedly caused by the product unless either of the following applies: 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.

Senate Bill 344 adds that a defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the plaintiff.

In a product 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 is not be liable unless the plaintiff proves that the manufacturer knew or should have known about the risk of harm based on the scientific, technical, or medical information reasonably available at the time the specific unit of the product left the control of the manufacturer.

The bill provides that the preceding provisions do not limit a manufacturer's or seller's duty to use reasonable care in relation to a product after the product has left the manufacturer's or seller's control.

Except to the extent a state or Federal statute or regulation requires a manufacturer to warn, the bill provides that a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user. "Sophisticated user" means a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or generally is expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect. An employee who does not have actual knowledge of the product's potential hazard or adverse effect that caused the injury is not a sophisticated user.

Damages for Noneconomic Loss. Senate Bill 344 provides that, in a product liability action, the total amount of damages for noneconomic loss may not exceed $280,000, unless the defect in the product caused either the person's death or permanent loss of a vital bodily function, in which case the total damages for noneconomic loss may not exceed $500,000. On the bill's effective date, the State Treasurer must adjust these limitations so that they are equal to the limitations provided in Section 1483 of the RJA. After that date, the State Treasurer must adjust the limitations at the end of each calendar year so that they continue to equal the limitations provided in Section 1483. (Section 1483, as amended by Public Act 78 of 1993, limits the noneconomic damages recoverable in a medical malpractice action to $280,000, except under certain circumstances in which noneconomic damages may not exceed $500,000; Section 1483 requires the State Treasurer to adjust this limitation annually to reflect the change in the consumer price index.)

The bill provides that, in awarding damages in a product liability action, the trier of fact must itemize damages into economic and noneconomic losses. Neither the court nor counsel for a party may inform the jury of the maximum limits on the award for noneconomic damages. The court must adjust an award of noneconomic loss to conform to the statutory maximums. If the damages for economic loss cannot readily be ascertained by the trier of fact, then the trier of fact must calculate damages for economic loss based on an amount that is equal to the State average median family income as reported in the immediately preceding Federal decennial census and adjusted by the State Treasurer in the manner provided above.

The limitation on damages for noneconomic loss for death or permanent loss of a vital bodily function does not apply to a defendant if the trier of fact determines by a preponderance of the evidence that the death or loss was the result of the defendant's gross negligence, or if the court finds that, at the time of manufacture or distribution, the defendant had actual knowledge that the product was defective and willfully disregarded that knowledge (as described below). ("Gross negligence" is defined as conduct so reckless as to demonstrate a substantial lack of concern for whether injury results.)

The bill defines "noneconomic loss" as 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" means 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.

Defendant's Knowledge of Defect. Senate Bill 344 provides that, in a product liability action, if the court determines that at the time of manufacture or distribution the defendant had actual knowledge that the product was defective and that there was a substantial likelihood that the defect would cause the injury that is the basis of the action, and the defendant willfully disregarded that knowledge in the product's manufacture or distribution, then the following do not apply:

-- The provision creating a rebuttable presumption that a manufacturer or seller is not liable if the product complied with government standards.
-- The limitation on noneconomic damages.
-- The provisions under which a manufacturer or seller is not liable if a product was altered or misused, if the purchaser or user voluntarily exposed himself or herself to an unreasonable risk, or if the manufacturer or seller failed to warn a sophisticated user.
-- The provision under which a defendant is not liable for failure to warn of a material risk that is or should be obvious or a matter of common knowledge.

Allocation of Fault. Under the RJA (as discussed below), the court must determine the award of damages to each plaintiff in accordance with findings of fault and enter judgment against each party; a person may not be required to pay damages in an amount greater than his or her percentage of fault. These provisions currently do not apply to product liability actions; House Bill 4508 deletes that exception.

The bill also repeals a section specifying that in all product liability actions, the fact that the plaintiff may have been guilty of contributory negligence does not bar a recovery by the plaintiff, but damages sustained by the plaintiff must be diminished in proportion to the amount of negligence attributed to the plaintiff (MCL 600.2949).

Venue. House Bill 4508 provides that for the purpose of Section 1629 (which governs venue), a defendant in a product liability action "is considered to conduct business in a county in which the defendant's product is sold at retail".

Expert Witnesses/Scientific Evidence

Senate Bill 344 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 is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court must examine the opinion and the basis for it, including the facts, technique, methodology, and reasoning relied on by the expert, and must consider all of the following:

-- Whether the opinion and its basis have 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 are 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 are generally accepted within the relevant expert community. ("Relevant expert community" means "individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market".)
-- Whether the basis for the opinion is 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 is relied on by experts outside the context of litigation.

A novel methodology or form of scientific evidence may be admitted as evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

In an action alleging medical malpractice, these provisions are in addition to, and do not otherwise affect, the criteria for expert testimony specified in the RJA for medical malpractice cases.

