MPLA: Available Option or Exclusive Means of Recovery?

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Introduction

The Mississippi Product Liability Act (MPLA or the Act), Miss. Code Ann. § 11-1-63, was intended to be *the* standard for product liability actions and thus stabilize this area of Mississippi law. Some courts have applied the Act this way. Others have not. The resulting uncertainty causes parties to needlessly waste time and money fighting about what plaintiffs must prove and what defenses are available in a product liability action. Clarification by the Mississippi Supreme Court is needed to stop this waste of resources and to bring about the certainty in this field of law that the Act was intended to accomplish.

If the MPLA is to have its intended effect, the clarification needs to be a definitive pronouncement that the Act applies to *all* claims that a defective product caused a personal injury, regardless of the "label" the plaintiff puts on those claims in his pleadings. Practically speaking, if the MPLA is not the exclusive legal standard for product-based actions, then it is ineffective and thus irrelevant. No informed plaintiff will voluntarily submit to the heightened legal standards of the MPLA if common law negligence or warranty theories are available.

Framing the Issue

The scope of the MPLA matters. Suppose, hypothetically, that a Mississippi consumer buys a product. Let's say it's a car. While driving, he crashes into a tree and spends three 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 this particular make and model car might have a design or manufacturing problem. The car manufacturer, upon investigation of the accident, believes that the car wasn't defective and that negligent driving caused the crash. The consumer, nevertheless, 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 product-based claims can the consumer pursue under Mississippi law? Is he limited to pursuing the claims set forth in the MPLA? Is he allowed instead to bring other types of statutory or common law claims (e.g., negligence, implied warranty of merchantability, implied warranty of fitness for a particular purpose)? Can he assert multiple causes of action even if they overlap or conflict in terms of proof standards? If he can, and they overlap or conflict, is the jury to be instructed on all theories? How can the jury be properly instructed on conflicting claims?

The answers to these questions matter. Each theory requires a plaintiff to prove different elements. For example, if a plaintiff wants to pursue a design defect claim, he must, under the MPLA, prove that there existed a "feasible design alternative." If he can pursue common law negligence or implied warranty claims instead (claiming, for example, that the product is not "merchantable" because the design is flawed), he does not have to prove this important, but sometimes onerous, requirement. A defendant seeking to limit or control its exposure, especially under a threat of multiple lawsuits or even a mass tort, needs to know which claims a plaintiff is permitted to assert and which claims may be impermissible and thus possibly eliminated. The earlier such claims can be eliminated, the fewer resources are wasted on those claims.

The MPLA

The MPLA was originally enacted in 1993 and has been amended several times over the years. The statute sets forth a variety of concepts previously associated with both strict liability and negligence theories as they existed under common law. Currently, the MPLA allows a plaintiff to recover from a product manufacturer or seller if the product has a defect that renders the product unreasonably dangerous and that dangerous condition proximately caused plaintiff's damages. Miss. Code Ann. § 11-1-63(a). The Act lists 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.

Id. § 11-1-63(a)(i)(1)-(4). Later subsections of the MPLA further define these permitted claims.

Subsection (c) sets forth what has been characterized as a negligence standard for inadequate warning claims, providing 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.* § 11-1-63(c)(i). Subsection (c) also defines what an adequate warning is:

> [O]ne that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger that communicates sufficient information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to, an ordinary consumer who purchases the product…

Id. § 11-1-63(c)(ii).

Subsection (f), adopting what has also been observed to be a negligence calculus, sets forth exactly what a plaintiff must prove to succeed on a defective design claim. Namely, that at the time the product left the control of the manufacturer or seller, the manufacturer or seller knew or should have 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.* § 11-1-63(f).[1] Although pre-MPLA law included consideration of "the availability of a substitute product which would meet the same need and not be as unsafe"[2] as one of several risk-utility factors, the MPLA's feasible design alternative requirement was new. As such, it is central to the debate over the role of the MPLA. *See* discussion *infra*.

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) is available as to any of the four types of defects. It immunizes a seller 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. *Id*. § 11-1-63(h).

