GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

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HOUSE BILL 637

Short Title: Products Liability Amendments. (Public)

Sponsors: Representatives Neely; McComas, Russell, Snowden, Robinson, Shubert, Hurley, and Miner.

Referred to: Judiciary II.

March 30, 1995

A BILL TO BE ENTITLED

AN ACT TO AMEND THE LAW REGARDING PRODUCTS LIABILITY.

The General Assembly of North Carolina enacts:

Section 1. Chapter 99B of the General Statutes reads as rewritten:

"CHAPTER 99B.

"PRODUCTS LIABILITY.

"§ 99B-1. Definitions.

When used in this Chapter, unless the context otherwise requires:

(1) 'Claimant' means a person or other entity asserting a claim and, if said claim is asserted on behalf of an estate, an incompetent or a minor, 'claimant' includes plaintiff's decedent, ~~guardian~~ guardian, or guardian ad litem.

(2) 'Manufacturer' means a person or entity who designs, assembles, fabricates, produces, constructs or otherwise prepares a product or component part of a product prior to its sale to a user or consumer, including a seller owned in whole or significant part by the manufacturer or a seller owning the manufacturer in whole or significant part.

(3) 'Product liability action' includes any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, ~~packaging~~ packaging, or labeling of any product.

(4) 'Seller' includes a retailer, wholesaler, or distributor, and means any individual or entity engaged in the business of selling a product, whether such sale is for resale or for use or consumption. 'Seller' also includes a lessor or bailor engaged in the business of leasing or bailment of a product.

"**§ 99B-1.1. Strict liability.**

This Chapter is not intended to establish, approve, or endorse the common-law principles of strict liability in product liability cases.

"**§ 99B-2. ~~Liability of seller and manufacturer.~~ Claims based on breach of an express or implied warranty.**

(a) No product liability action, except an action for breach of express warranty, shall be commenced or maintained against any seller when the product was acquired and sold by the seller in a sealed container or when the product was acquired and sold by the seller under circumstances in which the seller was afforded no reasonable opportunity to inspect the product in such a manner that would have or should have, in the exercise of reasonable care, revealed the existence of the condition complained of, unless the seller damaged or mishandled the product while in his possession; provided, that the provisions of this section shall not apply if the manufacturer of the product is not subject to the jurisdiction of the courts of this State or if such manufacturer has been judicially declared insolvent.

(b) A claimant who is a buyer, as defined in the Uniform Commercial Code, of the product involved, or who is a member or a guest of a member of the family of the buyer, a guest of the buyer, or an employee of the buyer may bring a product liability action directly against the manufacturer of the product involved for breach of implied warranty; and the lack of privity of contract shall not be grounds for the dismissal of such action.

"**§ 99B-3. Alteration or modification of product.**

(a) No manufacturer or seller of a product shall be held liable in any product liability action where a proximate cause of the personal injury, ~~death~~ death, or damage to property was either an alteration or modification of the product by a party other than the manufacturer or seller, which alteration or modification occurred after the product left the control of such manufacturer or such seller unless:

(1) The alteration or modification was in accordance with the instructions or specifications of such manufacturer or such seller; or

(2) The alteration or modification was made with the express consent of such manufacturer or such seller.

(b) For the purposes of this section, alteration or modification includes changes in the design, formula, function, or use of the product from that originally designed, tested,

or intended by the manufacturer. It includes failure to observe routine care and maintenance, but does not include ordinary wear and tear.

"**§ 99B-4. Injured parties' knowledge or reasonable care.**

No manufacturer or seller shall be held liable in any product liability action if:

(1) The use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warnings delivered with, appearing on, or attached to the product or on its original container or wrapping, if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings; ~~provided, that in the case of prescription drugs or devices the adequacy of the warning by the manufacturer shall be determined by the prescribing information made available by the manufacturer to the health care practitioner;~~ or

(2) The user knew of or discovered a defect or ~~unreasonably~~ dangerous condition of the product ~~and was aware of the danger,~~ that was inconsistent with the user's safety; and deliberately and voluntarily exposed himself or herself to the danger; ~~and nevertheless proceeded unreasonably to make use of the product and was injured by or caused injury with that product;~~ or

(3) The claimant failed to exercise reasonable care under the circumstances in his use of the product, and such failure was a proximate cause of the occurrence that caused injury or damage to the claimant.

"**§ 99B-5. Claims based on failure to give adequate warning or instruction.**

(a) Subject to the provisions of subsections (b) and (c) of this section, no manufacturer or seller of a product shall be held liable in any product liability action that asserts a claim based upon inadequate warning or instruction unless:

(1) At the time the product left the control of the manufacturer or seller, the product contained an inadequate warning or instruction that created an unreasonably dangerous and defective condition that the manufacturer knew or in the exercise of ordinary care under the circumstances similar to those shown by the evidence should have known posed a substantial risk of harm to a reasonably foreseeable consumer or user of the product; and

(2) The failure to provide adequate warnings or instruction would cause harm of the type for which the claimant seeks to recover compensatory damages.

(b) A product is not defective due to lack of warning or instruction or inadequate warning or instruction as a result of the failure of the manufacturer to warn about an open and obvious risk or a risk that is a matter of common knowledge.

