Stabilization of Product Liability Law by Statue: Mississippi as a Case Study

By Stephanie M. Rippee and Everett E. White

SUPPOSE A CONSUMER buys a product—a car. While driving, he crashes into a tree and spends weeks in the hospital recovering from his injuries. He misses weeks of work without pay. He soon hears news reports and sees lawyers' advertisements claiming the particular make and model car he owns might have a defect of some sort. The car manufacturer, upon investigation of his accident, believes that the car isn't defective and that negligent driving caused the crash. The consumer decides to sue the car manufacturer and the local dealership to recover his damages, including his medical bills, lost wages, pain and suffering and mental anguish. What claims can the consumer pursue under state law for harm caused by the allegedly defective car?

In product liability cases, plaintiffs routinely file expansive complaints that include common law negligence, strict liability, warranty, fraud and misrepresentation claims, as well as claims permitted by various state statutes such as consumer fraud statutes or the state's version of the Uniform Commercial Code ("UCC"). Sometimes, these causes of action overlap or conflict in terms of evidence permitted and proof standards required. Sometimes, the legal claims asserted don't really even seem to fit the situation involved or the harm supposedly incurred.

Defendants want certainty as to what claims legitimately can be pursued.

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Uncertainty causes parties to needlessly waste time and money fighting about the proof required or permitted, the defenses available, and the appropriate jury instructions. And ultimately, uncertainty about liability exposure can discourage businesses, such as product manufacturers and sellers, from locating or remaining in the state.

To provide more certainty about potential exposure under product liability law, some states have enacted product liability statutes that clearly set forth the claims permitted and proof required when alleging damages caused by a defective product. Quite often, the proof requirements mandated by state product liability statutes are more stringent than or conflict with those required by common law or other statutory schemes. Quite often, the defenses are different or more complete.

But do such statutes actually achieve the desired stability? The answer to that question seems to depend on whether the courts enforce the statute as the exclusive means of recovery for harm caused by a product. If instead plaintiffs are allowed to plead around the statute, the stabilizing effect likely will not materialize.

Mississippi presents an interesting case study of this issue. In 1993, the Mississippi Legislature enacted the Mississippi Product Liability Act (MPLA or the Act)[1] to stabilize product liability law in Mississippi. But after having been in effect for nearly twenty years, the stabilizing effect has never really materialized. Although the Mississippi Legislature intended the Act to be *the* standard for product liability actions in the state, many courts have interpreted the Act as simply one option for recovery available to plaintiffs. This failure to effectuate the Act's legislative intent has diminished its effectiveness and has even added to the confusion about what a plaintiff can claim and must prove, and what defenses are available in a product liability lawsuit.

I. The MPLA

The MPLA, in its current form, allows a plaintiff to sue a product manufacturer or seller for damages caused by a product if the product has a defect that renders the product unreasonably dangerous and that dangerous condition proximately causes personal injury to the claimant.[2] The Act excepts from its seemingly broad, comprehensive scope only commercial damage to the product itself.[3] The Act provides only four specific types of defects upon which liability can be premised: 1) failure to meet manufacturing specifications; 2) inadequate warnings; 3) defective design; and 4) breach of an express warranty upon which the user justifiably relied.[4] Later subsections of the MPLA further define these four permitted claims, which are subject to varying standards. Specifically, while the standards for a manufacturing defect and a breach of express warranty claim seem to still be strict liability where fault is irrelevant, the standards set forth for inadequate warning claims[5] and design defect claims[6] have

[1] MISS. CODE ANN. § 11-1-63 (Rev. 2002).

[2] MISS. CODE ANN. § 11-1-63(a)(Rev. 2002).

[3] *Id.*

[4] *Id*. at § 11-1-63(a)(i)(1)-(4).

[5] Subsection (c) provides that a claimant cannot recover unless he proves the manufacturer or seller knew or should have known about the danger that was not included in the warning and that the ordinary user would not have been aware of that danger. *Id.*at § 11-1-63(c)(i).

[6] Subsection (f) provides that a claimant must prove that at the time the product left the control of the manufacturer or seller, the manufacturer or seller knew or should have

both been characterized as negligence, rather than strict liability, standards.[7] The statutory standards are decidedly different from the standards previously set forth in the common law. For example, pre-MPLA common law for design defect claims considered "the availability of a substitute product which would meet the same need and not be as unsafe" as just one of several factors for a risk-utility analysis of defectiveness.[8] The MPLA's requirement that a feasible design alternative must be proven was a new requirement and arguably a heavier burden for plaintiffs.

The remaining subsections of the MPLA set out various defenses available to a manufacturer or seller, some of which did not exist in the prior common law. For example, the innocent seller defense in subsection (h) immunizes a seller as to liability for any of the named defects unless he exercised control over certain aspects of the development of the product; altered the product in a way that substantially contributed to the harm; or had actual or constructive knowledge of the defect at the time he sold the product.[9] Sellers were not immunized in this manner under common law. As another example, the assumption of the risk defense in subsection (d) provides that if a plaintiff knew about and appreciated the alleged danger and still voluntarily exposed himself to it, then the manufacturer "shall not be liable."[10] Under the prior common law scheme, the plaintiff would merely have been allocated a percentage of fault pursuant to Mississippi's statute on joint and several liability.[11]

A. Legislative Intent: An Exclusive Remedy for Product-Based Claims

Interpreting the Act is the duty of the Mississippi courts, and the "polestar" consideration is legislative intent.[12] A statute should be read in the manner most

known of the danger in the design that caused the damages; that the product failed to function as expected; and that a feasible design alternative existed that would likely have prevented the harm without impairing the utility, usefulness, practicality or desirability of the product. *Id.*at § 11-1-63(f).

[7] MISS. CODE ANN. §11-1-63(a)(i)(4), (c) and (f) (Rev. 2002). Estate of Hunter v. Gen. Motors Corp., 729 So.2d 1264, 1277-1278 (Miss. 1996); Palmer v. Volkswagen of Am., Inc., 905 So.2d 564, 600 (Miss. Ct. App. 2003) *rev'd on other grounds*, 904 So.2d 1077 (Miss. 2005). Philip McIntosh, *Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability*, 16 MISS. C. L. REV. 393, 395 (1996) (MPLA moves standard for design defect claims from strict liability toward negligence).