Impairment Defense

Senate Bill 344 provides that, in an action for the death of an individual or for injury to a person or property, it is an absolute defense that the individual upon whose death or injury the action is 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, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual was less than 50% the cause of the accident or event, an award of damages must be reduced by that percentage. "Impaired ability to function due to the influence of intoxicating liquor or a controlled substance" means that, as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses are impaired to the point that his or her ability to react is diminished from what it would have been had the individual not consumed liquor or a controlled substance. An individual will 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 a controlled substance, a presumption would arise that the individual's ability to operate a vehicle was impaired.

Percentage of Fault/Uncollectible Amounts

The RJA specifies that in a personal injury action involving fault of more than one party to the action, including third-party defendants, the court may 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. In determining the percentages of fault, the trier of fact (the jury or, if none, the court) must consider both the nature of the conduct of each party at fault, and the extent of the causal relation between the conduct and the damages claimed. (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.)

Senate Bill 344 provides, instead, that in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than one person, including third-party defendants and nonparties, the court must instruct the jury to answer special interrogatories, or the court must make findings, indicating 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, regardless of whether the person was or could have been named as a party to the action. (Section 2925d provides for covenants not to sue, and is described below.)

The bill requires the trier of fact, in determining the percentages of fault, to consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed. The bill provides that "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

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. (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.) House Bill 4508 retains this requirement but deletes reference to a reduction under Section 2925d. Senate Bill adds a reference to a reduction under Section 2955a, which provides for the impairment defense.

The RJA further provides that, except for uncollectible amounts that are reallocated, a person may not be required to pay damages in an amount greater than his or her percentage of fault. Senate Bill 344 specifies that this provision and Section 2956 do not apply to a defendant that is jointly and severally liable under Section 6312. (Section 2956, added by House Bill 4508, provides that a defendant's liability is several and not joint. Section 6312, added by Senate Bill 344, provides for joint and several liability for specific crimes, as described below.)

The RJA 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. Under the bills, uncollectible amounts may be reallocated only in medical malpractice actions. Specifically, Senate Bill 344 provides that if an action includes a medical malpractice claim against a person or entity described in Section 5838a(1), one of the following applies:

-- If the plaintiff is determined to be without fault, the liability of each defendant is joint and several, whether or not the defendant is a person or entity described in Section 5838a(1).
-- If the plaintiff is determined to have fault, the court must determine whether all or part of a party's share of the obligation is uncollectible from that party, and reallocate any uncollectible amount among the other parties, whether or not another party is a person or entity described in Section 5838a(1), according to their respective percentages of fault.

(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.)

Senate Bill 344 retains a 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.

Joint and Several Liability for Criminal Acts

Under Senate Bill 344, a defendant that is found liable for an act or omission that causes personal injury, property damage, or wrongful death is jointly and severally liable if the defendant's act or omission is either 1) a crime, an element of which is gross negligence, for which the defendant is convicted, or 2) a crime involving the use of alcohol or a controlled substance for which the defendant is convicted and that is a violation of one or more of the following:

-- Section 14 of the Explosives Act.
-- Section 111 of the Michigan Code of Military Justice.
-- Section 625 of the Michigan Vehicle Code.
-- Section 185 of the Aeronautics Code.
-- Section 80176 of Part 801 (marine safety), Section 81134 of Part 811 (off-road recreation vehicles), or Section 82127 of Part 821 (snowmobiles) of the Natural Resources and Environmental Protection Act.
-- Section 353 of the Railroad Code.
-- Section 237 of the Michigan Penal Code.

Release/Covenant not to Sue

Under Section 2925d of the RJA, if a release or covenant not to sue or not to enforce judgment is given to one of two or more persons for the same injury or the same wrongful death, the following apply:

-- The release or covenant does not discharge any of the other persons from liability for the injury or wrongful death unless its terms so provide.
-- The release or covenant discharges the person to whom it is given from all liability for contribution to any other person for the injury or wrongful death.

House Bill 4508 deletes an additional provision under which a release or covenant not to sue reduces the claim against the other tort-feasors to the extent of any amount stipulated or to the extent of the amount of consideration paid for it.

Allocation of Liability

House Bill 4508 specifies that, except as provided in Section 6304 (concerning medical malpractice actions), in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. This provision, however, does not abolish an employer's vicarious liability for an act or omission of the employer's employee.

The bill provides that the liability of each person must be allocated by the trier of fact and, subject to Section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault, the trier of fact must consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

Upon motion of a party within 91 days after identification of an at-fault nonparty, the court must grant leave to the moving party to file and serve an amended pleading alleging one or more causes of action against that nonparty. A cause of action added under this provision is not barred by a period of limitation unless a period of limitation

would have barred the cause of action at the time the original action was filed.

