

STATE OF OKLAHOMA

1st Session of the 44th Legislature (1993)

HOUSE BILL NO. 1074

By: Henshaw

AS INTRODUCED

An Act relating to torts; creating the Product Liability Act; defining terms; identifying actions subject to the act; providing for damages; establishing liability in certain instances; protecting manufacturers from certain liability; providing for the liability of certain product sellers; protecting product sellers from certain liability; providing rules of evidence; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 30 of Title 76, unless there is created a duplication in numbering, reads as follows:

Sections 1 through 7 of this act shall be known and may be cited as the "Product Liability Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 31 of Title 76, unless there is created a duplication in numbering, reads as follows:

As used in the Product Liability Act:

1. "Claimant" means any person who brings a product liability action, and if such an action is brought through or on behalf of an

estate, the term includes the claimant's decedent, or if such an action is brought through or on behalf of a minor, the term includes the claimant's parent or guardian;

2. "Commerce" means trade, traffic, commerce, or transportation:

- a. between a place in a state and any place outside of a state, and
- b. which affects trade, commerce, or transportation described in subparagraph a of this paragraph;

3. "Concert of action" means the conscious and deliberate agreement to, acknowledgment of, and collaborative participation in wrongful conduct by two or more persons who do not have the relationship of master and servant, principal and agent, parent and subsidiary, affiliates or employer and employee;

4. "Express warranty" means any positive material statement, affirmation of fact, promise, or description relating to a product, including any sample or model of a product;

5. "Harm" means:

- a. damage to property other than the product itself,
- b. personal physical injury, illness, or death,
- c. mental anguish or emotional harm, or
- d. any loss of consortium or services or other loss deriving from any type of harm described in subparagraphs a, b, or c of this paragraph;

6. "Manufacturer" means:

- a. any person who is engaged in a business to design, produce, make, fabricate, construct, or remanufacture any product or component part of a product, or
- b. any product seller not described in subparagraph a of this paragraph holding itself out as a manufacturer to the user of the product; except that any product seller who acts primarily as a wholesaler,

distributor, or retailer of products may be a manufacturer with respect to a given product to the extent that such seller designs, produces, makes, fabricates, constructs, or remanufactures the product before its sale;

7. "Practical technological feasibility" means the technical and scientific knowledge relating to the safety of a product which is available, adequately demonstrated, and economically feasible for use by a product seller at the time of manufacture of a product;

8. "Person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity including any governmental entity or unincorporated association of persons;

9. "Preponderance of the evidence" is that measure or degree of proof which, by the weight, credit, and value of the aggregate evidence on either side, establishes that it is more probable than not that a fact occurred or did not occur;

10. "Product" means any object possessing intrinsic value which is capable of delivery either as an assembled whole or as a component part and is produced for introduction into trade or commerce; but such term does not include human tissue, blood and blood products, or organs;

11. a. "Product seller" means:

- (1) a manufacturer, or
- (2) a person who, in the course of a business conducted for that purpose, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or otherwise is involved in placing a product in the stream of commerce,

b. the term "product seller" does not include:

- (1) a seller of real property, unless that person is engaged in the sale of manufactured housing or in the mass production of dwellings,
- (2) a provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services, or
- (3) any person who:
  - (a) acts in only a financial capacity with respect to the sale of the product,
  - (b) is not a manufacturer, wholesaler, distributor, or retailer, and
  - (c) leases a product, without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor; and

12. "Unavoidably dangerous" means that aspect of a product incapable, in light of the state of scientific and technological knowledge at the time of manufacture, of being made safe without seriously impairing the product's usefulness or desirability to the persons who use or consume the product.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 32 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. Except as excluded under subsection B of this section, any civil action brought against a manufacturer or other product seller for harm caused by a product is a product liability action and is governed by the provisions of the Product Liability Act. The

Product Liability Act is intended to govern any civil action for harm caused by a product, including any action which before the effective date of this act would have been based on any of the following theories:

1. Strict liability in tort;
2. Negligence;
3. Breach of express or implied warranty;
4. Failure to discharge a duty to warn or instruct;
5. Misrepresentation, concealment, or nondisclosure; or
6. Any other theory that is the basis for an award of damages for harm caused by a product.

