GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

H **2**

HOUSE BILL 637
Committee Substitute Favorable 5/8/95

Short Title: Products Liability Amendments. (Public)

Sponsors:

Referred to:

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.**

There shall be no strict liability in tort in product liability actions.

"**§ 99B-2. ~~Liability of seller and manufacturer.~~ Seller's opportunity to inspect; privity requirements for warranty claims.**

(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~~ 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 safe use of the product, unreasonably and voluntarily exposed himself, herself, or others 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~~ the use of the product, and such failure was a proximate cause of the occurrence that caused the injury or damage ~~to the claimant.~~ complained of.

"**§ 99B-5. Claims based on inadequate warning or instruction.**

(a) 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 the claimant proves that the manufacturer or seller acted unreasonably in failing to provide such warning or instruction, that the failure to provide adequate warning or instruction was a proximate cause of the harm for which damages are sought, and also proves one of the following:

(1) At the time the product left the control of the manufacturer or seller, the product, without an adequate warning or instruction, created an unreasonably dangerous condition that the manufacturer or seller knew or in the exercise of ordinary care should have known posed a substantial risk of harm to a reasonably foreseeable claimant.

(2) After the product left the control of the manufacturer or seller, the manufacturer or seller knew or in the exercise of ordinary care should have known that the product posed a substantial risk of harm to a reasonably foreseeable user or consumer and failed to take reasonable steps to give adequate warning or instruction or to take other reasonable action under the circumstances.

(b) Notwithstanding subsection (a) of this section, no manufacturer or seller of a product shall be held liable in any product liability action for failing to warn about an open and obvious risk or a risk that is a matter of common knowledge.

(c) Notwithstanding subsection (a) of this section, no manufacturer or seller of a prescription drug shall be liable for failing to provide a warning or instruction directly to a consumer if an adequate warning or instruction has been provided 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 such direct consumer warning or instruction.

"**§ 99B-6. Claims based on inadequate design or formulation.**

(a) No manufacturer or seller of a product shall be held liable in any product liability action for the inadequate design or formulation of the product unless the claimant proves that at the time of its manufacture the manufacturer unreasonably failed to adopt a safer, practical, feasible, and otherwise reasonable alternative design or formulation that could then have been reasonably adopted and that would have prevented or substantially reduced the risk of harm without substantially impairing the usefulness, practicality, or desirability of the product.

(b) In determining whether the manufacturer unreasonably failed to adopt an alternative design or formulation of a product, the factors to be considered shall include, but are 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 standard that was in effect when the product left the control of its manufacturer.

(4) The extent to which the labeling for a prescription or nonprescription 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.

(5) The utility of the product, including the performance, safety, and other advantages associated with that design or formulation.

(6) The technical, economic, and practical feasibility of using an alternative design or formulation at the time of manufacture.

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

(c) No manufacturer or seller of a product shall be held liable in any product liability action for a claim under this section based upon an inherent characteristic 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.

(d) No manufacturer or seller of a prescription drug shall be liable in a product liability action on account of some aspect of the prescription drug that is unavoidably unsafe, if an adequate warning and instruction has been provided pursuant to G.S. 99B-5(c). As used in this subsection, 'unavoidably unsafe' means that, in the state of technical, scientific, and medical knowledge generally prevailing at the time the product left the control of its manufacturer, an aspect of that product that caused the claimant's harm was not reasonably capable of being made safe.

"**§ 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. The provisions of this act are severable. If any portion of this act is declared unconstitutional or the application of this act to any person or circumstances is held invalid, the remaining portions and their applicability to any person or circumstances are valid.

Sec. 3. This act shall not apply to product liability actions for injury to or the death of a person resulting from exposure to asbestos if that exposure occurred prior to October 1, 1995.

Sec. 4. This act shall not apply to product liability actions for injury to or the death of a person resulting from any silicone gel breast implant implanted prior to October 1, 1995.

Sec. 5. This act becomes effective October 1, 1995, and applies to causes of action arising on or after that date.