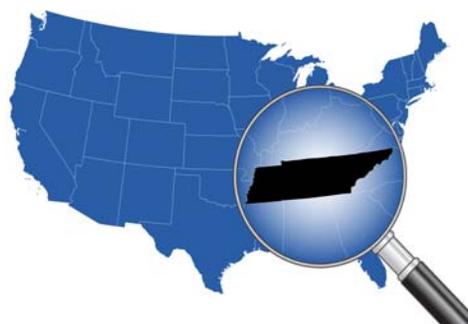


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Tennessee Legislature Rewrites Summary Judgment and Products Liability

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Claims for personal injury and punitive damages took the brunt of the tort reform in The Tennessee Civil Justice Act of 2011, which became effective for claims that accrue on or after October 1, 2011. But the Act affects property subrogation in important ways as well: It resurrects summary judgment in state courts, practically eliminates claims against product sellers, and makes warranty claims more difficult.

Previously, a summary judgment movant (usually a defendant) in Tennessee state court had to show not only (1) that there was a gap in the plaintiff's evidence at the time of the summary judgment motion, but also (2) that the plaintiff could not possibly fill that gap at trial. The latter required no actual evidence—only a plausible suggestion that such evidence could later appear in the case. This was not difficult for a plaintiff to show and it made summary judgment almost impossible for defendants. But now, a plaintiff in Tennessee state court must come forward with admissible evidence to defeat the motion when the motion is filed.

The Act also provides that "[n]o 'product liability action,' as defined in § 29-28-

102(6), shall be commenced or maintained against any seller, other than the manufacturer," unless one of five limited exceptions apply. These exceptions include situations in which (1) the seller exercised substantial control over the aspect of the product that allegedly caused the harm, (2) the seller modified or altered the product, (3) the seller gave an express warranty regarding the product, (4) a Tennessee court cannot obtain personal jurisdiction over the manufacturer, and (5) the manufacturer has been judicially declared insolvent. (Note the "judicially declared" component of the last exception: an obviously uninsured and penniless manufacturer, or one who has merely *filed* for bankruptcy, will not suffice.)

These exceptions no longer allow claims against a seller who had the ability to inspect the product and discover a readily apparent defect. They also remove claims for breach of implied warranty against a seller. Sellers rarely make their own express warranties and an implied warranty arises only out of a sale; therefore, the Act effectively ends implied warranty claims in Tennessee unless the seller is also the manufacturer—which is rare. (And express warranties from manufacturers are rarely

useful as they usually have short terms and damage and remedy exclusions or limitations.) Limiting warranty claims in this way, by extension, limits the application of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (15 U.S.C.A. § 2301 *et seq.*), a federal add-on which allows for the recovery for attorney fees on state-law warranty “consumer

product” claims.

Expect to see more summary judgment motions from Tennessee state court defendants. Expect to hear more requests from subrogation counsel to do what is needed to obtain necessary evidence in admissible form sooner rather than later. And expect to make far fewer warranty claims.

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