▶ PRODUCT LIABILITY

Prosecuting and Defending Product Liability Cases: A View From Both Sides of the Aisle

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Practical advice for attorneys evaluating, prosecuting and defending product cases.

I. Introduction

I have had the good fortune and unique opportunity of handling product liability cases for both plaintiffs and defendants in many jurisdictions across the United States. While the law governing product liability claims varies (sometimes significantly) from state to state, the process of evaluating, prosecuting and defending product cases is in general terms the same regardless of the jurisdiction involved.

This is not to say that a particular jurisdiction's law will not affect the manner in which these cases are handled; many times it will. For example, Oregon does not allow interrogatories or any type of expert witness disclosure.[1] Litigants have no idea who the opposing party's experts are or what opinions they will offer until the expert takes the witness stand. Similarly, although Pennsylvania and New York require expert disclosure, absent a court order, they do not allow expert witness depositions.[2]

Setting aside the issue of a particular state's law governing product liability claims, this article is intended to provide some practical advice for attorneys evaluating, prosecuting and defending product cases.

II. Recognizing Product Claims

Many product liability claims are disguised as medical malpractice claims, car wreck cases or workers compensation matters. While there may be a medical malpractice component to your client's claim, do not automatically assume that surgery gone awry is physician error. All surgical procedures involve the use of medical devices and prescription drugs. As such, even if there is a clear case of medical malpractice, circumstances may warrant investigating what surgical instruments and drugs were used during surgery to determine if they played a role in causing your client's injuries. The message here is do not assume that the drunk truck driver who t-boned your client is solely responsible for your client's injuries. A defective seat belt, seat back, air bag, tire, traffic light or some other product may also have contributed.

III. Proceed With Caution

Product liability claims are exceedingly complex, time-consuming and expensive—for plaintiffs and defendants. I have been involved in cases on the plaintiff's side where the out-of-pocket expenses approached $1 million, and I have defended cases where the fees and costs far exceeded that amount. It is critically important to make an informed decision about whether to pursue a product liability case in the first place. Here are a few points to consider.

A. What are Your Client's Injuries and Damages?

Unless your client has suffered catastrophic injuries, think twice about pursuing a product liability case. Often-

times the costs associated with retaining expert witnesses, locating and preserving the product, purchasing exemplar products, product testing and travel do not justify pursuing a case. Spending $250,000 to prosecute a claim when your client's damages are minimal is one of the quickest ways to find yourself on the wrong side of the table in bankruptcy court. Thoroughly evaluate your client's injuries, damages and the costs you are likely to incur before deciding to take a case.

B. Where is the Product?

Although there are exceptions (i.e., you have excellent post-incident photographs of the product), it is often a mistake to accept a case without actually having the product at issue. Proving that a product was not manufactured in accordance with the defendant's specifications is virtually impossible without the product, which may then require you to rely solely on a defective design theory (and/or failure to warm claim) and prove that all of the defendant's products are unreasonably dangerous and defective. Moreover, without the product, your expert witnesses will likely have to speculate about issues that are at the heart of your case.

Even if your client claims that the product was destroyed, lost or thrown away, always confirm that this is in fact the case. Your client may believe her insurance company destroyed the minivan that she claims had a defective air bag, but the vehicle may be sitting in a salvage yard in the same condition it was in at the time of your client's crash. Never assume the product cannot be located. Conduct a thorough search until you are confident that it no longer exists.

If the product is located, do not do anything with or to it until its condition is documented with photographs and videotape and it is inspected by an expert. Do not test or alter the product without permission of all counsel and an agreed upon testing protocol. If an agreement cannot be reached about how to inspect or test the product, stop and seek guidance from the court. Do not set yourself up for a spoliation instruction.

C. Is Your Case Time Barred?

All states have some time limitation within which product liability claims must be brought.[3] Research the statute of limitations and make sure your case is timely. Defense attorneys look for "homerun" defenses when analyzing new product cases, and there are none better than a motion to dismiss based on plaintiff's failure to file suit within the applicable statute of limitation.

Some states, like Kansas, have statutes of repose which can also affect your ability to recover in a product liability matter.[4] In Kansas, a product seller is not subject to liability if it proves by a preponderance of the evidence that your client's injuries were caused after the product's "useful safe life" had expired.[5] If the product is more than 10 years old, its useful safe life is presumed to have expired, thereby relieving the manufacturer of liability unless the plaintiff can rebut the presumption with clear and convincing evidence.[6]

D. Are Your Claims Preempted?

While the various ways in which product liability claims can be or are preempted is beyond the scope of this article, it warrants noting that certain product claims—such as those involving Class III medical devices approved through the Food and Drug Administration's Premarket Approval Process—are absolutely preempted.[7] Evaluate preemption and how it may apply to your case.[8] Preemption is another "homerun" defense that you do not want to learn about from opposing counsel.

