Fair Share Act

The model Fair Share Act builds upon and replaces ALEC's Joint and Several Liability Abolition Act, which was approved in 1995. It retains the central feature of the earlier model act: each defendant is liable only for damages in direct proportion to that defendant's responsibility. It also continues to provide juries with the opportunity to consider the full picture of the events surrounding an injury when allocating responsibility, including the responsibility of settling parties and those who were not named as defendants. The updated model act incorporates helpful features of state laws enacted in recent years.

Joint and Several Liability

The rule of joint liability, commonly called joint and several liability, provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant may be held liable for a plaintiff's entire compensatory damages award. Thus, a jury's finding that a particular defendant may have been only 1% at fault is overridden and that defendant may be forced to pay 100% of the award if other responsible defendants are insolvent or unable to pay their "fair share."

Joint liability has its origin in a time in which the doctrine of contributory negligence barred a plaintiff that was even partially at fault for his or her own injury from any recovery. When this rule was in place, it was felt that it was fairer for the culpable defendant to bear the loss than to leave the blameless plaintiff without a full recovery. With the widespread adoption of comparative fault, the principal justification for requiring one defendant to bear another individual or entity's share of fault was lost.[1] In the vast majority of jurisdictions, a plaintiff who is partially to blame for his or her own injury is not barred from recovery but will have his or her recovery reduced in proportion to that individual's share of responsibility for the harm. In this legal environment, in which liability is closely linked with fault, courts and scholars have criticized continued application of joint liability.[2]

The Vast Majority of States Have Moved Away from Joint Liability

"Over the past two decades, the shortcomings of joint liability rules have become increasingly apparent: A defendant only minimally at fault bears a disproportionate and unfair burden."[3] Joint liability blunts incentives for safety, because it allows negligent actors to under-insure and puts full responsibility on those who may have been only marginally at fault. In addition, joint liability encourages plaintiffs' attorneys to engage in "shotgun pleading" because they know that if they join enough "deep pockets," they are likely to be able to convince the jury to assign at least one percent responsibility to one of them, assuring that at least one party will be available to pay the entirety of a potentially large award.

Recognizing the need for reform, forty-one states have abolished or limited the application of joint liability through legislation or court decision. These reforms show a

clear movement toward equating liability with fault. Significantly, no state that has repealed or modified its joint liability law has ever gone back and amended the law to restore joint liability.

- Only eight states and the District of Columbia retain full joint liability.[4] Half of those states, however, retain contributory negligence as a complete bar to recovery. Several other states have generally adopted several liability, but provide broad exceptions in which joint liability continues to apply.[5]

- Nineteen states have abolished joint liability, replacing it with several ("fair share") liability, or sharply limited the application of joint liability to narrow situations.[6]

- Seventeen states have abolished joint liability for defendants whose degree of fault falls below a specified threshold (e.g., no joint liability for defendants found to be less than fifty percent at fault), retaining joint liability only for defendants with a major share of the fault for the plaintiff's harm.[7] Washington State applies joint liability only when the plaintiff bears no degree of fault and other limited situations.

- Seven states have limited joint liability for noneconomic damages, such as pain and suffering, while retaining joint liability for certain economic losses, such as medical expenses or lost wages.[8]

- A few states combine some of these approaches.

Oklahoma and Pennsylvania are the most recent states to enact joint liability reform. The Oklahoma experience shows that states can successfully take a step-by-step approach to reducing joint liability. In 2004, Oklahoma moved from full joint liability to a 50% threshold approach, but continued to apply joint liability when it is found that the defendants acted willfully or recklessly, or where the plaintiff had no comparative negligence. Five years later, the Oklahoma legislature eliminated these exceptions, but otherwise retained the 50% threshold approach. Most recently, in 2011, Oklahoma abolished joint liability except where the state brings the lawsuit.[9]

Pennsylvania moved toward several liability on June 28, 2011, when Governor Tom Corbett signed the Fair Share Act into law. The Pennsylvania law is similar to Oklahoma's first step in joint liability reform. Pennsylvania's Fair Share Act eliminates joint liability except where a defendant is responsible for 60% or greater of the total fault apportioned to all parties and in several other limited situations.[10]

