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THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 1083 Session of 1979

INTRODUCED BY MESSRS. FISHER, KOWALYSHYN, FREIND, D. R. WRIGHT, LEHR, MOWERY, POTT, J. L. WRIGHT, JR., CESSAR, POLITE, GOODMAN, CALTAGIRONE, MRS. M. H. GEORGE, MESSRS. REED, BROWN, COCHRAN, ANDERSON, ARMSTRONG, MRS. ARTY, MESSRS. BITTLE, BURD, BRUNNER, CIMINI, MRS. M. R. CLARK, MESSRS. DORR, GALLEN, GEESEY, GOEBEL, HALVERSON, PICCOLA, PUNT, SALVATORE MISS SIRIANNI, MESSRS. SCHEAFFER, ZORD, S. E. HAYES, JR., MRS. HONAMAN, MESSRS. KNEPPER, MADIGAN, MILLER, NOYE, GRIECO, PETERSON, WEIDNER, BRANDT, A. C. FOSTER, JR., W. W. FOSTER, McCLATCHY, D. M. O'BRIEN, SPENCER, L. E. SMITH, PYLES, THOMAS, VROON, WILSON, WHITE, YAHNER, E. R. LYNCH, MACKOWSKI, E. H. SMITH, HASAY, GRUPPO, PITTS, DIETZ AND MRS. E. Z. TAYLOR, APRIL 25, 1979

AS AMENDED ON THIRD CONSIDERATION, HOUSE OF REPRESENTATIVES, JANUARY 29, 1980

AN ACT

Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, adding provisions relating to product liability actions.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Subchapter B of Chapter 55 of Title 42, act of November 25, 1970 (P.L.707, No.230), known as the Pennsylvania Consolidated Statutes, is amended by adding a section to read:

§ 5537. Product liability actions.

(a) General 12-year statute of repose.--No product liability action, as defined in section 8352 (relating to definitions), may be brought more than 12 years from the time the person who

is primarily responsible for manufacturing the final product parted with its possession and control, or sold it, whichever occurred last.

(b) Two-year statute of limitation.--Any product liability action accruing during or prior to the twelfth year from the time set forth in subsection (a) shall be brought within two years after the date on which that action accrued. However, this subsection shall not be construed to alter any contrary provision contained in Title 13 (relating to uniform commercial code).

(c) Action for indemnity or contribution.--An action for indemnity or contribution, other than an action arising out of a written contract, shall be commenced within the period of time set forth in this section, plus 180 days, unless extended by the court, for good cause shown. An action for indemnity or contribution may be commenced at the time the party seeking indemnity or contribution is named a defendant in any action, whether or not the party seeking indemnity or contribution has come under a fixed obligation to pay damages in the product liability action brought against it.

(d) Exceptions.--The limitation period provided in subsection (a) shall not apply to:

(1) An action based solely upon any theory or theories of negligence.

(2) An action based upon fraudulent misrepresentation, fraudulent concealment or fraudulent nondisclosure by the defendant.

(3) An action based upon a negotiated contractual obligation which provides for a different period of limitation in which the action may be commenced. However, if

the negotiated contractual obligation provides for a shorter period of limitation, such shorter period shall not be applicable to the rights of persons who were not parties to such negotiated contractual obligation. If the contract provides for a shorter statute of repose, the shorter time period shall be plainly disclosed either in writing or on the product, provided no reduction or limitation of the period of limitation stated in subsection (a) shall be applicable to consumer goods as defined in 13 Pa.C.S. § 9109 (relating to classification of goods; "consumer goods"; "equipment"; "farm products"; "inventory").

(4) An action for damages to the person caused by the use of or exposure to any product or substance which causes injury of a latent or incremental nature which was not manifested or reasonably detectable prior to the expiration of the period set out in subsection (a). As used in this paragraph, "injury of a latent or incremental nature" shall include but not be limited to, injury caused by use of or exposure to toxic or hazardous substances, radioactive materials, ionizing radiation, any materials used in the generation of nuclear energy or power, any controlled substance, narcotic or new drug as defined by the act of April 14, 1972 (P.L.233, No.64), known as "The Controlled Substance, Drug, Device and Cosmetic Act," or any other drug.

Section 2. Chapter 83 of Title 42 is amended by adding a subchapter to read:

CHAPTER 83

PARTICULAR RIGHTS AND IMMUNITIES

* * *

SUBCHAPTER E

PRODUCT LIABILITY ACTIONS

Sec.

