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Pretrial battles in product liability cases

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Prevailing on questions of admissibility is critical to success in defending products liability cases.

The purpose of this article is to address certain types of evidence that plaintiffs regularly — and improperly — try to get before the jury in these cases. These usual suspects include customer complaints, warranty claims and plaintiffs' post-accident statements concerning the cause of the incident.

Customer complaints and warranty claims

Many manufacturers, in an effort to improve customer satisfaction, create a record of customer complaints made either directly to the manufacturer or to third-party retailers. Most manufacturers also maintain records related to the warranty claims they process and pay.

Plaintiffs' lawyers routinely request these records during discovery and subsequently attempt to introduce them at trial to prove defect and/or notice of a defect. Defendants should be acquainted with the law surrounding the admissibility of these records and the arguments supporting their exclusion.

Complaints and claims are hearsay

Customer complaints and warranty claims are fundamentally hearsay, and almost uniformly contain multiple levels of hearsay. They are thus inadmissible unless the plaintiffs can provide an exception to the rule against hearsay for each layer of hearsay present in a given record.

Under the recently codified Illinois Rules of Evidence, each layer must be satisfied by an exception to the hearsay rule to be admissible. See Illinois Rule of Evidence 805. Although there are exceptions to the hearsay rule, reports regarding customer complaints and warranty records are not admissible under any exception.

Plaintiffs often argue that customer complaints and warranty claims are business records. The glaring distinction between a business record and a customer complaint or warranty claim is that the latter emanates from someone who does not share the interests of the manufacturer or its agents, meaning they lack the reliability necessary to constitute business records. *Kimble v. Earle M. Jorgenson Co.*, 358 Ill.App.3d 400, 414 (1st Dist. 2005).

Moreover, even if these documents are business records, that status only provides one exception to the hearsay rule. Unless plaintiffs can satisfy every layer of hearsay within a record, the document should not be admitted.

Plaintiffs' statements of pain and symptoms are admissible as exceptions to the hearsay rule if they were made to a physician for purposes of diagnosis and treatment.

Irrelevance without similarity

Even if plaintiffs can provide an exception to each layer of hearsay in a customer complaint or warranty claim, they are nonetheless inadmissible unless plaintiffs can also demonstrate that the events described in the proffered record are substantially similar to the incident at issue. See *Bachman v. General Motors Corp.*, 332 Ill.App.3d 760, 785-86 (4th Dist. 2002).

To be substantially similar, a prior incident must have involved equipment that was in substantially the same condition as the equipment involved in the incident in question, and the incidents themselves must have occurred in a substantially similar matter. *Mikolajczyk v. Ford Motor Co.*, 374 Ill.App.3d 646, 669-70 (1st Dist. 2007) (evidence of three prior accidents admissible to show the automobile seat was dangerous and defective because they involved a seat that was built with inadequate strength that caused the accident victim's brain and spinal injuries, and because all accidents involved an impact to the rear of the cars driven by the accident victims), rev'd on other grounds, 231 Ill.2d 516 (Ill. 2008).

Plaintiffs carry the burden of demonstrating substantial similarity. See Bachman. To meet this burden, plaintiffs have to disclose and call witnesses with firsthand knowledge of the incident described in the customer complaint or warranty claim, and those witnesses must lay a sufficient foundation of substantial similarity.

Plaintiffs' post-incident statements

In many cases, there is some record or testimony that the plaintiffs, sometime after the incident with the subject product, described how they sustained their injuries. In most cases, that testimony conveniently aligns directly with the plaintiffs' theory as to liability.

Plaintiffs' out-of-court, self-serving statements concerning the cause of an incident are hearsay and should generally be excluded at trial. See *Vujovich v. Chicago Transit Authority*, 6 Ill.App.2d 115, 120 (1st Dist. 1955) (holding as inadmissible self-serving hearsay plaintiff's statement to employer that she was absent from work because her back was bothering her); see also *Schuppenhauer v. Peoples Gas Light & Coke Co.*, 30 Ill.App.3d 607, 612 (1st Dist. 1975) (self-serving statements should not be admitted because they are difficult to evaluate even with the benefit of cross-examination).

Plaintiffs' statements of pain and symptoms are admissible as exceptions to the hearsay rule if they were made to a physician for purposes of diagnosis and treatment. However, statements made in anticipation of trial, such as physical demonstrations capable of simulation or declarations made to a physician who has made an examination shortly before trial, are inadmissible self-serving hearsay. *Rogers v. Chicago & North Western Transportation Co.,* 59 Ill.App.3d 911, 921 (5th Dist. 1978).

Defense counsel should, therefore, carefully scrutinize any evidence containing plaintiffs' post-accident statements to ensure that they are legitimately necessary for the purposes of diagnosis and treatment.