Another example is the assumption of the risk defense found in subsection (d). It provides that if a plaintiff knew about and appreciated the alleged danger and still

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[1] Immediately before the MPLA was enacted, the Mississippi Supreme Court followed the risk-utility test for determining whether a product contained a design defect. *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 256 (Miss. 1993). 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)).

[2] *Prestage*, 617 So. 2d at 256.

voluntarily exposed himself to it, then the manufacturer "shall not be liable." Under common law theories, the plaintiff would merely have been allocated a percentage of fault pursuant to § 85-5-7 of the Mississippi Code Annotated.

Lastly, the statute expressly provides that it is not to be construed as eliminating any common law defenses. *Id.* § 11-1-63(i). Notably, the statute does not state that it is not to be construed as eliminating common law claims.

On its face, the MPLA would seem to be *the* vehicle a plaintiff should and must choose in pursuing recovery against a product manufacturer or seller for product-based claims. But that interpretation has not always been espoused by all Mississippi courts. Despite the broad range of claims permitted by the MPLA, since its inception, plaintiffs have tried to circumvent its provisions by filing product-based claims under a number of other legal theories which generally were easier to prove. The most common alternative theories asserted seem to have been common law negligence and statutory breach of implied warranty claims. This is not what the Legislature intended.

Legislative Intent: An Exclusive Remedy for Product-Based Claims

The "polestar" consideration in interpreting a statute is legislative intent. *Miss. Gaming Comm'n v. Imperial Palace of Miss., Inc.*, 751 So. 2d 1025, 1028 (Miss. 1999). A statute should be read in the manner most consistent with the legislative language and the policies and principles justifying that language. *Taylor v. Gen. Motors Corp.*, No. 1:96CV179-B-A, 1996 WL 671648, at *1 (N.D. Miss. Aug. 6, 1996). The Mississippi Legislature's clear intent was that the MPLA would exclusively govern all product liability actions.

First, as discussed above, the plain and unambiguous language of the opening statement of the Act provides:

> [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[.]

Miss. Code Ann. § 11-1-63 (emphasis added). *Any action*. *Shall not be liable*. These are clear, unambiguous words, and the words the Legislature chose to put in the text of the MPLA itself are the best evidence of its intent. *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).

Second, the title of the Act is evidence of the legislative intent behind it. *Bellew v. Dedeaux*, 126 So. 2d 249, 251 (Miss. 1961). The title of the MPLA, viewed by every legislator who voted on the Act, states:

> 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.

1993 Miss. Laws 302. In other words, if the requirements of the Act are not met, no liability can be imposed upon a manufacturer or seller.

Third, the commentary from representatives involved in the passage of the bill evidences the legislative intent that the MPLA be the sole means of recovery for product-based claims. At the time the MPLA was passed, Judge Mike Mills was chairman of the House Judiciary "A" Committee. According to Judge Mills, who went on to be a Justice of the Mississippi Supreme Court and then a United States District Judge, "[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." Paul Barton, *Mills Defends Law Defining Product Safety*, The Com. Appeal, Feb. 24, 1993, at A12. Judge Mills reasoned that the MPLA was enacted to provide stability for businesses. *Id*. He explained that "[b]usinesses like stability. They want to know what the rules are, and they can fashion their business accordingly. [The 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." *Id*.

Fourth, it is a core principle of 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. *Land*, 2008 WL 4056224, at *3. Conversely, a construction that renders a statute ineffective should be avoided. *Id*. at *2; *see also Martin v. State*, 199 So. 98, 102 (Miss. 1940). Interpreting the MPLA as just one option for recovery for personal injuries caused by a product does not accomplish its stated purpose of providing stability to companies doing business in Mississippi. In fact, it renders the Act meaningless by allowing plaintiffs to plead around it.

As noted above, the MPLA contains additional, sometimes tougher, proof requirements for plaintiffs, and provides to defendants complete defenses not previously available under common law. *If the MPLA is simply an option for recovery, why would an informed plaintiff ever choose to sue under the MPLA knowing that common law negligence and statutory breach of implied warranty claims may be easier to prove with fewer available defenses*?