§ 8351. Short title of subchapter.

This subchapter shall be known and may be cited as the "Product Liability Law."

§ 8352. Definitions.

The following words and phrases when used in this subchapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Manufacturer." A seller of a product who manufactures the finished product or any component substance or part thereof. The term includes any seller who:

(1) has actual knowledge of a defect in a product;

(2) creates and furnishes a manufacturer with

specifications for manufacturing the product when the specifications are related to the alleged defect;

(3) otherwise exercises some substantial control over all or a portion of the manufacturing process;

(4) alters or modifies a product in a substantial way before it is sold to a user or consumer;

(5) is a business entity owned or controlled by the manufacturer of the allegedly defective product;

(6) is the actual importer of the product, if the party instituting an action pursuant to this subchapter is unable to obtain valid in personam jurisdiction over a foreign product manufacturer; or

(7) sells a product manufactured by a person who has been judicially declared insolvent or bankrupt or who has no identifiable successor in interest.

A seller not otherwise a manufacturer shall be deemed to be a manufacturer unless the seller discloses the identity of the actual manufacturer subsequent to the incident which is the basis of the product liability action and the disclosure is made within 45 days after service of process is made on the defendant or after receiving a written request for such disclosure, whichever shall first occur.

"Manufactures." Constructs, designs, fabricates, formulates, installs, prepares or assembles a product.

"Person." An individual, corporation, partnership, business trust, unincorporated organization, association, professional association or joint stock company.

"Product." Tangible personal property, including fixtures, but not including real property or buildings.

"Product liability action" or "action." Any action brought

for or on account of personal injury, illness, disease, disability, death or property damage caused by the manufacture, construction, design, formula, installation, preparation, assembly, testing, marketing, packaging, labeling or sale of any product or the failure to warn or protect against a danger or hazard in the use, misuse or unintended use of any product, or the failure to provide proper instructions for the use of any product, including such an action brought under Title 13 (relating to commercial code).

"Seller." Any person, including a wholesaler, distributor or retailer, who is engaged in the business of selling or leasing such products for resale, use or consumption.

"User or consumer." A person who uses or consumes a product, including bystanders or other persons who are harmed by a product.

§ 8353. Strict liability in tort.

(a) General rule.--A manufacturer is subject to liability for physical harm caused to the person or property of the user or consumer only if all of the following conditions are met:

(1) The product was manufactured in a defective condition.

(2) The product was expected to and did reach the user or consumer without substantial change in the condition in which it was manufactured.

(3) The defective condition was unreasonably dangerous to the person or property of the user or consumer.

(4) The defective condition caused the harm sustained by the person or property of the user or consumer.

(b) Lack of care or contract not necessary.--The rule stated in subsection (a) applies although:

(1) the manufacturer has exercised all possible care in the manufacture and sale of the product; and

(2) the user or consumer has not bought the product from or entered into any contractual relation with the manufacturer.

(c) Manufacturer not guarantor.--In any action brought on the theory of strict liability as set forth in subsection (a), the trier of fact shall not be instructed that the manufacturer is the guarantor of the safety of the product.

§ 8354. Permissible theories for product liability actions.

(a) General rule.--Product liability actions shall be brought only upon the theories of:

(1) Negligence.

(2) Breach of contract, including breach of warranty, express or implied.

(3) Breach of, or failure to discharge, a duty to warn or instruct, whether deliberate or negligent.

(4) Misrepresentation, concealment or nondisclosure, whether fraudulent or negligent.

(5) In the case of a manufacturer, strict liability in tort as defined in this subchapter, except as set forth in section 8358 (relating to failure to specify, instruct or warn).

(b) Action against seller.--No product liability action based on the theory of strict liability in tort shall be commenced or maintained against any seller of a product who is not otherwise a manufacturer. This subsection shall not prevent an action based upon any of the other theories of liability listed in subsection (a) from being brought against a seller.

§ 8355. Defense for product modification, alteration or

deterioration.

(a) General rule.--A defendant shall not be liable for that portion of injury or damage caused by an alteration or modification that would not have occurred but for the fact that the product was altered or modified by a person other than the defendant unless the plaintiff proves by a preponderance of the evidence that:

(1) the alteration or modification was in accordance with the defendant's instructions or specifications;

(2) the alteration or modification was made with the express consent of the defendant; or

(3) the alteration or modification was the result of conduct that reasonably should have been anticipated by the defendant.

