SENATE BILL NO. 292

INTRODUCED BY A. OLSEN

A BILL FOR AN ACT ENTITLED: “AN ACT REVISING PRODUCT LIABILITY LAWS TO INCLUDE ECONOMIC HARM TO THE USER OR CONSUMER; REQUIRING THAT A PERSON WHO SELLS AN UNREASONABLY DANGEROUS PRODUCT IS LIABLE FOR PHYSICAL OR ECONOMIC HARM CAUSED BY THE PRODUCT; AND AMENDING SECTION 27-1-719, MCA.”

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 27-1-719, MCA, is amended to read:

"**27-1-719. (Temporary) Liability of seller of product for physical or economic harm to user or consumer.** (1) A person who sells a product in a defective condition that is unreasonably dangerous to a user or consumer or to the property of a user or consumer is liable for physical or economic harm caused by the product to the ultimate user or consumer or to the user's or consumer's property if:

(a) the seller is engaged in the business of selling the product; and

(b) the product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The provisions of subsection (1) apply even if:

(a) the seller exercised all possible care in the preparation and sale of the product; and

(b) the user or consumer did not buy the product from or enter into any contractual relation with the seller.

(3) (a) Subsection (1) does not apply to product liability claims brought for damages caused in part by covid-19 as defined in 27-1-1601, which are governed by 27-1-1602.

(b) Subsection (1)(b) does not apply to a claim for relief based on improper product design.

(4) A seller named as a defendant in an action based on strict liability in tort for damages to person or property caused by a defectively designed or defectively manufactured product may assert the following affirmative defenses against the claimant, user, or consumer, the legal representative of the claimant, user, or

consumer, or any person claiming damages by reason of injury to the user or consumer:

(a) the claimant, user, or consumer of the product discovered the defect or the defect was open and obvious and the claimant, user, or consumer unreasonably made use of the product and was injured by it;

(b) the product was unreasonably misused by the user or consumer and the misuse caused or contributed to the injury. Unreasonable misuse of the product includes use of the product in a manner that contravenes an express warning or instruction appearing on, accompanying, or attached to the product or on its original container or wrapping, if the user or consumer knew or with the exercise of reasonable and diligent care should have known of the instructions or warnings.

(c) the claimant's contributory negligence or fault, regardless of the legal basis;

(d) the negligence or fault, regardless of the legal basis, of any party to a product liability action;

(e) the negligence or fault, regardless of the legal basis, of any person or entity with whom the claimant has settled or whom the claimant has released from liability as provided in 27-1-703(6).

(5) The affirmative defenses referred to in subsection (4) mitigate or bar recovery and must be applied in accordance with the principles of comparative negligence set forth in 27-1-702.

(6) A seller named as a defendant in a product liability action may assert the following affirmative defenses against the claimant, user, or consumer, the legal representative of the claimant, user, or consumer, or any person claiming damages by reason of injury to the user or consumer:

(a) the plans or design for the product at issue or the methods and techniques of manufacturing, inspecting, testing, and labeling the product could not have been made safer by the adoption of a reasonable alternative that was available at the time the product was first sold to a user or consumer; or

(b) the product liability action was not commenced within 10 years of the date on which the product was first sold or leased to any person or otherwise placed into the stream of commerce, unless:

(i) the seller against whom the product liability action is brought knowingly concealed a defective or unsafe condition in the product that is the subject of the action or has knowingly concealed negligence in the product's construction, manufacture, or assembly, and if the matter so concealed directly resulted in the economic loss, personal injury, property damage, or wrongful death for which the action is brought;

(ii) the product is subject to a government-mandated product recall related to consumer safety, provided that the action must be limited to the extent that the subject of the product liability action and the

underlying reason for the recall are the same;

(iii) the product liability action is brought with respect to a product that is real property or an improvement to real property;

(iv) the product liability action alleges that the product has a defective condition that is unreasonably dangerous because it causes a respiratory or malignant disease with a latency of more than 10 years, and the seller against whom the product liability action is brought is also the manufacturer of the product claimed to be defective; or

(v) the seller or the person who first placed the product that is the subject of the product liability action in the stream of commerce has stated in a written warranty or an advertisement to the public that the product has an expected useful life for a period certain that is greater than 10 years, in which event any product liability action that is otherwise within this section and is not barred by any other provision of law must be brought no later than 2 years following the expiration of that period certain.

