



Aida S. Montano

*Bill Analysis*  
Legislative Service Commission

## **Sub. S.B. 120**

124th General Assembly  
(As Reported by H. Civil & Commercial Law)

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**Reps. Seitz, Latta**

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### **BILL SUMMARY**

**Tort actions in general (includes product liability actions based either on a product's defective design or formulation or on a defective product because of inadequate warning or instruction)**

- Specifies that a defendant is jointly and severally liable in tort for all compensatory damages that represent economic loss if more than 50% of the tortious conduct is attributable to that defendant.
- Specifies that a defendant is liable in tort only for that defendant's proportionate share of the compensatory damages that represent economic or noneconomic loss if 50% or less of the tortious conduct is attributable to that defendant.
- Provides that a defendant against whom an intentional tort claim has been alleged and established is jointly and severally liable in tort for all compensatory damages that represent economic loss if 50% or less of the tortious conduct is attributable to that defendant and that each defendant against whom an intentional tort claim has not been alleged and established and to whom 50% or less of the tortious conduct is attributable is liable only for that defendant's proportionate share of the compensatory damages that represent economic loss.
- Specifies how to determine the percentages of tortious conduct attributable to a party in a tort action under the joint and several liability or contributory fault provisions of the bill.

- Establishes a right of contribution among tortfeasors even though judgment has not been recovered against all or any of the tortfeasors.
- Specifies the guidelines for the right of contribution among tortfeasors, and provides that there is no right of contribution in favor of any tortfeasor against whom an intentional tort claim has been alleged and established.
- Provides that the contributory fault of a plaintiff may be asserted as an affirmative defense to a negligence claim or to a tort claim other than a negligence claim, but may not be asserted as an affirmative defense to an intentional tort claim or to a product liability claim based upon a product's defective manufacture or construction or upon a defective product because it did not conform to a representation made by its manufacturer.
- Requires a court to diminish the total amount of the compensatory damages that would have been recoverable by an amount that is proportionately equal to the percentage of tortious conduct that is determined to be attributable to the plaintiff when there is contributory fault.

**Product liability claims**

- Provides that express or implied assumption of the risk may be asserted as an affirmative defense to a product liability claim based upon a product's defective manufacture or construction or upon a defective product because it did not conform to a representation made by its manufacturer, except that express or implied assumption of the risk may not be asserted as an affirmative defense to an intentional tort claim.
- Provides that no cause of action may exist as a product liability claim unless it is defined and governed by the Product Liability Law (R.C. 2307.71 to 2307.80).

**Strict liability product liability actions (product liability claims based upon a product's defective manufacture or construction or upon a defective product because it did not conform to a representation made by its manufacturer)**

- Provides that contributory negligence or other contributory tortious conduct may not be asserted as an affirmative defense to a strict liability product liability claim.

- Specifies that a defendant in a strict liability product liability action is jointly and severally liable for all of the plaintiff's damages that represent economic loss if the defendant is responsible for more than 50% of those damages.
- Specifies that a defendant in a strict liability product liability action is liable only for that defendant's proportionate share of the plaintiff's damages that represent economic loss if the defendant is responsible for 50% or less of the plaintiff's damages.
- Specifies that each defendant in a strict liability product liability action is liable only for that defendant's proportionate share of the plaintiff's damages that represent noneconomic loss.
- Requires the trier of fact in a strict liability product liability action to determine each defendant's proportionate share of the plaintiff's damages that represent economic or noneconomic loss pursuant to the Product Liability Law.
- Establishes a right of contribution among the defendants in a strict liability product liability action if one or more of them are jointly and severally liable and even though judgment has not been recovered against all or any of them.
- Specifies the guidelines for the right of contribution among the defendants in a strict liability product liability action, and provides that there is no right of contribution in favor of any defendant against whom an intentional tort claim has been alleged and established.

**Combined product liability claims**

- Provides that the bill's provisions applicable to tort actions apply in a civil action in which the plaintiff combines a product liability claim based upon a product's defective design or formulation or upon a defective product because of inadequate warning or instruction with a product liability claim based upon a product's defective manufacture or construction or upon a defective product because it did not conform to a representation made by its manufacturer.