(b) Definition.--For purposes of this section, "alteration or modification" includes, but is not limited to, changes in the design, formula or function of the product from that originally designed, tested or intended by the defendant, or changes in or removal of any safety feature or deterioration arising from unreasonable failure to observe routine care and maintenance.

§ 8356. Product misuse by persons other than defendant.

(a) Product misuse.--In any product liability action, evidence of misuse of the product by persons other than the defendant shall be admissible.

(b) Definition.--For the purposes of this subsection (a), misuse shall include, in addition to uses deemed to constitute misuse under the law of this Commonwealth:

(1) Uses contrary to adequate recommendations, specifications, instructions or warnings accompanying the product or otherwise provided by the defendant, unless the

defendant knows, or is aware of facts from which a reasonable person would infer, that there exist identifiable hazards associated with a substantial pattern of use contrary to such recommendations, specifications, instructions or warnings, and fails, or has failed, to take reasonable precautions against such hazards.

(2) Uses other than those for which persons of ordinary skill and judgment (or in the case of prescription products, practitioners of appropriate medical skill and judgment) would normally and reasonably expect the product to be suitable.

§ 8357. Liability for product design or formula.

(a) Liability limited.--In any product liability action based upon injury or damage alleged to have resulted from the defective design or formula of a product, the manufacturer responsible for the design or formula of a product shall not be liable unless the plaintiff proves by a preponderance of the evidence that the utilization of an alternative design or formula was known or should have been known and was readily available to the manufacturer at the time the product was manufactured and that such utilization would have prevented the injury or damage or resulted in less severe injury or damage.

(b) Considerations in determination.--In determining in accordance with subsection (a) whether the product was defective in design or formula, the trier of fact shall consider whether an alternative design or formula should have been utilized or the product should have been withheld from the market in light of the following:

(1) The probability at the time of manufacture that the product would cause the harm suffered by the user or

consumer.

(2) The seriousness of that harm.

(3) The technological feasibility of manufacturing the product in accordance with the alternative design or formula.

(4) The relative costs of producing, distributing and selling such an alternative design or formula.

(5) The new or additional or increased risk of injury or damage that may result from such an alternative design or formula.

(c) Safety or protective devices.--In any product liability action in which a defect in the formulation or design of a product is alleged, the manufacturer shall not be liable for that portion of the injury or damage which could have been avoided or reduced by attachment to, inclusion in, or use with the product of a safety or protective device or substance, if the defendant proves by a preponderance of the evidence that:

(1) the attachment, inclusion or use of such safety or protective device or substance would have been inappropriate to or incompatible with a function or manner of use to which the product reasonably was suited; or

(2) such safety or protective device or substance was offered or recommended by the manufacturer for purchase or use by the user or consumer who was injured or damaged, or by such person's employer, and such person or such person's employer did not purchase or use such additional safety or protective device or substance.

§ 8358. Failure to specify, instruct or warn.

(a) Liability limited.--In any product liability action based upon an alleged failure to provide adequate specifications, instructions or warnings, the manufacturer or

any other defendant shall not be held liable for failure to specify, instruct or warn, except upon the theory of negligence.

(b) Considerations in determination.--In determining whether adequate specifications, instructions or warnings were provided, the trier of fact shall consider the following:

(1) The probability at the time of manufacture or sale that the product would cause the injury or damage suffered by the user or consumer.

(2) The seriousness of that injury or damage.

(3) The defendant's ability, at the time of manufacture or sale, reasonably to anticipate that the expected product user or consumer would be aware of the product's risks and the nature of the potential injury or damage.

(4) The technological feasibility and cost of providing specifications, warnings or instructions.

(c) Burden of proof.--In a product liability action based upon a claimed failure to provide adequate specifications, instructions or warnings, the plaintiff shall be required to prove by a preponderance of the evidence that the failure to provide adequate specifications, warnings or instructions was the proximate cause of the injury or damage.