It follows that, if the MPLA does not abrogate these other 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." Robert A. Weems[3] and Robert M. Weems, *Mississippi Law of Torts* § 15:1 (2005). Professor Robert A. Weems explained 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.

Id. at § 15:9. It seems inconceivable at best, and nonsensical at worst, that the Mississippi Legislature, in looking for stability, intended to enact a statute that could be so easily side-stepped by plaintiffs.[4]

Unfortunately, the Mississippi case law interpreting the MPLA has been inconsistent and unclear.

The Mississippi Courts' First Look: Taylor v. General Motors Corp.

The first Mississippi decision to squarely address whether the then newly enacted MPLA abrogated other causes of action was *Taylor v. Gen. Motors*, Corp., No. 1:96CV179-B-A, 1996 WL 671648 (N.D. Miss. Aug. 6, 1996). The reasoning in this decision was adopted by virtually all of the subsequent cases holding that the MPLA is optional, and thus a detailed analysis of its reasoning is important to understanding the issues.

Taylor sued General Motors ("GM") after his seat belt allegedly broke during a car wreck. *Id*. at *1. GM moved to dismiss Taylor's common law negligence claims and statutory breach of implied warranty claims because they were outside the MPLA.

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[3] Professor Robert A. Weems is a Professor of Law at the University of Mississippi School of Law.

[4] Professor Weems 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 with the implied warranty action in products cases.

Id. at § 15:5.

The federal court denied GM's motion, holding that the MPLA did not abrogate these other theories of recovery. *Id.* at *2.

The *Taylor* court recognized that the MPLA must be viewed in its entirety and that unambiguous words must be given their ordinary meanings. *Id.* at *1-*2. But in doing so, the court surprisingly found that the MPLA did not express a clear intent to abrogate other causes of action. The court made four points to support its holding, but each point, when closely examined, is unpersuasive.

First, the *Taylor* court noted that the text of the MPLA did not expressly limit other actions. *Id*. at *2. This argument ignores the plain, unambiguous words of the Act. It is true that the Legislature did not list every other possible statutory or common law claim that was abrogated by the MPLA, or include an affirmative disclaimer that "this act abrogates all other theories of recovery." Instead, the Legislature expressed its clear intent to abrogate all other claims by much more efficiently stating in the opening sentences of the Act: "in *any action* for damages caused by a product ….[t]he manufacturer or seller of the product *shall not be liable* if the claimant does not" meet the proof requirements of the Act. Miss. Code Ann. § 11-1-63 (emphasis added). The Act governs any action for damages caused by a product (except for damage to the product itself), and the manufacturer or seller shall not be liable otherwise. Again, these are ordinary, unambiguous words that preclude other theories of liability for product-based claims. Moreover, although the Legislature did in Subsection (i) expressly say that the Act does not eliminate any common law defenses, the Legislature did not include similar express language that the Act does not eliminate common law claims.

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 did not affect other causes of action. *Id*. at *2. The court reasoned that since the MPLA expressly addressed changes to strict liability claims but remained silent as to changes to the other types of traditionally permitted claims (e.g., negligence and warranty claims), the statute must have intended no preclusion of or changes to those other types of claims. *Id*. at *2. 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." *Id*. at *2 (citations omitted) (emphasis added).)

This argument is simply misguided. The MPLA did not just codify "strict liability." It codified all of "product liability" law. Product liability is a much broader concept. It covers 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." *R.J. Reynolds Tobacco Co. v. King*, 921 So. 2d 268, 271 (Miss. 2005) (internal quotations and citations omitted). Product liability encompasses all actions aimed at holding a manufacturer or

seller liable for damages caused by an allegedly defective product – not just claims filed under the theory of strict liability. *Id*.

In actuality, the MPLA codified particular claims with particular standards for those claims. For example, the MPLA codified a strict liability standard to govern manufacturing defect claims. Miss. Code Ann. § 11-1-63(a). But it adopted a negligence-based standard for design and warnings claims. Miss. Code Ann. §11-1-63(a)(i)(4), (c) and (f). *Estate of Hunter v. Gen. Motors Corp.*, 729 So. 2d 1264, 1277-78 (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).

