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To: Judiciary

SENATE BILL NO. 2644

1 AN ACT TO AMEND SECTION 11-1-63, MISSISSIPPI CODE OF 1972, TO
2 PROVIDE THAT A PRODUCT SELLER OTHER THAN A MANUFACTURER SHALL NOT
3 BE LIABLE FOR A LATENT DEFECT IF THE SELLER IS A MERE CONDUIT WHO
4 PURCHASED THE PRODUCT FROM A REPUTABLE MANUFACTURER; AND FOR
5 RELATED 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. Subject to the provisions of Section 11-1-64, in
10 any action for damages caused by a product except for commercial
11 damage to the product itself:

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

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

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

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

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



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

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

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

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

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



61 licensed professional who prescribes the drug, device or other
62 product.

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

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

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

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

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



94 usefulness, practicality or desirability of the product to users
95 or consumers.

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

111 (ii) Subparagraph (i) shall not apply unless the
112 seller has given prompt notice of the suit to the manufacturer
113 within ninety (90) days of the service of the complaint against
114 the seller.

115 (h) In any action alleging that a product is defective
116 pursuant to paragraph (a) of this section, a product seller other
117 than a manufacturer shall not be liable for a latent defect if the
118 seller is a mere conduit who purchased the product from a
119 reputable manufacturer. It is the intent of this section to
120 insulate innocent sellers who are not actively negligent from
121 forum driven lawsuits. A product seller shall not be considered
122 to have failed to exercise reasonable care with respect to a
123 product based upon an alleged failure to inspect the product if
124 there was no reasonable opportunity to inspect the product, or if
125 the inspection in the exercise of reasonable care would not have
126 revealed that the product was defective.



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

130 **SECTION 2.** This act shall take effect and be in force from
131 and after July 1, 2003.