~~§ 8359. Government standards.~~ <—

~~(a) Request for determination as to product.--A defendant may by a motion request the court to determine whether the injury-causing aspect of the product conformed to a mandatory administrative or statutory standard in effect at the time the defendant parted with possession and control of the product, or sold it, whichever occurred last.~~

~~(b) Affirmative determination.--If the court makes the determination referred to in subsection (a) in the affirmative,~~

~~it shall instruct the trier of fact to presume that the product was not defective and that the defendant was not negligent. This presumption may be rebutted by a preponderance of evidence showing that:~~

~~(1) the standard was not developed as a result of an independent and careful, thorough product testing and a formal product safety evaluation by the governmental agency responsible for promulgating such standards;~~

~~(2) consumer safety interests were not considered in formulating the standard; or~~

~~(3) the standard was not up to date in light of the state of the art knowledge reasonably available to the defendant at the time of promulgation thereof.~~

§ ~~8360~~ 8359. State of the art. <—

In any product liability action, ~~it shall be a rebuttable presumption~~ AN INFERENCE SHALL BE CREATED that the product was not defective nor the defendant negligent if the defendant proves by a preponderance of the evidence that the product conformed with generally recognized and prevailing standards, designs or methods of testing or manufacturing of the state of the art. For the purposes of this section "state of the art" means the safety, technical, mechanical and scientific knowledge in existence and reasonably feasible for use at the time of the manufacture of the product.

§ ~~8361~~ 8360. Inadmissibility of evidence of improvements. <—

In any product liability action, evidence of advancements or changes in technical knowledge or techniques, in design, theory or philosophy, or in manufacturing or testing techniques or of any alteration, modification, improvement or change in or discontinuance of the manufacture, construction, design,

formula, installation, preparation, assembly, testing, marketing, packaging, labeling or sale of a product, whether made by the defendant or any other party, which have been made, learned or placed into common use subsequent to the time the person who is primarily responsible for manufacturing the final product allegedly causing injury, death or damage parted with its possession and control, or sold it, whichever occurred last, shall not be admissible for any purpose: Provided, however, That this section does not require the exclusion of evidence of subsequent advancements, alterations, modifications, improvements or changes when offered for the purpose of contradicting a witness or of impeaching relevant testimony.

§ ~~8362~~ 8361. Evidence of collateral benefits. <——

(a) General rule.--In any product liability action in which compensatory damages are sought, the defendant shall be entitled to the admission of evidence as to the nature and extent of any public collateral benefits or services received or to be received by the plaintiff. It shall be admissible for the plaintiff to show that such collateral benefits or services received or to be received are subrogatable.

(b) Definition.--As used in this section "public collateral benefits or services" mean those benefits or services that an individual receives or is entitled to receive from social security (except those benefits provided under Title XIX of the Federal Social Security Act and except those medicare benefits to which a person's entitlement depends upon use of his so-called "lifetime reserve" of benefit days), workmen's compensation, any State required temporary nonoccupational disability and all other benefits (except the proceeds of life insurance and except benefit programs not statutorily mandated)

received by or recoverable by an individual from any government because of the injury.

§ ~~8363~~ 8362. Punitive and exemplary damages. <—

(a) General rule.--In any product liability action, no punitive or exemplary damages shall be awarded except upon a finding by the trier of fact that the defendant acted with a bad motive or with reckless indifference to the health and safety of the users or consumers.

(b) Evidence.--Punitive or exemplary damages shall be awardable only if the plaintiff establishes all the elements of the cause of action for punitive or exemplary damages by clear and convincing evidence.

(c) Damages stated separately.--The trier of fact shall separately state the amount of punitive or exemplary damages awarded.

§ ~~8364~~ 8363. Comparative responsibility in product liability actions. <—

(a) General rule.--In any product liability action the responsibility of the person suffering the injury or damage, as well as the responsibility of all others for causing the injury or damage, shall be compared by the trier of fact. The responsibility of the person suffering the harm shall not bar recovery for the injury or damage sustained where it was not greater than the total responsibility of all parties against whom recovery is sought. However, any damages allowed shall be diminished in proportion to the amount of responsibility attributable to the person recovering.

(b) Allocating damages and responsibility for each party.--The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the total

dollar amount of damages and the percentages of responsibility attributable to each party. The court shall then reduce the amount of such damages in proportion to the amount of responsibility attributable to the person recovering.

(c) Proportional liability of multiple defendants.--Where the recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of his responsibility to the amount of responsibility attributed to all defendants against whom recovery is allowed. The plaintiff may recover the full amount of the allowed recovery from any defendant against whom such plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution.

(d) Responsibility defined.--As used in this section "responsibility" means conduct which was a substantial factor in bringing about the harm for which damages are sought.