Professor Philip McIntosh[5], of the Mississippi College School of Law, explained it this way:

> "The Act moves the theory of liability for design defects from strict liability under Section 402A to one that is more akin to negligence. The claimant must show that 'the manufacturer or seller knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known about the danger that caused the damage.' Under prior law, a plaintiff making a design defect claim only needed to prove that the product was unreasonably dangerous in design…."

Philip McIntosh, *Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability*, 16 Miss. C. L. Rev. 393, 395 (1996).

The *Taylor* court's third and fourth points are slightly more complex and relate to the relationship between the MPLA and other Mississippi statutes, namely, Mississippi's version of the Uniform Commercial Code ("UCC"), Miss. Code Ann. §§ 75-1-101 to -3-805, and the Wrongful Death Act, Miss. Code Ann. § 11-7-13. In short, the *Taylor* court found that the Legislature's failure to amend certain aspects of these statutes evidenced intent to preserve the implied warranty cause of action in a products liability claim. This argument is, like the others, unpersuasive.

With respect to the UCC, the *Taylor* court harped 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 and the MPLA. Thus, reasoned the *Taylor* court, the MPLA was not intended to be the sole vehicle for recovery. *Id*.

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[5] Professor McIntosh is an Associate Dean and Professor of Law at Mississippi College School of Law.

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 by failing to amend this portion of the statute, the Legislature intended that plaintiffs be able to bring product-related warranty claims for personal injuries under both acts.

The *Taylor* court, however, failed to recognize that Miss. Code Ann. § 75-2-715 actually excepts House Bill 1270 from this provision, stating: "*[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 (emphasis added). Moreover, the Wrongful Death Act does not purport to create additional actions not otherwise sanctioned by the law. Instead, it preserves for persons killed those actions they could have brought had they only been injured rather than killed. Miss. Code Ann. § 11-7-13.

Further, 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. *See Smith v. Braden*, 765 So. 2d 546, 556 (Miss. 2000). Indeed, as the Mississippi Supreme Court has explained:

> The legislative intent of a statute can hardly be based solely on that which the legislature failed to do. Such an interpretation would amount to the legislature having spoken by its silence, or, stated otherwise, taken action by inaction. It could just as easily be said that the legislature did not pass the revisions…because it determined the additional language to be superfluous and the existing language to already adequately [address the situation].

Id. Here again, the plain, unambiguous language of the MPLA (any action for damages…shall not be liable otherwise) is sufficient to express the Legislature's intent that product liability actions be governed, and permitted, only by the MPLA.

The Wake of Taylor

Several years later, a Mississippi federal court in another automobile case expressly followed the *Taylor* decision allowing plaintiff to pursue product-based claims outside the MPLA without offering any additional reasoning. *Childs v. Gen. Motors Corp.*, 73 F. Supp. 2d 669 (N.D. Miss. 1999). In 2000, still another Mississippi federal court relied on both *Taylor* and *Childs* and rejected a manufacturer's argument that the case was removable because the common law negligence claim asserted against the resident defendant product sellers could not be brought outside the MPLA.

Hodges v. Wyeth-Ayerst Labs., No. 3:00CV254WS, 2000 WL 33968262 (S.D. Miss. May 18, 2000).

Following in the footsteps of the federal courts, the Mississippi Supreme Court also initially agreed with the finding that the MPLA did not abrogate other theories of recovery in a product liability action. *See Bennett v. Madakasira*, 821 So. 2d 794, 808 (Miss. 2002) (claims for breach of implied warranty of merchantability and fitness not abrogated by MPLA). This case offered no additional reasons for its holding either, relying only on the unpersuasive reasoning of *Taylor*.

Steps Toward the Correct Interpretation

Eventually, however, Mississippi state courts began to at least take note of the redundancy of allowing common law negligence claims to be pursued in addition to MPLA-based defect claims. For example, in 2003 an appellate court ruled that it was not error for the trial court to refuse 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. *Palmer*, 905 So. 2d at 600. The court reasoned that both claims essentially required a negligence determination. *Id.*

Redundancy, however, is not the only issue. Again, the proof requirements and defenses of the MPLA are often different and more stringent than those of common law claims. Thus, the real issue is whether the MPLA is the exclusive vehicle for a product liability action so that a plaintiff must prove each of the Act's elements.

