Amendments to Product Liability Act
Section-by-Section Analysis

Section 1. {Title.}

Section 1 retains the existing title of the model act, the Product Liability Act.

Section 2. {Definitions.}

Sets forth definitions applicable to the model act. These definitions have not changed from the 1995 Act, except for the addition of definitions for "express warranty" and "material fact," and a clarification that "claimant" includes class actions.

Section 3. {Effect on other laws.}

Section 3, as with the 1995 Act, states that the Model PLA is intended to serve as the exclusive basis for claims arising out of harms caused by products. Courts in several states, including Arkansas, Colorado, Connecticut, Louisiana, New Jersey, Texas and Washington, that have adopted product liability statutes follow this sound approach. *See, e.g., Persichini v. Brad Ragan, Inc.*, 735 P.2d 168 (Colo. 1987) (the PLA applies to claims pled under negligence); *Winslow v. Lewis-Shepard Inc.*, 562 A.2d 517 (Conn. 1989) (the PLA provides the exclusive remedy for claims failing within its scope); *Washington St. Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993) (the PLA "created a single cause of action for product-related harms, and supplants previously existing common law remedies.").

In these and other states, there have been several attempts since 1995 to circumvent product liability law and subject product manufacturers to tort law generally. These efforts involve novel tort theories or novel applications of traditional tort theories to go after the deep pocket manufacturer, often regardless of fault. Consider these three prominent examples:

- In high-profile industry litigation over lead paint, firearms and other products, some have tried to subject product manufacturers to public nuisance liability for harms caused by individuals who misused the products, for example by allowing lead paint to fall into a state of disrepair or through criminal gun violence. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541 (2006). In these cases, it is not alleged that the products were defective, which is the linchpin for liability under products liability law. This effort has largely failed. *See Rhode Island v. Lead Indus. Ass'n Inc.*, 951 A.2d 428, 435, 440 (R.I. 2008); *In re: Lead Paint Litigation*, 924 A.2d 484 (N.J. 2007).

- In pharmaceutical litigation, individuals are seeking to subject manufacturers of brand-name drugs to liability for their harms, even though they fully acknowledge that they only took only generic versions of those drugs, which were manufactured by someone else. This litigation violates the bedrock product liability law principle that one can only sue the company that made the actual product that allegedly caused the harm – not its competitors. While courts in nearly twenty states have rejected these theories, a couple of courts have permitted them. *See*, *e.g.*, *Conte v. Wyeth*, 85 Cal.Rptr.3d 299 (Cal Ct. App. 2008).

- Product liability claims are routinely cast as consumer protection claims to avoid the need to show an actual physical injury and causation. One recent class action brought on behalf of uninjured cell phone users claimed that radiation from their use placed them at risk of developing cancer, but that the manufacturers represented such products as safe. *See Farina v. Nokia*, 625 F. 3d 97 (3d Cir. 2010) (dismissing claim on basis of federal preemption), *cert. denied*, 2011 WL 4536521 (Oct. 3, 2011). Likewise, plaintiffs' lawyers often attack the safety of prescription drugs under state consumer protection statutes by alleging that they were not as safe or beneficial, or had greater risk, than the manufacturer represented. *See* James P. Muehlberger & Cary Silverman, *Lawsuits Without Injury: The Rise of Consumer Protection Claims*, HarrisMartin Columns: Drugs & Supplements, Oct. 2006, at 4. Such methods attempt to eliminate the need to show the product had an inadequate warning or harmed a patient, as required by product liability law.

To assure courts will interpret paragraph (A)(5) as precluding efforts to circumvent the PLA, revisions have been made to paragraph (A) clarifying this point. For example, it makes clear that the Product Liability Act "establishes the *exclusive* theories of liability for any civil action for harm caused by a product." The precise language in (A)(5) follows provisions in PLAs enacted in the states listed above where courts have validated that the PLA provides the exclusive remedy for harms caused by products. Also, paragraph (A)(6) expressly adds public nuisance theory to the exclusivity provision of the model act. Such a provision was added to the Ohio PLA after firearm and lead paint litigation was allowed to proceed in that state. *See* 2006 Ohio Am. Sub. S.B. 117 (codified as amended at Ohio Rev. Code Ann. § 2307.71(13)(c)).

