

SENATE No. 145

The Commonwealth of Massachusetts

PRESENTED BY:

Patrick M. O'Connor

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act protecting innocent sellers.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	
<i>Patrick M. O'Connor</i>	<i>Plymouth and Norfolk</i>	
<i>Richard J. Ross</i>	<i>Norfolk, Bristol and Middlesex</i>	<i>1/25/2017</i>
<i>Ryan C. Fattman</i>	<i>Worcester and Norfolk</i>	<i>1/31/2017</i>

SENATE No. 145

By Mr. O'Connor, a petition (accompanied by bill, Senate, No. 145) of Patrick M. O'Connor, Richard J. Ross and Ryan C. Fattman for legislation to establish nonmanufacturing seller liability. Consumer Protection and Professional Licensure.

The Commonwealth of Massachusetts

**In the One Hundred and Ninetieth General Court
(2017-2018)**

An Act protecting innocent sellers.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Chapter 93B of the General Laws is hereby amended by including the following new
2 Section:

3 SECTION 19. NONMANUFACTURING SELLER LIABILITY

4 SECTION 1. Definitions.

5 (1) "Claimant" means a party seeking relief, including a plaintiff, counterclaimant, or
6 cross-claimant.

7 (2) "Products liability action" means any action against a manufacturer or seller for
8 recovery of damages arising out of personal injury, death, or property damage allegedly caused
9 by a defective product whether the action is based in strict tort liability, strict products liability,
10 negligence, misrepresentation, breach of express or implied warranty, or any other theory or
11 combination of theories.

12 (3) "Seller" means a person who is engaged in the business of distributing or otherwise
13 placing, for any commercial purpose, in the stream of commerce for use or consumption a
14 product or any component part thereof.

15 (4) "Manufacturer" means a person who is a designer, formulator, constructor, rebuilder,
16 fabricator, producer, compounder, processor, or assembler of any product or any component part
17 thereof and who places the product or any component part thereof in the stream of commerce.

18 SECTION 2. Manufacturer's duty to indemnify.

19 (a) A manufacturer shall indemnify and hold harmless a seller against loss arising out of
20 a products liability action, except for any loss caused by the seller's negligence, intentional
21 misconduct, or other act or omission, such as negligently modifying or altering the product, for
22 which the seller is independently liable.

23 (b) For purposes of this section, "loss" includes court costs and other reasonable
24 expenses, reasonable attorney fees, and any reasonable damages.

25 (c) Damages awarded by the trier of fact shall, on final judgment, be deemed reasonable
26 for purposes of this section.

27 (d) For purposes of this section, a wholesale distributor or retail seller who completely or
28 partially assembles a product in accordance with the manufacturer's instructions shall be
29 considered a seller.

30 (e) The duty to indemnify under this section:

31 (1) applies without regard to the manner in which the action is concluded; and

32 (2) is in addition to any duty to indemnify established by law, contract, or otherwise.

33 (f) A seller eligible for indemnification under this section shall give reasonable notice to
34 the manufacturer of a product claimed in a petition or complaint to be defective, unless the
35 manufacturer has been served as a party or otherwise has actual notice of the action.

36 (g) A seller is entitled to recover from the manufacturer court costs and other reasonable
37 expenses, reasonable attorney fees, and any reasonable damages incurred by the seller to enforce
38 the seller's right to indemnification under this section.

39 SECTION 3. Liability of nonmanufacturing sellers.

40 (a) A seller that did not manufacture a product is not liable for harm caused to the
41 claimant by that product unless the claimant proves:

42 (1) that the seller participated in the design of the product;

43 (2) that the seller altered or modified the product and the claimant's harm resulted from
44 that alteration or modification;

45 (3) that the seller installed the product, or had the product installed, on another product
46 and the claimant's harm resulted from the product's installation onto the assembled product;

47 (4) that:

48 (a) the seller exercised substantial control over the content of a warning or instruction
49 that accompanied the product;

50 (b) the warning or instruction was inadequate; and

51 (c) the claimant's harm resulted from the inadequacy of the warning or instruction;

52 (5) that:

53 (a) the seller made an express factual representation about an aspect of the product;

54 (b) the representation was incorrect;

55 (c) the claimant relied on the representation in obtaining or using the product; and

56 (d) if the aspect of the product had been as represented, the claimant would not have
57 been harmed by the product or would not have suffered the same degree of harm;

58 (6) that:

59 (a) the seller actually knew of a defect to the product at the time the seller supplied the
60 product; and

61 (b) the claimant's harm resulted from the defect; or

62 (7) that the manufacturer of the product is:

63 (a) insolvent; or

64 (b) not subject to the jurisdiction of the court.