B. A product liability action does not include any civil action against a manufacturer or seller for:

1. Harm caused to a product itself;
2. Damage to property under a breach of warranty theory if prohibited by the Uniform Commercial Code;
3. Commercial loss, including incidental and consequential damages in a commercial setting; or
4. Commercial risks that are the subject of a contract between the manufacturer or a seller and a buyer.

C. In any product liability action, the product seller is not liable to a claimant for mental anguish or emotional harm in the absence of personal physical injury, illness, or death.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 33 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. In any product liability action, a product seller is liable to a claimant if, and only if:

1. The claimant establishes by a preponderance of the evidence that:
  - a. the product was unsafe in construction,
  - b. the product was unsafe in design,

- c. the product was unsafe because the manufacturer failed to provide adequate warnings or instructions about a danger connected with the product or about the proper use of the product, or
- d. the product was unsafe because the product did not conform to an express warranty made by the manufacturer with respect to the product; and

2. The claimant establishes by a preponderance of the evidence that:

- a. the defendant was the manufacturer of the particular product unit that caused the claimant's harm, and
- b. the unsafe aspect of the product was the proximate cause of the harm complained of by the claimant.

B. A product may be considered unsafe in construction if, when the product left the control of the manufacturer, the product deviated in a material way:

- 1. From the design specifications or performance standards of the manufacturer; or
- 2. From otherwise identical units of the same product line.

C. A product may be considered unsafe in design if, at the time of the manufacture of the product:

1. The manufacturer knew or, in the exercise of reasonable care, should have known of the danger that caused the harm;

2. An alternative design was within practical technological feasibility at the time of manufacture and would have provided:

- a. equivalent or better safety with respect to all hazards associated with use of the product, and
- b. better safety with respect to the particular hazard which allegedly caused the harm to the claimant; and

3. The alternative design would not have had any adverse effects on:

- a. the effectiveness with which the product performs its intended function, or
- b. the desirability of the product to the persons who use or consume it.

D. In making a determination under subsection C of this section, the trier of fact may consider such factors as:

1. The likelihood that the product would cause harm of the type alleged by the claimant, and the seriousness of that harm;
2. Any burdens on the manufacturer to adopt a product with a safer design that would have prevented that harm; and
3. Whether, at the time of manufacture, the design conformed with the generally accepted industry custom and practice for the design of the same or similar products.

E. In any product liability action based upon an unsafe design, the manufacturer is not liable for harm caused by:

1. An unavoidably dangerous aspect of the product;
2. An inherent characteristic of the product that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the community; or
3. An aspect of the product that was, at the time of manufacture, in compliance in all material respects with standards or specifications established, adopted, or approved by a federal or state statute or by an agency of the federal or state government responsible for the design, formulation, packaging, performance, or approval of the product.

F. A product may be considered unsafe because of the failure of the product seller to provide adequate warnings or instructions about a danger connected with the product or about the proper use of the product if:

1. At the time of the manufacture of the product, the manufacturer:

- a. knew or, in the exercise of reasonable care, should have known about a danger connected with the product that caused the claimant's harm, and
- b. failed to provide the warnings or instructions that a person exercising reasonable care would have provided with respect to the danger which caused the harm alleged by the claimant, given the likelihood that the product would cause harm of the type alleged by the claimant and given the seriousness of the harm, unless those warnings or instructions, if provided would not have materially affected the conduct of the product user; or

2. Subject to subsection H of this section, the warnings or instructions pertaining to the product were not provided to the product user.