[8] Sperry-New Holland v. Prestage, 617 So.2d 248, 256 (Miss. 1993). Immediately before the MPLA was enacted, the Mississippi Supreme Court followed the risk-utility test for determining whether a product contained a design defect. *Id.* The risk-utility test, however, "has probably been replaced by the statutory command that there is no liability unless the product 'failed to perform as expected.'" Wolf v. Stanley Works, 757 So.2d 316, 321-322 (Miss. Ct. App. 2000) (citing MISS. CODE ANN. § 11-1-63(f)(ii)).

[9] MISS. CODE ANN. § 11-1-63(h).

[10] *Id*. at § 11-1-63(d).

[11] MISS. CODE ANN. § 85-5-7(Rev. 2011).

[12] Miss. Gaming Comm'n v. Imperial Palace of Miss., Inc., 751 So.2d 1025, 1028 (Miss. 1999).

consistent with the legislative language and the policies and principles justifying that language.[13] In Mississippi, however, no formal written record of legislative history is maintained. But the title of the Act can evidence legislative intent, and the words the legislature chose to put in the text of the MPLA itself are considered the best evidence of its intent.[14]

The title and language of the MPLA, as well commentary from the legislators at the time of enactment, seem to clearly indicate that the Mississippi Legislature intended the MPLA to be *the* vehicle a plaintiff must choose in pursuing a recovery against a product manufacturer or seller for injury caused by a product. Although we now refer to the Act as "the MPLA," the title of the Act as passed was:

> AN ACT…TO PROVIDE THAT THE MANUFACTURER OR SELLER OF A PRODUCT SHALL NOT BE LIABLE…IF THE CLAIMANT DOES NOT PROVE CERTAIN FACTS ABOUT THE PRODUCT.[15]

The opening statements of the Act provide:

> [I]n *any action* for damages caused by a product except for commercial damage to the product itself:
> (a) The manufacturer or seller of the product *shall not be liable* if the claimant does not prove by the preponderance of the evidence that at the time the product left control of the manufacturer or seller: …[16]

Any action. *Shall not be liable*. These are clear, unambiguous words. Said differently, if the requirements of the Act are not met, no liability can be imposed upon a manufacturer or seller for damage caused by a product.

Moreover, Judge Mike Mills,[17] the then Chairman of the House Judiciary Committee, specifically explained at the time the Act was passed that it was intended to be the exclusive remedy: "[w]hat [the MPLA] does is say if there is a product out here that injures someone, here are four ways you can take that action into court . . . If it doesn't fit one of those four, you don't have a lawsuit."[18] Judge Mills reasoned that the MPLA was enacted to provide stability for businesses.[19] He explained that "[b]usinesses like stability. They want to know what the rules are, and they can fashion their business accordingly. [The

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[13] Taylor v. Gen. Motors Corp., No. 1:96CV179-B-A, 1996 WL 671648, at *1 (N.D. Miss. Aug. 6, 1996).

[14] Bellew v. Dedeaux, 126 So.2d 249, 251 (Miss. 1961); Div. of Medicaid v. Miss. Indep. Pharmacies Ass'n, 20 So.3d 1236, 1240 (Miss. 2009) ("The Court accepts the text of the statute as the best evidence of legislative intent") (internal citations omitted); Land v. Agco Corp., No. 1:08CV012, 2008 WL 4056224, at *3 (N.D. Miss. Aug. 25, 2008).

[15] 1993 Miss. Laws 302.

[16] MISS. CODE ANN. § 11-1-63(a) (Rev. 2002) (emphasis added).

[17] Judge Mills went on to be a Justice of the Mississippi Supreme Court and then a United States District Judge.

[18] Paul Barton, *Mills Defends Law Defining Product Safety*, THE COM. APPEAL, Feb. 24, 1993, at A12.

[19] *Id*.

MPLA] gives stability to the law; they don't have to worry about the Supreme Court jumping off into another theory of liability. It locks it in."[20]

Despite this seemingly clear language, however, the Act has not been consistently interpreted by Mississippi courts as the exclusive remedy, in keeping with the legislative intent. Interpreting the Act as simply one "option" for recovery has been a great obstacle to its effectiveness as a stabilizer of the law. As described above, the MPLA contains additional, sometimes tougher, proof requirements for plaintiffs, and provides more complete defenses not previously available under common law. If the MPLA is "optional," why would an informed plaintiff ever choose to sue under the MPLA? If the MPLA does not abrogate other previously permitted theories of recovery, "then it is likely that few plaintiffs will choose to file lawsuits under the MPLA rather than filing, for example, a common-law implied warranty action."[21] Professor Robert A. Weems explains the absurd results an "optional" MPLA would cause:

> [a]ssuming that the Mississippi Supreme Court agrees that the common-law negligence action survives the enactment of the MPLA, plaintiffs could arguably use the risk-utility standard to establish such negligence. This would seemingly result in the entire MPLA being neatly side-stepped, and Mississippi's previously existing products liability common-law jurisprudence continuing essentially as before.[22]

Not surprisingly in light of its tougher proof requirements, plaintiffs have, since the Act's inception, tried to circumvent it by pleading around it, including in their complaints product based claims that were easier to prove such as common law negligence and statutory breach of implied warranty claims. Some courts have allowed and even endorsed this practice.

It seems inconceivable that the Mississippi Legislature, in looking for stability, intended to enact a statute that could be so easily side-stepped by plaintiffs.[23] It is a core principle of

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[20] *Id.*

[21] ROBERT A. WEEMS AND ROBERT M. WEEMS, MISSISSIPPI LAW OF TORTS § 15:1 (2005). Professor Robert A. Weems is a Professor of Law at the University of Mississippi School of Law.

[22] *Id.* at § 15:9.