(7) In a product liability action, it is rebuttably presumed that the product that caused the injury, death, ~~or~~ property, or economic damage was not in a defective condition that is unreasonably dangerous and that the manufacturer or seller of the product was not negligent. The jury must be informed of this presumption if at the time the product was first sold or leased to any person or otherwise placed into the stream of commerce:

(a) the product at issue's formula, design, labeling, warning, or instructions complied with mandatory safety statutes, standards, or regulations adopted by the federal or state government or an agency of the federal or state government that were applicable to the product at issue at the time of its manufacture and that addressed the product risk that allegedly caused harm;

(b) the product at issue was subject to premarket licensing or approval by the federal or state government or an agency of the federal or state government, the seller complied with all of the government's or agency's procedures and requirements pertaining to premarketing licensing or approval, and the product was approved or licensed for sale by the government or agency; or

(c) the product at issue:

(i) was a drug or medical device;

(ii) was approved for safety and efficacy by the United States food and drug administration;

(iii) was in compliance, in addition to its labeling, with the United States food and drug administration's approval at the time the product at issue left the control of the seller; and

(iv) was not sold in the United States after the effective date of any order of the United States food and drug administration to remove the product at issue from the market or to withdraw its approval.

(8) A product liability action may not be commenced or maintained against a seller who is not also a manufacturer unless the claimant proves by a preponderance of evidence that:

(a) the seller actually exercised substantial control over some aspect of the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, warnings, and instructions of the product that was a proximate cause of the damages for which the claimant seeks recovery;

(b) the seller altered, modified, or installed the product after it left the manufacturer's possession, and the alteration, modification, or installation was not authorized or requested by the manufacturer, was not performed in compliance with the directions or specifications of the manufacturer, and was a direct cause of the damages for which the claimant seeks recovery;

(c) the seller failed to exercise reasonable care with regard to the assembly, maintenance, service, or repair of the product at issue or in conveying to the claimant the manufacturer's labels, warnings, or instructions, and this failure was a proximate cause of the damages for which the claimant seeks recovery;

(d) the seller made an express factual representation regarding the product independent of any express warranty made by a manufacturer regarding the product, the product failed to conform to the seller's independent express warranty, the claimant relied on the express factual representation, and the failure of the product to conform to the seller's independent express warranty was a proximate cause of the damages for which the claimant seeks recovery;

(e) the manufacturer cannot be identified, despite a good-faith exercise of due diligence to identify the manufacturer of the product;

(f) personal jurisdiction over the manufacturer cannot be obtained in the state;

(g) the manufacturer has been adjudicated bankrupt and a judgment is not otherwise recoverable from the assets of the manufacturer's bankruptcy estate; or

(h) the seller had actual knowledge that the product contained a defect at the time the seller placed the product into the stream of commerce, and that known defect was a proximate cause of the damages

for which the claimant seeks recovery.

(9) As used in this section:

(a) "Claimant" means a party seeking relief, including a plaintiff, counterclaimant, or cross-claimant. When the action seeks to recover damages to or for a person who has died, the term includes the decedent as well as the party or parties bringing the action seeking relief.

(b) "Manufacturer" means a person, corporation or other legal entity that is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or any component part of a product and who places the product or any component part of the product in the stream of commerce.

(c) "Product liability action" means any action brought against a manufacturer or seller of a product, regardless of the substantive legal theory or theories on which the action is brought, for or on account of personal injury, death, ~~or~~ property, or economic damage caused by or resulting from the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, or sale of any product, 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.