House Bill 4508 specifies that, subject to the following provision, a plaintiff's contributory fault does not bar that party's recovery of damages. In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court must reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages were based as provided in Section 6306. (Under that section, if the plaintiff was assigned a percentage of fault, the total judgment amount must be reduced by an amount equal to the percentage of the plaintiff's fault.) If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court must reduce economic damages by the percentage of comparative fault of the person who was injured or killed as provided in Section 6306, and noneconomic damages may not be awarded.

The bill specifies that the preceding provisions do not eliminate or diminish an existing defense or immunity, except as expressly provided in the bill. Assessments of percentages of fault for nonparties are used only to determine accurately the fault of named parties. If fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action and may not be introduced as evidence of liability in another action.

The bill also states that the preceding provisions do not create a cause of action. A person seeking to establish fault under these provisions has the burden of alleging and proving that fault.

Venue

Section 1629 of the RJA 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 the defendant resides, has a place of business, or conducts business, or the registered office of a defendant corporation is located. If no county satisfies those criteria, a tort action may be tried in the county in which all or part of the cause of action arose and in which either the plaintiff resides, has a place of business, or conducts business, or the registered office of a plaintiff corporation is located. House Bill 4508 applies these provisions to an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death. Thebill also refers to the county in which "the original action occurred", rather than the county in which "all or part of the cause of action arose". The bill retains additional provisions specifying the proper county if these criteria are not met.

The RJA specifies that either party may file a motion for a change of venue based on hardship or inconvenience. The bill deletes a requirement that a change of venue under this provision be limited to the county in which the moving party resides.

In addition, the bills require that venue be determined under the rules applicable to tort actions as provided in Section 1629 if more than one cause of action is pleaded in the complaint or added by amendment at any time during the action and one of the causes of action is based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death.

Certified Public Accountants

Senate Bill 344 provides that a certified public accountant (CPA) is liable for civil damages in connection with public accounting services performed by the CPA only in one of the following situations:

-- A negligent act, omission, decision, or other conduct of the CPA if the claimant is the CPA's client.
-- An act, omission, decision, or conduct of the CPA that constitutes fraud or an intentional misrepresentation.
-- A negligent act, omission, decision, or other conduct of the CPA if he or she was informed in writing by the client at the time of engagement that a primary intent of the client was for the certified public accounting services to benefit or influence the person bringing the action for civil damages.

For the purposes of the third situation, the CPA must identify in writing to the client each person, generic group, or class description that the CPA intends to have rely on the services. The CPA may be held liable only to each identified person, group, or class description. The CPA's written identification must include each person, generic group, or class description identified by the client as being benefited or influenced.

MCL 600.1621 et al.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bills do a great deal to address the excesses of tort law, especially in the product liability field. According to an article in *Business Week*, "Each year, over $100 billion flows through the liability system from companies to lawyers and claimants" (7-29-91). In addition to paying the direct costs of lawsuits, damages awards, and insurance premiums, businesses and the economy incur incalculable costs when products cannot be developed or marketed due to potential litigation. Small business and innovation are especially hard-hit within this internationally competitive environment, particularly when a firm is forced to choose between not marketing a product and risking bankruptcy because insurance is not available. Consumers, too, suffer when they are denied new products that would increase public safety or improve their quality of life, or when existing products are discontinued, prices are raised, and jobs are lost. Unfortunately, manufacturers often are considered impersonal, rich, and even greedy, which makes them an easy target for product liability claims. As a result, product liability litigation not only has threatened the financial viability of many enterprises, but also has added substantially to the cost and unavailability of many goods and services. The bills will reverse this trend by significantly limiting manufacturers' and sellers' exposure to liability.

Response: According to a more recent article in *Business Week*, "...the National Association of Insurance Commissioners puts the [annual product liability cost] figure at about $4 billion, which includes all insurance premiums, legal fees, and damages collected" (3-20-95). Furthermore, many of the nationwide complaints regarding product liability litigation stem from the award of punitive damages and the imposition of strict liability against manufacturers and sellers, which focuses on the product itself rather than on the conduct or state of mind of the defendant. Michigan, however, does not recognize strict liability; in this State, any product liability defendant may raise every available defense. Also, punitive damages cannot be awarded in Michigan.

Large awards against corporations and other institutional defendants might result not from juror bias, but because these suits involve the most serious injuries, or because these defendants are organized around long-term planning and are considered able to anticipate the consequences of their decisions. As a *Detroit Free Press* editorial concluded, "...it would seem that the best defense against the threat of litigation is not a weakening of legal protections, but safer products" (4-30-95).

Supporting Argument

It is unfair to deem a product defective when it conforms to applicable governmental standards. These standards are promulgated after intense public scrutiny, expert evaluation, and thorough product evaluation. Lay jurors should not be permitted to second-guess a standard that has been developed by government experts. Under Senate Bill 344, there is a rebuttable presumption that a manufacturer or seller is not liable if a product complied with Federal or state standards or was approved by a Federal or state agency. In addition, noncompliance will not raise a presumption of negligence.