[23] Professor Weems has also pointed out that having a tough, but optional MPLA could ironically increase the filing of non-MPLA claims:

> If plaintiffs are held entitled to pursue a common-law implied warranty action, such plaintiffs may be able to avoid some of the MPLA's more onerous requirements, such as the feasible design alternative requirement, while still enjoying many of the attractive elements of common-law strict products liability. Thus, far from abolishing the implied warranty cause of action, the enactment of the MPLA may actually result in an increase in the number of implied warranty actions in Mississippi. This would certainly be an ironic development, considering that the strict liability action developed partly out of dissatisfaction

statutory interpretation that if more than one interpretation is possible, the interpretation which best accomplishes the purpose of the act should be the one used, and a construction that renders a statute ineffective should be avoided.[24]

B. The Mississippi Courts' First Look: *Taylor v. General Motors Corporation*

The application of the MPLA seems to have gone awry in the very first court opinion interpreting it, *Taylor v. Gen. Motors Corporation*.[25] Taylor sued General Motors ("GM") after his seat belt allegedly broke during a car wreck.[26] GM moved to dismiss Taylor's common law negligence claims and statutory breach of implied warranty claims because they were outside the then newly-enacted MPLA. The federal court denied GM's motion, holding that the MPLA did not abrogate these other theories of recovery.[27]

The *Taylor* court espoused four specific reasons to support its holding, all of which seem to be in error. First, the *Taylor* court held that the text of the MPLA did not expressly limit other actions.[28] This argument ignores the Act's plain, unambiguous words ("*any action*"…. "*shall not be liable*").[29]

Second, the *Taylor* Court held that the MPLA merely "codified the existing common law of strict liability as presented in the Restatement (Second) of Torts §402A", and thus, by remaining silent as to other traditionally permitted causes of action such as those for negligence or breach of implied warranty, did not affect them.[30] This argument is simply misguided. The MPLA did not codify "strict liability." It codified "product liability" law, which encompasses the entire "area of law involving the liability of those who supply goods or products for the use of others to purchasers, users, and bystanders for losses of various kinds resulting from so-called defects in those products."[31] As discussed above, the MPLA actually codified particular and differing standards for the four defect claims permitted. Some are governed by strict liability standards, while others are governed by negligence standards.

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with the implied warranty action in products cases.

Id. at § 15:5.

[24] 2008 WL 4056224, at *2-*3; *see also* Martin v. State, 199 So. 98, 102 (Miss. 1940).

[25] No. 1:96CV179-B-A, 1996 WL 671648 (N.D. Miss. Aug. 6, 1996).

[26] *Id.* at *1.

[27] *Id.* at *2.

[28] *Id.*

[29] MISS. CODE ANN. § 11-1-63 (Rev. 2002). It is worth noting that, the Legislature in subsection (i) expressly stated that the Act does not eliminate any common law defenses. MISS. CODE ANN. § 11-1-63(i) (Rev. 2002). The Legislature could have, but did not, expressly say that the Act does not eliminate any common law claims.

[30] *Taylor*, 1996 WL 671648 at *2.

[31] R.J. Reynolds Tobacco Co. v. King, 921 So.2d 268, 271 (Miss. 2005) (internal quotations and citations omitted). Ironically, the Court's authority for this proposition was the House Bill statement that the MPLA was "[a]n act to codify certain rules and establish new rules applicable to **product** liability actions." *Taylor*, 1996 WL 671648 at *2 (citations omitted) (emphasis added).

The *Taylor* court's third and fourth points, which are somewhat convoluted, analyzed the relationship between the MPLA and other Mississippi statutes. In summary, the *Taylor* court held that the Legislature's failure to amend certain aspects of Mississippi's version of the UCC[32] and the Wrongful Death Act[33] evidenced an intent to preserve in a product liability case the statutory implied warranty causes of action contained in those other statutes.[34] The *Taylor* court failed to recognize, however, that if carefully analyzed, these other statutes simply do not conflict with the MPLA.[35] More fundamentally, the Legislature's failure to expressly amend each aspect of any other possible applicable law is not evidence of its intent in enacting the MPLA.[36]

This first misstep in interpretation of the Act has been critical to its lack of success as a stabilizer of product liability law. For several years thereafter, the seemingly flawed reasoning in *Taylor* was adopted by virtually all subsequent decisions of both state and federal courts, holding the MPLA effectively optional with no additional reasoning offered.[37] The path back toward an interpretation of

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[32] MISS. CODE ANN. §§ 75-1-101 to -3-805.

[33] MISS. CODE ANN. § 11-7-13.

[34] With respect to the UCC, the *Taylor* court focused on the fact that House Bill 1270—which included the MPLA—addressed changes to some language in MISS. CODE ANN. § 75-2-715, but did not remove from the definition of consequential damages available under this statute the phrase "physical injury to persons." *Taylor*, 1996 WL 671648 at *3. The court reasoned that by failing to remove this phrase from the UCC, the Legislature intended to leave open the option for a plaintiff to sue for personal injuries caused by a product under both the UCC (i.e., an implied warranty theory) and the MPLA. The *Taylor* court also observed that House Bill 1270 amended only portions of the Wrongful Death Act and failed to remove from that Act language allowing a wrongful death beneficiary to maintain an action for breach of implied warranty involving a product. *Id.* at *3. Again, the Court reasoned that this failure meant that the Legislature intended that plaintiffs be able to bring product-related implied warranty claims for personal injuries under the MPLA and the Wrongful Death Act.

[35] The Mississippi UCC itself, at MISS. CODE ANN. § 75-2-715, actually excepts the MPLA (a.k.a House Bill 1270) from its consequential damages provision. The applicable provision states: "*[e]xcept as otherwise provided in House Bill 1270* [Laws, 1993, ch. 302], consequential damages resulting from the seller's breach include…injury to person or property proximately resulting from any breach of warranty." MISS. CODE ANN. § 75-2-715 (Rev. 2002) (emphasis added). Additionally, the Wrongful Death Act does not purport to create additional actions not otherwise sanctioned by the law. Instead, it simply preserves for persons killed those actions they could have brought had they only been injured rather than killed. MISS. CODE ANN. § 11-7-13 (Rev. 2002).

[36] *See* Smith v. Braden, 765 So.2d 546, 556 (Miss. 2000) (Legislature should not be viewed as taking action by inaction).

[37] Childs v. Gen. Motors Corp., 73 F. Supp.2d 669 (N.D. Miss. 1999); Hodges v. Wyeth-Ayerst Labs., No. 3:00CV254WS, 2000 WL 33968262 (S.D. Miss. May 18, 2000) (manufacturer's removal prohibited, in part, based on reasoning that common law negligence claim asserted against the resident defendant product seller was not abrogated by the MPLA); Bennett v. Madakasira, 821 So.2d 794, 808 (Miss. 2002) (claims for breach of implied warranty of merchantability and fitness not abrogated by MPLA).

the MPLA that is consistent with the original legislative intent behind it—stability through defined certainty—has been long, confusing and is still, almost twenty years later, incomplete.

