UPDATES TO ALABAMA'S PRODUCT LIABILITY LEGISLATION

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I. Historic AEMLD – What Does it Govern?

Alabama's Extended Manufacturers' Liability Doctrine ("AEMLD") governs all actions for product liability claims brought in the state, and is predicated upon (albeit with significant differences) the strict liability doctrine found in the Restatement (Second) of Torts Section 402A ("§ 402A"). The Alabama Supreme Court first articulated the AEMLD in 1976 in two decisions: *Casrell v. Altec Industries, Inc.*, 335 So. 2d 128 (Ala. 1976) and *Atkins v. American Motors Corp.*, 335 So. 2d 134 (Ala. 1976), and a formal "products liability" action was codified by statute in 1979.[2]

In its initial form, and as it functioned for the last thirty-five (35) years, the AEMLD included and governed the following principles: where a plaintiff presents evidence of injury due to a product sold in a defective condition which renders the product unreasonably dangerous to the ultimate user or consumer, (1) a manufacturer, supplier, and/or seller of a product shall be subject to liability; (2) the tort concept of fault is retained; (3) a defendant is negligent as a matter of law when said defendant markets a product which is not reasonably safe when applied to its intended use in the usual and customary manner; (4) a the defendant may present evidence to rebut any element of the plaintiff's prima facie case; and (5) a defendant may assert affirmative defenses in answer to plaintiff's claims, including contributory negligence, assumption of the risk, product misuse, the closed container doctrine (see Section II. below), and/or lack of causal relation. *See Casrell*, 335 So. 2d at 132, 134; *Atkins*, 335 So. 2d at 143.

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[2] *See, e.g.*, Acts 1979, No. 79-468, p. 855, § 2. and Acts 1979, No. 79-476, p. 876, §1.

A prima facie product liability action was refined to its more well known state via the 1981 ruling in *Sears, Roebuck & Co., Inc. v. Haven Hills Farm, Inc.*, 395 So. 2d 991 (Ala. 1981) a case involving a tire blowout on the plaintiff's delivery vehicle, which resulted in an accident. *Id.* at 993-96. Here, the Alabama Supreme Court held that a product failure or accident involving a specific product does not create a presumption or infer the existence of a defect. *Id.* at 994-95. The Court went on to lay out the roadmap by which a plaintiff must prove its prima facie case, by showing: (1) the product is in fact defective; (2) the product left the defendant's control in the defective condition; (3) the product reached and was used by the plaintiff without substantial change in its condition[3]; (4) the defect is traceable back to the defendant; and (5) the defect caused the injury complained of. *Id.*

II. The Closed Container Causation Defense

In *Kirkland v. Great Atl. & Pac. Tea Co.* (1936), the Alabama Supreme Court the established the standard of care for retail grocers selling prepackaged closed containers of food – now known as the "closed container doctrine," "sealed container doctrine," or the "sealed package doctrine." 171 So. 735 (1936). In *Kirkland*, the plaintiff alleged the grocery retail defendant negligently sold plaintiff a package of flour containing poison. *Id.* at 736. The package of flour was "an ordinary sack of flour, put up by reliable millers, to be sold by the retailer intact, for the convenience of both merchant and customer." *Id.*

[3] "Substantial changes" in a product do not automatically relieve the manufacturer of liability. *See Sears, Roebuck & Co., Inc. v. Harris*, 630 So. 2d 1018 (Ala. 1993) (A manufacturer or seller remains liable if the change or modification to the product did NOT case the injury, or if the change or modification was reasonably foreseeable to the manufacturer or seller.).