Other states that have reformed their joint and several liability laws over the past decade include Arkansas, Florida, Georgia, and Mississippi, which abolished joint liability, Missouri and South Carolina, which limited joint liability to defendants who are found at least 50% responsible for the injury, Ohio, which adopted both a 50% threshold and limited joint liability to economic damages, and Texas, which clarified its procedures for allocation of fault to nonparties. In addition, West Virginia placed modest limitations on joint liability.[11]

Consideration of All Parties

The area of greatest deviation, ambiguity, and confusion in the states is with respect to a jury's ability to allocate fault to individuals or entities that are not present at trial, but whose conduct may have contributed to the plaintiff's injury. This issue arises in states that have otherwise abolished joint liability, modified joint liability to apply only to those whose responsibility for the injury reaches a certain threshold percentage, or enacted other limitations on joint liability.

There are many reasons why a person or company may not be named as a defendant in litigation, even if it contributed to the plaintiff's injury. A company that shares responsibility for the injury may have gone out of business or may be insolvent. An individual who clearly is largely at fault for the harm may be "judgment proof," meaning he or she has little or no assets to pay damages. Some people or entities are immune from litigation. For example, states have sovereign immunity, employers liability for on-the-job injuries is generally limited to workers' compensation, and, in some states, charitable organizations have limited liability. A plaintiff may also choose not to sue a individual or entity because it is beyond the jurisdiction of the court or not subject to service of process, such as a foreign company that does little business in the United States. In addition, it is common for plaintiffs to settle with those who have little financial resources, even if those parties bear most of the responsibility for the injury, to focus their litigation on "deep pockets" that had a lesser role in the harm.

If a jury is only allowed to consider the responsibility of parties that are before the court, the effect is to shift liability on the named defendants for the actions of others. Such a result is contrary to the purpose of several liability and, effectively, retains a form of joint liability. As the authoritative Prosser treatise, recognizes, "[T]he failure to consider the negligence of all tortfeasors, whether parties or not, prejudices the joint defendants who are thus required to bear a greater proportion of the plaintiff's loss than is attributable to their fault."[12]

Nevertheless, this issue is subject to a great deal of litigation because some state laws have referred to allocation of fault to "parties" or "defendants." Some courts have narrowly interpret these terms to limit allocation of fault to those who are named as a defendants in the litigation.[13] Some states, such as Illinois, do not even allow the jury to consider the responsibility of settling parties.[14] In other states, judges interpret state law as permitting juries to allocate fault to nonparties.[15] Several states have adopted statutes that explicitly permit the jury to allocate fault nonparties, Some of these states provide a specific procedure for a defendant to provide notice to the plaintiff of its intention to allocate fault to a nonparty[16] while others do not provide such detail.[17] Finally, in some states, the law on allocation of fault to nonparties may be unclear. The model act makes clear that juries may allocate fault to any person or entity that shared responsibility for the injury, regardless of whether it is named as a defendant.

Section-by-Section Analysis

Section 1 abolishes joint liability and adopts several liability, under which a defendant is liable only for its share of responsibility for the plaintiff's injury. In allocating responsibility, jurors (or the court in a bench trial) consider the responsibility of each claimant, defendant, settling party, or nonparty designed by a defendant. A jury's allocation of fault to a nonparty does not bind that person or entity to pay damages and may not be used in any subsequent legal proceeding. The jury allocates responsibility to nonparties only as a way of accurately determining the defendant's liability.

Notes: In adopting several liability, this provision retains the policy of the ALEC's 1995 Joint and Several Liability Abolition Act. Some states have gradually amended their joint and several liability laws to move from full joint liability, to a threshold approach, to several liability, and reduced exceptions under which joint liability applies along the way. Under any approach, it is essential that legislation explicitly recognize that juries may allocate fault to nonparties regardless of whether the person or entity was or could have been named as a party to the action. Without such a provision, courts may interpret the law to shift liability onto named defendants for the responsibility of those who are not in court.