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## TABLE OF CONTENTS

Overview of the bill.....	4
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### TORT ACTIONS

Joint and several liability .....	5
Determination of joint and several liability .....	5
Determining the percentages of tortious conduct attributable to a party .....	7
Limitation on application of bill's joint and several liability provisions .....	7
Right of contribution among tortfeasors.....	7
Covenant not to sue or not to enforce judgment.....	9
Exclusion of contribution provisions .....	10
Contributory fault .....	10
Contributory fault of the plaintiff asserted as an affirmative defense .....	10
Allocation of damages .....	11
Judgment.....	11
Definitions .....	11

### PRODUCT LIABILITY ACTIONS

Express or implied assumption of the risk as an affirmative defense.....	14
Contributory tortious conduct.....	14
Statutory product liability claims .....	14

### STRICT LIABILITY PRODUCT LIABILITY ACTIONS

Joint and several liability .....	15
Determination of joint and several liability .....	15
Right of contribution among defendants .....	16
Covenant not to sue or not to enforce judgment.....	17
Nonapplicability of provisions .....	18
Combined product liability claims .....	18
Definitions .....	18
Applicability.....	20
Miscellaneous .....	20

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## CONTENT AND OPERATION

### Overview of the bill

The bill prescribes provisions governing joint and several liability, right of contribution among tortfeasors, and contributory fault in tort actions, which is defined to include a product liability claim brought under the Product Liability Law (R.C. 2307.71 to 2307.80) and based either on a product's defective design or

formulation or on a defective product because of inadequate warning or instruction. The bill prescribes separate provisions governing joint and several liability and right of contribution among defendants in a strict liability product liability action, which is defined as an action that includes only product liability claims brought under the Product Liability Law and based upon either a product's defective manufacture or construction or a defective product because it did not conform to a representation made by its manufacturer. The bill specifies that contributory negligence or other contributory tortious conduct may not be asserted as an affirmative defense to a strict liability product liability claim.

## TORT ACTIONS

### Joint and several liability

#### Determination of joint and several liability

Subject to the provisions under "Determining the percentages of tortious conduct attributable to a party" and "Limitation on application of bill's joint and several liability provisions," below, and except as provided in another section of the Revised Code that expressly establishes joint and several tort liability for specified persons, joint and several tort liability *in tort actions* (see "Definitions," below) must be determined as follows (R.C. 2307.22(A)):

(1) In a tort action in which the trier of fact determines that two or more persons proximately caused the same injury or loss to person or property or the same wrongful death and in which the trier of fact determines that more than 50% of the tortious conduct is attributable to one defendant, that defendant is jointly and severally liable in tort for all compensatory damages that represent economic loss.

(2) If paragraph (1), above, is applicable, each defendant who is determined by the trier of fact to be legally responsible for the same injury or loss to person or property or the same wrongful death and to whom 50% or less of the tortious conduct is attributable is liable to the plaintiff only for that defendant's proportionate share of the compensatory damages that represent economic loss. The proportionate share of a defendant must be calculated by multiplying the total amount of the economic damages awarded to the plaintiff by the percentage of tortious conduct determined as described in "Determining the percentages of tortious conduct attributable to a party," below, that is attributable to that defendant.

(3) In a tort action in which the trier of fact determines that two or more persons proximately caused the same injury or loss to person or property or the same wrongful death and in which the trier of fact determines that 50% or less of

the tortious conduct is attributable to any defendant against whom an *intentional tort claim* (see "Definitions," below) has been alleged and established, that defendant is jointly and severally liable in tort for all compensatory damages that represent economic loss.

(4) If paragraph (3), above, is applicable, each defendant against whom an intentional tort claim has not been alleged and established, who is determined by the trier of fact to be legally responsible for the same injury or loss to person or property or the same wrongful death, and to whom 50% or less of the tortious conduct is attributable is liable to the plaintiff only for that defendant's proportionate share of the compensatory damages that represent economic loss. The proportionate share of a defendant must be calculated by multiplying the total amount of the economic damages awarded to the plaintiff by the percentage of tortious conduct as described in "Determining the percentages of tortious conduct attributable to a party," below, that is attributable to that defendant.

Except as described above in paragraphs (3) and (4), in a tort action in which the trier of fact determines that two or more persons proximately caused the same injury or loss to person or property or the same wrongful death and in which the trier of fact determines that 50% or less of the tortious conduct is attributable to each defendant, each defendant is liable to the plaintiff only for that defendant's proportionate share of the compensatory damages that represent economic loss. The proportionate share of a defendant must be calculated by multiplying the total amount of the economic damages awarded to the plaintiff by the percentage of tortious conduct that is attributable to that defendant. (R.C. 2307.22(B).)