Relying on an earlier court's reasoning in *Dothan Chero-Cola Bottling Co. et al. v. Weeks*, 80 So. 734, 735 (Ala. 1918), the *Kirkland* court held that retail grocers "selling canned goods, or packages in any form, put up by the manufacturer, advertised by brands and trade-names, and purchased by the consumer in the original package, who has the same knowledge as his grocer touching the contents," do not owe a legal duty to consumers to inspect the contents of said goods. *Kirkland*, 171 So. at 737 (relying on *Dothan*, 80 So. at 735 ("Such retailer is not liable to the consumer … if he purchases of a reputable manufacturer or dealer, and the goods so purchased and supplied by him are such as are without imperfections that may be discovered by the exercise of the reasonable care of a person skilled and experienced in dealing in and supplying goods to the general public.")). According to the court,

> In this day the grocer's stock consists in much of canned goods, goods in bottles, cartons, sacks, packages of great variety, put up under pure food regulations, and sold at retail in the unopened package. In common reason the grocer could not inspect the contents of every sack of flour he handles. No one expects him to do so. To impose a legal duty so to do is too exacting. The legal responsibility should rest where it belongs, on him who made the package and inclosed [sic] poisonous substances therein.

Kirkland, 171 So. at 737.

The Alabama Supreme Court has distinguished *Kirkland* on various gorunds over the last seventy-five (75) years. For instance, in *Allen v. Delchamps, Inc.*, the court found the doctrine inapplicable to a case where the grocer retailer received celery "contained in perforated clear plastic bags closed by a plastic twist-tie or tape" and the grocer "did in fact open samples of the celery to inspect it for freshness and quality." 624 So. 2d 1065, 1067 (Ala. 1993). Further, in *Sparks v. Total Body Essential Nutrition, Inc.*, the Alabama

Supreme Court held that the sealed container doctrine is not a defense to claims alleging breach of implied warranties of merchantability and fitness for a particular purpose. 27 So. 3d 489, 493-494 (Ala. 2009). Rather, the closed contained doctrine only applies to personal injury claims arising from consumer use of food products prepackaged by the manufacturer and delivered to the grocer retailer.

III. Act 2011-627 – In Effect June 9, 2011

In the original "as proposed" form, Senate Bill 184 ("SB 184") provided total and complete immunity to all "distributors"[4] of a product. The amended and final form of Act No. 2011-627 provides limited immunity to distributors[5] against whom a prima facie claim would not survive. Below is the full text[6] of Sections 6-5-501 and 6-5-521, as amended, and applicable to all cases commenced or filed on or after the effective date of June 9, 2011:

> § 6-5-501.
>
> The following definitions are applicable in this division:
>
> (1) ORIGINAL SELLER. Any person, firm corporation, association, partnership, or other legal or business entity, which in the course of business or as an incident to business, sells or otherwise distributes a manufactured product (a) prior to or (b) at the time the manufactured product is first put to use by any person or business entity who did not acquire the manufactured product for either resale or other distribution in its unused condition or for incorporation as a component part in a manufactured product which is to be sold or otherwise distributed in its unused condition.

[4] As defined in the newly adopted § 6-5-501, "distributor" includes any of the following persons/entities who is not the manufacturer of the product in question: distributor, wholesaler, dealer, retailer, or seller of a product, or against an individual or business entity using a product in the production or delivery of its products or services

[5] As used herein, the term "distributor(s)" is meant to include all sub-classes of entities/individuals as defined in the newly amended Sections 6-5-501(2)a. and 6-5-521(b), full text provided herein.

[6] New and/or amended language is denoted via bold and underlined text. Plain text indicates language that was <u>not</u> changed or amended.

(2) PRODUCT LIABILITY ACTION. Any action brought by a natural person 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 a manufactured product when such action is based upon (a) negligence, (b) innocent or negligent misrepresentation, (c) the manufacturer's liability doctrine, (d) the Alabama extended manufacturer's liability doctrine, as it exists or is hereafter construed or modified, (e) breach of any implied warranty, or (f) breach of any oral express warranty and no other. A product liability action does not include an action for contribution or indemnity.

a. No product liability action may be asserted or may be provided a claim for relief against any distributor, wholesaler, dealer, retailer, or seller of a product, or against an individual or business entity using a product in the production or delivery of its products or services (collectively referred to as the distributors) unless any of the following apply:

1. The distributor is also the manufacturer or assembler of the final product and such act is causally related to the product's defective condition.

2. The distributor exercised substantial control over the design, testing, manufacture, packaging, or labeling of the product and such act is causally related to the product's condition.

