

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:

Patrick M. O'Connor

DISTRICT/ADDRESS:

First Plymouth and Norfolk

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:

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

2 "CHAPTER 93M. NONMANUFACTURING SELLER LIABILITY

3 Section 1. Definitions.

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

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

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

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

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

17 Section 2. Manufacturer's duty to indemnify.

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

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

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

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

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

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

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

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

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

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

40 Section 3. Liability of nonmanufacturing sellers.

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

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

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

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

48 (4) that:

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

51 (ii) the warning or instruction was inadequate; and

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

53 (5) that:

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

55 (ii) the representation was incorrect;

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

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

59 (6) that:

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

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

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

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

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

71 Section 4. Design defects.

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

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

77 (2) there was a safer alternative design; and

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

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

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

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

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

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

92 Section 5. Compliance with government standards.

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

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

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

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

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

109 Section 6. Affidavit by seller identifying manufacturer

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

153 Section 8. Effectiveness; civil actions and remedies

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

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

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

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