Supporting Argument

Senate Bill 344 firmly establishes what is known as the state-of-the-art defense, which reportedly is the generally prevailing rule among states. This concept gives manufacturers and sellers a defense when they have used the most advanced technology available. Under the bill, a manufacturer or seller will not be liable for an alleged production defect unless the plaintiff establishes that, according to generally accepted production practices at the time the product left the defendant's control, a practical and technically feasible alternative design was available and would have prevented the harm without impairing the usefulness or desirability of the product.

In addition, manufacturers and sellers will not be liable for a defectless product--that is, for an inherent aspect of a product that cannot be removed if the product is to serve its function and that is commonly recognized (such as the blade of a knife). In effect, this recognizes that an ordinary consumer is the best judge of whether the dangers he or she perceives are outweighed by the benefits of the product. Along the same lines, the bill recognizes that warnings or instructions about obvious dangers are unnecessary, by providing that a defendant is not liable for failure to warn of material risks that are or should be obvious or a matter of common knowledge. In addition, a manufacturer or seller will not be liable for failure to warn if a product was provided for use by a sophisticated user.

The bill also exempts a manufacturer or seller from liability if a consumer voluntarily exposed himself or herself to an unreasonable risk. Further, a manufacturer or seller will not be liable for failure to warn unless the plaintiff proves that the manufacturer knew or should have known about the risk based on the information available at the time the product left the manufacturer's control. This will ensure that defendants are not held responsible for hazards that they could not or should not have known about before a product left their control. In addition, by precluding liability for harm caused by an unforeseeable misuse or alteration of a product, the bill recognizes that the manufacturer or seller should not have to bear responsibility for injury attributable to the consumer or others.

Supporting Argument

Senate Bill 344 establishes a fault-based standard of liability for nonmanufacturing product sellers, by providing that a seller is not liable unless it failed to exercise reasonable care or a product failed to conform to an express warranty, and the failure was a proximate cause of the harm. By holding sellers responsible only for their own wrongdoing, the bill will eliminate unnecessary and burdensome legal costs and insurance premiums. Since manufacturers ultimately indemnify sellers for the harm caused by the manufacturers' own products, claims should be brought directly against them. In addition, placing liability on the party that is in the best position to prevent harm will encourage product safety.

Supporting Argument

A cap on awards for noneconomic losses, such as pain and suffering, in product liability cases will reduce the incidence of unrealistic jury awards while still protecting the right of an injured party to recover the full amount of economic damages, such as medical expenses and lost wages. There is a common belief that noneconomic damages are a significant source of overly generous and arbitrary payments. This is because these claims cannot be easily translated into monetary amounts and, as a result, arriving at an award for noneconomic losses can be a very subjective and emotional process for the jury. By capping noneconomic damages in product liability cases, Senate Bill 344 continues the reform started by Public Act 178 of 1986, which placed a similar cap on noneconomic damages in medical malpractice cases.

Response: Capping noneconomic damages reflects a distrust in the jury system, which represents the cornerstone of this nation's system of justice. It is the same jurors, now being blamed for excessive awards, who will be responsible for making the difficult allocation of fault among product liability defendants.

Supporting Argument

House Bill 4508 moves toward the full elimination of joint and several liability begun by Public Act 178 of 1986. Under the traditional concept of joint and several liability, a single defendant may be responsible for paying the entire amount of the damages, even if there are other tort-feasors who contributed to the injury. Since the Revised Judicature Act was amended by Public Act 178, the jury or the judge must determine the percentage of fault of all of the parties to an action, and the court must enter judgment accordingly; Public Act 178, however, made exceptions for product liability actions and cases in which the plaintiff was without fault. As a result, in cases in which the injured party was also at fault, it has been in his or her interest to bring a product liability suit. Also, in cases involving a workplace injury--for which the employer is immune from tort liability under workers' compensation law--it has been to the plaintiff's advantage to bring a product liability suit against a manufacturer who could be held liable for the full amount of the damages. The bill makes several changes to address this situation. First, the bill eliminates joint and several liability in product liability cases, so each defendant will be responsible for only its percentage of the fault. In addition, a court must consider the percentage of fault of a person who was released from liability. Furthermore, the bill eliminates the requirement that a court reallocate uncollectible amounts. Also, for purposes of allocating fault in any personal injury action involving more than one party at fault, a court may determine that a person and that person's employee are to be considered a single person. As a result of these amendments, the recovery from any party in any personal injury action (except a medical malpractice case) may not exceed that party's percentage of the total fault, and the incentive to bring product liability suits will be reduced.