In a tort action in which the trier of fact determines that two or more persons proximately caused the same injury or loss to person or property or the same wrongful death, each defendant who is determined by the trier of fact to be legally responsible for the same injury or loss to person or property or for the same wrongful death is to be liable to the plaintiff only for that defendant's proportionate share of the compensatory damages that represent noneconomic loss. The proportionate share of a defendant must be calculated by multiplying the total amount of the noneconomic damages awarded to the plaintiff by the percentage of tortious conduct that is attributable to that defendant. (R.C. 2307.22(C).)

The contribution provisions of the bill (see "Right of contribution among tortfeasors," "Covenant not to sue or not to enforce judgment," and "Exclusion of contribution provisions," below) apply to joint and several tort liability in a tort action in which the trier of fact determines that two or more tortfeasors proximately caused the same injury or loss to person or property or the same wrongful death and in which the trier of fact determines that more than 50% of the tortious conduct is attributable to one defendant (R.C. 2307.22(D)).

### **Determining the percentages of tortious conduct attributable to a party**

In determining the percentage of tortious conduct attributable to a party in a tort action under the joint and several liability and contributory fault provisions of the bill, the court in a nonjury action must make findings of fact, and the jury in a jury action must return a general verdict accompanied by answers to interrogatories, that specify all of the following: (1) the percentage of tortious conduct that proximately caused the injury or loss or the wrongful death that is attributable to the plaintiff and to each party to the tort action from whom the plaintiff seeks recovery in this action and (2) the percentage of tortious conduct that proximately caused the injury or loss or the wrongful death that is attributable to each *person from whom the plaintiff does not seek recovery in this action* (see "**Definitions**," below). (R.C. 2307.23(A).)

The sum of the percentages of tortious conduct as determined in the preceding paragraph must equal 100% (R.C. 2307.23(B)).

For purposes of clause (2), above, it is an affirmative defense for each party to the tort action from whom the plaintiff seeks recovery that a specific percentage of the tortious conduct that proximately caused the injury or loss to person or property or the wrongful death is attributable to one or more persons from whom the plaintiff does not seek recovery in this action. Any party to the tort action from whom the plaintiff seeks recovery in this action may raise that affirmative defense at any time before the trial of the action. (R.C. 2307.23(C).)

### **Limitation on application of bill's joint and several liability provisions**

The above provisions regarding joint and several liability do not affect joint and several liability that is not based in tort. Additionally, they do not affect any other section of the Revised Code or the common law to the extent that the other section or common law makes a principal, master, or other person vicariously liable for the tortious conduct of an agent, servant, or other person. A principal and agent, a master and servant, or other persons having a vicarious liability relationship must constitute a single party when determining percentages of tortious conduct in a tort action in which vicarious liability is asserted. (R.C. 2307.24.)

### **Right of contribution among tortfeasors**

If one or more persons are jointly and severally liable in tort for the same injury or loss to person or property or for the same wrongful death, the bill states that there may be a right of contribution even though judgment has not been recovered against all or any of them. The right of contribution exists only in favor of a tortfeasor who has paid more than that tortfeasor's proportionate share of the

common liability, and that tortfeasor's total recovery is limited to the amount paid by that tortfeasor in excess of that tortfeasor's proportionate share. No tortfeasor may be compelled to make contribution beyond that tortfeasor's own proportionate share of the common liability. There is no right of contribution in favor of any tortfeasor against whom an intentional tort claim has been alleged and established. (R.C. 2307.25(A).)

The bill further provides that a tortfeasor who enters into a settlement with a claimant is not entitled to contribution from another tortfeasor whose liability for the injury or loss to person or property or the wrongful death is not extinguished by the settlement, or in respect to any amount paid in a settlement that is in excess of what is reasonable (R.C. 2307.25(B)).

Additionally, the bill provides that a liability insurer that by payment has discharged in full or in part the liability of a tortfeasor and has discharged in full by the payment its obligation as insurer is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's proportionate share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship. (R.C. 2307.25(C).)

The bill's provisions regarding contribution do not impair any right of indemnity under existing law. If one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of the indemnity obligation. The bill's provisions regarding contribution also do not apply to breaches of trust or of other fiduciary obligations. (R.C. 2307.25(D) and (E).)

The bill provides that the proportionate shares of tortfeasors in the common liability must be based upon their relative degrees of legal responsibility. If equity requires the collective liability of some as a group, the group will constitute a single share, and principles of equity applicable to contribution generally will apply. Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or loss or for the same wrongful death, contribution may be enforced by separate action. (R.C. 2307.25(F) and (G).)

