



McKENNA LAW UPDATE & NEWS

www.mckenna-law.com

NO POST SALE DUTY TO WARN OF DEFECTS

On September 22, 2011, the Illinois Supreme Court reaffirmed that in Illinois a manufacturer owes no post-sale duty to warn of defects first discovered after a product has left its control.

In *Jablonski v. Ford Motor Co.*, 2011 IL 110096 (2011), the Plaintiffs' 1993 Ford Town Car burst into flames after being rear-ended by another vehicle while they were stopped at a highway construction zone, causing an item in the trunk to pierce the tank. The husband was killed, his wife was severely injured. A jury awarded the wife compensatory damages totaling \$23.1 million and punitive damages of \$15 million and awarded compensatory damages to the Estate of the husband exceeding \$5 million. The appellate court affirmed. Thereafter, the Illinois Supreme Court reversed, finding in favor of Ford Motor Company.

The Court declined to adopt section 10 of the Restatement (Third) of Torts (1998), which recognizes a post-sale duty to warn regardless of whether the product was defective at the time of manufacture if a reasonable person would have provided warning under certain enumerated circumstances.

While a victory for this Defendant, this case leaves open the possibility that the Supreme Court will find a post-sale duty to warn in the future. Its refusal to do so in this case was based in large part on the evidence, which it found did not justify the non-IPI instruction that was taken from section 10 of the Restatement (Third) of Torts. The Court also refused to base a post-sale duty to warn on a voluntary undertaking when the manufacturer specifically limited its undertaking to warn police departments to which it had sold police vehicles but did not voluntarily undertake to warn most consumers. Nevertheless, it will heighten the

hurdle that future plaintiffs will have to cross in order to advance this theory of product liability.

For further information, contact **Kristin Tauras** at 312.558.3923 or ktauras@mckenna-law.com.

INSURER OWES DUTY TO DEFEND AGAINST CLAIM ARISING OUT OF EMISSION OF HAZARDOUS MATERIALS IN LEVELS PERMITTED BY ILLINOIS EPA

In *Erie Insurance Exchange v. Imperial Marble Corporation*, 2011 WL 4375335 (3rd Dist. 09/15/2011), an insurance coverage dispute arose when Erie Insurance Exchange refused to defend its insured, Imperial Marble Corporation, in an underlying action involving Imperial's emissions of odors and air contaminants. Imperial manufactures cultured marble vanities, countertops and other synthetic products and its manufacturing process involves the use of certain chemicals which create odorous emissions that are dispersed into the atmosphere. However, the emissions are authorized by a permit issued by the Illinois Environmental Protection Agency ("IEPA").

Erie issued a Commercial General Liability (CGL) Policy to Imperial, which provided Imperial with coverage for claims of bodily injury and property damage caused by an "occurrence". The policy defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The Erie Policy also included the following exclusions:

"This insurance does not apply to:

- a. Expected or Intended Injury

'Bodily injury' or 'property damage' expected or intended from the standpoint of the insured.* * *

f. Pollution

- (1) 'Bodily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants':
 - (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured."

A class action suit was filed against Imperial alleging that the plaintiffs sustained personal injuries and property damage as a result of the emissions. Erie denied coverage and filed a declaratory judgment action seeking a determination that it had no duty to defend or indemnify Imperial based upon the above-referenced exclusions.

The trial court granted summary judgment in Erie's favor based upon a finding that coverage was barred by the pollution exclusion. The primary issue considered by the trial court was whether Imperial's emissions constituted traditional environmental pollution, which is barred by the pollution exclusion. The trial court relied upon the underlying complaint allegations characterizing the emissions as "hazardous" and migrating off of Imperial's premises to support its finding that Imperial's emissions did constitute traditional environmental pollution.