3. The distributor altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sough.

4. It is the intent of this subsection to protect distributors who are merely conduits of a product. This subsection is not intended to product distributors from independent acts unrelated to the product design or manufacture, such as independent acts of negligence, wantonness, warranty violations, or fraud.

b. Notwithstanding paragraph a., if a claimant is unable, despite a good faith exercise of due diligence, to identify the manufacturer or an allegedly defective and unreasonably dangerous product, a product liability action may be brought against a distributor, wholesaler, dealer, retailer, or seller of a product, or against the individual or business entity using a product in the production or delivery of its products or services. The claimant shall provide an affidavit certifying that the claimant, or the attorney

therefore, has in good in [sic] faith exercised due diligence and has been unable to identify the manufacturer or the product in question.

c. In a product liability action brought pursuant to paragraph b., against a distributor, wholesaler, dealer, retailer, or seller of a product, or against the individual or business entity using a product in the production or delivery of its products or services, the party, upon answering or otherwise pleading, may file an affidavit certifying the correct identity of the manufacturer of the product that allegedly caused the claimant's injury. Once the claimant has received an affidavit, the claimant shall exercise due diligence to file an action and obtain jurisdiction over the manufacturer. Once the claimant has commenced an action against an manufacturer, and the manufacturer has or its required to have answered or otherwise pleaded, the claimant shall voluntarily dismiss all claims against any distributor, wholesaler, dealer, retailer, or seller of a product, or against the individual or business entity using a product in the production or delivery of its products or services, unless the claimant can identify prima facie evidence that the requirements of paragraph a. for maintaining a product liability action against such a party are satisfied.

(3) The definitions used herein are to be used for purposes of this division and are not to be construed to expand or limit the status of the common or statutory law except as expressly modified by the provisions of this division.

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§ 6-5-521.

(a) A "product liability action" means any action brought by a natural person 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 a manufactured product when such action is based upon (1) negligence, (2) innocent or negligent misrepresentation, (3) the manufacturer's liability doctrine, (4) the Alabama extended manufacturer's liability doctrine, as it exists or is hereafter construed or modified, (5) breach of any implied warranty, or (6) breach of any oral express warranty and no other. A product liability action does not include an action for contribution or indemnity.

(b) No product liability action may be asserted or may be provided a claim for relief against any distributor, wholesaler, dealer, retailer, or seller of a product, or against an individual or business entity using a product in the production or delivery of its products or services

(collectively referred to as the distributors) unless any of the following apply:

(1) The distributor is also the manufacturer or assembler of the final product and such act is causally related to the product's defective condition.

(2) The distributor exercised substantial control over the design, testing, manufacture, packaging, or labeling of the product and such act is causally related to the product's condition.

(3) The distributor altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sough.

(4) It is the intent of this subsection to protect distributors who are merely conduits of a product. This subsection is not intended to product distributors from independent acts unrelated to the product design or manufacture, such as independent acts of negligence, wantonness, warranty violations, or fraud.

(c) Notwithstanding subsection (b), if a claimant is unable, despite a good faith exercise of due diligence, to identify the manufacturer or an allegedly defective and unreasonably dangerous product, a product liability action may be brought against a distributor, wholesaler, dealer, retailer, or seller of a product, or against the individual or business entity using a product in the production or delivery of its products or services. The claimant shall provide an affidavit certifying that the claimant, or the attorney therefore, has in good in [sic] faith exercised due diligence and has been unable to identify the manufacturer or the product in question.

(d) In a product liability action brought pursuant to subsection (c), against a distributor, wholesaler, dealer, retailer, or seller of a product, or against the individual or business entity using a product in the production or delivery of its products or services, the party, upon answering or otherwise pleading, may file an affidavit certifying the correct identity of the manufacturer of the product that allegedly caused the claimant's injury. Once the claimant has received an affidavit, the claimant shall exercise due diligence to file an action and obtain jurisdiction over the manufacturer. Once the claimant has commenced an action against an manufacturer, and the manufacturer has or its required to have answered or otherwise pleaded, the claimant shall voluntarily dismiss all claims against any distributor, wholesaler, dealer, retailer, or seller of a product, or against the individual or business entity using a product in the production or

> **delivery of its products or services, unless the claimant can identify prima facie evidence that the requirements of paragraph a. for maintaining a product liability action against such a party are satisfied.**
>
> **(e)** The definition used herein are to be used for purposes of this division and are not to be construed to expand or limit the status of the common or statutory law except as expressly modified by the provisions of this division.