Whenever the provisions of the "Federal Tort Claims Act," 60 Stat. 842 (1946), 28 U.S.C. 2671 et seq., are applicable to a tort and the United States is held liable in tort, the United States has no right of contribution under the bill against the state pursuant to the waiver of sovereign immunity contained in R.C. Chapter 2743. (the Court of Claims Law) (R.C. 2307.25(H)).

**Enforcement of right of contribution.** The bill provides that, if a judgment that imposes joint and several liability has been entered in an action against one or more tortfeasors for the same injury or loss or for the same wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment debtors, by motion, upon notice to all parties to the action. If there is a judgment for the injury or loss or the wrongful death against the tortfeasor seeking contribution, that tortfeasor must commence any separate action to enforce contribution within one year after the judgment has become final by lapse of time for appeal or after appellate review. If there is no judgment for the injury or loss or the wrongful death against the tortfeasor seeking contribution, that tortfeasor's right of contribution is barred unless that tortfeasor (1) has discharged by payment the common liability within the statute of limitations period applicable to the claimant's right of action against that tortfeasor and has commenced that tortfeasor's action for contribution within one year after the payment, or (2) has agreed while an action is pending against that tortfeasor to discharge the common liability and has paid within one year after the agreement the common liability and commenced that tortfeasor's action for contribution. (R.C. 2307.26.)

The bill further provides that recovery of a judgment for an injury or loss to person or property or a wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury, loss, or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution. Valid answers to interrogatories by a jury or findings of fact by a court sitting without a jury in determining the percentage of liability of several defendants for an injury or loss to person or property or a wrongful death are binding as among those defendants in determining their right to contribution. (R.C. 2307.27.)

**Covenant not to sue or not to enforce judgment**

The bill provides that when a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons for the same injury or loss or the same wrongful death, both of the following apply (R.C. 2307.28):

(1) The release or covenant does not discharge any of the other tortfeasors from liability unless its terms otherwise provide, but it reduces the claim against the other tortfeasors to the extent of the greater of any amount stipulated by the release or the covenant or the amount of the consideration paid for it, except that the reduction of the claim against the other tortfeasors does not apply in any case in which the reduction results in the plaintiff recovering less than the total amount of the plaintiff's compensatory damages awarded by the trier of fact and except that in any case in which the reduction does not apply the plaintiff cannot recover

more than the total amount of the plaintiff's compensatory damages awarded by the trier of fact.

(2) The release or covenant discharges the person to whom it is given from all liability for contribution to any other tortfeasor.

### **Exclusion of contribution provisions**

The contribution provisions of the bill as described above do not apply to a negligence or other tort claim to the extent that the joint and several liability provisions or the contributory fault provisions of the bill as described above and below make a party against whom a judgment is entered liable to the plaintiff only for the proportionate share of that party (R.C. 2307.29).

### **Contributory fault**

#### **Contributory fault of the plaintiff asserted as an affirmative defense**

The bill provides that its contributory fault provisions do not apply to a product liability claim brought under R.C. 2307.71 to 2307.80 (Product Liability Law) and based upon a product's defective manufacture or construction as described in R.C. 2307.74 or a product liability claim brought under the Product Liability Law and based upon a defective product because it did not conform to a representation made by its manufacturer as described in R.C. 2307.77. (R.C. 2315.32(A).) The contributory fault of the plaintiff may be asserted as an affirmative defense to a negligence claim or to a tort claim other than a negligence claim, except that the contributory fault of the plaintiff may not be asserted as an affirmative defense to any of the following: (1) an intentional tort claim, (2) a product liability claim brought under the Product Liability Law and based upon a product's defective manufacture or construction, or (3) a product liability claim brought under the Product Liability Law and based upon a defective product because it did not conform to a representation made by its manufacturer. (R.C. 2315.32(B) and (C).)

The contributory fault of a person does not bar the person as plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other persons, if the contributory fault of the plaintiff was not greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery in this action and of all other persons from whom the plaintiff does not seek recovery in this action. The court must diminish any compensatory damages recoverable by the plaintiff by an amount that is proportionately equal to the percentage of tortious conduct of the plaintiff. The contributory fault provisions of the bill do not apply to actions described in R.C. 4113.03 (see **COMMENT**). (R.C. 2315.33.)

### Allocation of damages

The bill provides that, if contributory fault is asserted and established as an affirmative defense to a negligence claim, the court in a nonjury action must make findings of fact, and the jury in a jury action must return a general verdict accompanied by answers to interrogatories, that specify the following: (1) the total amount of the compensatory damages that would have been recoverable on that negligence claim but for the tortious conduct of the plaintiff, (2) the portion of the compensatory damages that represents economic loss, (3) the portion of the compensatory damages that represents noneconomic loss, and (4) the percentage of tortious conduct attributable to all persons (see "Determining the percentages of tortious conduct attributable to a party," above (R.C. 2315.34)).

