

SENATE BILL REPORT

SB 5986

As of February 24, 2005

Title: An act relating to the learned intermediary doctrine for prescription products.

Brief Description: Revising prescription drug product liability.

Sponsors: Senators Kline, Franklin, Keiser and Kohl-Welles.

Brief History:

Committee Activity: Judiciary: 2/24/05.

SENATE COMMITTEE ON JUDICIARY

Staff: Lidia Mori (786-7755)

Background: In general, this state's product liability law holds a manufacturer liable for harm caused by its failure to adequately instruct and/or warn consumers regarding its products. In 1978, however, the state Supreme Court recognized an exception to this general approach for products available only by prescription. In the case of *Terhune v. A.H. Robins Co.*, the court held that, "the duty of a manufacturer to warn of dangers involved in the use of a product is satisfied if he gives adequate warning to the physician who prescribes it." This is known as the "learned intermediary doctrine," and is consistent with holdings in a majority of states. It is premised on the notion that to a large extent, a patient relies on the independent judgment of his or her doctor in determining which prescriptions to take.

Some suggest that the emergence of direct-to-consumer advertising of prescription products has undermined the reasons given in support of the learned intermediary doctrine. Proponents of this legislation contend that such advertising interjects itself between doctors and patients, prompting patients to seek prescriptions independent of the judgment of their doctors, and treating the patient as the primary decision-maker with regard to the product which is ultimately purchased.

This reasoning led the New Jersey Supreme Court, in August 1999, to abrogate the learned intermediary doctrine as applied to prescription drugs advertised directly to consumer. In becoming the first state court to do so, it held that, "prescription drug manufacturers that market their products directly to consumers should be subject to claims by consumers if their advertising fails to provide adequate warning of the product's dangerous propensities."

Summary of Bill: The intent of the Legislature to create an exception to the learned intermediary doctrine for prescription products advertised directly to consumers is stated. Where a consumer has sought a prescription product in response to an advertisement for that product, the manufacturer of the product, if it would otherwise be liable for harm caused by that product, is not relieved of that liability solely because the manufacturer warned the practitioner who prescribed the product of its proper use and attendant dangers.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: Since the early 90's, there has been a flood of advertising about prescription drugs. Doctors face so much daily pressure, it's hard for them to know all about all the drugs. The FDA spends more money on helping to market drugs than regulating their safety. The "learned intermediary doctrine" (LID) is still intact, this bill does not remove it. It can still be a complete defense in some situations. The warnings provided in advertisements may create a defense. Patients are often angry if their doctor doesn't prescribe the medication they want. Health care is a busy field and it takes a lot of time to explain why one medication is not suitable for a patient.

Testimony Against: One half of the cost of every drug is due to the cost of liability. Only New Jersey has overturned the LID. A physician is in the best place to know the dangers of medication and to disclose them to patients. These are highly regulated products and advertising is highly regulated also. The physician has the training and knowledge to understand the risks and dangers associated with medications.

Who Testified: PRO: Larry Shannon, Washington State Trial Lawyers Association; Judy Zerzan, M.D.

CON: Cliff Webster, Pharmaceutical Research and Manufacturers of America.