C. Inconsistent Steps Toward Exclusivity

In the early 2000s, several cases from Mississippi state courts seemed to begin a shift away from *Taylor* and its progeny. Focusing on the redundancy of the non-MPLA claims asserted, these cases rejected plaintiffs' attempts to disguise product defect claims as other claims arising outside of the MPLA and highlighted the need to focus on the nature of the claims pursued. For example, in 2003 an appellate court ruled that the trial court's refusal to instruct the jury on a common law negligence claim when the jury was also being instructed on an inadequate warnings claim under the MPLA was not reversible error because both claims essentially required a negligence determination.[38] Analyzing the issue as one of redundancy, rather than exclusivity, does not solve the problem and does not effectuate the original legislative intent. A redundancy analysis would seem to imply that plaintiffs could choose to plead only common law claims, omitting the "redundant" MPLA claims from their complaints entirely in order to avoid a tougher burden. Moreover, focusing only on redundancy at the jury instruction stage allows the arguably impermissible claims to live on through most of the life of the case and requires defendants to conduct discovery on and prepare a defense against them. Such prolonged, uncertain litigation activity undermines the upfront certainty the Act was intended to provide. Also, for the statutory claims governed by a strict liability standard (i.e., manufacturing defect and breach of express warranty), no redundancy exists. Thus, a redundancy analysis creates an inconsistent situation where some common law negligence claims will be permitted to proceed (e.g. negligent manufacturing) while others will not (e.g. negligent design).[39]

Finally in 2005, twelve years after initial enactment, the Mississippi Supreme Court took what appeared to be large step in the right direction. In *R.J. Reynolds Tobacco Co. v. King*, the court tacitly recognized that the provisions of the MPLA applied to all product based claims, regardless of the theory under which the plaintiff sued, arguably reversing prior decisions that the MPLA was not an exclusive remedy.[40] In *King*, a smoking and health case, plaintiffs alleged ten causes of action against the major tobacco companies: (1) fraudulent misrepresentation; (2) conspiracy to defraud; (3) strict liability; (4) negligence; (5) gross negligence; (6) negligent misrepresentation; (7) breach of express warranty; (8) breach of implied warranty

[38] *Palmer*, 905 So.2d at 600.

[39] *See* Joiner v. Genlyte Thomas Group, LLC, Civil Action No. 1:09-CV-00093-GHD-DAS, 2012 WL 567201, at *2-*4 (N.D. Miss. Feb. 21, 2012) (plaintiff's common law negligent design claim dismissed as redundant of MPLA claims but common law negligent manufacturing claim held not redundant and permitted to proceed).

[40] R.J. Reynolds Tobacco Co. v. King, 921 So.2d 268, 272 (Miss. 2005).

of fitness; (9) deceptive advertising; and (10) wrongful death.[41] Defendants filed a motion for judgment on the pleadings as to all ten claims based on the MPLA's inherent characteristic defense.[42] The circuit court granted defendants' motion as to the claims it deemed to be "product liability" claims.[43] But the court denied defendants' motion as to the claims it viewed as "non-product liability claims."[44] Both parties appealed the ruling as to the non-product liability claims only. The Supreme Court essentially agreed with the lower court's reasoning.[45]

Some of the "product liability" claims that were dismissed were styled by plaintiffs as non-MPLA common law or statutory claims. Because the plaintiffs did not appeal the dismissal of the "product liability" claims, the application of the MPLA to all product-based claims—however labeled by plaintiffs—was not an issue squarely before the Court. But by adopting the lower court's reasoning as to the product based claims while analyzing the fate of the non-product based claims, the Mississippi Supreme Court at least arguably recognized that the nature of a plaintiff's claim, not the label placed on it by plaintiff, determines whether the claim is subject to the provisions of the MPLA. The logical application of *King* is that *all* provisions of the MPLA apply to *all* claims of injury caused by a product, regardless of how plaintiff might choose to label the claim.[46]

But despite this tacit recognition nearly seven years ago that the MPLA should govern all product liability claims, the case law that has developed since that time has been inconsistent. There have been opinions from Mississippi courts recognizing that the MPLA abrogates certain product-based claims, but then, in the same opinion, analyzing the merits of other non-MPLA claims asserted by the

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[41] *Id*. at 270.

[42] *Id.* The inherent characteristic defense provides that "[a] product is not defective in design or formulation if the harm for which the claimant seeks to recover compensatory damages was caused by an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with the ordinary knowledge common to the community." MISS. CODE ANN. § 11-1-63(b) (Rev. 2002)

[43] *Id*. at 272. The product based claims were: (3) strict liability, (4) negligence, (5) gross negligence, (7) breach of express warranty, and (8) breach implied warranty of fitness.

[44] *Id.* The non-product liability claims were: (1) fraudulent misrepresentation, (2) conspiracy to defraud, (6) negligent misrepresentation, (9) deceptive advertising, and (10) wrongful death.

[45] *Id*. ("…the inherent characteristic defense applies only to a products liability action").

[46] Professor Weems noted that, in light of *King*, "[i]t would appear that the most important question now is what causes of action are 'based upon products liability' and thus subject to MCA § 11-1-63. It can be inferred that the answer is those causes of action dismissed by the trial court [strict liability, negligence, gross negligence, and breach of warranty] in [*King*], but the Court does not expressly say so." Robert A. Weems, *2007 Summary of Recent Mississippi Law* at 93. The Court should expressly say so now. *See also* Williams v. Bennett, 921 So.2d 1269, 1273 (Miss. 2006).

plaintiff.[47] There have also been cases, harkening back to the earliest holdings in *Taylor*, *Childs* and *Bennett*, affirmatively finding that the MPLA does not abrogate certain non-MPLA product-based claims.[48]

D. An Argument For Exclusivity: The Innocent Seller Cases

Woven throughout this inconsistent jumble of opinions, however, lies a line of cases (ironically issued by Mississippi federal courts from which *Taylor* came) which provide support to the argument that the MPLA is an exclusive remedy and cannot be side-stepped by common law (or other) claims. These opinions have arisen primarily from plaintiffs' specific attempts to circumvent the "innocent seller" provision of the MPLA.