IV. How the Law Impacts Your Practice Now

With regards to direct claims against non-manufacturers, i.e., those entities/individuals who fall within the definition of "distributor" pursuant to Sections 6-5-501(2)a. and 6-5-521(b), the newly amended laws will mean very little change in the actual litigation of a traditional product liability action. The biggest change, as outlined below, will be seen with lawsuits wherein the identity of the product manufacturer is not known and cannot be reasonably ascertained through due diligence prior to filing the lawsuit. In those instances, the new laws provide a mechanism for filing against the distributor in order to determine the proper identity of the manufacturer so that service may be obtained, and then dismissing claims against the distributor once service is perfected.

a. Who is Protected Under the New Law?

There has been much discussion of the supposed "immunity" granted to distributors under the newly amended code sections. As they now read, the new laws "protect all distributors who are merely conduits of a product." Ala. Code §§ 6-5-501(2)a.4. & 6-5-521(b)(4), as amended June 9, 2011. However, distributors are **not** protected "from independent acts unrelated to the product design or manufacture, such as independent acts of negligence, wantonness, warranty violations, or fraud." *Id.* Three

specific (but non-exclusive) carve outs have been included in the new laws to provide for direct actions against distributors in the following cases:

1. the distributor is also the manufacturer or assembler of the final product and the act complained of is causally related to the product's defective condition;
2. the distributor had substantial control over the product, including design, testing, manufacture, packaging, or labeling, and such control is causally related to the product's condition; and
3. the distributor altered or modified the product, and such change was a substantial factor in causing the harm to the plaintiff.

Ala. Code §§ 6-5-501(2)a.1.-3. & 6-5-521(b)(1)-(3), as amended June 9, 2011. Only time will tell how the Alabama Courts will interpret the language found in subparts 2 and 3 above: "substantial control" and "substantial factor." However, these direct claims against a distributor do no significantly alter the products liability landscape as it has traditionally been. To the extent the case facts support a direct claim against a distributor or non-manufacturer, such a claim still exists and may be brought under the new laws.

b. Practice Pointers – Identifying an Unknown Manufacturer

As mentioned at the beginning of Section IV above, the biggest change will be seen with lawsuits wherein the identity of the product manufacturer is not known and cannot be reasonably ascertained through due diligence prior to filing the lawsuit. In those instances, a plaintiff may commence a product liability action against a distributor for the sole purpose of indentifying the manufacturer and obtaining service/jurisdiction

over that entity/individual. As amended, Code Sections 6-5-501(2)b.-c. and 6-5-521(c)-(d) provide specific instruction on how this process is to be carried out.

Upon filing the complaint, the plaintiff or his/her attorney, must provide an affidavit which certifies that he/she "has in good in [sic] faith exercised due diligence and has been unable to identify the manufacturer of the product in question." Ala. Code §§ 6-5-501(2)b. and 6-5-521(c), as amended June 9, 2011. Following service of the complaint and affidavit, the distributor may then file a responsive affidavit certifying the correct identity of the product manufacturer. *Id.* at c. & (d) respectively. The plaintiff then must "exercise due diligence to file an action and obtain jurisdiction over the manufacturer." *Id.* Once such an action has been filed and jurisdiction obtained, such that the manufacturer "has or is required to have answered or otherwise pleaded," the plaintiff "**shall** voluntarily dismiss all claims" against the previously named distributor. *Id.* (emphasis added). Note the use of the word "shall," which appears to make dismissal mandatory; however, the new law also provides that dismissal is not required wherein "the claimant can identify prima facie evidence…for maintaining a product liability action against such a party [i.e., distributor]." *Id.*