Section 2 provides a specific procedure for designation of nonparties to which the jury may allocate responsibility. The model act suggests that state's require a defendant to provide a plaintiff with 60 days notice prior to the date of trial of the identity of the nonparty to be considered unless the court finds good cause warranting a later designation. A person or entity may be designated as a responsible nonparty regardless of whether the person was or could have been named as a party to the action and irrespective of whether the nonparty is insolvent, immune, or not subject to service of process in the jurisdiction. After discovery, a plaintiff may challenge the designation of a nonparty on the ground that there is no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damage. At that point, the defendant must produce evidence showing a question of fact for the jury as to the nonparty's responsibility.

***Notes*:** States that require defendants to designate nonparties for allocation of fault vary on how and when such notice is to be given to the plaintiff.[18] The model act recommends providing notice of an intent to allocate fault to a nonparty by filing a motion no later than 60 days prior to the date of trial or the close of discovery, whichever is closer to trial, to provide fairness to plaintiffs. Those considering developing procedures based on Section 2 should consider that in one state, Arkansas, the state supreme court has found that requiring the filing of a pleading by a certain date violates the separation of powers by intruding on court rules.[19] If court decisions in your state raise such a concern, then an alternative is the Arizona approach, which requires only that the defendant provide notice before trial in accordance with requirements established by court rule.[20]

Section 3 recognizes that adoption of several liability and recognition that fault may be allocated to nonparties does not impact three areas: (1) concert of action claims; (2) vicarious liability; (3) a defendant's rights to contribution or indemnity, or procedural rules for filing of cross-claims or counterclaims.

***Notes*:** Joint liability continues to apply to "concert of action" claims, where it is alleged that a person or entity consciously and deliberately pursued a common plan or design to commit an intentional tort and actively take part in that intentional tort. Some form of this exception is contained in most several liability laws. Elimination of joint liability should not be misconstrued to alter a separate area of the law, vicarious liability. Vicarious liability arises only when there is a special relationship, recognized by law, that imposes liability for one parties acts upon another. For example, an employer is generally vicariously liable for the acts of employees acting within the scope of their job responsibilities. Finally, the allocation of fault provisions of the model act are not intended to affect the assertion by a defendant of rights to contribution or indemnity. Nothing in this section affects the filing of cross-claims or counterclaims.

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[1] *See* Victor E. Schwartz, Comparative Negligence § 1.05[e][3], at 29 (5th ed. 2010).

[2] *Dix & Associates Pipeline Contractors, Inc. v. Key*, 799 S.W.2d 24, 27 (Ky. 1999); *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992); *see also* Restatement (Third) of Torts: Apportionment of Liability § 10 cmt. a (2000) (stating "it is difficult to make a compelling argument" for full joint liability).

[3] Steven B. Hantler et al., *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1147 (2005).

[4] Jurisdictions retaining full joint liability include Alabama, Delaware, District of Columbia, Maine, Maryland, Massachusetts (limited to proportionate share of common liability), North Carolina, Rhode Island, and Virginia.

[5] Connecticut, Hawaii, Nevada, New Mexico, Washington, and West Virginia are examples of states with statutes that include broad exceptions in which joint liability continues to apply.

[6] States that have largely replaced joint liability with several liability include Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, North Dakota, Oklahoma, Tennessee, Utah, Vermont, and Wyoming.

[7] States that have adopted the "threshold approach" include Illinois (25%), Iowa (50%), Minnesota (50%), Missouri (51%), Montana (50%), Nevada (less than plaintiff's fault), New Hampshire (50%), New Jersey (60%), New York (50%), Ohio (50%), Oregon (equal or less than plaintiff or 25%), Pennsylvania (60%), South Carolina (50%), South Dakota (50%), Texas (50%), West Virginia (30%), and Wisconsin (51%).

[8] States that have limited joint liability for noneconomic damages, but retained joint liability in some circumstances for economic damages, include California, Hawaii, Illinois, Iowa, Nebraska, New York, and Ohio.