Supporting Argument

Under current law, a plaintiff may still recover damages even though he or she was largely responsible for an accident due to alcohol or drug use. Many people consider this highly unfair to defendants, and believe that this sort of lawsuit is an abuse of the civil justice system. Senate Bill 344 creates an absolute defense in a personal injury or wrongful death action if the individual who

was killed or injured was at least 50% at fault as a result of intoxication or drug use. If an individual was less than 50% at fault, the damages must be reduced by his or her percentage of fault.

Supporting Argument

Apparently, certified public accountants sometimes are subject to suits based on information contained in their reports brought by people other than their clients. Under Senate Bill 344, unless the CPA commits fraud or an intentional misrepresentation, a malpractice claim against a certified public accountant may be brought only by the CPA's clients or someone whom the CPA intended to rely on his or her services.

Opposing Argument

There is no product liability crisis in Michigan. In response to concerns about product liability and its impact on the economy, in June 1988 then-Governor Blanchard appointed a Special Counselor on Product Liability, Lawrence C. Mann, to review product liability laws, pending legal cases, and a survey of thousands of Michigan businesses. Mr. Mann's report was issued in June 1989, and concluded, "The tort system and substantive rules governing liability for defective products are not in crisis." Anecdotal reports of individual firms' being unable to market a product due to the lack of insurance, and allegations of companies' being forced to close because of exorbitant damages awards, do not amount to evidence of a crisis. Moreover, any unaffordability or unavailability of insurance does not translate into a need to reform the tort system; rather, it reflects the nature of the insurance business and its investment practices, and the need to regulate that industry. Most of the recommendations in the 1989 report, in fact, pertained to amending the insurance law and gathering data.

Furthermore, there is little reason to believe that amending Michigan's tort law will affect insurance rates, the cost of doing business in Michigan, or this State's economy. As the 1989 report stated, "In this national and global context, the impact on one state's product liability laws has little if any impact upon its 'business climate'...; and, "A substantial majority of cases filed against Michigan businesses were filed in states other than Michigan". This State's substantive law will rarely be applied to a suit brought against a Michigan manufacturer or seller by someone who is injured in another state. Also, according to the Alliance of American Insurers, product liability rates are an exception to the usual practice of setting rates by state; instead, they are based on countrywide experience.

The 1989 report also stated, "Many of the proposed reforms...would have the effect of radically altering the deterrence and compensatory functions of the products liability segment of our tort law... [O]ur civil justice system, although not perfect, has produced substantial benefits, including the production of safer products and the distribution of much needed funds as compensation to the victims of product related accidents." Like the proposals made in the 1980s, Senate Bill 344 severely erodes the accountability of business for selling and promoting dangerous products.

Response: There is reason to believe that these reforms will, in fact, improve the economic climate in Michigan. According to an article in *The Wall Street Journal*, "A study of states that have adopted limits on civil lawsuits found that overhauling the legal system led to major gains in jobs and economic growth... The study examined government economic data from 1969 through 1990 and found a strong correlation between the number of laws limiting liability that a state had adopted...and levels of employment and productivity" (9-18-95).

Opposing Argument

The bills are unnecessary in view of earlier tort reforms and judicial decisions. Among other things, Public Act 178 of 1986 dramatically altered the doctrine of joint and several liability (which had allowed a plaintiff to recover an entire verdict from any defendant who was collectible) as well as the collateral source rule (which held that funds received by an injured party from insurance policies and other third party sources could not be set off against a judgment holding a tort-feasor liable for money damages). Public Act 178 also altered the prior rules governing venue for tort cases; requires pretrial mediation in all cases in which alleged damages exceed $10,000; and requires courts to award costs and fees in the case of a frivolous suit or defense. According to the 1989 Mann report, "The available information indicates that several of the reforms adopted in 1986 have substantially reduced the exposure of defendants in tort, personal injury litigation in general and products liability cases in particular." Concerning venue, "The new statute clearly balances venue in favor of the county in which the defendant resides, conducts business or has a place of business."

In addition, the report states, "The pronouncements of the Michigan Supreme Court...have substantially narrowed the theories of recovery available to personal injury claimants and substantially reduced the potential dollar liability of defendants." A judicial trend in favor of defendants also was described in a February 1990 UCLA Law Review article: "...by the early to mid-1980s, the authors claim, courts were not only refusing to extend doctrine to benefit plaintiffs, but in many cases, they were also effectively retreating from prior pro-plaintiff stances" (*Lawyers Monthly*, March 1990).

Opposing Argument

The presumption against liability for products that comply with governmental standards will have the effect of abolishing many, if not most, injured parties' right to bring suit against product manufacturers and sellers. Under current Michigan law, compliance with governmental standards already may be considered strong--but not conclusive--evidence that the defendant was not negligent. This rule is fair to both sides because it allows jurors and judges to look at all of the circumstances and decide whether a product was reasonably safe. Under Senate Bill 344, however, if a product met governmental standards, there will be a presumption that the product was safe. This provision will create an enormous loophole through which product manufacturers may escape liability for dangerous products, while injured victims are left uncompensated and without any form of redress.

