

SENATE No. 232

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:

Patrick M. O'Connor

DISTRICT/ADDRESS:

Plymouth and Norfolk

SENATE No. 232

By Mr. O'Connor, a petition (accompanied by bill, Senate, No. 232) of Patrick M. O'Connor for legislation to protect innocent sellers. Consumer Protection and Professional Licensure.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. 171 OF 2019-2020.]

The Commonwealth of Massachusetts

**In the One Hundred and Ninety-Second General Court
(2021-2022)**

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 a
20 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 that
49 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 been

57 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. Design defects.

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

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

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

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

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

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

86 (c) This section does not supersede or modify any statute, regulation, or other law of this
87 state or of the United States that relates to liability for, or to relief in the form of, abatement of

88 nuisance, civil penalties, cleanup costs, cost recovery, an injunction, or restitution that arises
89 from contamination or pollution of the environment.

90 (d) This section does not apply to:

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

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

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

97 SECTION 5. Compliance with government standards.

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

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

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

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

111 (c) In a products liability action brought against a product manufacturer or seller, there is
112 a rebuttable presumption that the product manufacturer or seller is not liable for any injury to a
113 claimant allegedly caused by some aspect of the formulation, labeling, or design of a product if
114 the product manufacturer or seller establishes that the product was subject to pre-market
115 licensing or approval by the federal government, or an agency of the federal government, that the
116 manufacturer complied with all of the government's or agency's procedures and requirements
117 with respect to pre-market licensing or approval, and that after full consideration of the product's
118 risks and benefits the product was approved or licensed for sale by the government or agency.
119 The claimant may rebut this presumption by establishing that:

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

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

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