[9] S.B. 862 (2011) (codified at Okla. Stat. tit. 23, § 15.1).

[10] 42 Pa. Cons. Stat. § 7102. The Pennsylvania law also continues to apply joint liability where there is an intentional misrepresentation, an intentional tort, for certain environmental claims, and where there is a violation of the state's dram shop law.

[11] The West Virginia law eliminates joint liability for defendants 30% or less at fault. If a claimant has not been paid after six months of the judgment, however, defendants 10% or more responsible are subject to reallocation of uncollected amount. Defendants less than 10% at fault or whose fault is equal to or less than the claimant's percentage of fault are not subject to reallocation. W. Va. Code Ann. § 55-7-23.

[12] *See* W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* 475-76 (5th ed. 1984) (emphasis added).

[13] *See, e.g., Donner v. Kearse*, 662 A.2d 1269 (Conn. 1995); *Baker v. Webb*, 833 S.W.2d 898 (Ky. Ct. App. 1994); *Jensen v. ARA Servs., Inc.*, 736 S.W.2d 374 (Mo. 1987); *Bencivenga v. J.J.A.M.M., Inc.*, 609 A.2d 1299 (N.J. Super Ct., App. Div. 1992); *Bowman v. Barnes*, 282 S.E.2d 613 (W. Va. 1981); *Connar v. West Shore Equip. of Milwaukee, Inc.*, 227 N.W.2d 660 (Wis. 1975); *Board of County Commissioners v. Ridenour*, 623 P.2d 1174 (Wyo. 1981).

[14] *See Ready v. United/Goedecke Services, Inc.*, 905 N.E.2d 725 (Ill. 2008).

[15] *See, e.g., DaFonte v. Up-Right, Inc.*, 828 P.2d 140 (Cal. 1992); *Idaho Dep't of Labor v. Sunset Marts, Inc.*, 91 P.3d 1111 (Idaho 2004); *Brown v. Keill*, 580 P.2d 867 (1978); *Hunter v. General Motors Corp.*, 729 So.2d 1264 (Miss. 1999); Bode v. Clark Equip. Co., 719 P.2d 824 (Okla. 1986).

[16] *See, e.g.,* Ariz. Rev. Stat. § 12-2506; Colo. Rev. Stat. § 13-21-111.5; Fla. Stat. Ann. § 768.81(3); Ga. Code Ann. § 51-12-33; Ind. Code Ann. § 34-51-2; Mich. Comp. Laws §§ 600.2957, 600.6304; Tex. Civ. Prac. & Rem. Code Ann. §§ 33.003, 33.004; Utah Code Ann. § 78-27-38(4)(a).

[17] *See, e.g.*, La. Civ. Code art. 2323(A); N.M. Stat. Ann. § 41-3A-1(B); N.D. Cent. Code § 32-03.2-02.

[18] *See, e.g.,* Ariz. Rev. Stat. § 12-1506(B) (requiring notice before trial in accordance with requirements established by court rule); Colo. Rev. Stat. § 13-21-111.5(3)(b) (requiring notice within 90 days of commencement of an action unless the court determines a longer period is necessary); Fla. Stat. Ann. § 768.81(3) (requiring a defendant to affirmatively plead the fault of a nonparty either by motion or in the initial responsive pleading when defenses are first presented, subject to amendment any time before trial in accordance with state rules of civil procedure); Ga. Code Ann. § 51-12-33 (requiring notice by filing a pleading within 120 days prior to the date of trial); Ind. Code Ann. § 34-51-2-16 (requiring defendant to raise nonparty fault as an affirmative defense in the first answer or not later than 45 days before the expiration of the statute of limitations subject to alteration of the time limit by the court); Mont. Code Ann. § 27-1-705(6) (requiring defendant to affirmatively plead comparative fault and identify in the answer or within a reasonable amount of time after filing the answer, each person who the defendant alleges is at fault); Tex. Civ. Prac. & Rem. Code Ann. § 33.004(a) (requiring defendant to file a motion within 60 days of the trial date unless the court finds good cause for the motion to be filed at a later date); Utah Code Ann. § 78-27-41(4) (requiring a defendant to file a description of the factual and legal basis on which fault can be allocated and information identifying the non-party no later than 90 days before trial).