At times, it has seemed as if the Mississippi Supreme Court was beginning to shift its position toward recognizing the exclusive nature of the MPLA. In 2005, the Court recognized, albeit inadvertently, that the provisions of the MPLA applied to all "product liability claims," regardless of the theory under which the plaintiff sued. *R.J. Reynolds Tobacco Co. v. King*, 921 So. 2d 268, 272 (Miss. 2005). In doing so, the Court tacitly reversed prior Mississippi decisions which concluded that the MPLA was not the exclusive vehicle to pursue product liability claims.

In *King*, a smoking and health case, the 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 of fitness; (9) deceptive advertising; and (10) wrongful death. *Id*. at 270. Defendants filed a motion for judgment on the pleadings as to all ten claims based on the MPLA's inherent characteristic defense, a defense to all four types of defect claims permitted by the Act. *Id*. The circuit court granted defendants' motion as to the claims it deemed to be "product liability" claims – i.e., (3) strict liability, (4) negligence, (5) gross negligence, (7) breach of express warranty, and (8) breach implied warranty of fitness. *Id*. at 272. But the court denied defendants' motion as to the claims it viewed as "non-product

liability claims" – (1) fraudulent misrepresentation, (2) conspiracy to defraud, (6) negligent misrepresentation, (9) deceptive advertising, and (10) wrongful death. *Id*. Both parties appealed. *Id*. On appeal, the Supreme Court acknowledged that the MPLA's inherent characteristic defense was in fact a valid defense to any and all of plaintiff's product liability claims, but held that it was not a defense to plaintiffs' remaining non-product liability claims.[6] *Id*. at 272 ("…the inherent characteristic defense applies only to a products liability action").[7]

By finding that the defense applied to all of the product-based claims, some of which had been styled as common law claims or claims arising from other statutes besides the MPLA, (e.g., negligence, gross negligence, and breach of implied warranty of fitness), the Mississippi Supreme Court recognized that it is the nature of a plaintiff's claim, not the theory of recovery asserted, that determines whether the claim is governed by the provisions of the MPLA. The Supreme Court thus implicitly recognized that if, for example, a plaintiff brought a claim for design defect under the MPLA and also a claim for common law negligent design, those "claims" should really both be viewed merely as one design defect claim subject to the terms of the MPLA.

The *King* decision focused specifically on the inherent characteristic defense, but it did not carve that defense out as somehow special or different from other terms of the Act. The logical application of *King*, therefore, is that all provisions of the MPLA apply to *all* product liability claims regardless of the legal label placed on the claim. That is, by holding that product liability claims seemingly pled outside of the MPLA are actually subject to the terms of the MPLA, the *King* court effectively held that the MPLA abrogated such claims.[8]

The next year, the Mississippi Supreme Court again implicitly recognized the exclusivity of the MPLA for product-based claims in a case involving a design defect claim for a handgun. The Court did so by determining the true nature of plaintiff's claim (i.e., design defect) and then applying the provisions of the MPLA with the broad statement that since the passage of the MPLA, "…products liability claims

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[6] Since plaintiff had not appealed the dismissal of the "product liability" claims, the application of the inherent characteristic defense of the MPLA to those claims was not squarely before the Court. *Id.*

[7] The Court explained that this was not inconsistent with its decision in *Lane v. R.J. Reynolds Tobacco Co.*, 853 So. 2d 1144, 1150 (Miss. 2003), which held that "[s]tate law precludes all tobacco cases that are based on products liability."

[8] 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." Professor Robert A. Weems: 2007 Summary of Recent Mississippi Law at p. 93. The Court should expressly say so now.

have been specifically governed by statute, and a claimant, in presenting his case, must pay close attention to the elements of the cause of action and the liability limitations enumerated in the statute." *Williams v. Bennett*, 921 So. 2d 1269, 1273 (Miss. 2006) (emphasis added) (defendant gun seller granted summary judgment because plaintiff did not prove all statutorily required elements of design defect claims). The court did not even analyze plaintiff's "alternative" claims for negligent "failure to provide adequate instruction" and "fail[ure] to distribute a handgun which would not discharge when dropped." *Id*. at 1271.

