RATIONAL USE OF A PRODUCT ACT

Summary

The ALEC model Rational Use of a Product Act clarifies the law as to when a manufacturer or other seller is subject to liability for injuries stemming from misuse of its products: the alleged injury must result from the reasonable, foreseeable misuse of the product. The model act accomplishes this goal in two ways. First, the model act assures that the reasonableness of the consumer's conduct in misusing the product is taken into account. The mere fact that a misuse might, in some way, be "foreseeable" is insufficient for imposing liability when the misuse was unreasonable.

Second, the model act clarifies how courts should apply the misuse doctrine. It states that misuse is an affirmative defense to a product liability claim when a consumer puts a product to an objectively unreasonable use. But, when an individual uses a product in an unintended but reasonable way, the misuse becomes a factor for the trier of fact to consider in assessing comparative fault. In such an instance, the court shall reduce damages to the extent the alleged injury resulted from the misuse.

Model Legislation

{Title, enacting clause, etc.}

Section 1. {Title.}

This Act shall be known and may be cited as the Rational Use of a Product Act.

Section 2. {Misuse of a Product}

(A) Affirmative defense.

A seller is not liable in a civil action for harm caused by unreasonable misuse of its product.

(B) Comparative Fault.

If a defendant does not qualify for an affirmative defense under subsection (A), the claimant's damages shall be reduced to the extent any reasonable misuse contributed to the injury. The trier of fact may determine that the harm was caused solely as a result of such misuse.

(C) Definitions.

(1) "Misuse" means use of a product for a purpose or manner different from the purpose or manner for which the product was manufactured. Misuse includes, but is not limited to, uses: (a) unintended by the seller; (b) inconsistent with a

specification or standard applicable to the product; (c) contrary to an instruction or warning provided by the seller or other person possessing knowledge or training regarding the use or maintenance of the product; or (d) determined to be improper by a federal or state agency.

(2) "Seller" means the manufacturer, wholesaler, distributor, or retailer of the relevant product.

(3) "Unreasonable misuse" means (a) a reasonably prudent person would not have used the product in the same or similar manner or circumstances; or (b) the product was used for a purpose or in a manner that was not reasonably foreseeable by the seller against whom liability is asserted. For purposes of subsection (3)(a), the reasonableness of the conduct of a person who is a member of an occupation or profession with special training or experience in the use of a product shall be determined based on a reasonably prudent member of that occupation or profession in the same or similar manner or circumstances.

Section 3. {Misuse in Product Liability Action.}

(A) Design defect. A misused product may be considered defective in design when the reasonably foreseeable risks of harm related to a reasonable misuse of the product could have been significantly reduced or avoided by the adoption of an alternative design that (a) would not have resulted in an unreasonable increase in the cost of designing and manufacturing the product for its intended use; (b) would not have reduced the efficiency, utility, or safety of the product for its intended use; and (c) was available at the time of manufacture.

(B) Warning defect. A misused product may be considered defective because of inadequate instructions or warnings when the reasonably foreseeable risks of harm posed by a reasonable misuse of the product could have been significantly reduced or avoided by providing additional instructions or warnings regarding the dangers of the misuse at issue. A product is not defective if additional instructions or warnings related to such misuses would have detracted from instructions or warnings intended to prevent more serious or likely hazards.

Section 4. {Severability clause.}

Section 5. {Repealer clause.}

Section 6. {Effective date.}

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In many states, a manufacturer has a duty to both design a product to avoid, and warn against, risks of injury from reasonably *foreseeable* misuses of their products. The problem with this approach is that almost any kind of product misuse can be "foreseeable," especially in hindsight – *e.g.,* that someone will use a book as a stepstool, a shovel as a doorstop, or a steak knife as a toothpick.

A rule imposing liability on a manufacturer for misuses of its products regardless of how unreasonable, inconceivable or absurd does not create the right incentives. It undermines the goals of effective warnings and cost-effective design improvements. It leads to a proliferation of wacky warnings, higher prices, and less choice. It also wrongfully rewards irresponsible people for engaging in risky, dangerous activities. Further, it holds manufacturers and other sellers to standards they cannot meet, and, in some cases, can result in putting them out of business.

It is not feasible or helpful for manufacturers to design products to withstand any conceivably foreseeable misuse. American automobile makers need not design a car that floats, just because it is foreseeable that someone may drive a car through a stream. Similarly, they need not build a pickup truck like a bulldozer because it is foreseeable that someone will use the vehicle to push a boulder. Such unnecessary features drive up costs that are passed on to consumers, penalizing the average person for the irresponsible behavior of a few individuals. Product liability law is not intended to turn manufacturers into absolute insurers of their products or require them to supply merchandise that is accident or fool proof.

