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Newsletters

Products Liability Bulletin - February 2011

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Illinois Supreme Court Amends Valuable Products Litigation Discovery Tool

In most litigation in Illinois, including products liability matters, requests to admit under Ill. Sup. Ct. R. 216 are important pretrial discovery tools. Rule 216 provides that any litigant may issue and serve upon another party a request to admit the truth of any relevant fact, or the genuineness of any relevant document. The fact or genuineness of documents are deemed admitted under this rule unless the party who is served responds within 28 days either by a sworn statement that specifically denies the request or sets forth in detail the reasons why they cannot be truthfully admitted or denied, or that provides written objections. Ill. Sup. Ct. R. 219(b) allows for courts to award expenses and attorneys' fees where a party has wrongfully denied a request to admit.

A recent decision by the Illinois Appellate Court, Second District, supports judicial enforcement under Ill. Sup. Ct. R. 219(b). *McGrath v. Botsford*, No. 2-09-0235 (2nd Dist. Nov. 5, 2010). Defendant served plaintiff with requests for admissions of fact in October of 2003. The requests went unanswered. For unknown reasons, defendant waited until March of 2004 to move the court to have the subject facts deemed admitted. After the court permitted plaintiff to file late responses, the requests to admit were "denied." Plaintiff later admitted that one of his denials was false and could not explain why he had denied the remaining requests. The trial court ultimately entered judgment in defendant's favor on all claims. Defendant moved for an award of reasonable expenses, including attorneys' fees under Rule 219(b) for the alleged wrongful denials. The trial court denied the motion.

The appellate court reversed, determining that the trial court had committed error as a matter of law by refusing to grant the motion for expenses unless defendant could show that plaintiff's denials were "almost an intent to obstruct" or "an attempt to make someone jump through hoops." The appellate court found that neither Ill. Sup. Ct. R. 219(b) nor Ill. Sup. Ct. R. 216 provided any basis for imposing such a requirement. This decision shows a judicial intent to treat requests to admit as valuable discovery tools which cannot be summarily denied or objected to without reasonable basis.

Ill. Sup. Ct. R. 216 was recently amended by adding subparagraphs (f) and (g), which limit the number of requests to admit and also require that requests to admit have the following legend placed prominently on the first page, in 12-point or larger boldface type:**"WARNING: if you fail to serve the response**

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required by Rule 216 within 28 days after you are served with this paper, all the facts set forth in the request will be deemed true and all the documents described in the request will be deemed genuine."

This amendment went into effect January 1, 2011. Therefore, all future requests to admit should include the above warning language.

For more information, please contact Lyndon M. Flosi or your regular Hinshaw attorney.

Wisconsin Enacts Extensive Products Liability Legislation

On February 1, 2011, the state of Wisconsin enacted legislation that provides for significant changes to the state's products liability laws. Download to read the new Wisconsin Products Liability Legislation. Following are some of the more significant changes resulting from the new laws.

Wis. Stat. § 895.043(6) creates a limitation on the amount of a punitive damage award. Previously, Wisconsin had no limitations on the amount of a punitive damage award. The new legislation provides that punitive damages may not exceed twice the amount of any compensatory damages recovered by the plaintiff, or $200,000, whichever is greater.

The threshold for the admissibility of expert testimony has been changed. Wis. Stat. §§ 907.02 and 907.03 have been amended to bring Wisconsin expert evidentiary standards more in line with the federal rules. Previously, expert testimony had been admissible if it was helpful to the trier of fact.

Wis. Stat. § 895.047 has been created to define "product defect" and set forth applicable defenses. It should be noted that this section only applies to strict liability claims. Some highlights of Section 895.047 are as follows:

- A design defect is defined as one in which the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the manufacturer and the omission of the alternative design renders the product not reasonably safe.
- The product is defective because of inadequate instructions or warnings only if the foreseeable risk of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings and the omission of the instructions or warnings renders the product not reasonably safe.
- Evidence that at the time of sale the product complied with relevant standards, conditions or specifications adopted or approved by a federal or state law or agency creates a rebuttable presumption that the product is not defective.
- If the defendant proves by clear and convincing evidence that the claimant was under the influence of a controlled substance or alcohol, there is a rebuttable presumption that the claimant's intoxication or drug use was the cause of injury.
- Evidence of remedial measures is not admissible for the purpose of showing a manufacturing, design or warning defect, unless it is used to show a reasonable alternative design that existed when the product was sold.
- If the product alleged to have caused the damage was manufactured 15 years or more before the claim accrues then no action can be maintained unless the manufacturer makes a specific representation that the product will last for a period beyond 15 years.

Wis. Stat. § 895.047(2) has been created to limit the liability of a seller or distributor. A seller or distributor of a product is not liable based upon a claim of strict liability unless:

- The claimant establishes that seller or distributor has contractually assumed one of the manufacturer's duties to manufacture, design or provide warnings; and /or
- The claimant proves by a preponderance of the evidence that neither the manufacturer nor its insurers is subject to service of process within the state; and/or
- A court determines that the claimant would be unable to enforce a judgment against the manufacturer and/or its insurer. If, however, the manufacturer or its insurer submits itself to the court's jurisdiction, then the product, seller or

distributor will be dismissed.

Wis. Stat. § 895.046 has been created to address the liability of manufacturers, distributors and sellers in toxic tort cases. Section 895.046 requires that the claimant prove that the manufacturer, distributor or seller manufactured, distributed, sold or promoted the specific product alleged to have caused his or her injury unless the claimant can establish that:

- No other lawful process exists for the claimant to seek any redress.
- The claimant has suffered an injury or harm that can be caused only by a manufactured product chemically and physically identical to the specific product that allegedly caused the harm or injury.
- The manufacturer, distributor or seller sold or promoted a complete integrated product in the form used by the claimant or to which the claimant was exposed.
- There is also a limitation of liability. If more than 25 years has passed between the date the manufacturer promoted the specific product chemically identical to the specific product that allegedly caused the claimant's injury and the date that the claimant's cause of action accrued, then the action is barred.

Wis. Stat. § 895.045(3) addresses comparative fault in strict liability cases.

- The injured party's fault must be compared with any defect in the product, the contributory negligence of the injured plaintiff, and the negligence of any other person.
- If multiple defendants are alleged to be responsible for the product's defective condition, the fact finder is then required to determine the percentage of causal responsibility of each defendant for such condition. If a defendant's responsibility for the damage to the injured party is 51 percent or more of the total responsibility for the damages to the injured party, it is jointly and severally liable. If the responsibility is less than 51 percent, then that defendant's responsibility is limited to that percentage of responsibility to the injured party.

Numerous challenges and issues raised by this new legislation are anticipated. Meanwhile, these changes must be kept in mind with regard to any products liability matters filed on or after February 1, 2011.

For more information, please contact Jeffrey S. Fertl or your regular Hinshaw attorney.

This newsletter has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.