

By: Representative Formby

To: Judiciary A

HOUSE BILL NO. 88

1 AN ACT TO AMEND SECTION 11-1-63, MISSISSIPPI CODE OF 1972, TO
2 PROVIDE THAT THE MANUFACTURER OR SELLER OF A PRODUCT SHALL NOT BE
3 LIABLE IN A PRODUCTS LIABILITY ACTION IF THE PRODUCT HAS NOT BEEN
4 USED IN THE MANNER FOR WHICH IT WAS DESIGNED; AND FOR RELATED
5 PURPOSES.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

7 **SECTION 1.** Section 11-1-63, Mississippi Code of 1972, is
8 amended as follows:

9 11-1-63. In any action for damages caused by a product
10 except for commercial damage to the product itself:

11 (a) The manufacturer or seller of the product shall not
12 be liable if the claimant does not prove by the preponderance of
13 the evidence that at the time the product left the control of the
14 manufacturer or seller:

15 (i) 1. The product was defective because it
16 deviated in a material way from the manufacturer's specifications
17 or from otherwise identical units manufactured to the same
18 manufacturing specifications, or

19 2. The product was defective because it
20 failed to contain adequate warnings or instructions, or

21 3. The product was designed in a defective
22 manner, or

23 4. The product breached an express warranty
24 or failed to conform to other express factual representations upon
25 which the claimant justifiably relied in electing to use the
26 product; and

27 (ii) The defective condition rendered the product
28 unreasonably dangerous to the user or consumer; and



29 (iii) The defective and unreasonably dangerous
30 condition of the product proximately caused the damages for which
31 recovery is sought.

32 (b) A product is not defective in design or formulation
33 if the harm for which the claimant seeks to recover compensatory
34 damages was caused by an inherent characteristic of the product
35 which is a generic aspect of the product that cannot be eliminated
36 without substantially compromising the product's usefulness or
37 desirability and which is recognized by the ordinary person with
38 the ordinary knowledge common to the community.

39 (c) (i) In any action alleging that a product is
40 defective because it failed to contain adequate warnings or
41 instructions pursuant to paragraph (a)(i)2 of this section, the
42 manufacturer or seller shall not be liable if the claimant does
43 not prove by the preponderance of the evidence that at the time
44 the product left the control of the manufacturer or seller, the
45 manufacturer or seller knew or in light of reasonably available
46 knowledge should have known about the danger that caused the
47 damage for which recovery is sought and that the ordinary user or
48 consumer would not realize its dangerous condition.

49 (ii) An adequate product warning or instruction is
50 one that a reasonably prudent person in the same or similar
51 circumstances would have provided with respect to the danger and
52 that communicates sufficient information on the dangers and safe
53 use of the product, taking into account the characteristics of,
54 and the ordinary knowledge common to an ordinary consumer who
55 purchases the product; or in the case of a prescription drug,
56 medical device or other product that is intended to be used only
57 under the supervision of a physician or other licensed
58 professional person, taking into account the characteristics of,
59 and the ordinary knowledge common to, a physician or other
60 licensed professional who prescribes the drug, device or other
61 product.



62 (d) In any action alleging that a product is defective
63 pursuant to paragraph (a) of this section, the manufacturer or
64 seller shall not be liable if the claimant (i) had knowledge of a
65 condition of the product that was inconsistent with his safety;
66 (ii) appreciated the danger in the condition; and (iii)
67 deliberately and voluntarily chose to expose himself to the danger
68 in such a manner to register assent on the continuance of the
69 dangerous condition.

70 (e) In any action alleging that a product is defective
71 pursuant to paragraph (a)(i)2 of this section, the manufacturer or
72 seller shall not be liable if the danger posed by the product is
73 known or is open and obvious to the user or consumer of the
74 product, or should have been known or open and obvious to the user
75 or consumer of the product, taking into account the
76 characteristics of, and the ordinary knowledge common to, the
77 persons who ordinarily use or consume the product.

78 (f) In any action alleging that a product is defective
79 because of its design pursuant to paragraph (a)(i)3 of this
80 section, the manufacturer or product seller shall not be liable if
81 the claimant does not prove by the preponderance of the evidence
82 that at the time the product left the control of the manufacturer
83 or seller:

84 (i) The manufacturer or seller knew, or in light
85 of reasonably available knowledge or in the exercise of reasonable
86 care should have known, about the danger that caused the damage
87 for which recovery is sought; and

88 (ii) The product failed to function as expected
89 and there existed a feasible design alternative that would have to
90 a reasonable probability prevented the harm. A feasible design
91 alternative is a design that would have to a reasonable
92 probability prevented the harm without impairing the utility,
93 usefulness, practicality or desirability of the product to users
94 or consumers.



95 (g) (i) The manufacturer of a product who is found
96 liable for a defective product pursuant to subsection (a) shall
97 indemnify a product seller for the costs of litigation, any
98 reasonable expenses, reasonable attorney's fees and any damages
99 awarded by the trier of fact unless the seller exercised
100 substantial control over that aspect of the design, testing,
101 manufacture, packaging or labeling of the product that caused the
102 harm for which recovery of damages is sought; the seller altered
103 or modified the product, and the alteration or modification was a
104 substantial factor in causing the harm for which recovery of
105 damages is sought; the seller had actual knowledge of the
106 defective condition of the product at the time he supplied same;
107 or the seller made an express factual representation about the
108 aspect of the product which caused the harm for which recovery of
109 damages is sought.

110 (ii) Subparagraph (i) shall not apply unless the
111 seller has given prompt notice of the suit to the manufacturer
112 within thirty (30) days of the filing of the complaint against the
113 seller.

114 (h) In any action for products liability, the
115 manufacturer or seller shall not be liable if the product has not
116 been used in the manner for which the product was designed.

117 (i) Nothing in this section shall be construed to
118 eliminate any common law defense to an action for damages caused
119 by a product.

120 **SECTION 2.** This act shall take effect and be in force from
121 and after July 1, 2002.

