

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

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HOUSE BILL 637

Committee Substitute Favorable 5/8/95

Senate Judiciary I/Constitution Committee Substitute Adopted 6/29/95

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.

- 1 (3) 'Product liability action' includes any action brought for or on account  
2 of personal injury, death or property damage caused by or resulting  
3 from the manufacture, construction, design, formulation, development  
4 of standards, preparation, processing, assembly, testing, listing,  
5 certifying, warning, instructing, marketing, selling, advertising,  
6 ~~packaging, packaging,~~ or labeling of any product.
- 7 (4) 'Seller' includes a retailer, wholesaler, or distributor, and means any  
8 individual or entity engaged in the business of selling a product,  
9 whether such sale is for resale or for use or consumption. 'Seller' also  
10 includes a lessor or bailor engaged in the business of leasing or bailment  
11 of a product.

12 **"§ 99B-1.1. Strict liability.**

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

14 **"§ 99B-1.2. Breach of warranty.**

15 Nothing in this act shall preclude a product liability action that otherwise exists  
16 against a manufacturer or seller for breach of warranty. The defenses provided for in this  
17 Chapter shall apply to claims for breach of warranty unless expressly excluded under this  
18 Chapter.

19 **"§ 99B-2. ~~Liability of seller and manufacturer.~~ Seller's opportunity to inspect; privity**  
20 **requirements for warranty claims.**

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

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

36 **"§ 99B-3. Alteration or modification of product.**

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

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

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

3 (b) For the purposes of this section, alteration or modification includes changes in  
4 the design, formula, function, or use of the product from that originally designed, tested,  
5 or intended by the manufacturer. It includes failure to observe routine care and  
6 maintenance, but does not include ordinary wear and tear.

7 **"§ 99B-4. ~~Injured parties' knowledge~~ Knowledge or reasonable care.**

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

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

18 (2) The user knew of or discovered a defect or unreasonably dangerous  
19 condition of the product and was aware of the danger, that was  
20 inconsistent with the safe use of the product, and then unreasonably and  
21 voluntarily exposed himself or herself to the danger, and nevertheless  
22 proceeded unreasonably to make use of the product and was injured by or  
23 caused injury with that product; or

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

28 **"§ 99B-5. Claims based on inadequate warning or instruction.**

29 (a) No manufacturer or seller of a product shall be held liable in any product  
30 liability action that asserts a claim based upon inadequate warning or instruction unless  
31 the claimant proves that the manufacturer or seller acted unreasonably in failing to  
32 provide such warning or instruction, that the failure to provide adequate warning or  
33 instruction was a proximate cause of the harm for which damages are sought, and also  
34 proves one of the following:

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

40 (2) After the product left the control of the manufacturer or seller, the  
41 manufacturer or seller became aware of or in the exercise of ordinary  
42 care should have known that the product posed a substantial risk of  
43 harm to a reasonably foreseeable user or consumer and failed to take

1           reasonable steps to give adequate warning or instruction or to take other  
2           reasonable action under the circumstances.

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

6       (c) Notwithstanding subsection (a) of this section, no manufacturer or seller of a  
7 prescription drug shall be liable in a products liability action for failing to provide a  
8 warning or instruction directly to a consumer if an adequate warning or instruction has  
9 been provided to the physician or other legally authorized person who prescribes or  
10 dispenses that prescription drug for the claimant unless the United States Food and Drug  
11 Administration requires such direct consumer warning or instruction to accompany the  
12 product.

13 **"§ 99B-6. Claims based on inadequate design or formulation.**

14       (a) No manufacturer of a product shall be held liable in any product liability action  
15 for the inadequate design or formulation of the product unless the claimant proves that at  
16 the time of its manufacture the manufacturer acted unreasonably in designing or  
17 formulating the product, that this conduct was a proximate cause of the harm for which  
18 damages are sought, and also proves one of the following:

19           (1) At the time the product left the control of the manufacturer, the  
20 manufacturer unreasonably failed to adopt a safer, practical, feasible,  
21 and otherwise reasonable alternative design or formulation that could  
22 then have been reasonably adopted and that would have prevented or  
23 substantially reduced the risk of harm without substantially impairing  
24 the usefulness, practicality, or desirability of the product.

25           (2) At the time the product left the control of the manufacturer, the design  
26 or formulation of the product was so unreasonable that a reasonable  
27 person, aware of the relevant facts, would not use or consume a product  
28 of this design.

29       (b) In determining whether the manufacturer acted unreasonably under subsection  
30 (a) of this section, the factors to be considered shall include, but are not limited to, the  
31 following:

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

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

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

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

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

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

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

7           (c)    No manufacturer of a product shall be held liable in any product liability action  
8           for a claim under this section to the extent that it is based upon an inherent characteristic  
9           of the product that cannot be eliminated without substantially compromising the product's  
10           usefulness or desirability and that is recognized by the ordinary person with the ordinary  
11           knowledge common to the community.

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

19           (e)    Nothing in this section precludes an action against a manufacturer based on  
20           inadequate design or formulation under the provisions of G.S. 99B-5.

21   **"§ 99B-10. Immunity for donated food.**

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

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

35   **"§ 99B-11. ~~Products liability lawsuits involving~~ Claims based on defective design of**  
36           **firearms.**

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

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

- 1           (1) That the actual design of the firearm or ammunition was defective,  
2           causing it not to function in a manner reasonably expected by an  
3           ordinary consumer of firearms or ammunition; and  
4           (2) That any defective design was the proximate cause of the injury,  
5           damage, or death."  
6           Sec. 2. G.S. 1-50(6) reads as rewritten:  
7           "(6) No action for the recovery of damages for personal injury, death or  
8           damage to property based upon or arising out of any alleged defect or  
9           any failure in relation to a product shall be brought more than six years  
10           after the date of initial purchase for use or consumption. This provision  
11           shall have no application to claims arising out of a disease."  
12           Sec. 3. The provisions of this act are severable. If any portion of this act is  
13           declared unconstitutional or the application of this act to any person or circumstances is  
14           held invalid, the remaining portions and their applicability to any person or circumstances  
15           are valid.  
16           Sec. 4. Section 1 of this act shall not apply to product liability actions for  
17           injury to or the death of a person resulting from any silicone gel breast implant implanted  
18           prior to January 1, 1996.  
19           Sec. 5. Sections 1 and 4 of this act become effective January 1, 1996, and  
20           apply to causes of action arising on or after that date. The remainder of this act is  
21           effective upon ratification. Section 2 of this act applies to causes of actions pending or  
22           arising on or after the effective date.