



Sub. S.B. 117*

126th General Assembly
(As Reported by H. Judiciary)

Sens. Mallory, Dann, Fedor, Jacobson, Miller, Schuler, Amstutz, Zurz, Armbruster, Brady, Clancy, Fingerhut, Goodman, Hagan, Jordan, Mumper, Niehaus, Padgett, Schuring, Wachtmann, Wilson, Harris, Spada, Cates

BILL SUMMARY

- Allows a consumer in an action brought under the Consumer Sales Practices Act to recover the consumer's actual economic damages plus an amount not exceeding \$5,000 in noneconomic damages or the greater of three times the consumer's actual economic damages or \$200 plus an amount not exceeding \$5,000 in noneconomic damages.
- Removes the prohibition against the use of a record of a conviction, unless obtained by confession in open court, as evidence in certain civil actions.
- Provides that a final judgment entered after a trial or upon a plea of guilty that adjudges an offender guilty of an offense of violence generally precludes the offender from denying any fact essential to sustain that judgment when entered as evidence in a civil proceeding that is based on the criminal act.
- Expands the definition of "product liability claim" to include a public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public.

* *This analysis was prepared before the report of the House Judiciary Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

- Requires the claimant in a product liability action brought against a manufacturer to prove that the manufacturer designed, formulated, produced, constructed, created, assembled, or rebuilt the actual product that caused the harm for which the claimant seeks to recover compensatory damages in the action.
- Provides that proof that a manufacturer designed, formulated, produced, constructed, created, assembled, or rebuilt the *type* of product in question in a product liability claim is not proof that the manufacturer designed, formulated, produced, constructed, created, assembled, or rebuilt the *actual* defective product that is the basis of the claim.
- Provides that a manufacturer may not be held liable in a product liability action based on market share, enterprise, or industrywide liability.
- Provides that if an attorney's client is an insurance company the attorney may be compelled to testify about communications with the client that are made in the attorney-client relationship and that relate to the attorney's aiding or furthering an ongoing or future act of bad faith by the client if the person seeking disclosure of the communications makes a prima facie showing of bad faith, fraud, or criminal misconduct by the client.

CONTENT AND OPERATION

Damages under Consumer Sales Practices Act

Existing law sets forth the permissible damages in actions for violations of R.C. Chapter 1345., which deals with unfair or deceptive consumer sales practices. Generally, for violations of R.C. 1345.02 (unfair or deceptive consumer sales practices), 1345.03 (unconscionable consumer sales practices), or 1345.031 (unconscionable acts or practices concerning residential mortgages), the consumer, in an individual action, may rescind the transaction or recover the consumer's damages (general rule). If the violation is (1) an act or practice that the Attorney General by rule declared to be deceptive or unconscionable in violation of R.C. 1345.02, 1345.03, or 1345.031 before the consumer transaction on which the action is based or (2) an act or practice determined by an Ohio court to violate R.C. 1345.02, 1345.03, or 1345.031 and committed after the decision containing the determination has been made available for public inspection by the Attorney General, the consumer may rescind the transaction or recover, in an individual action, three times the amount of the consumer's actual damages or \$200,

whichever is greater, or recover damages or other appropriate relief in a class action (treble damages rule). (R.C. 1345.09(A) and (B).)

The bill specifies that under the general rule the consumer may recover in an individual action the consumer's "actual economic damages" plus an amount not exceeding \$5,000 in noneconomic damages and that under the treble damages rule the consumer may recover in an individual action three times the consumer's "actual economic damages" or \$200, whichever is greater, plus an amount not exceeding \$5,000 in noneconomic damages. The bill defines "actual economic damages" as damages for direct, incidental, or consequential pecuniary losses resulting from a violation of R.C. Chapter 1345. It explicitly excludes from the definition damages for noneconomic loss as defined in R.C. 2315.18 (not in the bill). (R.C. 1345.09(A), (B), and (G).)

The bill provides that nothing in R.C. 1345.09 precludes a consumer from also proceeding with a cause of action under any other theory of law (R.C. 1345.09(H)).

The bill specifies that R.C. 1345.09, as amended by the bill, takes effect on July 1, 2007, and to the extent constitutionally permissible applies to cases pending on that date (Section 5).

Record of criminal conviction as evidence in a subsequent civil action

Current law provides that anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law, may recover the costs of maintaining the civil action and attorney's fees if authorized by any provision of the Rules of Civil Procedure or another section of the Revised Code or under common law of this state, and may recover punitive or exemplary damages if authorized by law. Current law prohibits the use of a record of a conviction, unless obtained by confession in open court, to be used as evidence in a civil action brought pursuant to the provisions described above. (R.C. 2307.60(A)(1).)

The bill removes this prohibition and provides that a final judgment of a trial court that has not been reversed on appeal or otherwise set aside, nullified, or vacated, entered after a trial or upon a plea of guilty, but not upon a plea of no contest or the equivalent plea from another jurisdiction, that adjudges an offender guilty of an offense of violence, when entered as evidence in any subsequent civil proceeding based on the criminal act, precludes the offender from denying in the subsequent civil proceeding any fact essential to sustaining that judgment, unless the offender can demonstrate that extraordinary circumstances prevented the offender from having a full and fair opportunity to litigate the issue in the criminal proceeding or other extraordinary circumstances justify affording the offender an

opportunity to relitigate the issue. The offender may introduce evidence of the offender's pending appeal of the final judgment of the trial court, if applicable, and the court may consider that evidence in determining the liability of the offender. (R.C. 2307.60(A)(2).)