### Judgment

After the court makes its findings of fact or after the jury returns its general verdict accompanied by answers to interrogatories, both of the following apply (R.C. 2315.35 and 2315.36):

(1) The court must diminish the total amount of the compensatory damages that would have been recoverable by an amount that is proportionately equal to the percentage of tortious conduct attributable to the plaintiff. If that percentage attributable to the plaintiff is greater than the sum of the percentages attributable to all parties to the tort action from whom the plaintiff seeks recovery plus all persons from whom the plaintiff does not seek recovery, the court is required to enter judgment in favor of the defendants.

(2) The court must enter a judgment in favor of the plaintiff that imposes liability (see "Determination of joint and several liability," above) if contributory fault is asserted as an affirmative defense to a negligence claim, it is determined that the plaintiff was contributorily at fault and that contributory fault was a direct and proximate cause of the injury, death, or loss to person or property that is the subject of the tort action, and the plaintiff is entitled to recover compensatory damages from more than one party.

### Definitions

The bill defines the following terms for Chapters 2307. (civil actions) and 2315. (trial procedure) of the Revised Code unless specifically provided otherwise (R.C. 2307.011):

(1) "Conduct" means actions or omissions.

(2) "Contributory fault" means contributory negligence, other contributory tortious conduct, comparative negligence, or express or implied assumption of the risk.

(3) "Economic loss" means any of the following types of pecuniary harm:

(a) All wages, salaries, or other compensation lost as a result of an injury, death, or loss to person or property that is a subject of a tort action, including wages, salaries, or other compensation lost as of the date of a judgment and future expected lost earnings;

(b) All expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations incurred as a result of an injury, death, or loss to person that is a subject of a tort action, including expenditures for those purposes that were incurred as of the date of a judgment and expenditures for those purposes that, in the determination of the trier of fact, will be incurred in the future because of the injury, whether paid by the injured person or by another person on behalf of the injured person;

(c) All expenditures of a person whose property was injured or destroyed or of another person on behalf of the person whose property was injured or destroyed in order to repair or replace the property;

(d) Any other expenditures incurred as a result of an injury, death, or loss to person or property that is a subject of a tort action, except expenditures of the injured person, the person whose property was injured or destroyed, or another person on behalf of the injured person or the person whose property was injured or destroyed in relation to the actual preparation or presentation of the claim involved.

(4) "Intentional tort claim" means a claim alleging that a tortfeasor intentionally caused or intentionally contributed to the injury or loss to person or property or the wrongful death or that a tortfeasor knew or believed that the injury or loss to person or property or the wrongful death was substantially certain to result from the tortfeasor's conduct. As used in the bill's provisions, "intentional tort claim" does not include an intentional tort claim alleged by an employee or the employee's legal representative against the employee's employer and that arises from the tortfeasor's conduct that occurs on premises owned, leased, or supervised by the employer.

(5) "Negligence claim" means a civil action for damages for injury, death, or loss to person or property to the extent that the damages are sought or recovered based on allegation or proof of negligence.

(6) "Noneconomic loss" means nonpecuniary harm that results from an injury, death, or loss to person that is a subject of a tort action, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; mental anguish; and any other intangible loss.

(7) "Person" has the same meaning as in R.C. 1.59(C) of the Revised Code and additionally includes a political subdivision and the state.

(8) "Persons from whom the plaintiff does not seek recovery in this action" includes, but is not limited to, the following:

(a) Persons who have entered into a settlement agreement with the plaintiff;

(b) Persons whom the plaintiff has dismissed from the tort action without prejudice;

(c) Persons whom the plaintiff has dismissed from the tort action with prejudice;

(d) Persons who are not a party to the tort action whether or not that person was or could have been a party to the tort action if the name of the person has been disclosed prior to trial.

(9) "Plaintiff" includes the person for whom the plaintiff is legal representative.

(10) "Political subdivision" and "state" have the same meanings as in R.C. 2744.01.

(11) "Tort action" means a civil action for damages for injury, death, or loss to person or property. "Tort action" includes any of the following:

(a) A product liability claim brought under the Product Liability Law and based on a product's defective design or formulation as described in R.C. 2307.75;

(b) A product liability claim brought under the Product Liability Law and based on a defective product because of inadequate warning or instruction as described in R.C. 2307.76;

(c) A product liability claim that is described in (a) or (b), above, and that pursuant to R.C. 2315.47 are governed by the bill's provisions described in "**Joint and several liability**" and "**Contributory fault**," above.

