STATE OF OKLAHOMA

1st Session of the 50th Legislature (2005)

COMMITTEE SUBSTITUTE
FOR
HOUSE BILL NO. 1896 By: Morgan (Fred)

COMMITTEE SUBSTITUTE

An Act relating to torts; creating the Product Liability Act; providing short title; defining terms; providing that a manufacturer or seller shall not be liable for inherently unsafe products; providing procedures and requirements in actions alleging design defect; providing elements a claimant must prove in certain actions against manufacturers or sellers of firearms or ammunition; limiting liability of nonmanufacturing sellers; providing rebuttable presumption in actions relating to pharmaceutical products; providing rebuttable presumption concerning compliance with government standards; defining term; making evidence regarding measures taken after injury inadmissible; requiring filing of certain affidavit and procedures therefor; repealing Section 8, Chapter 368, O.S.L. 2004 (12 O.S. Supp. 2004, Section 832.1), which relates to indemnification of certain sellers in product liability actions; 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 101 of Title 76, unless there is created a duplication in numbering, reads as follows:

Sections 1 through 10 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 102 of Title 76, unless there is created a duplication in numbering, reads as follows:

In the Product Liability Act:

1. “Claimant” means a party seeking relief, including a plaintiff, counterclaimant, or cross-claimant;

2. “Product 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;

3. “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; and

4. “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 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 103 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. In a product liability action, a manufacturer or seller shall not be liable if:

1. The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and

2. The product is a common consumer product intended for personal consumption.

B. For purposes of this section, the term “product liability action” does not include an action based on manufacturing defect or breach of an express warranty.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 104 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. In a product liability action in which a claimant alleges a design defect, the burden is on the claimant to prove by a preponderance of the evidence that:

1. There was a safer alternative design; and

2. 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 supersede or modify any statute, regulation, or other law of this state or of the United States that relates to liability for, or to relief in the form of, abatement of nuisance, civil penalties, cleanup costs, cost recovery, an injunction, or restitution that arises from contamination or pollution of the environment.

D. This section does not apply to:

1. A cause of action based on a toxic or environmental tort; or

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

E. 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. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 105 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. In a product liability action brought against a manufacturer or seller of a firearm or ammunition that alleges a design defect in the firearm or ammunition, the burden is on the claimant to prove, in addition to any other elements that the claimant must prove, that:

1. The actual design of the firearm or ammunition was defective, causing the firearm or ammunition not to function in a manner reasonably expected by an ordinary consumer of firearms or ammunition; and

2. The defective design was a proximate cause of the personal injury, property damage, or death.

B. The claimant may not prove the existence of the defective design by a comparison or weighing of the benefits of the firearm or ammunition against the risk of personal injury, property damage, or death posed by its potential to cause such injury, damage, or death when discharged.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 106 of Title 76, unless there is created a duplication in numbering, reads as follows:

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:

a. the seller exercised substantial control over the content of a warning or instruction that accompanied the product,

b. the warning or instruction was inadequate, and

c. the claimant's harm resulted from the inadequacy of the warning or instruction;

5. That:

a. the seller made an express factual representation about an aspect of the product,

b. the representation was incorrect,

c. the claimant relied on the representation in obtaining or using the product, and

d. 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;

6. That:

a. the seller actually knew of a defect to the product at the time the seller supplied the product, and

b. the claimant's harm resulted from the defect; or

7. That the manufacturer of the product is:

a. insolvent, or

b. not subject to the jurisdiction of the court.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 107 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. In a product liability action alleging that an injury was caused by a failure to provide adequate warnings or information with regard to a pharmaceutical product, there is a rebuttable presumption that the defendant or defendants, including a health care provider, manufacturer, distributor, and prescriber, are not liable with respect to the allegations involving failure to provide adequate warnings or information if:

1. The warnings or information that accompanied the product in its distribution were those approved by the United States Food and Drug Administration for a product approved under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Section 301 et seq.), as amended, or Section 351, Public Health Service Act (43 U.S.C. Section 262), as amended; or

2. The warnings provided were those stated in monographs developed by the United States Food and Drug Administration for pharmaceutical products that may be distributed without an approved new drug application.