65 (b) This section does not apply to a manufacturer or seller whose liability in a products
66 liability action is governed by Chapter 93B. In the event of a conflict, Chapter 93B prevails over
67 this section.

68 (c) If after service on a nonresident manufacturer through the secretary of state, the
69 manufacturer fails to answer or otherwise make an appearance in the time required by law, it is

70 conclusively presumed for the purposes of Subsection (a)(7)(B) that the manufacturer is not
71 subject to the jurisdiction of the court unless the seller is able to secure personal jurisdiction over
72 the manufacturer in the action.

73 SECTION 4. Inherently unsafe products.

74 (a) In a products liability action, a manufacturer or seller shall not be liable if:

75 (1) the product is inherently unsafe and the product is known to be unsafe by the
76 ordinary consumer who consumes the product with the ordinary knowledge common to the
77 community; and

78 (2) the product is a common consumer product intended for personal consumption, such
79 as:

80 (A) sugar, castor oil, alcohol, tobacco, and butter, as identified in Comment i to Section
81 402A of the Restatement (Second) of Torts; or

82 (B) an oyster.

83 (b) For purposes of this section, the term "products liability action" does not include an
84 action based on manufacturing defect or breach of an express warranty.

85 SECTION 5. Design defects.

86 (a) In a products liability action in which a claimant alleges a design defect, the burden is
87 on the claimant to prove by a preponderance of the evidence that:

88 (1) there was a safer alternative design; and

89 (2) the defect was a producing cause of the personal injury, property damage, or death
90 for which the claimant seeks recovery.

91 (b) In this section, "safer alternative design" means a product design other than the one
92 actually used that in reasonable probability:

93 (1) would have prevented or significantly reduced the risk of the claimant's personal
94 injury, property damage, or death without substantially impairing the product's utility; and

95 (2) was economically and technologically feasible at the time the product left the control
96 of the manufacturer or seller by the application of existing or reasonably achievable scientific
97 knowledge.

98 (c) This section does not supersede or modify any statute, regulation, or other law of this
99 state or of the United States that relates to liability for, or to relief in the form of, abatement of
100 nuisance, civil penalties, cleanup costs, cost recovery, an injunction, or restitution that arises
101 from contamination or pollution of the environment.

102 (d) This section does not apply to:

103 (1) a cause of action based on a toxic or environmental tort; or

104 (2) a drug or device, as those terms are defined in the federal Food, Drug, and Cosmetic
105 Act (21 U.S.C. Section 321).

106 (e) This section is not declarative, by implication or otherwise, of the common law with
107 respect to any product and shall not be construed to restrict the courts of this state in developing
108 the common law with respect to any product which is not subject to this section.

109 SECTION 6. Compliance with government standards.

110 (a) In a products liability action brought against a product manufacturer or seller, there is
111 a rebuttable presumption that the product manufacturer or seller is not liable for any injury to a
112 claimant caused by some aspect of the formulation, labeling, or design of a product if the product
113 manufacturer or seller establishes that the product's formula, labeling, or design complied with
114 mandatory safety standards or regulations adopted and promulgated by the federal government,
115 or an agency of the federal government, that were applicable to the product at the time of
116 manufacture and that governed the product risk that allegedly caused harm.

117 (b) The claimant may rebut the presumption in Subsection (a) by establishing that:

118 (1) the mandatory federal safety standards or regulations applicable to the product were
119 inadequate to protect the public from unreasonable risks of injury or damage; or

120 (2) the manufacturer, before or after marketing the product, withheld or misrepresented
121 information or material relevant to the federal government's or agency's determination of
122 adequacy of the safety standards or regulations at issue in the action.

123 (c) In a products liability action brought against a product manufacturer or seller, there is
124 a rebuttable presumption that the product manufacturer or seller is not liable for any injury to a
125 claimant allegedly caused by some aspect of the formulation, labeling, or design of a product if
126 the product manufacturer or seller establishes that the product was subject to pre-market
127 licensing or approval by the federal government, or an agency of the federal government, that the
128 manufacturer complied with all of the government's or agency's procedures and requirements
129 with respect to pre-market licensing or approval, and that after full consideration of the product's

130 risks and benefits the product was approved or licensed for sale by the government or agency.

131 The claimant may rebut this presumption by establishing that:

132 (1) the standards or procedures used in the particular pre-market approval or licensing
133 process were inadequate to protect the public from unreasonable risks of injury or damage; or

134 (2) the manufacturer, before or after pre-market approval or licensing of the product,
135 withheld from or misrepresented to the government or agency information that was material and
136 relevant to the performance of the product and was causally related to the claimant's injury.

137 (d) This section does not extend to manufacturing flaws or defects even though the
138 product manufacturer has complied with all quality control and manufacturing practices
139 mandated by the federal government or an agency of the federal government.