"Tort action" does not include any of the following:

(a) Except as provided in clause (c), above, a product liability claim brought under the Product Liability Law and based upon a product's defective manufacture or construction or based upon a defective product because it did not conform to a representation made by its manufacturer;

(b) A civil action for damages for a breach of contract or another agreement between persons.

(12) "Trier of fact" means the jury or, in a nonjury action, the court.

## **PRODUCT LIABILITY ACTIONS**

### **Express or implied assumption of the risk as an affirmative defense**

The bill provides that express or implied assumption of the risk may be asserted as an affirmative defense to a *product liability claim* (see "**Definitions**," below), except that express or implied assumption of the risk may not be asserted as an affirmative defense to an intentional tort claim. If express or implied assumption of the risk is asserted as an affirmative defense to a product liability claim and if it is determined that the plaintiff expressly or impliedly assumed a risk and that the express or implied assumption of the risk was a direct and proximate cause of harm for which the plaintiff seeks to recover damages, the express or implied assumption of the risk is a complete bar to the recovery of those damages. (R.C. 2315.42.)

### **Contributory tortious conduct**

The bill provides that contributory negligence or *other contributory tortious conduct* may not be asserted as an affirmative defense to a *strict liability product liability claim* (see "**Definitions**," below) (R.C. 2315.43).

### **Statutory product liability claims**

The bill modifies the Product Liability Law by specifically providing that no cause of action may exist as a product liability claim unless it is defined and governed by R.C. 2307.71 to 2307.80 (R.C. 2307.82).

## STRICT LIABILITY PRODUCT LIABILITY ACTIONS

### Joint and several liability

#### Determination of joint and several liability

The bill provides that the trier of fact in a strict liability product liability action must determine the liability of the defendants and the persons from whom the plaintiff does not seek recovery in this action and the amount of damages to which the plaintiff is entitled in the action pursuant to the Product Liability Law. After the trier of fact has determined the liability of the defendants and other persons and the amount of the plaintiff's damages, the trier of fact must determine in accordance with the Product Liability Law the relative responsibility for the plaintiff's damages among the defendants who are liable to the plaintiff and the persons from whom the plaintiff does not seek recovery in this action who are liable to the plaintiff. For purposes of this provision, it is an affirmative defense for each party to the strict liability product liability action from whom the plaintiff seeks recovery in this action that a specific percentage of the responsibility for the plaintiff's damages is attributable to one or more persons from whom the plaintiff does not seek recovery in this action. Any party to the strict liability product liability action from whom the plaintiff seeks recovery in this action may raise that affirmative defense at any time before the trial of the action. (R.C. 2315.44(A).)

If the trier of fact determines in accordance with the preceding paragraph that two or more persons are liable for the plaintiff's damages in a strict liability product liability action brought pursuant to the Product Liability Law, joint and several liability must be determined as follows (R.C. 2315.44(B)):

(1) If the trier of fact determines that two or more persons are liable for the plaintiff's damages and determines that one defendant is responsible for more than 50% of those damages, that defendant is jointly and severally liable for all of the plaintiff's damages that represent economic loss.

(2) If paragraph (1), above, is applicable, each defendant whom the trier of fact determined is responsible for the plaintiff's damages and whom the trier of fact determined to be responsible for 50% or less of the plaintiff's damages is liable to the plaintiff only for that defendant's proportionate share of the plaintiff's damages that represent economic loss. The trier of fact must determine each defendant's proportionate share of the plaintiff's damages pursuant to the Product Liability Law.

In a strict liability product liability action in which the trier of fact determines that two or more persons are liable for the plaintiff's damages and in which the trier of fact determines that each defendant is responsible for 50% or

less of the plaintiff's damages, each defendant is liable to the plaintiff only for that defendant's proportionate share of the plaintiff's damages that represent economic loss. The trier of fact must determine each defendant's proportionate share of the plaintiff's damages pursuant to the Product Liability Law. (R.C. 2315.44(C).)

In a strict liability product liability action in which the trier of fact determines that two or more persons are liable for the plaintiff's damages, each defendant is liable to the plaintiff only for that defendant's proportionate share of the plaintiff's damages that represent noneconomic loss. The trier of fact must determine each defendant's proportionate share of the plaintiff's damages pursuant to the Product Liability Law. (R.C. 2315.44(D).)

