SENATE DOCKET, NO. 1442 FILED ON: 1/19/2023

SENATE . . . . . No. 1092

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 relative to protecting innocent sellers.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Patrick M. O'Connor	*First Plymouth and Norfolk*

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SENATE . . . . . No. 1092

By Mr. O'Connor, a petition (accompanied by bill, Senate, No. 1092) of Patrick M. O'Connor for legislation to protect innocent sellers. The Judiciary.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. *232* OF 2021-2022.]

The Commonwealth of Massachusetts

In the One Hundred and Ninety-Third General Court
(2023-2024)

An Act relative to 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:

SECTION 1. Title XV is hereby amended by adding the following new chapter:-

“CHAPTER 93M. NONMANUFACTURING SELLER LIABILITY

Section 1. Definitions.

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

(b) "Products liability action" means any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability,

negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories.

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

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

Section 2. Manufacturer's duty to indemnify.

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

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

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

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

(e) The duty to indemnify under this section:

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

(2) shall supersede a preexisting contractual agreement absolving a manufacturer of the duty to indemnify; and

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

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

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

Section 3. Liability of nonmanufacturing sellers.

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

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

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

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

(4) that:

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

(ii) the warning or instruction was inadequate; and

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

(5) that:

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

(ii) the representation was incorrect;

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

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

(6) that:

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

(ii) the claimant's harm resulted from the defect.

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

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

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

Section 4. Design defects.

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

(1) it is proper to bring action against a seller rather than the manufacturer because a judgment is not recoverable from the assets of the bankruptcy estate associated with said manufacturer;

(2) there was a safer alternative design; and

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

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

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

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

(c) This section does not apply to a drug or device as those terms are defined in the federal Food, Drug, and Cosmetic Act (21 U.S.C. Section 321).

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

Section 5. Compliance with government standards.

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

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

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

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

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

Section 6. Affidavit by seller identifying manufacturer

(a) In any product liability action against a product seller, the product seller may file an affidavit certifying the correct identity of the manufacturer of the product which allegedly caused the injury, death or damage.

(b) Upon filing the affidavit pursuant to subsection (a) of this section, the product seller shall be relieved of all strict liability claims, subject to the provisions set forth in subsection (a) of section 3 of this chapter. Due diligence shall be exercised in providing the plaintiff with the correct identity of the manufacturer or manufacturers.

(c) The product seller shall be subject to strict liability if:

(1) The identity of the manufacturer given to the plaintiff by the product seller was incorrect. Once the correct identity of the manufacturer has been provided, the product seller shall again be relieved of all strict liability claims, subject to subsection (d) of this section; or

(2) The manufacturer has no known agents, facility, or other presence within the United States; or

(3) A judgment is not recoverable from the assets of the bankruptcy estate.

(d) The commencement of a product liability action based in whole or in part on the doctrine of strict liability against a product seller shall toll the applicable statute of limitations

with respect to manufacturers who have been identified pursuant to the provisions of subsection (a) of this section.

Section 7. Elements of defense; summary judgment; reinstatement of action

(a) It shall be a defense to an action against a seller of a product for property damage or personal injury allegedly caused by the defective design or manufacture of a product if the seller establishes that:

(1) The seller had no knowledge of the defect;

(2) The seller in the performance of the duties he performed or while the product was in his possession could not have discovered the defect while exercising reasonable care;

(3) The seller did not manufacture, produce, design, or designate the specifications for the product which conduct was the proximate and substantial cause of the claimant's injury; and

(4) The seller did not alter, modify, assemble, or mishandle the product while in the seller's possession in a manner which was the proximate and substantial cause of the claimant's injury.

(b) The defense provided in subsection (a) of this section is not available if the manufacturer is not subject to service of process under the laws of Commonwealth.

(c) Except in an action based on an expressed indemnity agreement, if the seller shows by unrebutted facts that he has satisfied subsection (a) of this section and that subsection (b) of this section does not apply, summary judgment shall be entered in his favor as to the original or third party actions.

(d) Notwithstanding the granting of a motion for summary judgment pursuant to paragraph (c) of this subsection, the seller will thereafter continue to be treated as though he were still a party for all purposes of discovery including the uses thereof.

(e) On a subsequent showing of the occurrence of any condition described in subsection (b) of this section or that one or more of the conditions of subsection (a) of this section did not exist, during the pending litigation, the actions dismissed by summary judgment pursuant to paragraph (c) of this subsection shall be reinstated and are not barred by the passage of time.

Section 8. Effectiveness; civil actions and remedies

(a) Sections one through seven of this chapter, inclusively, shall apply to contracts made before and after the passage of this act.

(b) A seller entity who has been injured by an act or practice declared to be unlawful by the provisions of this chapter may bring an action in the superior court whether by way of original complaint, counterclaim, cross-claim, or third party action, for damages and such equitable relief as the court deems to be necessary and proper.

(c) Judgments entered on actions prior to the passage of this act shall not be re-adjudicated on substantially similar facts and claims pursuant to the passage of this act."

SECTION 2. This act shall go into effect upon its passage.