B. The claimant may only rebut the presumption provided for in subsection A of this section as to each defendant by establishing that:

1. The defendant, before or after premarket approval or licensing of the product, withheld from or misrepresented to the United States Food and Drug Administration required information that was material and relevant to the performance of the product and was causally related to the claimant's injury;

2. The pharmaceutical product as sold or prescribed in the United States by the defendant after the effective date of an order of the United States Food and Drug Administration to remove the product from the market or to withdraw its approval of the product;

3. a. The defendant recommended, promoted, or advertised the pharmaceutical product for an indication not approved by the United States Food and Drug Administration,

b. The product was used as recommended, promoted, or advertised, and

c. The claimant's injury was causally related to the recommended, promoted, or advertised use of the product;

4. a. The defendant prescribed the pharmaceutical product for an indication not approved by the United States Food and Drug Administration, and

b. The product was used as prescribed, and

c. The claimant's injury was casually related to the prescribed use of the product; or

5. The defendant, before or after premarket approval or licensing of the product, engaged in conduct that would constitute a violation of 18 U.S.C., Section 201 and that conduct caused the warnings or instructions approved for the product by the United States Food and Drug Administration to be inadequate.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 108 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. In a product 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 formula, labeling, or design for the product 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 of this section 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. In a product 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 allegedly caused by some aspect of the formulation, labeling, or design of a product if the product manufacturer or seller establishes that the product was subject to premarket licensing or approval by the federal government, or an agency of the federal government, that the manufacturer complied with all of the government's or agency's procedures and requirements with respect to premarket licensing or approval, and that after full consideration of the product's risks and benefits the product was approved or licensed for sale by the government or agency. The claimant may rebut this presumption by establishing that:

1. The standards or procedures used in the particular premarket approval or licensing process were inadequate to protect the public from unreasonable risks of injury or damage; or

2. The manufacturer, before or after premarket approval or licensing of the product, withheld from or misrepresented to the government or agency information that was material and relevant to the performance of the product and was causally related to the claimant's injury.

D. 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.

E. This section does not extend to products covered by Section 7 of this act.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 109 of Title 76, unless there is created a duplication in numbering, reads as follows:

In a product liability action, if measures are taken which, if taken previously, would have made an event less likely to occur, evidence of the subsequent measures is not admissible to prove a defect in a product, negligence, or culpable conduct in connection with the event. In a product liability action brought under any theory or doctrine, if the feasibility of a design or change in warnings is not controverted, then a subsequent design change or change in warnings shall not be admissible into evidence. This section shall not require the exclusion of evidence of subsequent measures when offered for another purpose such as proving ownership, control, or impeachment.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 110 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. In any product liability action in which the plaintiff seeks damages for bodily injuries or death, the attorney for the plaintiff or the plaintiff, if the plaintiff is proceeding pro se, shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following:

1. That the plaintiff or attorney has consulted and reviewed the facts of the case with a qualified expert, as defined in subsection C of this section, who has determined in a written report, after examination of the product or a review of literature pertaining to the product, that:

a. in any action based on strict tort liability, the product contained specific identifiable defects having a potential for injury beyond that which would be contemplated by the ordinary user of the product and was unreasonably dangerous and in a defective condition when it left the control of the manufacturer, or

b. in any other action, those acts or omissions would give rise to fault, and

c. in any action based on any theory or doctrine, the defective condition of the product or other fault was a proximate cause of the plaintiff's injury; or

2. That the plaintiff or attorney was unable to obtain a consultation required by paragraph 1 of this subsection because a statute of limitations would impair the action and the consultation required could not be obtained before the expiration of the statute of limitations. If an affidavit is executed pursuant to this paragraph, the affidavit required by this subsection shall be filed within ninety (90) days after the filing of the complaint. The defendant shall be excused from answering or otherwise pleading until thirty (30) days after being served with an affidavit required by this subsection. No plaintiff shall be afforded the ninety-day extension of time provided by this paragraph if the plaintiff has voluntarily dismissed an action and has subsequently commenced a new action.

B. If the defective condition referred to in the written report required by paragraph 1 of subsection A of this section is based on a design defect, the plaintiff or attorney shall further state that the qualified expert has identified in the written report either:

1. A feasible alternative design that existed at the time the product left the control of the manufacturer; or

2. An applicable government or industry standard to which the product did not conform.

C. A “qualified expert”, for the purposes of this section, means someone who possesses scientific, technical, or other specialized knowledge regarding the product at issue or similar products and who is qualified to prepare the report required by this section.

D. A copy of the written report required by this section shall be attached to the original and all copies of the complaint.

E. The failure to file an affidavit required by this section shall be grounds for dismissal.

F. This section shall apply to any cause of action filed on or after November 1, 2005.

SECTION 11. REPEALER Section 8, Chapter 368, O.S.L. 2004 (12 O.S. Supp. 2004, Section 832.1), is hereby repealed.

SECTION 12. This act shall become effective November 1, 2005.

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