### **Right of contribution among defendants**

The bill provides that if one or more persons are jointly and severally liable in a strict liability product liability action for the plaintiff's damages, there may be a right of contribution even though judgment has not been recovered against all or any of them. The right of contribution exists only in favor of a defendant that has paid more than that defendant's proportionate share of the plaintiff's damages, and that defendant's total recovery is limited to the amount paid by that defendant in excess of that defendant's proportionate share. No defendant may be compelled to make contribution beyond that defendant's own proportionate share of the plaintiff's damages. There is no right of contribution in favor of any defendant against whom an intentional tort claim has been alleged and established. (R.C. 2315.45(A).)

The bill further provides that a defendant who enters into a settlement with a claimant is not entitled to contribution from another defendant whose liability for the plaintiff's damages is not extinguished by the settlement, or in respect to any amount paid in a settlement that is in excess of what is reasonable (R.C. 2315.45(B)).

Additionally, the bill provides that a liability insurer that by payment has discharged in full or in part the liability of a defendant and has discharged in full by the payment its obligation as insurer is subrogated to the defendant's right of contribution to the extent of the amount it has paid in excess of the defendant's proportionate share of the plaintiff's damages. This provision does not limit or impair any right of subrogation arising from any other relationship (R.C. 2315.45(C).)

The bill's provisions regarding contribution do not impair any right of indemnity under existing law. If one defendant is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any

portion of the indemnity obligation. The bill's provisions regarding contribution also do not apply to breaches of trust or of other fiduciary obligations. (R.C. 2315.45(D) and (E).)

The bill provides that the proportionate shares of defendants in the plaintiff's damages must be determined pursuant to the Product Liability Law. If equity requires the collective liability of some as a group, the group will constitute a single share, and principles of equity applicable to contribution generally will apply. Whether or not judgment has been entered in an action against two or more defendants for the same plaintiff's damages, contribution may be enforced by separate action. (R.C. 2315.45(F) and (G).)

**Enforcement of right of contribution.** The bill provides that if a judgment that imposes joint and several liability has been entered in a strict liability product liability action against one or more defendants for the same plaintiff's damages, contribution may be enforced in that action by judgment in favor of one against other judgment debtors, by motion, upon notice to all parties to the action. If there is a judgment for the plaintiff's damages against the defendant seeking contribution, that defendant must commence any separate action to enforce contribution within one year after the judgment has become final by lapse of time for appeal or after appellate review. If there is no judgment for the plaintiff's damages against the defendant seeking contribution, that defendant's right of contribution is barred unless that defendant (1) has discharged by payment the common liability within the statute of limitations period applicable to the claimant's right of action against that defendant and has commenced that defendant's action for contribution within one year after payment, or (2) has agreed while an action is pending against that defendant to discharge the common liability and has paid within one year after the agreement the common liability and commenced that defendant's action for contribution. (R.C. 2315.46(A).)

The bill further provides that the recovery of a judgment for a plaintiff's damages against one defendant does not of itself discharge the other defendants from liability for the plaintiff's damages unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution. (R.C. 2315.46(B).)

**Covenant not to sue or not to enforce judgment**

The bill provides that when a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons for the same damages, both of the following apply (R.C. 2315.46(C)):

(1) The release or covenant does not discharge any of the other defendants from liability for the damages unless its terms otherwise provide, but it reduces the

claim against the other defendants to the extent of the greater of any amount stipulated by the release or the covenant or the amount of the consideration paid for it, except that the reduction of the claim against the other defendants does not apply in any case in which the reduction results in the plaintiff recovering less than the total amount of the plaintiff's damages awarded by the trier of fact and except that in any case in which the reduction does not apply the plaintiff cannot recover more than the total amount of the plaintiff's damages awarded by the trier of fact.

(2) The release or covenant discharges the person to whom it is given from all liability for contribution to any other defendant.

### **Nonapplicability of provisions**

The bill's product liability provisions (R.C. 2315.41 to 2315.46) as described above do not apply to actions described in R.C. 4113.03 (R.C. 2315.41(B)).

### **Combined product liability claims**

The bill provides that in any civil action in which the plaintiff combines a product liability claim brought under the Product Liability Law and based upon a product's defective design or formulation or a product liability claim brought under that Law and based upon a defective product because of inadequate warning or instruction with a product liability claim that is brought under the Product Liability Law and based upon either a product's defective manufacture or construction or upon a defective product because it did not conform to a representation made by its manufacturer, the entire action and all claims in the action are governed by the bill's provisions described above in "**Joint and several liability**" and "**Contributory fault**" under "**TORT ACTIONS**," above, and the provisions of the bill described above in "**Express or implied assumption of the risk as an affirmative defense**" and "**Contributory tortious conduct**" and in "**Joint and several liability**" under "**STRICT LIABILITY PRODUCT LIABILITY ACTIONS**" do not apply to the action nor to any of the claims in the action. (R.C. 2315.47.)