Product liability claims

Definitions

Existing law defines "product liability claim," as used in the Ohio Product Liability Act, means a claim that is asserted in a civil action pursuant to R.C. 2307.71 to 2307.80 (the Ohio Product Liability Act) and that seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the product in question, that allegedly arose from any of the following:

- (1) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product;
- (2) Any warning or instruction, or lack of warning or instruction, associated with that product;
- (3) Any failure of that product to conform to any relevant representation or warranty.

The bill provides that "product liability claim" means a claim *or cause of action* that meets the criteria set forth above. The bill also expands the definition to include a public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public. (R.C. 2307.71(A)(13).)

Existing law defines "environment," as used in the Ohio Product Liability Act, as "navigable waters, surface water, ground water, drinking water supplies, land surface, subsurface strata, and air." The bill specifies that "environment" means *only* those things. (R.C. 2307.71(A)(3).)

Proof of liability

Under existing law, a manufacturer is subject to liability for compensatory damages based on a product liability claim only if the claimant establishes, by a preponderance of the evidence, (1) that the product in question was defective in manufacture, construction, design, or formulation, was defective due to inadequate warning or instruction, or was defective because it did not conform to a representation made by its manufacturer and (2) that a defective aspect of the

product in question was a proximate cause of harm for which the claimant seeks to recover compensatory damages. If a claimant cannot establish by direct evidence that a product was defective, because the product was destroyed or for some other reason, the claimant may, consistently with the Rules of Evidence, present circumstantial or other competent evidence that establishes, by a preponderance of the evidence, that the product was defective. (R.C. 2307.73.)

The bill requires the claimant, in order to subject a manufacturer to liability for compensatory damages based on a product liability claim, to prove, in addition to the defective nature of the product and proximate cause as described in (1) and (2) above, that the manufacturer designed, formulated, produced, constructed, created, assembled, or rebuilt that actual product that was the cause of the harm for which the claimant seeks to recover compensatory damages. The bill provides that proof that a manufacturer designed, formulated, produced, constructed, created, assembled, or rebuilt the *type* of product in question is not proof that the manufacturer designed, formulated, produced, constructed, created, assembled, or rebuilt the *actual* defective product in a claim. (R.C. 2307.73(A)(3) and (C).)

Theories of liability

The bill provides that a manufacturer may not be held liable in a product liability action based on market share, enterprise, or industrywide liability (R.C. 2307.73(C)).

Legislative intent

The bill states that the General Assembly's intent in amending R.C. 2307.71 and 2307.73 is to clarify its original intent in enacting the Ohio Products Liability Law to abrogate all common law product liability causes of action, including public nuisance causes of action, regardless of how a claim is characterized. The bill also declares that the General Assembly's intent in amending R.C. 2307.73 is to follow holdings of the Ohio Supreme Court in *Horton v. Harwick Chemical Co.* (1995), 73 Ohio St.3d 679, and *Sutowski v. Eli Lilly & Co.* (1998), 82 Ohio St.3d 347, that a plaintiff in a product liability case must identify the particular manufacturer of the product that allegedly caused the plaintiff's harm in order to maintain the claim. (Sections 3 and 4.)

Attorney-client privilege

Existing law prohibits an attorney from testifying about a communication made to the attorney by a client in that relation or about the attorney's advice to a client, except with express consent of the client or, if the client is deceased, the express consent of the client's surviving spouse or the executor or administrator of the client's estate. However, if the client voluntarily testifies or is deemed by R.C.

2151.421 to have waived the testimonial privilege, the attorney may be compelled to testify on the same subject.

The testimonial privilege does not apply concerning a communication between an attorney and a deceased client if the communication is relevant to a dispute between parties who claim through the deceased client, regardless of whether (1) the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased client when the deceased client executed a document that is the basis of the dispute or (2) the deceased client was a victim of fraud, undue influence, or duress when the deceased client executed a document that is the basis of the dispute. (R.C. 2317.02(A).)

The bill adds that if the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications with the client made in the attorney-client relationship if the communications relate to the attorney's aiding or furthering an ongoing or future act of bad faith by the client and if the person seeking disclosure makes a prima facie showing of bad faith, fraud, or criminal misconduct by the client. The bill states that the General Assembly declares that the attorney-client privilege is a substantial right and that it is the public policy of Ohio that all communications between an attorney and a client in that relation are worthy of the protection of privilege, and further that where it is alleged that the attorney aided or furthered an ongoing or future commission of insurance bad faith by the client, that the party seeking waiver of the privilege must make a prima facie showing that the privilege should be waived and the court should conduct an in camera inspection of disputed communications. The bill states that the common law is modified accordingly to provide for judicial review regarding the privilege. (R.C. 2317.02(A)(2); Section 6.)

HISTORY

ACTION	DATE
Introduced	04-01-05
Reported, S. Judiciary on Civil Justice	10-26-05
Passed Senate (31-0)	10-26-05
Reported, H. Judiciary	---

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