[19] *See Johnson v. Rockwell Automation, Inc.*, 308 S.W.3d 135 (Ark. 2009).

[20] Ariz. Rev. Stat. § 12-2506. Legislators may also consider the approach of states such as Louisiana, New Mexico, and North Dakota, which have adopted laws that explicitly provide for allocation of fault to nonparties but do not provide a specific procedure for doing so. This approach, however, may also raise the potential for a constitutional challenge as the Montana Supreme Court, in invalidated a law authorizing allocation of fault to nonparties, found that it lacked "any kind of procedural safeguard" when compared to such statutes in other states and "imposed a burden upon plaintiffs to anticipate defendants' attempts to apportion blame [to a nonparty] up to the time of submission of the verdict form to the jury." *Newville v. Department of Family Servs.*, 883 P.2d 793, 802 (Mont. 1994).

Fair Share Act

Summary

ALEC's model Fair Share Act provides that each defendant is liable only for damages in direct proportion to that defendant's responsibility. The model act also ensures that juries have an opportunity to consider the full picture of the events surrounding an injury when allocating responsibility, including the contribution of settling parties and those who were not named as defendants to the alleged harm. Defendants are required to provide plaintiffs with adequate notice of their intent to designate one or more nonparties as wholly or partially responsible for damages. Defendants must present sufficient evidence to support such assertions. Joint liability applies to those who consciously and deliberately pursue a common plan or design to commit an intentional tort or who are subject to vicarious liability under existing law.

Model Legislation

{Title, enacting clause, etc.}

Fair Share Act; abolishing joint and several liability and providing for allocation of responsibility.

Section 1. {Several liability.}

(A) In any civil action based on any legal theory seeking damages for personal injury, property damage, wrongful death, or other harm for which damages are allowed, the liability of each defendant shall be several only and shall not be joint. Each defendant shall be liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of responsibility for the claimant's harm, and a separate judgment shall be rendered against the defendant for that amount.

(B) The trier of fact shall consider the responsibility of all persons or entities that contributed to a claimant's harm, including: (1) each claimant; (2) each defendant; (3) each settling person or entity; and (4) each responsible nonparty, designated under Section 2 of this Act., regardless of whether the person or entity was or could have been named as a party to the action and irrespective of whether the nonparty is insolvent, immune, or not subject to service of process in the jurisdiction.

(C) Assessments of responsibility regarding nonparties shall be used only to determine the liability of named parties. Such assessments shall not subject any nonparty to liability and may not be introduced as evidence of liability in any action.

Section 2. {Designation of Responsible Nonparties.}

(A) A defendant may file a notice to designate a person or entity as a responsible nonparty not later than 60 days prior to the date of trial or the close of discovery, whichever is closer to trial, unless the court finds good cause to allow the defendant to file the notice at a later date.

(B) After adequate time for discovery, a party may move to strike the designation of a responsible nonparty on the ground that there is no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damage. The court shall grant the motion to strike unless a defendant produces sufficient evidence to raise a genuine issue of fact regarding the designated person's responsibility for the claimant's injury or damage.

Section 3. {Limitations.}

(A) Notwithstanding this Act, joint and several liability shall apply to any person or entity that consciously and deliberately pursues a common plan or design to commit an intentional tort and actively take part in that intentional tort. Any person or entity held jointly liable for acting in concert shall have a right of contribution against co-defendants.

(B) Nothing in this Act abrogates or affects the doctrine of respondeat superior or vicarious liability to the extent recognized by existing law.

(C) Nothing in this Act affects the third-party practice as recognized in the rules and statutes of this state with regard to the assertion by a defendant of rights to contribution or indemnity. Nothing in this section affects the filing of cross-claims or counterclaims.

Section 4. {Severability clause.}

Section 5. {Repealer clause.}

Section 6. {Effective date.}

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.}

RATIONAL USE OF A PRODUCT ACT

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.