The Third District Appellate Court disagreed, holding that Erie did owe a defense to Imperial in the class action. The Appellate Court first determined that the underlying complaint alleged an "occurrence" as defined by the CGL Policy. It alleged an "ongoing, continuous, repeated, regular and uninterrupted" invasion of the complainants' persons and property by "odors and air contaminants." In response to Erie's assertion that the emissions were intentionally discharged (and, thus, not an "occurrence"), the Court focused on the alleged damages, not Imperial's conduct. The Court held that because the alleged bodily injury and property damage were unexpected results of Imperial's intended

emission, they constitute an accident under the CGL Policy. The Erie court also focused on the complainants' alleged injuries, rather than Imperial's alleged actions, in holding that the CGL Policy's "Expected or Intended Injury" Exclusion did not apply.

Finally, the Erie court considered whether coverage was precluded under the CGL Policy's pollution exclusion. Whereas the trial court found that Imperial's emissions constituted traditional environmental pollution for purposes of the pollution exclusion, the Appellate Court did not make this determination. It held that the pollution exclusion was ambiguous as to whether the emission of hazardous materials in levels permitted by an IEPA permit constituted traditional environmental pollution excluded under the policy. Therefore, because any ambiguities must be resolved in favor of the insured, it held that Erie had a duty to defend Imperial in the underlying action.

For further information, contact **Tina Simmons** at 312.558.8316 or tsimmons@mckenna-law.com.

ILLINOIS RULE 2-1401 PETITION TO VACATE: THE LAST CHANCE FOR VACATING A DEFAULT JUDGMENT

Illinois courts have vacated default judgments entered more than thirty days after entry of the default judgment provided that petitioner's Rule 2-1401 petition to vacate sets forth: (1) specific allegations which support the existence of a meritorious defense, (2) the exercise of due diligence by the petitioner in presenting a defense to the lawsuit, and (3) the exercise of due diligence by the petitioner in presenting his petition to vacate. *Pirman v. A&M Cartage, Inc., et al*, 285 Ill. App. 3d 993, 1000 (1st Dist, 1996). The courts have looked to equity to relax the due diligence standard where necessary to prevent the unjust entry of default judgments and to effect substantial justice.

In *Pirman*, the plaintiff alleged he was injured while at work at a construction site and sued his employer and co-workers. The defendants were served and submitted their summons and complaint to their employer's claims office. The claim officer affirmed that he forwarded the court papers to the employer's insurer's office in

Pennsylvania. Each defendant was informed that the paperwork went to the employer's insurer. Each defendant failed to appear and the case was set for a prove-up date. The individual defendants received notice of default and again forwarded the paperwork to their employer's claims office who, again, informed them that the insurer was handling their defense. A default judgment was entered at the prove-up against all defendants for \$950,000.00

Ten months after default judgment was entered, the plaintiff sought to enforce the judgment by issuing citations to discover assets to all defendants. Upon receipt of the citations, defendant's insurer retained defense counsel and a petition to vacate was filed under Illinois Rule 2-1401. The defendant's insurer, located in Downers Grove, Illinois, affirmed that the first time its office received notice of the lawsuit was plaintiff's citations. The Downers Grove office was the office that handled all lawsuits filed in Cook County. The employer's claim officer had sent all the paperwork to the Pennsylvania office of its insurer, which was the wrong office.

In their petition to vacate, the defendants argued that the time sheets of the individual defendants showed that they were not even at the construction site on the day plaintiff alleged his injuries occurred. They then argued that they gave all of the court paperwork to their claims officer who told them that the defendants' insurer would handle it. When defendants' insurer received the citations to discover assets, it immediately filed its petition to vacate the default judgment within 28 days after plaintiff filed his citations. The trial court granted the defendants' petition to vacate and the plaintiff appealed.

The Appellate Court held that a petition to vacate invokes the equitable powers of the court, even absent due diligence, to prevent the enforcement of defaults under unjust, unfair or unconscionable circumstances. The Court also stated that there are parallel cases that assert that an insured's good faith reliance on his insurer will satisfy the requirement of due diligence in the interests of justice. The Court held that the trial court did not abuse its discretion when it granted defendants' petition to vacate because the defendants were diligent in forwarding their paperwork to their claims officer who was diligent in forwarding the paperwork to its insurer in Pennsylvania.

For further information contact **Alex Sweis** at 312.558.3994 or asweis@mckenna-law.com.