Steps Backwards Toward an Optional Interpretation

Despite this recognition almost six years ago that the MPLA should govern all product liability claims, the case law that has developed since that time has been mixed and inconsistent on allowing plaintiffs to assert what would seem to be product-based personal injury claims not provided for by the MPLA. There have been opinions from both Mississippi federal and state courts that fail to recognize the issue and simply analyze the merits of product liability claims that are plainly outside the scope of the MPLA. *E.g., Moss v. Batesville Casket Co.,* 935 So. 2d 393 (Miss. 2006)(court analyzed merits of non-MPLA claims against casket manufacturer for defective casket including breach of implied warranty of merchantability, breach of implied warranty of fitness, and negligence). While there is usually no discussion in these cases about the propriety of the assertion of the claims, the court's mere analysis of their merits can be used to argue that their assertion is permissible.

In still other cases, the courts have recognized the exclusivity of the MPLA as abrogating certain product-based claims, but then, in the same opinion, have analyzed the merits of other non-MPLA claims asserted by the plaintiff. *See 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).

Recently, there have even been cases, harkening back to the holdings in *Taylor*, *Childs* and *Bennett*, affirmatively holding that the MPLA did not abrogate certain non-MPLA product-based claims. *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, 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.")

A Return Toward Exclusivity: The Innocent Seller Cases

Woven throughout these opinions, however, is a line of cases issued by Mississippi federal courts that focus on the intent of the Legislature. These opinions recognize that all claims that a product defect caused a personal injury, regardless of how pled or labeled by the plaintiff, should be subject to the terms of the MPLA, thus abrogating all product based claims asserted outside the MPLA.

These opinions have arisen primarily from plaintiff's specific attempts to circumvent the innocent seller provision of the MPLA. In one such case, plaintiffs sued Ford Motor Company and the local Ford dealership for personal injuries allegedly caused by defects in the vehicle. *Collins v. Ford Motor Co.*, No. 3:06CV32-HTW-JCS, 2006 WL 2788564 (S.D. Miss. September 26, 2006). Plaintiffs couched their claim against the resident dealership as one for breach of the implied warranty of merchantability as permitted by the UCC. *See* Miss. Code Ann. §75-2-314. Ford removed the case, arguing that the dealership, the only Mississippi defendant, was an innocent seller under subsection (h) of the MPLA and thus immune from liability. *Id*. at *1-2. Plaintiffs filed a motion to remand the case on grounds that the MPLA did not apply because they did not assert not a "product liability" claim subject to the MPLA, but rather a statutory UCC breach of implied warranty claim, to which there is no such innocent seller defense. *Id*. Even though plaintiffs labeled their design defect claim as a claim for breach of the implied warranty, it was a classic design defect claim. Plaintiff just substituted "merchantable" for "defectively designed."

The court was not persuaded by plaintiffs' argument and denied their motion to remand, reasoning:

> Section 11-1-63(a) applies in product liability cases where a seller is accused of placing a product into the stream of commerce that is unreasonably dangerous to the user or consumer. Plaintiffs explicitly allege in their complaint that the 1999 Ford Ranger at issue here was 'defective and unreasonably dangerous [in] design and/or manufacture' of the rear window system, seatback, and the occupant restraint system –

> claims clearly contemplated by § 11-1-63(a)(ii). Resultedly, the court determines that [the dealership] is entitled to § 11-1-63(h) immunity from suit….

Id. at *3.