### **Definitions**

The bill defines the following terms for purposes of R.C. 2315.41 to 2315.46 (strict liability product liability actions) (R.C. 2315.41):

(1) "Economic loss" means any of the following types of pecuniary harm:

(a) All wages, salaries, or other compensation lost as a result of an injury, death, or loss to person or property that is a subject of a strict liability product

liability action, including wages, salaries, or other compensation lost as of the date of a judgment and future expected lost earnings;

(b) All expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations incurred as a result of an injury, death, or loss to person that is a subject of a strict liability product liability action, including expenditures for those purposes that were incurred as of the date of a judgment and expenditures for those purposes that, in the determination of the trier of fact, will be incurred in the future because of the injury, whether paid by the injured person or by another person on behalf of the injured person;

(c) All expenditures of a person whose property was injured or destroyed or of another person on behalf of the person whose property was injured or destroyed in order to repair or replace the property;

(d) Any other expenditures incurred as a result of an injury, death, or loss to person or property that is a subject of a strict liability product liability action, except expenditures of the injured person, the person whose property was injured or destroyed, or another person on behalf of the injured person or the person whose property was injured or destroyed in relation to the actual preparation or presentation of the claim involved.

(2) "Noneconomic loss" means nonpecuniary harm that results from an injury, death, or loss to person that is a subject of a strict liability product liability action, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; mental anguish; and any other intangible loss.

(3) "Other contributory tortious conduct" or "other tortious conduct" means tortious conduct that contributes to the injury, death, or loss to person or property for which the plaintiff is seeking relief, but does not include conduct constituting express assumption of the risk or implied assumption of the risk.

(4) "Product liability claim" includes: (a) a product liability claim brought under the Product Liability Law and based upon a product's defective manufacture or construction, or (b) a product liability claim brought under the Product Liability Law and based upon a defective product because it did not conform to a representation made by its manufacturer.

"Product liability claim" does not include: (a) a product liability claim brought under the Product Liability Law and based on a product's defective design or formulation, or (b) a product liability claim brought under the Product Liability

Law and based on a defective product because of inadequate warning or instruction.

(5)(a) "Strict liability product liability action" means an action that includes only product liability claims brought under the Product Liability Law and based upon either a product's defective manufacture or construction or a defective product because it did not conform to a representation made by its manufacturer.

(b) "Strict liability product liability action" does not include any action that includes a product liability claim brought under the Product Liability Law and based upon either a product's defective design or formulation or a defective product because of inadequate warning or instruction.

### **Applicability**

The bills' various sections, as amended or enacted, apply only to causes of action that accrue on or after the effective date of the act. Any cause of action that accrues prior to the effective date of the act is governed by the law in effect when the cause of action accrued. (Section 3.)

### **Miscellaneous**

The bill amends and renumbers various Revised Code sections in order to correct cross-references and create room in the Revised Code for the bill's new sections.

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## **COMMENT**

R.C. 4113.03 states:

In all actions brought to recover from an employer for personal injuries suffered by his employee or for death resulting to such employee from such personal injuries, while in the employ of such employer, arising from the negligence of such employer or any of such employer's officers, agents, or employees, it shall be held in addition to any other liability existing by law that any person in the employ of such employer, in any way having power or authority in directing or controlling any other employee of such employer, is not the fellow servant, but superior to such other employee; any person in the employ of such employer in any way having charge or control of employees in any separate branch or department shall be held to be

the superior and not the fellow servant of all employees in any other branch or department in which they are employed; any person in the employ of such employer whose duty it is to repair or inspect the ways, works, boats, wharves, plant, machinery, appliances, or tools, in any way connected with or in any way used in the business of the employer, or to receive, give, or transmit any signal, instruction, or warning to or for such employees, shall be held to be the superior and not the fellow servant of such other employees of such employer.

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## HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced Reported, S. Judiciary on Civil Justice	05-29-01	pp. 457-458
Passed Senate (22-10)	06-21-01	p. 688
Reported, H. Civil & Commercial Law	06-26-01	p. 707
	11-27-02	p. 2120

S0120-rh.124/jc