Plaintiffs in one such case sued Ford Motor Company and the local Ford dealership for personal injuries allegedly caused by defects in the vehicle.[49] Plaintiffs couched their claim against the resident dealership—the innocent seller—as a UCC based claim for breach of the implied warranty of merchantability.[50] Ford removed the case, arguing that the dealership, the only Mississippi

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[47] *See e.g.,* Lundy v. Conoco Inc., No. 3:05CV477-WHB-JCS, 2006 WL 3300397 (S.D. Miss. Nov. 10, 2006) (negligent warning claim governed by MPLA regardless of "negligence" label; but merits of statutory claims for breach of implied warranties of merchantability and fitness for particular purpose analyzed); Rials v. Philip Morris, USA, No. 3:06CV583BA, 2007 WL 586796 (S.D. Miss. Feb. 21, 2007) (MPLA innocent seller defense bars all product liability claims; but court analyzed merits of "negligent sale" claim); Betts v. Gen. Motors Corp., No. 3:04CV169-M-A, 2008 WL 2789524 (N.D. Miss. July 16, 2008) (court recognized but side-stepped MPLA exclusivity issue as to negligence claims by dismissing them as redundant; but then also analyzed merits of breach of implied warranty claims); Walker v. George Koch Sons, Inc., 610 F. Supp.2d 551 (S.D. Miss 2009) (plaintiff's product-based negligence claims held not to have survived apart from MPLA; but court then analyzed merits of claims for implied warranty of merchantability and fitness for a particular purpose based on allegations of product defect).

[48] *See, e.g.,* Watson Quality Ford, Inc. v. Casanova, 999 So.2d 830, 833 (Miss. 2008) (holding that the MPLA does not abrogate breach of implied warranty claims); McSwain v. Sunrise Med., Inc., 689 F. Supp.2d 835 (S.D. Miss. 2010) (holding that common law negligence claims can be brought alongside MPLA claims and that UCC breach of implied warranty claims not abrogated by MPLA); Kerr v. Phillip Morris, USA, Inc., No. 1:09CV482-LG-RHW, 2010 WL 1177311 (S.D. Miss. Mar. 25, 2010) (holding MPLA does not bar common law claims for negligence or gross negligence); Richardson v. West-Ward Pharmaceuticals, Inc., No. 5:09CV167(DCB)(JMR), 2010 WL 3879541 (S.D. Miss. Sept. 28, 2010) (holding that common law negligence claims may be redundant of MPLA claim but "there is no clear indication that the Mississippi Supreme Court would find negligence claims abrogated by the statute."); McKee v. Bowers Window & Door Co., 64 So.3d 926, 937 and 942 (Miss. 2011) (Court applied MPLA to so-called "strict" or "product" liability claim, held the Act inapplicable to warranty claims, and dismissed plaintiff's negligence claim as essentially redundant of the non-meritorious defect claim).

[49] Collins v. Ford Motor Co., No. 3:06CV32-HTW-JCS, 2006 WL 2788564 (S.D. Miss. September 26, 2006).

[50] *See* MISS. CODE ANN. §75-2-314.

defendant, was immune from liability under subsection (h) of the MPLA, the innocent seller defense.[51] Plaintiffs sought remand arguing that the MPLA's innocent seller defense applied only to "product liability" claims, and not to their UCC based claim.[52] Denying plaintiff's motion to remand, the court recognized that even though plaintiff placed a UCC label on the claim, it was, in reality, a classic design defect claim. In other words, the plaintiff, who asserted a claim for breach of the implied warranty of merchantability, was claiming the product was not "merchantable" because it was defectively designed.[53]

In the five years following *Collins*, no less than five more opinions also refused to allow a plaintiff to side step the innocent seller defense of the MPLA by disguising a claim of product defect—which should be governed by the MPLA—as a claim of "breach of implied warranty."[54] In these opinions, the courts repeatedly recognize that the plain language of subsection (h) is evidence of legislative intent to immunize sellers from liability. The key language that the courts rely on is as follows: "in any action….the seller of the product….shall not be liable" unless certain actions by the seller are proven.[55] *Any action*. *Shall not be liable*. This key language mirrors exactly the language set forth in subsection (a) with regard to the liability of manufacturers (and sellers) in general.

The Mississippi Legislature simply cannot have intended these identical, plain and unambiguous words to be construed so differently within the same statute. Thus, if the words "any action" and "shall not be liable" in subsection (h)

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[51] *Collins*, 2006 WL 2788564 at *1-2.

[52] *Id.*

[53] *Id.* at *3.

[54] Jones v. Gen. Motors Corp., No. 3:06CV00608-DPJ-JCS, 2007 WL 1610478, at *2 (S.D. Miss. June 1, 2007) (allowing a plaintiff to sue seller outside the MPLA for breach of implied warranty "essentially nullifies the statute because immunity from product liability claims would be meaningless if plaintiff could avoid immunity merely by pleading the same facts as a case for breach of implied warranty."); Willis v. Kia Motors Corp., No. 2:07CV62-P-A, 2007 WL 1860769, at *3 (N.D. Miss. June 26, 2007) ("[I]t is readily apparent that the plaintiff is attempting to hold the dealership liable simply by virtue of being a seller of the implied warranty of merchantability—all to circumvent the innocent seller provision of [the MPLA]"); *Land*, 2008 WL 4056224, at *3 ("[A]llowing innocent retailers to be held liable for claims of breach of implied warranties would erode the rule of innocent seller immunity. In virtually any products liability action, a plaintiff would be able to bring such an action."); Jenkins v. Kellogg Co., No. 4:08CV121-P-S, 2009 WL 2005162 (N.D. Miss July 6, 2009) (innocent seller immunity extends to all theories of recovery for product liability, even those outside the MPLA such as breach of implied warranty); Murray v. Gen. Motors, No. 3:10CV188-DPJ-FKB, 2011 WL 52559 (S.D. Miss. Jan 7, 2011) (plaintiff's product-based claims for negligence, gross negligence, breach of implied warranty of merchantability and negligent misrepresentation held subject to and barred by MPLA's innocent seller defense); *but see* Gardner v. Cooksey, No. 2:11cv255KS-MTP, 2012 WL 968026, at *3-*4 (S.D. Miss. March 21, 2012) (breach of implied warranty claim against product seller not abrogated by innocent seller provision of MPLA but provision prevents it from being pursued).

[55] *See* MISS. CODE ANN. § 11-1-63(h).

mean that it is not acceptable to circumvent the MPLA as to a product seller by calling an allegedly defective product an "unmerchantable" one, then it also should not be acceptable assert non-MPLA claims as to a product manufacturer in general because subpart (a) speaks in identical terms. By extension, these clear, unambiguous words evidence legislative intent that the MPLA, in its entirety, is the exclusive remedy in all cases against both manufacturers and sellers claiming injury caused by a product. Plaintiffs should not be permitted to circumvent any part of the Act with creative pleading.