COOK COUNTY INSTITUTES PILOT PROGRAM FOR SIMULTANEOUS DISCLOSURE OF EXPERTS

Cook County has instituted a pilot program for selected cases in complex matters. When it is time for the parties to disclose Rule 213f(3) or retained expert witnesses, the court will order both the plaintiff and defendants to disclose their experts at the same time. The parties will then have a period of time to review the other party's disclosure and determine if they need to amend or add to their own disclosure. A deadline will then be set for all of the experts to be deposed. The purpose of the program is to see if this will move cases more quickly through the system. A number of concerns have been raised such as potential increased costs, flexibility in responding to unanticipated experts, and the timing for deposing each side's experts. A committee has been formed to follow the program and see if it results in any savings. We will keep you advised as to the progress of the program.

TRIALS AND CASE DISPOSITIONS

Alex Sweis obtained a result in favor of his client in an arbitration of a case involving an accident at the intersection of Oak and Wells streets. The plaintiff alleged that he had a green light as he drove westbound on Oak. The defendant driver stated that his light was out of order and it was a blinking red light. The City of Chicago stated that the lights were out at that intersection which means that both street lights were out of order and both lights would have blinking red lights. At arbitration Alex was successfully able to show that his driver came to a complete stop and then drove through the intersection and was hit by the plaintiff who blew through his blinking red light. The arbitrators found in favor of Alex and the City of Chicago and the plaintiff did not reject the arbitration award.

In another case **Alex** successfully opposed the plaintiff's motion for summary judgment on the issue of liability where Alex's client allegedly

rear-ended the plaintiff's car. The Plaintiff argued that summary judgment was proper because the defendant testified that he hit the rear of plaintiff's stopped vehicle because he was distracted by another vehicle. Alex was successful in arguing that the sudden emergency doctrine applied and the defendant was distracted by another vehicle that cut off the defendant. As the defendant reacted by changing lanes to avoid a collision with that vehicle, he was involved in a collision with the plaintiff's car. The judge denied plaintiff's motion for summary judgment on liability and this issue will be for the jury to decide.

a discharge in their Chapter 7 and are using its provisions to get a "fresh start" in life. In another matter, our attorneys are working with a finance company to ensure that the debtor in a Chapter 7 pays his obligations. Our client is a secured creditor and our attorneys have been working to identify assets that were used as collateral such as accounts and equipment which may be sold to pay down debt. Contact **Sara Cook** at scook@mckenna-law.com or **Andrew Bratzel** at abratzel@mckenna-law.com if you have a question about a bankruptcy issue.

OUR BANKRUPTCY PRACTICE

One of the areas of expertise at McKenna Storer is our bankruptcy practice for debtors and creditors. In one of our recent cases, a married couple filed a Chapter 13 reorganization in 2008 with the resolution predicated on the sale of their home. Unfortunately, the housing market fell precipitously and they could not sell it. When the bankruptcy trustee tried to dismiss their bankruptcy, they came to us and we worked out a plan where their Chapter 13 was dismissed and they then filed a Chapter 7. They received

McKENNA NEWS

James DeNardo has an article entitled "Misappropriation of Customer List Trade Secrets as a Basis for an Injunction Containing a Non-Solicitation Clause" in the latest issue of the IDC Quarterly. For further information, contact Jim at 312.558.3922 or idenardo@mckenna-law.com.

McKenna Storer has offices located at:

33 N. LaSalle Street
Suite 1400
Chicago, IL 60602
(312) 558-3900

666 Russel Court
Suite 303
Woodstock, IL 60098
(815) 334-9690

ADVERTISING MATERIAL

McKenna Storer has prepared this Law Update and News as a purely public resource of general information. Although it is not intended to be a source of either solicitation or legal advice, it could be regarded as an advertising or promotional communication in the terms of the lawyers' professional responsibility law. The reader should not consider this bulletin to be an invitation for, nor does receipt of it constitute, an attorney-client relationship. The reader should not rely on information provided herein and should always seek advice of competent counsel before taking any action with respect to matters mentioned in this publication.. Prior results do not guarantee a similar outcome. All rights reserved. ©2011, McKenna Storer. For information contact the specific attorney or **Dawn Ehrenberg** at 312.558.3900.