Section 4. {Product liability standards.}

Section 4 provides the core of the Product Liability Act. Paragraph (A) follows the general structure of the 1995 Act with minor revisions to reflect the terminology used Section 2 of the Restatement Third, such as "manufacturing" defect, rather than "construction" defect. In addition, Paragraph (A)(2) follows language added to the Ohio PLA emphasizing that only the manufacturer of the *actual* product that caused the plaintiff's injury is subject to a product liability lawsuit. Thus, in no case is the manufacturer of one product liable for an injury caused by a product made by a competitor. This principle may seem to be commonsense, but as discussed above, courts have entertained claims imposing liability on a manufacturer without requiring any showing that the manufacturer made the actual product causing the plaintiff's harm. Such claims are contrary to the basic foundation of product liability law, which imposes liability on the actual manufacturer because it is the one who had control of the product, had the ability to improve its safety, and profited from its sale.

Section 4 incorporates several other sections from the 1995 Act in order to provide a unified standard for product liability. Specifically,

- The old Section 8 ("Construction Defects") is incorporated into Paragraph (A)(1)(a);
- The old Section 9 ("Express Warranty") is in Paragraph (D);
- The old Section 10 ("Knowledge of the Danger") is in Paragraph (B)(1);
- The old Section 11 ("Feasible Alternative Design") is in Paragraph (B)(2); and
- The old Section 14 ("Warnings") is in Paragraph (C).

As mentioned above, wording as been slightly modified to reflect principles in the Restatement Third and state PLAs that have been enacted since 1995. *See, e.g.*, Miss. Code § 11-1-63.

Section 5. {Misuse and modification.}

Section 5 of the Product Liability Act replaces Section 7 of the 1995 Act. The 1995 Act provided an absolute defense in cases where the plaintiff misused a product, or the plaintiff or a third party altered or modified a product post-sale. The revised Model PLA limits the defense to misuse, alterations, or modifications that were not *reasonably foreseeable* to the product seller. A product seller has no duty to protect against an unforeseeable misuse, alteration, or modification. The change follows the laws of many states and the principles of the Restatement Third, that reasonably foreseeable misuses, alterations, and modifications may be relevant to the determination of defect, causation, or comparative responsibility. *See* Restatement Third § 2 cmt. p; *see also* Colo. Rev. Stat. § 13-21-402.5; Mich. Rev. Stat. § 600.2947(1), (2).

For example, if a misuse is foreseeable, a seller could have adopted a reasonable alternative design or provided additional instructions or warnings. In such cases, it may not be appropriate to fully eliminate a plaintiffs' recovery. The plaintiff's recovery can be reduced, though, by his or her degree of fault in misusing, altering, or modifying the product.

Section 6. {Learned intermediary doctrine}

Section 6 codifies the "learned intermediary doctrine," which was not addressed in the 1995 Act. The learned intermediary doctrine provides that manufacturers or suppliers of prescription drugs fulfill their duty to warn consumers of the dangerous propensities of their products by conveying accurate warning information to prescribing physicians. It is the physician's duty to evaluate the medication's benefits and risks for the individual patient. The rule, in effect, directs a manufacturer's legal duty to warn toward physicians, rather than individual consumers.

Almost all jurisdictions follow some formulation of the learned intermediary doctrine with regard to claims involving prescription drugs. *See In re Norplant Contraceptive Prods. Liab. Litig.*, 215 F. Supp.2d 795, 806-09 (E.D. Tex. 2002) (concluding that forty-eight states, the District of Columbia and Puerto Rico have either applied or recognized the learned intermediary doctrine, and providing chart reflecting the same). Courts have cited several reasons for supporting this doctrine. First, training and experience place physicians in a better position than the manufacturer to convey complex medical information and terminology to patients. Second, the physician has a relationship with the individual patient, making it possible to evaluate the patient's treatment needs and provide an assessment of the potential benefits and likely risks specific to the patient's medical and family history. Third, it is more effective and efficient for manufacturers to provide a common set of warnings to an intermediary with more definable knowledge and skill characteristics than to a broad spectrum of consumers. It is difficult, if not impossible, to convey comprehensive drug warnings to consumers due to the highly technical nature of the information and variations in the needs of individual patients.

