

By: Senator(s) Ross

To: Judiciary, Division A

## 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, misrepresentation, breach of express or  
134 implied warranty, or any other theory or combination of theories.

135       **SECTION 2.** This act shall take effect and be in force from  
136 and after its passage.