SENATE BILL NO. 216

INTRODUCED BY S. FITZPATRICK

A BILL FOR AN ACT ENTITLED: “AN ACT REVISING LAWS RELATING TO CIVIL LAWSUITS INVOLVING PRODUCTS; REVISING LAWS PERTAINING TO STRICT LIABILITY OR CERTAIN BREACH OF WARRANTY LAWS TO ALLOW A DEFENDANT TO ASSERT A DEFENSE THAT THE DAMAGES WERE CAUSED BY A PERSON WITH WHOM THE CLAIMANT HAS SETTLED OR RELEASED FROM LIABILITY; REVISING PRODUCT LIABILITY LAWS TO ALLOW CERTAIN DEFENSES; PROVIDING DEFINITIONS; ALLOWING CONTRIBUTORY NEGLIGENCE AS A DEFENSE IN A PRODUCT LIABILITY LAWSUIT; ALLOWING THE SELLER OF A PRODUCT TO ASSERT CERTAIN DEFENSES; PROVIDING STANDARDS OF PROOF FOR CLAIMANTS IN CERTAIN PRODUCT ACTIONS; AMENDING SECTIONS 27-1-703 AND 27-1-719, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE.”

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

Section 1. Section 27-1-703, MCA, is amended to read:

"**27-1-703. (Temporary) Multiple defendants -- determination of liability.** (1) Except as provided in subsections (2) and (3), if the negligence of a party to an action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.

(2) A party whose negligence is determined to be 50% or less of the combined negligence of all persons described in subsection (4) is severally liable only and is responsible only for the percentage of negligence attributable to that party, except as provided in subsection (3). The remaining parties are jointly and severally liable for the total less the percentage attributable to the claimant and to any person with whom the claimant has settled or whom the plaintiff has released from liability.

(3) A party may be jointly liable for all damages caused by the negligence of another if both acted in concert in contributing to the claimant's damages or if one party acted as an agent of the other.

(4) On motion of a party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, and third-party defendants. The liability of persons released from liability by the claimant and persons with whom the claimant has settled must also be considered by the trier of fact, as provided in subsection (6). The trier of fact shall apportion the percentage of negligence of all persons listed in this subsection. Nothing contained in this section makes any party indispensable pursuant to Rule 19, Montana Rules of Civil Procedure.

(5) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party. A party found to be 50% or less negligent for the injury complained of is liable for contribution under this section only up to the percentage of negligence attributed to that party.

(6) (a) In an action based on negligence, strict liability as provided in 27-1-719(1), or on a breach of warranty, including but not limited to the provisions of 30-2-314, 30-2-315, or 30-11-215, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a person with whom the claimant has settled or whom the claimant has released from liability.

(b) In determining the percentage of liability attributable to persons who are parties to the action, the trier of fact shall consider the negligence of persons released from liability by the claimant or with whom the claimant has settled. A finding of negligence of a person with whom the claimant has settled or who has been released from liability by the claimant is not a presumptive or conclusive finding as to that person for purposes of a prior or subsequent action involving that person.

(c) Except for persons who have settled with or have been released by the claimant, comparison of fault with any of the following persons is prohibited:

(i) a person who is immune from liability to the claimant;

(ii) a person who is not subject to the jurisdiction of the court; or

(iii) any other person who could have been, but was not, named as a third party.

(d) A release of settlement entered into by a claimant constitutes an assumption of the liability, if any, allocated to the settled or released person. The claim of the releasing or settling claimant against other persons is reduced by the percentage of the released or settled person's equitable share of the obligation, as determined under subsection (4).

(e) A defendant who alleges that a person released by the claimant or with whom the claimant has settled is at fault in the matter has the burden of proving:

(i) the negligence of the person whom the claimant has released or with whom the claimant has settled;

(ii) any standard of care applicable to the person whom the claimant released or with whom the claimant settled; and

(iii) that the negligence of the person whom the claimant has released or with whom the claimant has settled was a contributing cause under the law applicable to the matter.

(f) A defendant alleging that a settled or released person is at fault in the matter shall affirmatively plead the settlement or release as a defense in the answer. A defendant who gains actual knowledge of a settled or released person after the filing of that defendant's answer may plead the defense of settlement or release with reasonable promptness, as determined by the trial court, in a manner that is consistent with:

(i) giving the defendant a reasonable opportunity to discover the existence of a settled or released person;

(ii) giving the settled or released person an opportunity to intervene in the action to defend against claims affirmatively asserted, including the opportunity to be represented by an attorney, present a defense, participate in discovery, cross-examine witnesses, and appear as a witness of either party; and

(iii) giving the claimant a reasonable opportunity to defend against the defense.

(g) If a defendant alleges that a settled or released person is at fault in the matter, the defendant shall notify each person who the defendant alleges caused the claimant's injuries, in whole or in part. Notification must be made by mailing the defendant's answer to each settled or released person at the person's last-known address by certified mail, return receipt requested. (Terminates on occurrence of contingency--sec. 11(2), Ch. 429, L. 1997.)

27-1-703. (Effective on occurrence of contingency) Multiple defendants -- determination of

liability. Each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of."

Section 2. Section 27-1-719, MCA, is amended to read:

"**27-1-719. (Temporary) Liability of seller of product for physical harm to user or consumer.** ~~(1) As used in this section, "seller" means a manufacturer, wholesaler, or retailer.~~

~~(2)~~(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 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.

~~(3)~~(2) The provisions of subsection ~~(2)~~ (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.

~~(4)~~(3) (a) Subsection ~~(2)~~ (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 ~~(2)~~(1)(b) does not apply to a claim for relief based ~~upon~~ on improper product design.

~~(5)~~(4) ~~Except as provided in this subsection, contributory negligence is not a defense to the liability of a seller, based on strict liability in tort, for personal injury or property damage caused by a defectively manufactured or defectively designed product.~~ 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~~ 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~~ 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).

~~(6)~~(5) The affirmative defenses referred to in subsection ~~(5)~~ (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;

(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;

(c) at the time the product was first sold or leased to any person or otherwise placed into the stream of commerce:

(i) 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;

(ii) 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

(iii) the product at issue:

(A) was a drug or medical device;

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

(C) 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

(D) 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.

(7) 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.

(8) 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 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 ~~(4)~~(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 harm to user or consumer. ~~(1) As used in this section, "seller" means a manufacturer, wholesaler, or retailer.~~

~~(2)~~(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 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.

~~(3)~~(2) The provisions of subsection ~~(2)~~ (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.

~~(4)~~(3) (a) Subsection ~~(2)~~ (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 ~~(2)~~(1)(b) does not apply to a claim for relief based upon improper product design.

~~(5)~~(4) ~~Contributory fault is a defense to the liability of a seller, based on strict liability in tort, for personal injury or property damage caused by a defectively manufactured or defectively designed product.~~ 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~~ 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~~ 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).

~~(6)~~(5) The affirmative defenses referred to in subsection ~~(5)~~ (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;

(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;

(c) at the time the product was first sold or leased to any person or otherwise placed into the stream of commerce:

(i) 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;

(ii) 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

(iii) the product at issue:

(A) was a drug or medical device;

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

(C) 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

(D) 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.

(7) 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.

(8) 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 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 ~~(4)~~(3)(a) terminates January 1, 2031--sec. 15, Ch. 2, L. 2021.)"

NEW SECTION. **Section 3. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 4. Effective date.** [This act] is effective on passage and approval.

NEW SECTION. **Section 5. Applicability.** [This act] applies to claims that accrue on or after [the effective date of this act].

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