The bill assumes that governmental standards constitute a reasonable level of safety, which is rarely the case. Governmental standards are the product of lobbying and compromise; they may be woefully inadequate in the first place or simply out-of-date. In fact, many governmental standards by statutory definition are *minimum* standards. According to testimony by a Georgetown University Law Center professor, standards set by the National Traffic Highway Safety Administration are an example of statutory minimum standards, and the Food and Drug Administration has consistently taken the position that its regulatory actions should have no bearing on lawsuits for compensation. In the workplace, Occupational Safety and Health Administration standards are most frequently applied; these standards may change soon after they are promulgated, however, if they are unsafe. Moreover, the same manufacturers that want this shield against liability are making every effort to undercut Federal regulations and get Congress to reduce the funding of regulatory agencies responsible for enforcing the standards.

According to the 1989 Mann report, "...the current approach to government standards and federal and state law is fair and reasonable in light of the diverse laws and regulatory schemes which bear upon products liability. Providing those laws and regulations with a presumptive effect in products litigation would negatively effect [sic] the level of consumer protection to which we have become accustomed." Once manufacturers and sellers have complied with the applicable standards, they will have little incentive to take the necessary steps to ensure that their products actually are safe in the real world.

Finally, the bill refers to compliance with standards set forth in Federal "and state" statutes and standards; it makes no distinction between Michigan standards and standards set by a state other than Michigan.

Response: The version of Senate Bill 344 that passed the Senate would have created an absolute defense if a product, under the oversight of a governmental agency, were tested and found to be in compliance with Federal or state statutes and standards. That version also would have created a presumption--rebuttable only by clear and convincing evidence--that a manufacturer or seller was not liable for a product that complied with governmental standards. In contrast, the enacted version of the bill simply creates a rebuttable presumption against liability if a product was in compliance with Federal or state law or was approved by or in compliance with standards of a Federal or state agency responsible for reviewing product safety.

Opposing Argument

One of the positive aspects of product liability litigation is its deterrent effect. A manufacturer will increase product safety in order to avoid legal liability, or will alter a product in order to remedy an area that has been subject to litigation. In making these decisions, a manufacturer most frequently will employ a cost-benefit analysis: Will the cost of the increased safety be less than or equal to the potential liability costs? By capping noneconomic damages awards and eliminating joint and several liability, however, the bills will give manufacturers less incentive on a cost-benefit basis to make safe products.

As the 1989 report points out, the doctrine of joint and several liability is based substantially upon risk allocation and risk-spreading, and presumes that

product manufacturers and sellers are in a different position than the individual victim. "The accident victim in today's mass market, technological world will frequently have misperceptions regarding the actual risks posed by various products. More significantly, the plaintiff has no resource subsequent to a disabling injury to recoup his or her loss or restore himself to a pre-accident condition. Under the proposed reform, the victim and his family have to absorb the majority of the loss reflected in the uncollectible portion of the verdict. That absorption will necessarily mean resort to the public welfare and social programs supported by tax dollars." In addition to being unfair to the victim, eliminating joint and several liability is unnecessary. According to the report, joint and several liability does not appear to pose substantial problems for Michigan manufacturers, and payouts directly attributable to joint and several liability are marginal.

Moreover, this amendment will be particularly harmful in combination with the defense for compliance with governmental standards. According to Senate committee testimony, there is almost no serious product liability case in which the defendant cannot claim that the product was approved by the government. The victim also may be left with little or no recovery in the event of a workplace injury, since employers are exempt from liability under workers' compensation law. An employer actually might have the majority of the fault (by ordering a worker to use defective machinery, for example), but remain uncollectible.

House Bill 4508 also diminishes a victim's ability to recover, by requiring juries and judges to allocate fault to nonparties. As a spokesperson for the Michigan Trial Lawyers Association (MTLA) pointed out, these might include uninsured individuals, parties who have settled with the plaintiff, a plaintiff's co-workers, bankrupt corporations, foreign corporations, and governmental entities. By accusing a nonparty of wrongdoing and having a jury assign a share of the fault to the "empty chair", manufacturers may reduce their own liability.

Response: The rule of joint and several liability was developed in the context of contributory negligence, which prevented a plaintiff who was negligent in any degree from recovering unless the defendant had committed gross negligence. Since the Michigan Supreme Court in 1979 replaced that system with the doctrine of comparative negligence, a plaintiff's own negligence no longer bars recovery, but his or her damages are reduced to the extent of his or her negligence. Since a plaintiff who is not entirely innocent still may recover, it is not fair to burden a defendant with responsibility for full payment of damages when the defendant may be only minimally responsible for the loss.