The awarding of such liability over the past few decades has led manufacturers to warn of hazards from absurd misuses of products. These warnings trivialize and undermine cautions concerning legitimate dangers about which the user might not otherwise be aware. "Bombarding" consumers with warnings about every conceivable risk, no matter how remote, causes consumers "to give up on warnings altogether" and, ultimately, will lead to more accidents.[1]

The ALEC model Rational Use of a Product Act clarifies the law to assure that the reasonableness of the consumer's conduct in misusing the product is taken into account. The mere fact that a misuse might, in some way, be "foreseeable" is insufficient for imposing liability when the misuse was unreasonable.

The model act also clarifies how courts should apply the misuse doctrine. It states that misuse is an affirmative defense to a product liability claim when a consumer puts a product to an objectively unreasonable use. But, when an individual uses a product in an unintended but reasonable way, the misuse becomes a factor for the trier of fact to consider in assessing comparative fault. In such an instance, the court shall reduce damages to the extent the alleged injury resulted from the misuse.

Deterioration of the Misuse Defense

Product liability law, at its origin, recognized that when a manufacturer places a product on the market, it implicitly represents that the product will "safely do the jobs for which it was built."[2] When a person is injured by a product due to a hidden risk that the manufacturer was in a better position to guard against than the consumer, the cost of the injury is placed on the manufacturer and incorporated into its prices. Consumers who use products in ways that are unintended, however, create risks that are different in degree and kind than those who properly use products, and for which manufacturers should not be considered responsible. Nevertheless, over time, some courts have compromised this basic principle.[3]

As tort scholar Professor David Owen explains, product liability was initially limited to injuries stemming from intended uses. In the 1950s and 1960s, courts increasingly determined liability based on whether the product was put to an "abnormal use." By the 1980s and 1990s, most courts had adopted the "reasonably foreseeable use" standard that prevails today.[4] As Professor Owen recognized, "the innate vagueness of 'foreseeability' as the one definitional standard for the doctrine [of misuse]—its only limiting basis—renders the definition of misuse virtually meaningless as a device for determining the scope of liability in actual cases" because foreseeability is an illusory, confusing, and flexible notion.[5]

Under an open, unlimited foreseeability standard, "no product use is ever forbidden."[6] Rewarding consumers who misuse products may lead to more careless behavior and unnecessarily inflated prices.

Some courts have shown extraordinary reluctance to dismiss cases where the misuse was even remotely foreseeable and in the most absurd and bizarre situations. Here are a few actual examples:

- A Michigan appellate court found that it would be improper to "assume" that intentionally inhaling glue to get high is a misuse of the product.[7]

- A New York appellate court reversed a rare grant of summary judgment, finding that a drug store could have foreseen that a customer would use cosmetic puffs to coat her daughter's pajamas in white fur for a costume, which ignited when she leaned over a stove.[8]

- The New Jersey Supreme Court found that an elevator manufacturer might have foreseen that a maintenance crew would use the top surface of an elevator to move a large conference table from floor-to-floor, though it found the jury erred when it placed *all* responsibility on the manufacturer when the crew accidently left the elevator set on automatic, crushing the skull of a worker riding on the top.[9]

- Maryland's highest court ruled that a cologne manufacturer may be liable after a teenager poured the cologne on a lit candle to scent it, igniting the

cologne and injuring her companion, because it was foreseeable that cologne might generally come in contact with a flame.[10]

- A federal appellate court, applying Virginia law, found that a manufacturer that sold "burning alcohol" only to dentists and professional dental laboratories, reasonably should have foreseen that inmate dental assistants in a penal farm laboratory might drink the alcohol as a beverage and then go blind.[11]

- One federal court even found it foreseeable that an eleven-year-old boy would amputate part of his penis while riding on top of a canister-type vacuum cleaner because children are known to "explore and fiddle with the device." The vacuum had been left out in the hallway, plugged in, with its two filters removed for cleaning, the hood open and fan exposed, when the child, left home alone, rode it in his pajamas as if it were a toy car.[12]

In each of these cases, the manufacturer was subjected to liability for these harms. Judges often allow cases involving obviously unreasonable misuse of a product to go to trial since jurors might still find such misuses "foreseeable" to the manufacturer. Jurors may be understandably inclined to require a business, which it may view as a "deep pocket," to pay a sympathetic plaintiff who has experienced a serious injury. The "foreseeability" standard, with its chance of recovery for injuries stemming from clear misuses of products, encourages plaintiffs to bring meritless claims. Such lawsuits impose unnecessary legal expenses on employers and hurt the economy.