E. The Current State of Affairs in Mississippi

But the issue is by no means settled in Mississippi. A few years ago, a federal MDL judge handling a Mississippi welding rod product liability case recognized and summed up the confusion in this area of the law perhaps as accurately as possible. Acknowledging the inconsistency of the past case law, but still carefully analyzing many of the cases cited herein, the court held that "the greater weight of the somewhat mixed authority holds that negligence-based claims of product defect are abrogated by the MPLA."[56] Following this reasoning, the court granted summary judgment as to plaintiff's common law general negligence claims. Similarly, the court held that any claim for negligent misrepresentation based on an omission of warnings (as distinguished from half truths or other affirmative representations) was product-based (i.e., was a disguised failure to warn claim) and was abrogated by the MPLA.[57]

Yet, at least in part because cases are often litigated without the issue of impermissible non-MPLA claims even being raised, the confusion continues. Recent decisions describe the MPLA in markedly different ways. In *Berry v. E-Z Trench Manufacturing*, the Court described the Act as "a statutory roadmap governing 'any action for damages caused by a product except for commercial damage to the product itself.'"[58] The Court cited and applied the Act even though the plaintiff pled negligence in the complaint and neither party even mentioned the MPLA in their briefs.[59] By contrast, the court in *Elliot v. Amadas Industries* found that the MPLA did not abrogate non-MPLA claims for breach of the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.[60] In short, the case law created even up to the present seems to be conflicting and confusing,[61] and the

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[56] Jowers v. BOC Group, Inc., No. 1:08CV0036, 2009 WL 995613, at *4 (S.D. Miss. April 14, 2009).

[57] *Id*. at *10.

[58] 772 F. Supp.2d 757 (S.D. Miss. 2011) (internal citations omitted).

[59] Causation was at issue in the case, so the result would have been the same under any theory, but it is significant that the Court recognized the MPLA as the appropriate legal standard. *See also* Smith v. Johnson & Johnson, No. 3:08CV245 HTW-LRA, 2011 WL 3876997, at *10-*11 (S.D. Miss. August 31, 2011).

[60] Elliot v. Amadas Indus., No. 2:10-CV-2-KS-MTP, 2011 WL 796738, at *15 (S.D. Miss. March 1, 2011).

[61] See the following other recent, decisions which demonstrate the lack of uniformity that

still exists in analysis and treatment of non-MPLA claims. Riley v. Ford Motor Co., No. 2:09-CV-148-KS-MTP, 2011 WL 2516595, at *2 (S.D. Miss June 23, 2011) (common law negligence claims are not abrogated by MPLA [specifically declining to follow *Jowers*] but rulings on MPLA claims can be dispositive as to redundant negligence claims); Riley v. Ford Motor Co., No. 2:09-CV-148-KS-MTP, 2011 WL 2728142, at *3) (S.D. Miss. July 12, 2011) (common law negligence claims are not abrogated by MPLA [specifically declining to follow *Jowers*] but rulings on MPLA claims can be dispositive as to redundant negligence claims); Patterson v. Taser, Int'l, Inc., No. 3:10-cv-00057-GHD-SAA, 2011 WL 3489858, at *2-*4 (N.D. Miss. Aug. 9, 2011) (plaintiff's claims described by court as "based on negligence" yet analyzed solely using MPLA standards); Hankins v. Ford Motor Co., No. 3:08-cv-639-CWR-FKB, 2011 WL 6180410, at *3-*6 (S.D. Miss. December 13, 2011) (plaintiff's claims for negligent design and failure to warn disposed of on summary judgment as duplicative of MPLA design defect claim); Cauley v. Sabic Innovative Plastics, U.S., No. 1:10-CV-26-KS-MTP, 2012 WL 192303, at *1-*2, *5 (S.D. Miss. January 23, 2012) (common law negligence claims not abrogated but findings on MPLA claims held to be dispositive of them; breach of implied warranty claims held not abrogated by MPLA); Deese v. Immunex Corp., No. 3:11-CV-373-DPJ-FKB, 2012 WL 463722, at *5 (Feb. 13, 2012) (negligent failure to adequately test claim analyzed as if permitted even though not provided for by MPLA; breach of implied warranty claims analyzed as if permitted but dismissed as governed by findings on MPLA claims); *Joiner, 2*012 WL 567201, at *2-*4 (plaintiff's common law negligent design claim dismissed as redundant of MPLA claims but common law negligent manufacturing claim held not redundant and permitted to proceed).

certainty and stability the MPLA was enacted to provide does not seem to have been realized.

II. Different Approaches in Other States

A look at product liability statutes from other states, enacted for seemingly the same or similar purposes as the MPLA, sheds some light into what perhaps could have been done to avoid the uncertainty that still exists in Mississippi.

A. New Jersey

New Jersey has had a different experience with its product liability statute. In New Jersey, plaintiffs are not permitted to plead around the statute to avoid its often more stringent proof requirements. Since its 1987 enactment, the New Jersey Product Liability Act[62] has been consistently interpreted as the sole and exclusive remedy for claims of harm caused by a product. The courts have repeatedly recognized that the New Jersey Legislature, in enacting the NJPLA, intended to create one unified, statutorily defined theory of recovery for harm caused by a product.[63] This is true

[62] N.J. STAT. ANN. § 2A:58C-1 to C-5 (West 1987) ("NJPLA").

[63] DeBenedetto v. Denny's Inc., No. L-6259-09, 2011 WL 67258 (N.J. Super. Ct. App. Div. Jan. 11, 2011) (in absence of evidence of physical injury, consumer fraud act claim dismissed as disguised failure to warn claim governed by the NJPLA); Sinclair v. Merck & Co., 948 A.2d 587, 595 (N.J. 2008) (plaintiff's claim for medical monitoring dismissed as not falling within definition of "harm" contained

even though the NJPLA contains proof requirements seemingly tougher than those of the prior common law. For example, the NJPLA contains an express presumption that a warning for a drug or device that has been approved by the FDA is adequate.[64]

Thus, in New Jersey, there is certainty as to which claims can be pursued for harm caused by a product—only those listed in the NJPLA. As a result, a wide variety of claims, including but not limited to claims for consumer fraud act violation, medical monitoring, fraudulent misrepresentation, negligent misrepresentation, negligence, public nuisance, strict liability, and conspiracy, have been dismissed because they asserted injury caused by a product yet fell outside the scope of the NJPLA.