Opposing Argument

By setting limits on the amount of noneconomic damages plaintiffs may be awarded, Senate Bill 344 singles out the most severely injured victims to afford relief to blameworthy manufacturers and their insurers. The burden on these victims will be no less real by virtue of the fact that only "noneconomic" injury will not be fully compensated. Noneconomic injuries include not only pain and suffering and loss of enjoyment, but also grief, anxiety, shock, indignity, humiliation, and terror. Also, it is inappropriate and unfair to judge all cases of noneconomic damages by the same measure; for example, the pain and suffering that result from injury to or even loss of a limb cannot be compared with that which result from being rendered a quadriplegic for the remainder of one's life. Finally, it is misleading to allow a jury to award whatever amount it deems proper in the belief that its verdict will be given effect, and then require the award to be reduced to the statutory cap.

Opposing Argument

It is patently unfair to create an absolute defense to liability if a product was altered or misused, except if the alteration or misuse was reasonably foreseeable. Under the definition of "alteration", even a change in a product's label may immunize the manufacturer from liability. According to the MTLA, for example, if a manufacturer places on its machine a warning label that it knows will wear off before the product's useful life has expired, the manufacturer still will be immune. Or, a manufacturer will be immune if it attaches a safety device with flimsy screws that the consumer attempts to replace. In addition, a manufacturer will have little incentive to use certain safety features, such as childproof caps or closures on drugs or poison; if a manufacturer provides a warning to keep the product out of reach of children and a parent inadvertently leaves the product within a child's reach, there may be no liability because of the parent's "misuse". Further, the defense for misuse will apply if *anyone* with knowledge about a product gives a warning or instruction concerning its use. This will be particularly onerous in the context of the workplace; if a supervisor gives a worker instructions that a worker forgets to follow, the

manufacturer may be immune even if that misuse was predictable. Under current law, a manufacturer may introduce evidence that its product was altered, and a jury may reduce a plaintiff's damages by the percentage of his or her negligence.

Opposing Argument

Under the sophisticated user defense in Senate Bill 344, a manufacturer or seller will not be liable for failure to warn if a product is provided to someone who, by training, experience, or profession, is generally expected to know about the product. This will be true even if the defendant knows that the buyer is not the person who ultimately will use the product, that the ultimate user is not knowledgeable about its dangers, and that the buyer will not warn the user of the dangers. This provision is unnecessary and overbroad, since Michigan law already recognizes a sophisticated user defense and applies it fairly. Under this defense, a product supplier is relieved of liability for failure to warn the ultimate user if it demonstrates that the supplier could reasonably rely on the intermediaries between itself and the ultimate user to warn of product-related dangers (*Tasca* v *GTE Products Corp*., 175 Mich App 617; *Brown* v *Drake-Willock International, Ltd.,* 209 Mich App 136). The focus under this analysis is not just on whether the purchaser was a sophisticated user, but also on whether the defendant acted reasonably in relying on the purchaser to warn ultimate users of the product's dangers. The bill, in contrast, creates blanket immunity whenever a sophisticated user purchases a product.

Opposing Argument

Senate Bill 344 provides that a defendant is not liable for failure to warn of a material risk that "is or should be" obvious. By including the term "should", the bill is saying that if a person does not discover a risk in the exercise of reasonable care, he or she will be totally barred from recovery. This will considerably expand the common law rule, under which there is no liability for failure to warn of a material risk that *is* obvious, because a warning would be superfluous. Under current Michigan law, if a plaintiff carelessly fails to discover a defect, the jury may apportion the liability--but the plaintiff is not automatically denied recovery.

The bill also provides that a manufacturer or seller is not liable for failure to warn unless the plaintiff proves that the manufacturer knew or should have known about the risk of harm based on information available at the time the product left the manufacturer's control. This excuses manufacturers from liability for failure to warn of subsequently discovered defects. For example, a drug company might not know that a product is dangerous at the time of sale, but years later discovers that the product has harmful side effects. If the manufacturer failed at that point to warn consumers, it could be criminally prosecuted by the Food and Drug Administration--but would be protected from civil liability under the bill. This would eliminate the current rule, recently affirmed by the Michigan Supreme Court, that manufacturers have a postmanufacture duty to warn of a defect that existed at the point of manufacture, but for some reason was undiscoverable by the manufacturer and the consumer at that time (*Gregory* v *Cincinnati Inc.*, 450 Mich 1). Under the language of the bill, according to the MTLA, the only time a manufacturer has a duty to warn will be at the point of manufacture.

Furthermore, although some plaintiffs might bring a product liability action based on a theory of liability other than failure to warn (such as breach of warranty or negligent manufacture), in many cases the only applicable theory of liability is failure to warn. This is particularly true in cases involving a product with an inherent characteristic that cannot be removed without compromising the product. Although the product is not defective, it may present a danger to some consumers. For example, a typically safe drug might have serious side effects for a few patients; in this case, an unsuspecting consumer is entitled to a warning about potential hazards.

