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The Codification of Illinois Rules of Evidence – Two Issues Worth Noting

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After relying on common law evidence and random statutory enactments, Illinois has now codified its rules of evidence, effective January 1, 2011. The *Illinois Rules of Evidence* are the product of the Special Supreme Court Committee for Illinois Evidence (committee), convened by the Illinois Supreme Court in 2008. In a state famous for several plaintiff-friendly trial jurisdictions, these new rules of evidence should help standardize the application of the law with respect to the most important evidentiary issues that arise at trial. It should also facilitate the assertion of objections during trial, and help trials run more smoothly. The new rules follow the same structure as the *Federal Rules of Evidence* (FRE), but have at least two unique and important features that affect drug and medical device litigation in the State of Illinois.

First, with respect to expert testimony, a key issue in most drug and medical device litigation, Illinois remains a "*Frye*" state, and will likely remain that way for the foreseeable future. The committee, by enacting Rule 702, codified the *Frye* standard enunciated in *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2nd 62 (2002), by specifically providing:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise. Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing that the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it applies.

This rule greatly limits the court's ability to exclude expert testimony based on a challenge that the testimony is not founded on reliable scientific principles, reliably applied. As a result, Illinois courts will continue to look to whether the scientific principle or methodology is novel. This almost invariably leads to the conclusion that the issue at hand involves the application of principles that belong to an existing field of science, not a new one. Therefore, unless a defendant can challenge the qualifications of the expert (and Illinois courts will take a hard look at qualifications), any dispute concerning the expert's opinion will likely go to the weight of the evidence, not its admissibility. It is also worth noting that the committee, through Evidence Code section 101, appears to suggest that the Illinois Legislature could not adopt a *Daubert*/FRE 702 standard even if it wanted to. The *Daubert* standard provides that trial judges must function as "gatekeepers," and determine the merits of scientific evidence before it can be admitted. The committee stated that: "*A statutory rule of evidence is effective unless in conflict with a rule or decision of the Illinois Supreme Court.*" (Emphasis added). This language reiterates the findings of the Illinois Supreme Court, which has invalidated three legislative attempts at tort reform based on the precept that such acts violate the separation of powers provided in the state constitution. *See generally Lebron v. Gottlieb Memorial Hospital*, 930 N.E.2d 895 (2010).

Second, in enacting the *Illinois Rules of Evidence*, the committee reserved Rule 407, relating to the admissibility of subsequent remedial measures, pending the outcome of the Illinois Supreme Court case *Jablonski v. Ford Motor Co.*, 932 N.E.2d 1030 (2010). FRE 407 provides that subsequent remedial measures are not admissible to prove liability, but may be admissible for narrower purposes, such as to prove feasibility. In *Jablonski*, a negligent design/failure to warn case, the Appellate Court of Illinois affirmed a $43 million jury verdict against Ford Motor Co. for injuries related to an accident stemming from the placement of a fuel tank in the plaintiffs' Ford-manufactured vehicle. The appellate court further affirmed the decision of an Illinois trial court that admitted evidence of Ford's pre-injury, post-sale safety improvements to another Ford-manufactured vehicle. That vehicle had the same fuel tank design as the plaintiffs, and was admitted on the issue of Ford's duty to warn. The appellate court reasoned that the trial court was correct in admitting such evidence as the "same policy considerations that bar the admission of post-accident remedial measures" do not apply "equally to pre-injury, post-sale measures." This case has been fully briefed. If the Illinois Supreme Court upholds the decisions of the lower courts, it may well impose on manufacturers a continuing duty to inform of later design iterations that may have an effect on product safety – or run the risk that evidence of these later designs may be used against them at trial.

Though the full impact of the newly codified *Illinois Rules of Evidence* at present remains unknown, the formal codification of the *Frye* standard and the potential admissibility of certain subsequent remedial measures warrant the attention of all companies forced to defend claims in Illinois. Ultimately, however, these new rules should enable counsel to develop more reliable litigation strategies by providing clearer guidelines to all parties – and judges – regarding the admissibility of evidence in Illinois state courts.

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