Why has the interpretation of the NJPLA been so different from that of the MPLA? An examination of the text of the statute provides some insight. In some significant respects, the NJPLA and MPLA are not that different. Both expressly apply to "any action" for damages or harm "caused by a product," other than damage "to the product itself."[65] The NJPLA, just like the MPLA, contains no direct statement that "no other claims besides those specified in the act may be pursued." But it appears that the New Jersey Legislature better described and/or defined the purpose of and terms used in the statute and by doing so, defined more precisely the scope of the statute. For example, the New Jersey Legislature took the time to expressly describe in the text of the statute the motivating factors behind the passage of the NJPL, namely "an urgent need for remedial legislation to establish clear rules with respect to certain matters relating to actions for damages for harm caused by products, including certain principles under which liability is imposed…"[66] There is evidence, as described above, that these same factors prompted the passage of the MPLA, yet that notion was not described anywhere in the MPLA. As another example, the NJPLA more broadly defines product liability actions as "any claim……for harm caused by a product, *irrespective of*

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in NJPLA and plaintiff's consumer fraud claim subsumed by NJPLA); McDarby v. Merck & Co., 949 A.2d 223, 277-278 (N.J. Super. Ct. App. Div. 2008) (plaintiff's consumer fraud claims were in reality failure to warn claims and thus subsumed by NJPLA); Bailey v. Wyeth, Inc., 2008 WL 8658571 (N.J. Super. Ct. Law. Div. July 11, 2008) (consumer's fraudulent misrepresentation, negligent misrepresentation and consumer fraud act claims against product manufacturer subsumed by NJPLA); Koruba v. Amer. Honda Motor Co., 935 A.2d 787, 795 (N.J. Super. Ct. App. Div. 2007) (plaintiff's negligence claims against product seller dismissed because not permitted by NJPLA which provided exclusive remedy); *In re* Lead Paint Litigation, 924 A.2d 484, 503-504 (N.J. 2007) (plaintiff's public nuisance claims dismissed as product liability claims in disguise governed by NJPLA); Brown v. Philip Morris Inc., 228 F. Supp.2d 506 (D. N.J 2002) (NJPLA subsumes common law causes of action for strict liability, negligence, fraud and conspiracy).

[64] N.J. STAT. ANN. § 2A:58C-4A (West 1987).

[65] *Compare* N.J. STAT. ANN. § 2A:58C-1(b)(1) and (2) (West 1987); *with* MISS CODE ANN. § 11-1-63(a) (Rev. 2002).

[66] N.J. STAT. ANN. §2A:58C-1(a) (West 1987).

the theory underlying the claim…"[67] The MPLA contains no definition of this term at all. The NJPLA also expansively defines the term "harm" caused by a product to include physical damage to property; personal physical illness, injury or death; pain and suffering, mental anguish or emotional harm; and loss of consortium or services or "other loss deriving from any type of harm" described in the statute.[68] The MPLA contains only the single undefined word "damages" caused by a product.[69]

B. Connecticut

Connecticut, too, appears to have avoided much of the confusion experienced in Mississippi by using an even more direct approach to this issue. In addition to using fairly expansive language to define the term "product liability claim,"[70] the Connecticut Legislature placed an express exclusivity provision in the Connecticut Product Liability Act ("CPLA").[71] The provision states: "[a] product liability claim . . . may be asserted and shall be in lieu of all other claims against product sellers, including actions of negligence, strict liability and warranty, for harm caused by a product."[72]

The phrase "may be asserted" seems less commanding than Mississippi's "shall not be liable" and seems somewhat at odds with the CPLA's "shall be in lieu of" language. Nevertheless, the Connecticut courts, focusing in part on the comments of the legislators who sponsored the original act, have long interpreted the exclusivity provision as abrogating common law theories of liability including negligence, strict liability and breach of warranty.[73] The provision seems to have had the desired effect of providing stability to Connecticut product liability law. Although the CPLA has been in effect in some form for more than 30 years, there has been only a small amount of litigation in Connecticut over what claims can and cannot be brought in case alleging injury by a product. And in many instances where plaintiffs have not truly had a distinct "other" claim, but rather have tried to disguise a product liability claim under another label, the courts have relied on the exclusivity provision to reject those efforts.[74]

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[67] N.J. STAT. ANN. § 2A:58C-1(b)(3) (West 1987) (emphasis added).

[68] N.J. STAT. ANN. § 2A:58C-1(b)(2)(West 1987).

[69] MISS CODE ANN. § 11-1-63(a) (Rev. 2002).

[70] The term "product liability claim" is defined in the statute as including "all claims or actions brought for personal injury, death or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging or labeling of any product. CONN. GEN. STAT. ANN.§ 52-572m(b). It is also defined to include, but not be limited to, "all actions based on the following theories: Strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation or nondisclosure, whether negligent or innocent." *Id.*

[71] CONN. GEN. STAT. ANN. §§ 52-572m – 572q (1995).

[72] CONN. GEN. STAT. ANN. § 52-572n(a).

[73] Winslow v. Lewis-Shepard, Inc., 562 A.2d 517, 520-521 (Conn. 1989).

[74] Higdon v. Railroad Salvage of Conn., Inc., No. NNHCV116019916S, 2011 WL 4908636,

B. Washington

Washington also appears to have achieved more certainty and stability in its product liability law than has Mississippi through its product liability statute. Like the MPLA, the Washington Product Liability Act ("WPLA") was enacted by the Washington Legislature as a tort reform statute "designed to address a liability insurance crisis which could threaten the availability of socially beneficial products and services."[75] It, like the MPLA, subjects manufacturers and sellers to liability for various product defects using different standards of liability for different defect claims.[76] And it contains no express preemption clause like the CPLA. But like the NJPLA, the Preamble to the WPLA expressly states its purpose of protecting businesses in the state of Washington by limiting, rather than expanding, product liability law.[77] The WPLA, again like the NJPLA, also contains an expansive definition of a "product liability claim" that supports an interpretation of the Act as the exclusive remedy for product based claims.[78]

In 1989, the Supreme Court of Washington addressed the precise issue of whether the WPLA preempted traditional common law remedies for product related harm.[79] The court recognized that the WPLA, by restricting recovery for economic loss to the law of sales (i.e., to UCC claims), created a number of obstacles for plaintiffs seeking to recover economic damages such as privity requirements, damages limitations and disclaimers, and a statute of repose.[80]

