

By: Representatives Ellington, Robertson

To: Judiciary A

HOUSE BILL NO. 440

1 AN ACT TO AMEND SECTION 11-1-63, MISSISSIPPI CODE OF 1972, TO
2 PROVIDE THAT THE SELLER OF A PRODUCT WHO IS NOT THE MANUFACTURER
3 SHALL NOT BE LIABLE FOR CERTAIN MANUFACTURING DEFECTS; AND FOR
4 RELATED PURPOSES.

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

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

8 11-1-63. In any action for damages caused by a product
9 except for commercial damage to the product itself:

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

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

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

20 3. The product was designed in a defective
21 manner; or

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

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



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

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

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

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



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

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

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

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

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



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

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

113 (h) The seller of a product who is not the manufacturer
114 shall not be liable for any latent defect in a product unless the
115 seller has knowledge of the defect or unless the defect violates
116 an express warranty made by the seller.

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.