(c) A prescription drug is not defective due to inadequate warning or instruction if its manufacturer provides adequate warning and instruction to the physician or other legally authorized person who prescribes or dispenses that prescription drug for the

claimant, unless the United States Food and Drug Administration requires that the warning be given by the manufacturer directly to the consumer.

"**§ 99B-6. Claims based on negligent or defective design.**

(a) No manufacturer or seller of a product shall be held liable in any product liability action that asserts a claim based upon negligent or defective design or formulation of the product unless the claimant proves that, at the time the product left the control of its manufacturer, a practical and feasible alternative design or formulation was available that would have prevented the harm without substantially impairing the usefulness, practicality, or desirability of the product to users or consumers. For purposes of this subsection, an alternative design or formulation is practical and feasible if the technical, medical, or scientific knowledge relating to the safety of the alternative design or formulation was, at the time the product left the control of the manufacturer, available and developed for commercial use in the same or similar marketplace.

(b) Subject to subsections (e) and (f) of this section, the design or formulation of a product is not defective unless the claimant proves either of the following:

(1) When it left the control of its manufacturer, the foreseeable risks associated with its design or formulation exceeded the benefits associated with that design or formulation; or

(2) It is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.

(c) As used in subsection (b) of this section, the foreseeable risks associated with the design or formulation of a product shall be determined by considering factors including, but not limited to, the following:

(1) The nature and magnitude of the risks of harm associated with that design or formulation in light of the intended and reasonably foreseeable uses, modifications, or alterations of the product.

(2) The likely awareness of product users, whether based on warnings, general knowledge, or otherwise, of those risks of harm.

(3) The extent to which the design or formulation conformed to any applicable government or private standard that was in effect when the product left the control of its manufacturer.

(4) The extent to which the labeling for a prescription drug approved by the United States Food and Drug Administration conformed to any applicable government or private standard that was in effect when the product left the control of its manufacturer.

(d) As used in subsection (b) of this section, the benefits associated with the design or formulation of a product shall be determined by considering factors including, but not limited to, the following:

(1) The intended or actual utility of the product, including any performance or safety advantages associated with that design or formulation.

(2) The technical and economic feasibility, when the product left the control of the manufacturer, of using an alternative design or formulation.

(3) The nature and magnitude of any foreseeable risks associated with that alternative design or formulation.

(e) A prescription drug is not defective in design or formulation because some aspect of it is unavoidably unsafe, if the manufacturer of the prescription drug provides adequate warning and instruction pursuant to G.S. 99B-5(c).

(f) No manufacturer or seller of a product shall be held liable in any product liability action if the harm for which the claimant seeks to recover damages was caused by an inherent characteristic of the product that is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and that is recognized by the ordinary person with the ordinary knowledge common to the community.

(g) As used in subsection (e) of this section, 'unavoidably unsafe' means that, in the state of technical, scientific, and medical knowledge at the time the product left the control of its manufacturer, an aspect of that product was incapable of being made safe.

"**§ 99B-7. Standard of care when performing blood-related services.**

Notwithstanding the provisions of Chapter 130A of the General Statutes, in an action for damages for personal injury or death arising out of the furnishing of or the failure to furnish medical services in the performance of blood-related services or the procurement or distribution of blood-related products by the American Red Cross, a licensed hospital, or blood providers licensed by the United States Food and Drug Administration (FDA), the defendant shall not be held liable for the payment of damages unless the trier of fact is satisfied by the greater weight of the evidence that the care of the health care provider was not in accordance with the applicable standards mandated by the FDA and the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the act or omission giving rise to the cause of action.

"**§ 99B-10. Immunity for donated food.**

(a) Notwithstanding the provisions of Article 12 of Chapter 106 of the General Statutes, or any other provision of law, any person, including but not limited to a seller, farmer, processor, distributor, ~~wholesaler~~ wholesaler, or retailer of food, who donates an item of food for use or distribution by a nonprofit organization or nonprofit corporation shall not be liable for civil damages or criminal penalties resulting from the nature, age, condition, or packaging of the donated food, unless an injury is caused by the gross negligence, recklessness, or intentional misconduct of the donor.

(b) Notwithstanding any other provision of law, any nonprofit organization or nonprofit corporation that uses or distributes food that has been donated to it for such use or distribution shall not be liable for civil damages or criminal penalties resulting from the nature, age, condition, or packaging of the donated food, unless an injury is caused by the gross negligence, recklessness, or intentional misconduct of the organization or corporation.

"**§ 99B-11. ~~Products liability lawsuits involving~~ Claims based on defective design of firearms.**

(a) In a products liability action involving firearms or ammunition, whether a firearm or ammunition shell is defective in design shall not be based on a comparison or weighing of the benefits of the product against the risk of injury, damage, or death posed by its potential to cause that injury, damage, or death when discharged.

(b) In a products liability action brought against a firearm or ammunition manufacturer, importer, distributor, or retailer that alleges a design defect, the burden is on the plaintiff to prove, in addition to any other elements required to be proved:

(1) That the actual design of the firearm or ammunition was defective, causing it not to function in a manner reasonably expected by an ordinary consumer of firearms or ammunition; and

(2) That any defective design was the proximate cause of the injury, damage, or death."

Sec. 2. This act is effective upon ratification and applies to any civil action based on a product liability claim that arises on or after that date.