

2011 Alabama Legislative Changes *to Tort, Evidence and Procedural Law*

In the recent 2011 session, the newly elected Alabama Legislature passed a series of bills aimed at changing evidence, tort and procedural standards. This article will provide an overview of some of these changes. It is worth noting that all of the bills were passed by comfortable margins and signed by the Governor, possibly indicating that the new Republican majority may push further in the future. However, it is also true that several of the bills were amended and narrowed during debate.

Evidence law – Daubert

Probably the most significant of these bills is the statutory adoption of the Daubert standard for the admissibility of scientific expert evidence. See Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). Subsequent to the U.S. Supreme Court's opinion in Daubert, the Federal Rules of Evidence were expressly amended in 2000 to incorporate the basic guidelines set forth in Daubert. Fed.R.Evid. 702. In sum, Fed.R.Evid.

702 includes three guideposts for admissibility: 1) the testimony is based upon sufficient facts or data, 2) the testimony is the product of reliable principles and methods, and 3) the witness has applied the principles and methods reliably to the facts of the case.

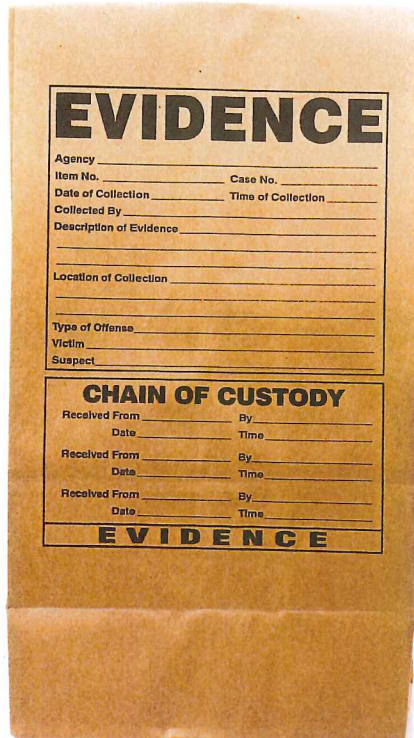
The Alabama Rules of Evidence, however, have not been amended like the Federal Rules. Ala.R.Evid. 702 reads like the earlier version of Fed.R.Evid. 702 and

states that expert testimony is admissible if it will “assist the trier of fact” and the witness is “qualified as an expert”. The Alabama courts have thus far used the Frye standard for the admission of expert evidence. The Frye standard requires that the evidence have been “sufficiently established to have gained general acceptance in the particular field in which it belongs.” Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); see e.g., Bagley v. Mazda Mo-

Changes may apply to...

- ...felony proceedings for arrests after January 1, 2012.
- ...post-judgment interest changes effective September 1, 2011
- ... liability actions effective for any actions filed after the passage of the bill
- ...wrongful death cases filed after June 9, 2011.

tor Corp., 864 So. 2d 301 (Ala. 2003) (Alabama follows Daubert for DNA evidence, by statutory directive, but otherwise adheres to Frye). Most commentators agree that the Daubert test is more difficult for expert testimony and requires the trial judge to review the evidence carefully rather than simply deferring to the expertise of the proffered witness.



Act No. 2011-629 (SB187) moves Alabama law much closer to this federal standard. This Act will be effective January 1, 2012 for newly filed civil actions and will be codified in Ala.Code § 12-21-160. This Act uses the language of Fed.R.Evid. 702 for expert testimony based on “scientific theory, principle, methodology or procedure.” It further indicates that this is an additional requirement over and beyond Ala.R.Evid. 702 (that is, the evidence must apparently meet both hurdles).

The Act does not expressly adopt the Daubert standard for expert evidence that is not scientific. Compare Kumho Tire Co. v. Carmichael, 526 US 137 (1999) (applying Fed.R.Evid. 702 to nonscientific expert testimony). Howev-

er, the Act codifies the existing language of Ala.R.Evid. 702 for all evidence which is a change from the prior text of Ala. Code § 12-21-160 which broadly stated that opinions of experts on any question of science, skill, trade or like questions are always admissible...” It is unclear whether this textual change works any real change to the standard for nonscientific expert evidence because Ala.Code § 12-21-160 may have already been superseded by the adoption of the Alabama Rules of Evidence. Ala.Code § 12-1-1 (deferring to the various rules adopted by the Supreme Court).

Note also that this bill does not affect the evidence standard for medical malpractice (*see* Ala.Code § 6-5-540), domestic relations, child support, juvenile, or probate cases; however it does apply to felony proceedings for arrests after January 1, 2012.

Post-Judgment Interest

Currently post-judgment interest in Alabama is 12 percent. Because interest rates have dropped very low, some defendants have complained bitterly about this figure as not representing the current cost of funds. Act 2011-521 (Senate Bill 207), effective September 1, 2011, lowers post-judgment interest to 7.5 percent, the current Southeast average. Ala.Code § 8-8-10.

Product Liability Actions Against Retailers and Distributors – Sealed Container

Senate Bill 184 (Act 2011-627) amends Ala.Code § 6-5-501 and 6-521 to generally prohibit liability actions against wholesalers, dealers, distributors or retailers (collectively, “distributors”). These changes are effective for any actions filed after the passage of the bill. The pri-

mary exception is where the distributor is also the manufacturer or assembler (and such action is “causally related” to the defective condition). In other words, is the product in a sealed container? Other exceptions exist (1) if the distributor “exercised substantial control over the design, testing, manufacture, or labeling” (and such actions were causally related to the defective condition), (2) if the distributor “altered or modified” the product and such actions were a “substantial factor in causing the harm”, or (3) if the distributor commits any “independent acts unrelated to product design or manufacture” including negligence, wantonness, warranty violations or fraud. In addition, plaintiff may bring suit against the distributor if it cannot, after “a good faith exercise of due diligence” determine the identity of the manufacturer (but must dismiss the distributor if the manufacturer is later made known). It would appear that litigation may arise over what constitutes an “independent acts unrelated to product design or manufacture.”

Venue in Wrongful Death Actions Now The Same As Personal Injury Actions

Act No. 2011-522 (SB 212) amends Ala.Code § 6-5-410 to require that a wrongful death action may only be filed in a venue which would have been proper if the deceased could have filed suit. In other words, venue provisions that would normally apply to personal injury cases also apply to wrongful death cases. This bill is effective for any case filed after June 9, 2011.

Conclusion

These legislative changes are significant when they apply; however, they do not work any wholesale changes to Alabama law.