For example, in one recent case an individual who was hit with a bottle in a bar brawl claimed that that the beer maker ought to have designed a stubby glass bottle or sold beer only in plastic bottles to diminish the likelihood of such incidents. While an appellate court agreed with the plaintiff that it was reasonably foreseeable that longneck bottles might be used as weapons, the court upheld the trial court's dismissal of the plaintiff's lawsuit on the ground that the risk-utility analysis used to evaluate whether a product is defective "does not operate in a vacuum, but rather in the context of the product's *intended use* and its *intended users*.[13] In appropriate cases, the appellate court found, such decisions may be made by the court as a matter of law.

Had the plaintiff provided more concrete evidence that the risk of fights involving longneck glass bottles outweighed the utility of design, however, the court would have required the company to prove at trial that a different type of bottle would have impaired the product's usefulness or raised its cost. The unquestionably unreasonable misuse of the product would not provide a defense.

A Rational Rule for Product Use

The model act provides a rational rule for product use. In Section 2, it recognizes that a product seller is not subject to liability for harm caused by misuse of a product if the seller shows that: "(1) an ordinary reasonably prudent person . . . would not have used the product in the same or similar manner and circumstances; *or* (2) the product was used for a purpose or in a manner that was not reasonably foreseeable by the product seller." As noted above, many states look solely to foreseeability in determining whether a manufacturer is subject to liability for misuse. The model act assures that an important aspect of evaluating the fairness of imposing liability for a particular misuse is whether the misuse is unreasonable such that the average, reasonable consumer would not reasonably expect the product to be designed and manufactured to withstand it.[14] In cases involving a person with special training or experience in the use of a product, such as machinery or other equipment, the model act provides that the reasonableness of that person's conduct is evaluated based on how a reasonably prudent member of that profession in the same or similar manner or circumstances.

This reasonable use standard is drawn from several sources. The Restatement Third, which has identified misuse as an area of confusion, invokes "reasonableness" to guide courts as to when a plaintiff's product misuse should not be deemed foreseeable. It recognizes that "[p]roduct sellers and distributors are not required to foresee and take precautions against every conceivable mode of use and abuse to which their products might be put. Increasing the costs of designing and marketing products in order to avoid the consequences of *unreasonable modes of use* is not required."[15]

The Restatement further notes that "[t]he post sale conduct of the user may be so unreasonable, unusual, and costly to avoid that a seller has no duty to design or warn against them. When a court so concludes, the product is not defective" in its design or warnings.[16] To illustrate this point, the Restatement notes that while it is reasonable to expect a chair to support a person standing on its seat to reach the top shelf of a bookcase, a chair is not defectively designed if it lacks the stability to support a person who balances on the chair's back frame. In that instance, the "misuse of the product is so unreasonable that the risks it entails need not be designed against."[17]

The model act's approach to considering the reasonableness of the misuse is consistent with the Model Uniform Product Liability Act (MUPLA) and the laws of several states. MUPLA provides that misuse "occurs when the product user does not act in a manner that would be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances."[18] Thus, MUPLA avoids use of the vague foreseeability standard entirely and focuses on reasonableness of the use.

Several states have adopted this or similar definitions. For example, Idaho follows MUPLA.[19] Michigan defines "misuse" to include "uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances."[20] Montana recognizes an affirmative defense where the "product was *unreasonably* misused by the user or consumer and the misuse caused or contributed to the injury."[21] In addition, some state courts have applied the

principle that when a person's injury results from an unreasonable use of the product, recovery may be precluded.[22]

Clarifying When Misuse is an Affirmative Defense or Element of Comparative Fault

Another point of confusion with regard to misuse law is when misuse provides an affirmative defense to liability or is simply a factor to be considered in apportioning liability in states that provide for comparative fault.

In the 1970s and 1980s, most states abandoned contributory negligence, which provided a complete defense to liability when a plaintiff was partially responsible for his or her injury. In its place, states adopted comparative fault, which permits a jury to reduce a plaintiff's recovery in proportion to his or her share of responsibility. Since this change in the law, there has been great uncertainty as to when misuse of a product provides a complete defense to liability and when it is merely an issue of comparative fault that may reduce recovery.[23] Legal scholars have noted that whether product misuse is a complete defense to liability or merges into comparative fault "is a vexing problem which has yet to be deliberatively addressed by most courts and legislatures."[24] The model act addresses and answers this question.