This provision in the Model PLA draws from states that have codified the doctrine as well as Section 6(d) of the Restatement Third. *See, e.g.,* Miss. Code Ann. § 11-1-63(c); N.J. 2A:58C-4; N.C. Gen. Stat. § 99B-5(c); Ohio Rev. Code Ann. § 2307.76.

Section 7. {Warnings to third parties.}

Section 7 incorporates Section 15 of the 1995 Act without modification. It codifies the bulk supplier doctrine and the sophisticated user defenses.

Bulk suppliers are those who sell their products in bulk, generally to other businesses. These suppliers may not know how the product will be used and may not be able to attach a label or instructions to the raw material or component. The bulk supplier doctrine, therefore, states that a bulk supplier's or raw material manufacturer's duty to warn consumers, or other end users, of the risks of its product is discharged by warning the product's immediate purchaser. It is the immediate purchaser's responsibility to include appropriate warnings when selling those materials or products to others.

The sophisticated user doctrine recognizes that users with superior knowledge of a product are or should already be well-aware of the product's risks. As with the bulk supplier doctrine, the law here anticipates that sophisticated users are businesses, not average individuals. Both provisions recognize that there are special challenges in conveying warnings regarding certain products in the workplace. In these instances, the obligation to warn falls on the party in the best position – because they are the most knowledgeable or informed – to provide such warnings.

Section 8. {Liability of product sellers.}

Section 8 modifies and simplifies Section 16 of the 1995 Act in accordance with product seller statutes enacted in several states. Absent legislation, traditional product liability law allows imposition of liability on wholesalers, distributors, and retailers for harm caused by a defective product, even if it was not aware of and could not have discovered the defect. An innocent seller can be named in a lawsuit simply because of its presence in the chain of distribution. This is often done for strategic litigation purposes, particularly when the "innocent seller" is a local mom-and-pop business, such as a corner pharmacy or grocery store. They are swept up as part of the "sue-everyone" mentality and their presence in the litigation can permit the plaintiff to pick certain favorable jurisdictions to have his or her claims heard. More than half of state legislatures have adopted innocent seller protection to address this problem.

Section 8 of the Model PLA draws from these laws to provide that a product seller, other than the manufacturer, is not subject to suit in a product liability action unless the seller designed or modified the product, or provided an express warranty. A product seller may also be subject to a product liability lawsuit if the plaintiff is unable to proceed with a claim against the manufacturer, such as when the manufacturer is unknown, not subject to service of process, or the manufacturer is insolvent or otherwise judgment proof. The language in this provision is based on the Alabama and Tennessee laws. *See* S.B. 184 (Ala. 2011); H.B. 2008 (Tenn. 2011). Finally, paragraph (B) retains a section of the 1995 Act that clarifies that although product sellers other than the manufacturer are not subject to strict liability absent application of one of the enumerated exceptions, they continue to have a duty of reasonable care in their sale of the product.

Section 9. {Alcohol and drug defense.}

Section 9 incorporates Section 17 of the 1995 Act without modification. It codifies the commonsense principle that an individual injured while drunk or under the influence of an illicit drug should not be able to shift responsibility for his or her injury on a product manufacturer where the influence of alcohol or drugs played the greatest role in causing the injury.

Section 10. {Subsequent remedial measures.}

Section 10 incorporates Section 18 of the 1995 Act without modification. It codifies a well-accepted principle of evidentiary law that is intertwined with product liability law – evidence that a manufacturer took steps to improve the safety of a product after an injury is inadmissible to prove that the earlier product was defective. This rule furthers product safety by encouraging manufacturers to learn from accidents and promptly modify their products to avoid future harm, rather than place them at significant risk of liability for doing so.

Section 11. {Concert of action.}

Section 11 incorporates Section 20 of the 1995 Act without modification. This section reacts to the inappropriate use of "concert of action" claims as a means of circumventing product liability requirements. Traditional application of "concert of action" theory involves conduct by a small number of individuals whose actions resulted in a tort against a single plaintiff, usually over a short span of time. The defendants are held jointly liable for the plaintiff's injuries.