Opposing Argument

By providing an absolute defense for harm caused by an inherent characteristic that cannot be eliminated without compromising a product and that is commonly recognized, Senate Bill 344 could eliminate the common law cause of action for negligent entrustment. For example, if a retailer knowingly sold a gun to a 12-year-old, who used the weapon to injure or kill someone, the victim would have no recourse against the retailer. This result would occur because the bill defines "product liability" with reference to "production", and includes "selling" in the definition of "production".

Opposing Argument

The impairment defense in Senate Bill 344 is unnecessary in light of Michigan's comparative negligence rule, and unfairly allocates risks associated with defective products. An example of

this point is given in the 1989 Mann report: Assume that a motor vehicle has a dangerously defective fuel system, and the nature of the defect involves a lack of integrity during low-impact, rear-end collisions. Also assume that a driver has a blood alcohol level above .07% (the level at which someone is presumed impaired for purposes of operating a motor vehicle); the driver loses control of the vehicle, which spins and hits a tree. Although the risks typically associated with this type of collision are bruises and abrasions, the fire initiated by this impact consumes the vehicle and the driver. In this scenario, the risk created by the vehicle's defective fuel system was not known to the driver and was not attributable to any conduct of the driver. Under the bill, however, the driver's estate would recover nothing. The current approach allows the jury to weigh the consequence of a plaintiff's fault and balance it against the degree to which the defendant caused an accident or aggravated an injury.

Furthermore, the bill's defense is unnecessary since a court already may deny a plaintiff any recovery if a plaintiff must rely on his or her own wrongful conduct to establish a cause of action. This common law rule was recently reiterated by the Michigan Supreme Court (*Orzel* v *Scott Drug Company*, 449 Mich 550).

Opposing Argument

Senate Bill 344 creates an almost insurmountable hurdle for the qualification of any expert witness who is not employed by or supporting a manufacturer. As the MTLA pointed out, every industry has far more employees who can qualify as "experts" than are available to the plaintiff. Further, requiring a court to consider whether a witness's opinion is "generally accepted" means that the opinion of a scientific outcast (such as Galileo) who was later proven to be correct will not be admissible. Current Michigan Rules of Evidence establish the foundation for admitting expert opinion evidence: "If a court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise" (MRE 702). Michigan courts already may find that some individuals are not qualified as "experts" and that the information upon which they base their opinion is not sufficient. Furthermore, a party may attempt to "impeach", or discredit, any witness of the opposing party upon cross-examination.

Opposing Argument

Under Senate Bill 344, a court may not admit a "novel methodology or form of scientific evidence" unless its proponent establishes that it has "achieved general scientific acceptance among impartial and disinterested experts in the field". While this might appear, at first, to codify the current *Davis-Frye* test, the bill actually is far more sweeping. The *Davis-Frye* test is Michigan's standard for determining the admissibility of expert scientific testimony, and is designed to ensure that a jury does not rely on unproven and ultimately unsound scientific methods or techniques of determining a fact. The test allows the admission of expert testimony concerning a novel scientific technique only if that technique has achieved recognition among impartial and disinterested experts in the field. The difference between this test and the bill is that *Davis-Frye* governs the admission of evidence of scientific methods and techniques, while the bill refers to all types of "scientific evidence". Cases in which the *Davis-Frye* test is applied generally involve testimony concerning a method of scientific measurement, such as a polygraph machine or serological electrophoresis, where the judge must first determine whether the *method* of measuring or determining a fact has achieved general acceptance in the scientific community. The test has not been extended to other types of evidence, such as expert testimony about child sexual abuse syndrome (*People* v *Beckley*, 434 Mich 691). As the Michigan Supreme Court pointed out, "...there is a fundamental difference between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral sciences" (*Beckley*). By applying the test to all "scientific evidence" (i.e., all scientific opinion evidence), the language of the bill could be used to prevent the admission of considerably more than is excluded under Michigan's current common law *Davis-Frye* rule, according to the MTLA.

Opposing Argument

Senate Bill 344 should include a "statute of repose" that would bar lawsuits involving a death or injury that occurred 15 years after a product was sold to the first buyer. Claims for defective products now may be brought many, many years after a product was manufactured. It is difficult for a manufacturer to "cost in" tort liability over a period of 20, 30, or more years, and litigation exposure has become nearly impossible to calculate.

Response: A statute of repose would arbitrarily deny individuals the opportunity to recover for injuries that did not manifest themselves until many years after a product was sold. A 15-year rule would bar claims arising from such products as thalidomide, asbestos, and hazardous waste. While reducing manufacturers' liability, a statute of repose would shift to the taxpayers the cost of caring for the victims of defective products.

Legislative Analyst: S. Margules

FISCAL IMPACT

Provisions in the bills concerning the allocation of fault among multiple tort-feasors and absolute defense will 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.

Fiscal Analyst: B. Bowerman

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