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at *2-*4 (Conn. Super. Ct. Sept. 22, 2011) (plaintiff's premises liability negligence claim stricken as based on claim of defective product); Calzone v. Costco., Inc., No. CV106006342, 2011 WL 1168601, at *1 (Conn. Sup. Ct. Feb. 23, 2011) (plaintiff's common law negligence claim stricken because CPLA provides exclusive remedy for claims falling within its scope); Hayes v. Invigorate Int'l, Inc., No. Civ.A.04-1577, 2004 WL 2203732, at *5-*7 (E.D. Pa. Sept. 24, 2004) (plaintiff's unfair trade practices act claim dismissed as a product liability claim in disguise); Santos v. Hillerich & Bradsby Co., No. X04CV020126680S, 2003 WL 21716347, at *2 (Conn. Super. Ct. July 1, 2003) (CUTPA claim stricken as being a product liability claim in reality); Daily v. New Britain Machine Co., 200 Conn. 562, 571, 512 A. 2d 893, 898-899 (Conn. 1986).

[75] Wash. Water & Power Co. v. Graybar Electr. Co., 774 P.2d 1199, 1202 (Wash. 1989); RCW § 7.72.010 (West 2012).

[76] RCW §§ 7.72.030(1)-(3) and 7.72.040(1)-(3) (West 2012).

[77] Buttelo v. S. A. Woods-Yates Am. Mach. Co., 864 P.2d 948, 952 (Wash. Ct. App. 1993) (quoting Laws of 1981, ch. 27, § 1).

[78] A product liability claim under the WPLA includes "any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product. It includes, but is not limited to, any claim or action previously based on: Strict liability in tort; negligence; breach of express or implied warranty; breach off, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or other claim or action previously based on any other substantive legal theory except fraud, intentionally caused harm or a claim or action under the consumer protection act….." RCW § 7.72.010(4) (West 2012).

[79] *Wash. Water,* 774 P.2d at 1199.

[80] *Id.* at 1203.

Nevertheless, the court held that the WPLA preempted common law product liability remedies because if it did not, it would "mean nothing."[81]

The court, while lamenting the failure of the legislature to include an express preemption clause, noted that the broad scope of the act expressed in the statutory language as well as the corroborative legislative history (which is apparently written and published in Washington) supported an interpretation of the WPLA as preempting common law tort claims for product related injuries.[82] The court noted that while the plaintiffs' bar made a number of well-presented, technical arguments that the statute did not preempt the common law tort remedies, ultimately, those arguments were inconsistent with the obvious purpose of the Washington Legislature.[83]

D. Ohio

The experience in Ohio perhaps indicates what may ultimately be needed in Mississippi. The Ohio Products Liability Act was originally enacted in 1988.[84] It provided that a manufacturer was subject to liability for compensatory damages based on a product liability claim "only if" the claimant established all of the elements set forth in the statute.[85]

Despite this broad, seemingly all encompassing language, the statute did not initially seem to stabilize the law. Some Ohio courts initially held that certain common law negligence claims survived even after the enactment of the statute and could be pursued in addition to the statutory product liability claims, while others did not.[86] In light of this confusion, effective in 2005, the Ohio General Assembly stepped in to address the problem by adding an express abrogation clause to the OPLA. It provides that the OPLA is "intended to abrogate all common law product liability claims or causes of action."[87]

Like these other states, the Mississippi Legislature, as demonstrated by the commentary noted above, had a clear purpose in enacting the MPLA—to stabilize Mississippi product liability law by bringing certainty and specificity to the types of claims that could be asserted. Perhaps if it had incorporated into the MPLA any one of the concepts employed by these other states (1.express language describing the purpose of the statute; 2. expansive language defining the terms in and scope of the statute; and/or 3. an express exclusivity provision), the Mississippi courts would have interpreted

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[81] *Id.* at 1203 and 1205 ("The WPLA would accomplish little if it were a measure plaintiffs could choose or refuse to abide at their pleasure.").
[82] *Id.* at 1203-1204.
[83] *Id.* at 1205.
[84] OHIO REV. CODE ANN. §§ 2307.71 to 2307.80 (West 2012) ("OPLA").
[85] *Id.* at 2307.73(A).
[86] *See* Carrel v. Allied Products Corp., 677 N.E.2d 795, 800 (Ohio 1997) (common law cause of action for negligent design survives enactment of OPLA); Barrett v. Waco Int'l, Inc., 702 N.E.2d 1216, 1222 (Ohio Ct. App. 1997) (claim for implied warranty in tort preempted by OPLA); White v. DePuy, Inc., 718 N.E.2d 450, 456 (Ohio Ct. App. 1998) (claim for implied warranty in tort survives enactment of OPLA).
[87] OHIO REV. CODE ANN. § 2307.71 (B) (West 2012).

and enforced the MPLA as the exclusive remedy for product based claims and held all previously permitted common law claims abrogated.

III. Conclusion

A product liability statute clearly setting out the rules applicable to product liability claims can stabilize a state's product liability law, but only if those rules are interpreted to be the exclusive rules. Informed plaintiffs simply will not otherwise voluntarily submit to the typically heightened legal standards of a State's product liability statute if other, easier to prove, theories are still available.

To ensure that the Courts interpret the statute as the exclusive remedy, the lesson learned from Mississippi, as compared to other states where the statutory intent has been followed more closely, is that the text of the statute is critical to ensuring an exclusive interpretation. While clear, definitive words like "any action" and "shall not be liable" may seem like enough, they may not be. Instead, the state legislature must be as explicit, and perhaps expansive, as possible in defining both the purpose and scope of the Act. Inclusion of an express disclaimer of all other product-based actions would be best. Also helpful would be a statement that the statute applies regardless of the underlying theory (i.e., label) asserted by the claimant. The state legislature should not count on the courts to correctly ascertain, after the fact, that the legislature intended an exclusive remedy. Instead, the legislature should do more to say, in some manner, just what it intended.

Practitioners in states like Mississippi, where such statutory language was not employed, have been left with little option other than to raise arguments like those raised in this article to remind courts what the legislature intended. Mississippi practitioners have been asserting similar dismissal arguments for years with only limited success. It seems evident that if the MPLA is ever to achieve its intended purpose, the Mississippi Legislature will need to act.