(d) "Seller" means a manufacturer, wholesaler, or retailer. (Terminates on occurrence of contingency--sec. 11(2), Ch. 429, L. 1997; subsection (3)(a) terminates January 1, 2031--sec. 15, Ch. 2, L. 2021.)

27-1-719. (Effective on occurrence of contingency) Liability of seller of product for physical or economic harm to user or consumer. (1) A person who sells a product in a defective condition that is unreasonably dangerous to a user or consumer or to the property of a user or consumer is liable for physical or economic harm caused by the product to the ultimate user or consumer or to the user's or consumer's property if:

(a) the seller is engaged in the business of selling the product; and

(b) the product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The provisions of subsection (1) apply even if:

(a) the seller exercised all possible care in the preparation and sale of the product; and

(b) the user or consumer did not buy the product from or enter into any contractual relation with the seller.

(3) (a) Subsection (1) does not apply to product liability claims brought for damages caused in part by covid-19 as defined in 27-1-1601, which are governed by 27-1-1602.

(b) Subsection (1)(b) does not apply to a claim for relief based upon improper product design.

(4) A seller named as a defendant in an action based on strict liability in tort for damages to a person or property caused by a defectively designed or defectively manufactured product may assert the following affirmative defenses against the claimant, user, or consumer, the legal representative of the claimant, user, or consumer, or any person claiming damages by reason of injury to the user or consumer:

(a) the claimant, user, or consumer of the product discovered the defect or the defect was open and obvious and the claimant, user, or consumer unreasonably made use of the product and was injured by it;

(b) the product was unreasonably misused by the user or consumer and the misuse caused or contributed to the injury. Unreasonable misuse of the product includes use of the product in a manner that contravenes an express warning or instruction appearing on, accompanying, or attached to the product or on its original container or wrapping, if the user or consumer knew or with the exercise of reasonable and diligent care should have known of the instructions or warnings.

(c) the claimant's contributory negligence or fault, regardless of the legal basis;

(d) the negligence or fault, regardless of the legal basis, of any party to a product liability action;

(e) the negligence or fault, regardless of the legal basis, of any person or entity with whom the claimant has settled or whom the claimant has released from liability as provided in 27-1-703(6).

(5) The affirmative defenses referred to in subsection (4) mitigate or bar recovery and must be applied in accordance with the principles of comparative fault set forth in 27-1-702 and 27-1-705.

(6) A seller named as a defendant in a product liability action may assert the following affirmative defenses against the claimant, user, or consumer, the legal representative of the claimant, user, or consumer, or any person claiming damages by reason of injury to the user or consumer:

(a) the plans or design for the product at issue or the methods and techniques of manufacturing, inspecting, testing, and labeling the product could not have been made safer by the adoption of a reasonable alternative that was available at the time the product was first sold to a user or consumer; or

(b) the product liability action was not commenced within 10 years of the date on which the product was first sold or leased to any person or otherwise placed into the stream of commerce, unless:

(i) the seller against whom the product liability action is brought knowingly concealed a defective or unsafe condition in the product that is the subject of the action or has knowingly concealed negligence in the product's construction, manufacture, or assembly, and if the matter so concealed directly resulted in the economic loss, personal injury, property damage, or wrongful death for which the action is brought;

(ii) the product is subject to a government-mandated product recall related to consumer safety, provided that the action must be limited to the extent that the subject of the product liability action and the underlying reason for the recall are the same;

(iii) the product liability action is brought with respect to a product that is real property or an improvement to real property;

(iv) the product liability action alleges that the product has a defective condition that is unreasonably dangerous because it causes a respiratory or malignant disease with a latency of more than 10 years, and the seller against whom the product liability action is brought is also the manufacturer of the product claimed to be defective; or

(v) the seller or the person who first placed the product that is the subject of the product liability action in the stream of commerce has stated in a written warranty or an advertisement to the public that the product has an expected useful life for a period certain that is greater than 10 years, in which event any product liability action that is otherwise within this section and is not barred by any other provision of law must be brought no later than 2 years following the expiration of that period certain.