E. Is Drinking or Drug Use an Issue?

If your client had been drinking or under the influence of illegal drugs at the time of the incident, think long and hard about how their intoxication may have contributed to their injuries and what impact this evidence will have on a jury. The public in general has little tolerance or sympathy for those who were injured even in part because they were intoxicated. While there are situations where evidence of alcohol or drug use is irrelevant and can be kept out of evidence, plaintiff's counsel should know the law in this area before proceeding.[9]

F. Who are the Defendants?

Depending on the circumstances and the state law at issue, almost anyone involved in the design, manufacture, distribution or sale of a product (chain of distribution) can be held liable for the harm caused by a defective product. Although some states like California allow fictitious party practice (John Doe defendants), most states and the federal courts do not.[10] Thus, plaintiff's counsel must identify and locate all potential defendants—some of whom may be located outside the United States.

IV. Venue

Thoroughly evaluate your venue options before filing suit. It is no secret that some venues are more favorable to personal injury matters than others (often termed "judicial hellholes" by the defense).[11] Find out how your jury pool is selected and what the pool will look like from a socioeconomic standpoint. Jury verdict reporters can help determine whether the venue is liberal, conservative or somewhere in between.

Evaluate the judges that may be assigned to your case. If the judges are elected, find out who contributes to their re-election campaigns. Ask other attorneys about their experiences with potential judges. If you are concerned about a judge, determine whether you can seek a change of judge as a matter of right. If not, consider whether a different venue may alleviate your concerns.

From the defense perspective, never assume a case was filed in the proper venue. I have defended many cases where plaintiff's counsel intentionally filed suit in an improper venue in an attempt to have the case heard in a plaintiffs-friendly jurisdiction. Failure to raise improper venue in your answer or a pre-answer motion constitutes waiver of the defense,[12] and you do not want to have to tell your client that you are stuck in a "judicial hellhole" because you failed

to notice the case was filed in the wrong venue.

V. Federal Court

Do not waste time filing a case in state court if the case is removable to federal court (i.e., there is diversity of citizenship and damages in excess of $75,000). Defendants in product liability cases prefer to be in federal court in large part because the rules governing the admission of expert testimony are considered to be more stringent than in most state courts.

If the state court petition or complaint does not clearly state that there is complete diversity of citizenship between the parties and that the plaintiff is seeking in excess of $75,000 (exclusive of interest and costs), defendants have one year from the date of filing to remove the case to federal court.[13] Defense attorneys who remove cases without these elements being clearly established are subjecting themselves and their client to sanctions.[14]

If the petition or complaint is not clear on the amount of damages being sought, serve requests for admissions on the issue. After the plaintiff admits that she is seeking more than $75,000 in damages, many defendants will remove the case to federal court, and plaintiff's counsel's efforts to have the case heard in state court will have been a waste of valuable time and resources.

Suing improper or tenuous parties in an effort to destroy diversity jurisdiction is likewise a waste of time. Seasoned defense lawyers will recognize improper joinder and move quickly to have the parties dismissed. And then they will remove your case to federal court.

VI. Product Identification

Product identification refers to the identity of the manufacturer of the product at issue. For example, many medical device companies manufacture very similar products such as trocars, surgical staplers, electro-surgery units, sutures, needles and endotracheal tubes, to name a few. Determining which company manufactured a particular medical device can be difficult. Many hospitals have exclusive arrangements with a device manufacturer and agree to only use that manufacturer's products in exchange for a discount on the devices it purchases. However, I have handled cases where a hospital had an exclusive arrangement with a particular device company but nevertheless purchased a different brand of the device at issue at the request of a single surgeon. Thus, exclusive distribution agreements can be misleading.

One of the best places to look for information about the manufacture of a medical device is your client's itemized medical bill. Some hospitals itemize by manufacturer name each medical device that was used during surgery. That being said, I have defended cases where the hospital bill stated that the product was manufactured by ABC Corporation only to find out that XYZ Corporation was the manufacturer. Mistakes are made. Confirm that your client's medical records accurately identify the manufacturer through the deposition testimony of hospital personnel knowledgeable about such matters.

Identifying the manufacturer of generic prescription drugs can also be problematic. Medical bills and pharmacy records do not always identify the manufacturer, necessitating additional efforts to determine if the medical provider received prescription drugs from a distributor or directly from the manufacturer, or both. Never rely solely on medical records, medical bills or deposition testimony to identify the manufacturer. I defended a case where a pharmacist signed in good faith an affidavit stating that his pharmacy received the drug at issue from company A. The pharmacist, however, was mistaken, and by the time plaintiff's counsel realized the pharmacist was wrong, the statute of limitations had run against the true manufacturer of the drug.