The model act recognizes that a seller has an affirmative defense when a product is used in a manner that is at odds with how an ordinary reasonably prudent person would use it. In these cases, the seller has no duty to take measures to protect the user. There is also no liability when a product is used for a purpose or in a manner that was not reasonably foreseeable by the product seller, in which case the seller could not have guarded against the danger.[25] In such situations, "comparative negligence should have no bearing. The defendant has violated no duty to the plaintiff."[26]

When misuse does not qualify as an affirmative defense under the criteria above, the model act recognizes in Section 2(B) that the jury may consider the extent to which misuse of the product resulted in the injury. The jury would then reduce the plaintiff's recovery in proportion to how much misuse of the product contributed to the injury. Finally, Section 3 of the Act provides guidance for when misuse can lead to a finding of design or warning defect.

NOTES

[1] *See* James A. Henderson & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 296 (1990).

[2] *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1962).

[3] *See* Alan Calnan, *A Consumer-Use Approach to Products Liability*, 33 U. Memphis L. Rev. 755, 766 (2003) (discussing California Chief Justice Roger Traynor's adoption of strict liability in *Greenman v. Yuba Power*, and examining treatment of misuse in the Restatement (Second) of Torts and Restatement, Third of Torts: Products Liability).

[4] David G. Owen, *Products Liability: User Misconduct Defenses*, 52 S.C. L. Rev. 1, 47-48 (2000).

[5] David G. Owen, *Products Liability: User Misconduct Defenses*, 52 S.C. L. Rev. 1, 51-52 (2000).

[6] Calnan, *supra*, at 785.

[7] *Crowther v. Ross Chem. & Mfg. Co.*, 202 N.W.2d 577, 581 (Mich. Ct. App. 1972). The court affirmed a trial court's denial of summary judgment finding that if the practice of glue sniffing was so "sufficiently notorious" that a manufacturer of model cement knew or should have known that this was an alternative use for its product, it could be held liable. *Id.*

[8] *Trivino v. Jamesway Corp.*, 539 N.Y.S.2d 123, 124 (N.Y. App. Div., 3d Dep't 1989). Given the "peculiar facts and circumstances," the court found that "varying inferences may be drawn as to whether plaintiff's use of the cosmetic puffs was reasonably foreseeable and, therefore, the issue is for the jury, not the court." *Id.*

[9] *Rivera v. Westinghouse Elevator Co.*, 526 A.2d 705, 707 (N.J. 1987).

[10] *Moran v. Faberge, Inc.*, 332 A.2d 11, 20-21 (Md. 1975) (reversing trial court's granting of judgment notwithstanding the verdict to the manufacturer).

[11] *Barnes v. Linton Indus. Prod., Inc.*, 555 F.2d 1184, 1187-88 (4th Cir. 1977) (reversing summary judgment for the manufacturer).

[12] *Larue v. National Union Elec. Corp.*, 571 F.2d 51, 57 (1st Cir. 1978).

[13] *Gann v. Anheuser-Busch Inc.*, No. 11-00017 (Tex. Ct. App. July 26, 2012). The Texas appellate court also dismissed the plaintiff's negligence claim on the basis that mere foreseeability that a legal product might be used as a weapon does not create a duty to protect a person from a criminal act of a third party.

[14] Owen, *supra*, at 55.

[15] Restatement Third, Torts: Products Liability § 2 cmt. m, at 33-34 (1998) (emphasis added).

[16] *Id.* § 2 cmt. p, at 39.

[17] *Id.*

[18] Model Uniform Product Liability Act (MUPLA), § 112(C)(1), 44 Fed. Reg. 62,714, 62,737 (daily ed. Oct. 31, 1979).

[19] Idaho Code § 6-1405(3)(a).

[20] Mich. Comp. Laws § 600.2945(e).

[21] Mont. Code Ann. § 27-1-719(5)(b).

[22] *See* Am. L. Prod. Liab. 3d § 42:9 (2011) (citing case law).

[23] *See* Victor E. Schwartz, Comparative Negligence 250 (5th ed. 2010).

[24] Owen, *supra*, at 57.

[25] *See* Schwartz, *supra*, at 258-59 ("Although unforeseeable misuse is sometimes called a form of contributory fault, the denial of the plaintiff's claim is better placed on the ground that the product simply was not 'defective' . . . . Courts agree that when such a case does arise, the comparative negligence statute should have no application and the plaintiffs' claim should be dismissed.") (citations omitted); Christopher H. Toll, *The Burden of Proving Misuse in Products Liability Cases*, 20 Colo. Law. 2307 (1991) (distinguishing misuse from comparative fault and assumption of risk).

[26] Schwartz, *supra*, at 254.