In the next three years, no less than three more Mississippi federal judges in four different opinions also refused to allow a plaintiff to circumvent 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." In 2007, the court dismissed the UCC-based breach of implied warranty of merchantability claim against a resident car dealership and allowed removal of the case. *Jones v. Gen. Motors Corp.*, No. 3:06CV00608-DPJ-JCS, 2007 WL 1610478 (S.D. Miss. June 1, 2007). The court held the dealership to be an "innocent seller" per subsection (h) of the MPLA and noted that allowing a plaintiff to sue a 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." *Id*. at *2. In deciding that the MPLA would apply regardless of how plaintiff labeled his product-based claim, the court specifically noted that the title of the enacting legislation that added the innocent seller provision to the MPLA expressed the legislature's clear intent to make innocent sellers immune from product claims regardless of whether plaintiff labeled them as MPLA claims. *Id*. at *2. The court further rejected plaintiff's argument that allowing this provision of the MPLA to be interpreted in such a manner as to impliedly amend the UCC provision was somehow unconstitutional. *Id*. at *4.

In *Willis v. Kia Motors Corp.*, No. 2:07CV62-P-A, 2007 WL 1860769 (N.D. Miss. June 26, 2007), the federal court, again focusing on the legislative intent of adding an innocent seller provision to the MPLA, held that the innocent seller provision of the MPLA abrogates UCC-based claims against a resident car dealership for breach of implied warranty. *Id*. at *3 ("[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]"); *see also 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).

In these opinions, the federal courts repeatedly recognize that the plain language of subsection (h) of the Act - the innocent seller defense - is evidence of legislative intent to immunize sellers from liability. The key language that the courts rely on is that "in any action….the seller of the product…..shall not be liable" unless certain actions by the seller are proven. *See* Miss. Code Ann. § 11-1-63(h). *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. Subsection (a) states that "in any action" manufacturers and sellers "shall not be liable" unless specific proof requirements are met. It simply cannot have been the intent of the Mississippi Legislature that these nearly identical, plain and unambiguous words could be construed so differently within the same statute. If it is not acceptable to circumvent the MPLA as to a product seller by calling an allegedly defective product an "unmerchantable" product, it should not be acceptable to do so as to a manufacturer.

The Current State of Affairs

A few years ago, a federal MDL judge handling a Mississippi welding rod product liability case summed up the confusion in this area of the law perhaps as accurately as possible. Recognizing the inconsistency of the past case law, but still careful 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." *Jowers v. BOC Group, Inc.*, No. 1:08CV0036, 2009 WL 995613, at *4 (S.D. Miss. April 14, 2009). Following this reasoning, the court granted summary judgment as to plaintiff's common law general negligence claims because they were product-based. 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. *Id*. at *10.

Yet the confusion continues. Two recent decisions from the Southern District describe the MPLA in markedly different ways. In *Berry v. E-Z Trench Manuf., Inc*., the Court described the Act this way: "The Mississippi Products Liability Act ("MPLA") is a statutory roadmap governing 'any action for damages caused by a product except for commercial damage to the product itself.'" *Id.,* No. 3:10CV44-DPJ-FKB, 2011 WL 679314, at *2 (S.D. Miss. Feb. 16, 2011) (internal citations omitted). The Court cited and applied the Act—as it should have—even though the plaintiff pled negligence in the complaint and neither party even mentioned the MPLA in their briefs.[9] In contrast, the court in *Elliot v. Amadas Indust.,* relying on the Mississippi Supreme Court's prior rulings, found that the MPLA did not abrogate claims for breach of the implied warranty of merchantability and breach of the implied warranty of fitness

for a particular purpose. *Elliot v. Amadas Indust., Inc.*, No. 2:10-CV-2-KS-MTP, 2011 WL 796738, at *15 (S.D. Miss. March 1, 2011).

Conclusion

The Mississippi Legislature enacted the MPLA to clearly set out the rules applicable to product liability claims. The intent was to provide stability and certainty in the law for product manufacturers and sellers with regard to personal injuries allegedly caused by their products. Only an interpretation of the MPLA as the exclusive vehicle for recovery for product-based claims will effectuate that legislative intent. The pronouncement to this effect, made tacitly years ago in *King*, needs to be made expressly to clarify this issue. As some, but not all, Mississippi courts have recognized, attempts to circumvent the MPLA by pleading other common law and statutory claims in a product liability lawsuit should not be permitted. If they are, then the Act is useless, and provides no stability to the law. That clearly is not what the Legislature intended.

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[9] 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.

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