Obtain and read all of your client's medical records and medical bills. If product identification is still unclear, contact the hospital's risk manager. If that does not resolve the issue, depose the surgeon and other medical personnel who may know who manufactured the product. Make sure you have the correct defendants. Many otherwise meritorious cases have been dismissed because plaintiff's counsel failed to properly and timely identify the manufacturer of a product.

VII. Serving Discovery

Think about the discovery you serve in product liability cases—before you serve it. Most attorneys have standard sets of interrogatories and requests for production that they tend to use in all cases. But a standard set of discovery is only the starting point. Discovery from both plaintiffs and defendants needs to be tailored to the particular facts of the case. Many times I have received discovery requests in product cases that were clearly drafted for a medical malpractice or car wreck case. Lack of planning and thought on plaintiff counsel's part is duly noted by defense counsel and may well indicate a lack of knowledge about the product, handling product liability claims, or both.

In my experience, neither plaintiffs nor defendants make good use of request for admissions. Use them. Make your requests simple and straightforward. Many issues can be resolved with requests for admissions, allowing you to focus your efforts on other matters.

VIII. Answering Discovery

Answer the discovery you receive. This goes for plaintiffs and defendants. I am amazed at the number of times plaintiff's attorneys ignore discovery requests directed to their clients, which inevitably leads to motions to compel and plaintiff's counsel not making a good impression with the judge. Despite the belief that all defense counsel want to "milk" a file, my experience has been that companies want to know as much

about a case as soon as possible so they can evaluate the case for insurance reserve purposes, budgeting and whether there is a possibility of early resolution.

Courts are less and less sympathetic to practitioners who do not follow the rules and repeatedly seek extensions of time to respond to discovery. Discovery is not a game. If relevant, discoverable information has been requested, you and your client have an obligation to produce it.[15] There is no "bad fact" or "bad document" privilege. Withholding relevant information without a good-faith basis is an excellent way to get sanctioned—particularly in federal court.[16]

IX. Expert Witnesses

With few exceptions, plaintiffs and defendants must rely on expert witnesses to prosecute and defend their cases, and selecting the proper experts is often the difference between winning and losing. Avoid experts that advertise because they can come across as hired guns willing to say anything for the right price. Evaluate your expert's credentials and prior testimony. While many plaintiff's bar associations obtain and share depositions and trial testimony from defense experts, my experience is that the defense bar is better organized when it comes to learning about a plaintiff's expert's prior testimony and background. IDEX, a service available through LexisNexis®, will provide you with a detailed report of an expert witness within a few days of a request. IDEX's database contains records on over 220,000 experts, including full-text transcripts, depositions, disciplinary actions and *Daubert* challenges.[17]

X. Conclusion

The time and expense that must be devoted to pursuing product claims requires plaintiff's counsel to ask tough questions and conduct a thorough evaluation of potential claims before proceeding. Lack of planning and evaluation can have disastrous results for attorneys and their clients. For those unsure about whether to take on a case, seek the advice of more experienced counsel, enter into a co-counsel arrangement or refer the case out.

Product litigation is hard work. In addition to a significant financial investment, product cases often require a thorough understanding of complex state and federal laws that govern the manufacture and sale of products such as medical devices, prescription drugs and motor vehicles. Do your homework, ask for help if you need it, and learn from the mistakes you make along the way. I have made many. ▲

Endnotes

1 *See* Rules 36 and 38 of Ore. Rules of Civ. Pro. (2009).
2 *See* 231 Pa. Code, Rule 4003.5 (2009); Laws of N.Y., CPLR § 3101(d) (2009).
3 K.S.A. § 60-513 (Supp. 2009).
4 K.S.A. § 60-3303(a) (Supp. 2009).
5 *Id.*
6 *Id.*
7 *Riegel v. Medtronic*, 128 S.Ct. 999 (2007) (medical device preemption); *Wyeth v. Levine*, 129 S.Ct. 1187 (2009) (prescription drug preemption).
8 Leslie Overfelt and Patrick A. Hamilton, *Drug Preemption v. Medical Device Preemption: A Study in Contrast*, Journal of the Kansas Association for Justice, pp. 9-14 (July 2009).
9 *See* Kansas PIK-Civil 4th § 121.89 (Supp. 2009) and cases cited therein.
10 *See* Cal. Civ. Pro. Code § 474 (2009); 28 U.S.C. § 1441(a) (2009).
11 *See* http://www.atra.org/reports/hellholes
12 K.S.A. § 60-212(h) (Supp. 2009); Fed. R. Civ. P. 12(h) (2009).
13 28 U.S.C. §§ 1441 and 1446(b) (2009).
14 *Laughlin v. K-Mart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995); *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).
15 K.S.A. § 60-226(b) (Supp. 2009); Fed. R. Civ. P. 26 (2009).
16 K.S.A. § 60-237 (Supp. 2009); Fed. R. Civ. P. 37 (2009).
17 *See* https://idex.lexisnexis.com

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