(7) In a product liability action, it is rebuttably presumed that the product that caused the injury, death, ~~or~~ property, or economic damage was not in a defective condition that is unreasonably dangerous and that the manufacturer or seller of the product was not negligent. The jury must be informed of this presumption if at the time the product was first sold or leased to any person or otherwise placed into the stream of commerce:

(a) the product at issue's formula, design, labeling, warning, or instructions complied with mandatory safety statutes, standards, or regulations adopted by the federal or state government or an agency of the federal or state government that were applicable to the product at issue at the time of its manufacture

and that addressed the product risk that allegedly caused harm;

(b) the product at issue was subject to premarket licensing or approval by the federal or state government or an agency of the federal or state government, the seller complied with all of the government's or agency's procedures and requirements pertaining to premarketing licensing or approval, and the product was approved or licensed for sale by the government or agency; or

(c) the product at issue:

(i) was a drug or medical device;

(ii) was approved for safety and efficacy by the United States food and drug administration;

(iii) was in compliance, in addition to its labeling, with the United States food and drug administration's approval at the time the product at issue left the control of the seller; and

(iv) was not sold in the United States after the effective date of any order of the United States food and drug administration to remove the product at issue from the market or to withdraw its approval.

(8) A product liability action may not be commenced or maintained against a seller who is not also a manufacturer unless the claimant proves by a preponderance of evidence that:

(a) the seller actually exercised substantial control over some aspect of the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, warnings, and instructions of the product that was a proximate cause of the damages for which the claimant seeks recovery;

(b) the seller altered, modified, or installed the product after it left the manufacturer's possession, and the alteration, modification, or installation was not authorized or requested by the manufacturer, was not performed in compliance with the directions or specifications of the manufacturer, and was a direct cause of the damages for which the claimant seeks recovery;

(c) the seller failed to exercise reasonable care with regard to the assembly, maintenance, service, or repair of the product at issue or in conveying to the claimant the manufacturer's labels, warnings, or instructions, and this failure was a proximate cause of the damages for which the claimant seeks recovery;

(d) the seller made an express factual representation regarding the product independent of any express warranty made by a manufacturer regarding the product, the product failed to conform to the seller's independent express warranty, the claimant relied on the express factual representation, and the failure of the product to conform to the seller's independent express warranty was a proximate cause of the damages for

which the claimant seeks recovery;

(e) the manufacturer cannot be identified, despite a good-faith exercise of due diligence to identify the manufacturer of the product;

(f) personal jurisdiction over the manufacturer cannot be obtained in the state;

(g) the manufacturer has been adjudicated bankrupt and a judgment is not otherwise recoverable from the assets of the manufacturer's bankruptcy estate; or

(h) the seller had actual knowledge that the product contained a defect at the time the seller placed the product into the stream of commerce, and that known defect was a proximate cause of the damages for which the claimant seeks recovery.

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(a) "Claimant" means a party seeking relief, including a plaintiff, counterclaimant, or cross-claimant. When the action seeks to recover damages to or for a person who has died, the term includes the decedent as well as the party or parties bringing the action seeking relief.

(b) "Manufacturer" means a person, corporation, or other legal entity that is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or any component part of a product and who places the product or any component part of the product in the stream of commerce.

(c) "Product liability action" means any action brought against a manufacturer or seller of a product, regardless of the substantive legal theory or theories on which the action is brought, for or on account of personal injury, death, ~~or~~ property, or economic damage caused by or resulting from the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, or sale of any product, 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.

(d) "Seller" means a manufacturer, wholesaler, or retailer. (Subsection (3)(a) terminates January 1, 2031--sec. 15, Ch. 2, L. 2021.)"

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