Most jurisdictions that have considered this theory have rejected its application to product liability cases, which involve numerous manufacturers that compete against each other. Often, the assertion is that the manufacturers shared involvement in regulatory or legislative activities, or collectively worked towards voluntary industry safety standards through industry associations. The Model PLA recognizes that "concert of action" claims must show conscious and deliberate agreement to, acknowledgment of, and collaborative participation in wrongful conduct by two or more persons. These other activities are legitimate, helpful endeavors that should be encouraged.

Section 12. {Specific Product Identification}

Section 12 is a new provision addressing instances in which plaintiffs have sought to impose liability based on a market share, enterprise, or other industry wide liability. For example, in the case accredited as the origin of market share liability, the California Supreme Court shifted the burden to the manufacturers of a widely distributed prescription drug to prove that they did not manufacture the drug that caused the plaintiff's harm. *See Sindell v. Abbott Laboratories, Inc*., 607 P.2d 924 (Cal. 1980). Otherwise, each defendant would be liable for a share of the plaintiff's injury equal to its share of the market for the product. The theory was adopted by fewer than a half-dozen courts in diethylstilbesterol (DES) cases. Most courts have rejected market-share liability in a variety of contexts, including cases involving asbestos, handguns, vaccines, breast implants, blood products, and lead paint.

Enterprise liability is another burden-shifting theory with some similarities to market-share theory. Enterprise liability stems from a New York federal court case, where only a handful of companies made a product, blasting caps, and it was not possible to determine the identity of the product that harmed the plaintiffs. *Hall ex rel. Hall v. E.I. du Pont de Nemours & Co.*, *Inc.,* 345 F. Supp. 353, 378 (E.D.N.Y. 1972). Because there was a strong likelihood that the blasting caps were produced by one of six major manufacturers, the court declined to dismiss the complaints

and indicated that it might be appropriate to shift the burden of causation to the defendants. Courts almost universally have rejected the theory or found it inapplicable under the facts of a particular case.

The language of this section of the Model PLA is based on legislation adopted by the Ohio General Assembly in 2006. *See* Ohio Code § 2307.73(C).

Section 13. {Incorporation of Other ALEC Model Acts.}

Since 1995, ALEC has adopted several model acts important to products liability claims, including some that cover topics included in the 1995 Act. These other model acts provide an important source for model legislation affecting products liability actions. The Model PLA includes by reference the following ALEC model bills:

- The **Regulatory Compliance Congruity With Liability Act** (adopted 2007) offers options for addressing the impact of regulatory compliance and product approvals on liability. This model act replaces the government standards defense included in Section 5 of the 1995 Act and regulatory approval defense for adequate warning or instruction, which was in Section 14(A)(2) of the 1995 Act.

- The **Assumption of Risk Act** (adopted 1995) continues to provide language for legislators interested in including such a provision in product liability legislation. This model act replaces Section 13 of the 1995 Act.

- The **Reliability in Expert Testimony Standards Act** (adopted 2000, revised 2005) provides current ALEC policy on expert testimony standards. This model act replaces Section 19 of the 1995 PLA. The 1995 Act was outdated in that it preceded recognition of the importance of the U.S. Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) and its progeny. In those cases, the Supreme Court deputized judges to serve as "gatekeepers" for the reliability of expert testimony and required expert testimony to follow scientific methods.

- The **Ten-Year Statute of Repose Act** (adopted 2002) provides that an injury occurring ten years after a product is sold is presumed to not result from a defect in the product, with certain exceptions. Approximately twenty states have similar laws.

- The **Asbestos and Silica Claims Priorities Act** (adopted 2003, revised 2006) ensures that those who are truly sick from exposure to asbestos or silica receive prompt, fair and efficient adjudication of their claims by requiring claimants to meet certain medical criteria for showing a physical impairment before proceeding with their claims. At least six states have adopted such medical criteria requirements through legislation. Several courts have taken similar steps through judicial action.

- The **Asbestos Claims Transparency Act** (adopted 2007) assures that courts and litigants have available to them information as to payments an asbestos claimant has or may receive from asbestos-related bankruptcy trusts.

- The **Transparency in Lawsuits Protection Act** (adopted 2007) provides that a court shall not create a new private right of action on the basis of a statute that provides regulatory requirements, such as product safety standards, unless the state legislature specifically provides a right to sue. Georgia was the first state to adopt legislation based on this model act in 2010.