

By: Senator(s) Ross

To: Judiciary, Division A

COMMITTEE SUBSTITUTE
FOR
SENATE BILL NO. 2037

1 AN ACT TO AMEND SECTION 11-1-63, MISSISSIPPI CODE OF 1972, TO
2 LIMIT SUITS BASED ON INJURIES THAT ARISE OUT OF THE USE OF A
3 PRODUCT TO PROVIDE AN EXCLUSIVE REMEDY; AND FOR RELATED PURPOSES.

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

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

7 11-1-63. * * * (1) In any action for damages caused by a
8 product except for commercial damage to the product itself:

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

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

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

19 3. The product was designed in a defective
20 manner, or

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

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

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

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

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

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

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

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

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

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

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

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

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

112 (h) In any action alleging that a product is defective
113 pursuant to paragraph (a) of this subsection, the seller of a
114 product other than the manufacturer shall not be liable unless the
115 seller exercised substantial control over that aspect of the
116 design, testing, manufacture, packaging or labeling of the product
117 that caused the harm for which recovery of damages is sought; or
118 the seller altered or modified the product, and the alteration or
119 modification was a substantial factor in causing the harm for
120 which recovery of damages is sought; or the seller had actual or
121 constructive knowledge of the defective condition of the product
122 at the time he supplied the product. It is the intent of this
123 section to immunize innocent sellers who are not actively
124 negligent, but instead are mere conduits of a product.

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

128 (2) For the purposes of this section, "any action for
129 damages" means any action against a manufacturer or seller for
130 recovery of damages arising out of personal injury, death or
131 property damage allegedly caused by a defective product whether
132 the action is based in strict tort liability, strict products
133 liability, negligence, fraudulent misrepresentation, negligent
134 misrepresentation, deceptive advertising, conspiracy to defraud,
135 breach of express or implied warranty, or any other theory or
136 combination of theories.

137 **SECTION 2.** This act shall apply to all causes of action
138 filed or pending on or after the effective date of Senate Bill No.
139 2037, 2006 Regular Session.

140 **SECTION 3.** This act shall take effect and be in force from
141 and after its passage.