Section 3. All acts or parts of acts which are inconsistent with the provisions of this act are repealed to the extent of the inconsistency.

Section 4. (a) Insurance Commissioner to require reports.--The Insurance Commissioner, by the authority vested in him by law pursuant to the act of June 11, 1947 (P.L.538, No.246), known as "The Casualty and Surety Rate Regulatory Act," and sections 213, 214 and 216, act of May 17, 1921 (P.L.789, No.285), known as "The Insurance Department Act of one thousand nine hundred and twenty-one," shall require every insurer transacting the business of insurance in this Commonwealth to report any and all information the commissioner may deem relevant to the faithful performance of his duties in

determining that rates for product liability insurance are neither excessive, inadequate nor unfairly discriminatory.

(b) Insurance Commissioner to review rates.--The commissioner shall from time to time review all product liability rate filings to determine their compliance with the purpose of the act of June 11, 1947 (P.L.538, No.246), known as "The Casualty and Surety Rate Regulatory Act," and shall within one year following the effective date of this act, and annually thereafter, report his findings to the General Assembly and shall take such steps as may be appropriate to bring all rate filings in conformity with the requirements of "The Casualty and Surety Rate Regulatory Act."

(c) Reporting requirements.--

(1) Every insurer authorized to transact business in this Commonwealth and providing product liability insurance shall on or before March 1 of each year file with the Insurance Commissioner a report upon forms approved by the commissioner the following information pertaining to product liability earned premium experience for:

(i) Basic limits liability (25,000/50,000); Bodily injury (5,000/25,000); Property damage per occurrence/per annual aggregate.

(ii) Excess limits.

(iii) Bodily injury liability.

(iv) Property damage liability.

(v) Pennsylvania.

(vi) Countrywide.

(vii) By classification.

(viii) Exposure base primarily units of sales, receipts or payroll for each classification.

(2) Every insurer authorized to transact business in this Commonwealth and providing product liability insurance shall on or before March 1 of each year file with the Insurance Commissioner a report upon forms approved by the commissioner the following information pertaining to claims experience for:

(i) Basic limits incurred claims.

(ii) Excess limits incurred claims by layer.

(iii) The number of paid claims.

(iv) The amount of paid claims.

(v) The number of outstanding claims.

(vi) The dollar amount of outstanding claims.

(vii) The dollars of incurred losses evaluated as of 27, 39, 51, 63 and 75 months.

(viii) The number of incurred claims as of the same evaluation date as of subparagraph (vii).

(ix) Number by size of incurred claims.

(x) Number by classification.

(xi) Number for Pennsylvania.

(xii) Number countrywide.

(xiii) Paid allocated loss adjustment expenses.

(xiv) Outstanding allocated loss adjustment expenses.

(xv) Whether or not the company sets reserves for product liability insurance claims filed and the annual earnings of each such reserve by property and casualty category for the past five years and each year thereafter.

(xvi) Whether or not the company sets reserves for any claims for product liability losses which have been

incurred but not reported and the annual earnings of such reserves for the past five years and each year thereafter.

(xvii) All reserves established in connection with each property and casualty line or type of insurance.

(3) The commissioner shall make reports required by this section available to the public.

(4) There shall be no liability on the part of and no cause of action of any nature shall arise against any insurer reporting under this section or its agents or employees, or the commissioner or the employees of the Insurance Department, for any action taken by them pursuant to this section.

(5) The commissioner shall submit to the Governor and the Chairmen of the House and Senate Insurance Committees no later than 36 months from the effective date of this section a report. The report shall evaluate the information reported by insurers as required under the provisions of paragraphs (1) and (2) and such relevant data as may be necessary to evaluate the operations of this section. The report may include recommendations at the discretion of the commissioner.

(d) Limitation on approval of rates.--The insurance commissioner is hereby directed to disapprove any product liability rate filing made by any insurer or rating organization for a period of three years from the effective date of this act, except:

(1) Upon the written consent of the insured stating his reasons therefor, filed with and approved by the commissioner a rate in excess of that provided by a filing otherwise

applicable may be used on any specific risk. The rate shall become effective when such consent is filed and shall be deemed to meet the requirements of this act until such time as the commissioner reviews the filing and so long thereafter as the filing remains in effect.

(2) A filing providing decreased rates for all or certain classes and categories of risks.

Section 5. This act shall take effect in 60 days and shall apply to all actions accruing after the effective date of this act.