G. In any product liability action based upon the failure to provide adequate warnings or instructions, the manufacturer is not liable for:

1. The failure to warn or instruct about a danger that is obvious. As used in this subsection, "a danger that is obvious" means a danger, including a danger that is an inherent characteristic of a product, of which a reasonably prudent user or consumer of a product would have been aware without warning or instruction or that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the community;

2. Product misuse; or

3. An alteration or modification of the product that does not constitute reasonably anticipated conduct on the part of the user of the product. As used in this subsection, "reasonably anticipated conduct" means the conduct which would be expected of a reasonably

prudent person who is likely to use the product in the same or similar circumstances.

H. A manufacturer is not liable for the failure to provide adequate warnings or instructions to the actual product user, if:

1. The manufacturer provided those warnings to a person who could reasonably have been expected to assure that action would be taken to avoid the harm or that the risk of the harm would be explained to the actual product user;

2. The product involved is one that may legally be used only by or under the supervision of a class of experts, and the manufacturer employed means reasonably calculated to make warnings or instructions available to the using or supervisory expert. As used in this subsection, the expression "means reasonably calculated to make warnings or instructions available" does not require actual, personal notice to the expert where such personal notice would be impossible or impracticable.

3. The product was used in a workplace, and warnings or instructions were provided to the employer of the claimant, because there was not practical and feasible means of transmitting them directly to the claimant; or

4. The product was sold as a component or material to be incorporated into another product, warnings or instructions were provided to the manufacturer's immediate buyer, and the claimant was exposed to the component or material after it was incorporated or converted into another product.

I. A warning, if provided, shall be deemed to be adequate if it is one that:

1. A reasonably prudent person in the same or similar circumstances would have provided with respect to the danger; or

2. Conforms to the requirements of a federal or state statute or agency regulation or the conditions of the approval of a product

by a federal or state agency that prescribes the form and language of the warning or instruction.

J. 1. A product may be considered to be unsafe because it did not conform to an express warranty if:

- a. the claimant, or a person acting on behalf of the claimant, reasonably relied on an express warranty made by the manufacturer about a material fact concerning the safety of the product. As used in this subsection, "material fact" means any specific characteristic or quality of the product, but does not include a general opinion about, or praise of, the product or its quality,
- b. this express warranty proved to be untrue, and
- c. had the representation been true, the claimant would not have been harmed.

2. A product seller may be subject to liability under this subsection although it did not engage in negligent or fraudulent conduct in making the express warranty.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 34 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. In any product liability action brought against a product seller other than a manufacturer, such a product seller is liable to a claimant, subject to subsection B of this section, if:

1. The claimant establishes by a preponderance of the evidence that the product was sold by the product seller and was the proximate cause of the harm complained of by the claimant; and

2. The claimant establishes by a preponderance of the evidence that the product seller failed to exercise reasonable care with respect to the product.

B. 1. In determining whether a product seller is subject to liability under this subsection, the trier of fact may consider the

effect of the conduct of the seller with respect to the design, construction, inspection, or condition of the product, and any failure of the seller to transmit adequate warnings or instructions about the dangers and proper use of the product.

2. A product seller is not subject to liability under this subsection unless the seller had a reasonable opportunity to inspect the product in a manner which would have revealed the existence of the defective condition if the inspection were conducted with the exercise of reasonable care.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 35 of Title 76, unless there is created a duplication in numbering, reads as follows:

In any product liability action, a product seller shall not be liable to the claimant on any theory of express or implied agreement among sellers, parallel behavior, or independent adherence to industry-wide standards unless the claimant proves, by a preponderance of the evidence, that the seller engaged in "concert of action".

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 36 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. In an action governed by the Product Liability Act, evidence of any measure taken by a product seller after the occurrence of a claimant's harm which, if taken previously, would have made the harm less likely to occur is not admissible to prove liability.

B. Evidence described in subsection A of this section may only be admitted when offered for:

1. Providing ownership, control, or feasibility of precautionary measures, if controverted; or
2. Impeachment.

SECTION 8. This act shall become effective September 1, 1993.

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