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PRODUCTS LIABILITY

Conducting Discovery in Your Products Liability Case

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Special to the Legal

Products liability cases can be simple straightforward cases—where there is perhaps a manufacturing defect that results in a clear failure of a product—or they may be much more complicated, as with design defect cases—where you are proposing that the design of a product could be safer or should not be on the market at all. Perhaps you have a failure-to-warn case, where the product itself might be safe for certain purposes, but the warnings and directions cause it to be used unsafely. Or, your case may involve a combination of the above. Naturally, your discovery should be specific to your case. Although your initial discovery may cover the broad range of design, manufacturing, marketing, warnings, use, etc., as you get deeper into your case and your theories crystallize, your general discovery should become more specific.

Like other cases, products liability cases will involve interrogatories, document requests, requests for admissions and depositions. You will likely need to complete product inspections, protocols and preservation of evidence to avoid spoliation issues. This article is intended to address some of these issues, as well as highlights of unique issues that might arise during litigation. However, product liability cases can be labor-intensive, involve hundreds to thousands of pages of records, and could even entail the development of an alternative design, which, in some circumstances, might warrant a patent application. As such, it is important upon initial review of your product liability case to expect not only a lengthy process, but also the potential need for immediate preservation of evidence.


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Discovery with your products liability case might start the day you receive the case—with your spoliation letter. Depending upon the nature of the product, who owns/holds it, and the manner in which the incident occurred, an immediate preservation letter may be needed. The product should be preserved in the condition it was in on the day of the incident. Because the possessor of your product might be an entity that is not going to be a party, an injunction may need to be filed, or a writ with a motion to inspect and preserve evidence. Be prepared to offer to pay to preserve the evidence. You may be preserving evidence that ranges from something as small as a screw to as large as an entire truck.

Once in suit, your initial requests for production of documents should be all encompassing. You will want to see not only everything associated with your product, including the conceptual drawings, notes concerning research and development, patents, testing and sales records, and records regarding other complaints, but also similar records for any predecessor or successor products to the product at issue. Perhaps the product that is involved in your case is a successor product to an earlier design and the new application was not properly vetted or did not meet the strict testing requirements that a predecessor product may have endured simply because it was a successor. Perhaps you will learn from discovery concerning successor products that a change was made to the product involving the very issue that is the subject of your litigation.

It is helpful to have experts on board for the record review process. Sifting through thousands of pages of technical drawings, which might contain modifications of designs by only millimeters, or important omissions, may require more than an untrained eye.

Maybe the design was changed because of a pinch point, the process was changed to create a new fail-safe, or a warning was added that did not previously exist. As such, discovery of a product's predecessors and successors can be just as important, if not more so, than of the product itself.

Take advantage of the Philadelphia Local Rules of Civil Procedure and form discovery for product liability cases. There are 15 standard interrogatories promulgated by the Philadelphia court system that can be served in every products liability case. It is impermissible to object to these interrogatories, and any objections may subject the responding party to sanctions. They may not be tailored toward your individual case, but, to the extent applicable, may still provide useful information.

It is helpful to have experts on board for the record-review process. Sifting through thousands of pages of technical drawings, which might contain modifications of designs by only millimeters, or important omissions, may require more than an untrained eye. There may also be times when many of these materials are not in English and require translation. While it is expensive, certified translators with technical training should review these materials so they know what to look for. You may not need to translate every document, but those that are relevant to the issues in your litigation should be translated and certified as accurate so they can be used with testimony.

Sometimes a record review is not just for the substance of the records, but also the appearance of them, leading to the need to request the original documents. Sometimes records are altered. Barely discernible evidence of white-out or other alterations may spark a suspicion that the original is necessary. Changes in handwriting or incredible similarity in handwriting might also bolster the need. The latter is seen sometimes in situations involving records that require someone to confirm completion of a particular task. Perhaps the worker filled out a week's worth of "hourly" quality control sheets at the end of the week, instead of completing them hourly as was required. As a result, a series of check marks in boxes may look virtually identical because they were all completed at the same time and not as the tasks were unfolding.

Once you have gathered your records and evidence you need to take some depositions. Oftentimes the defense will produce an engineer who is instrumental in the design, modification or sale of the product. These witnesses typically have hyper-technical knowledge about not only the particular portion of the product that is your focus, but also the product as a whole. Knowing and understanding all of the inter-relations of the various components of the product will be important to appreciate the answers and to examine the witness. It is helpful to spend time with your expert prior to the deposition so you know as much about the product as the witness.

Prior to the deposition, you should know and understand what technical qualifications the particular witness being proffered may possess or may lack. When you request a corporate designee to appear for deposition, it is important that you obtain the person's identity well beforehand. You are entitled to investigate witnesses before they appear for a deposition. If the defense intends to proffer Joe Smith as a corporate designee on the issue of widget safety, then you should have the opportunity to research Joe Smith well before his deposition. A party knows whom it is going to proffer as a witness on a particular topic, thus they can disclose that name to you well before the deposition.

You will also want to find out about other lawsuits and litigation concerning the product. This might result in no production, a production of litigation materials from one other case, or a production of materials and depositions from hundreds of other cases. While the particulars of other litigation may only be obtainable through discovery, general information may be obtainable through your own investigation. There are a number of websites that can be helpful in this endeavor, including the product manufacturer's own website, the Consumer Product Safety Commission's website, the FDA's website, and simple docket searches at the state and federal level, locally and nationally. Consider also your options with subpoenas and Freedom of Information Act (FOIA) requests to third-party entities (with the potential need for depositions of these facilities as well), such as UL Laboratories, the FDA, OSHA or other similar agencies.

At some, or even multiple points, product inspection(s) might be necessary. With most product inspections, protocols are put in place so field decisions are limited. You do not want to be at an inspection where multiple engineers and a number of attorneys have flown in and there is disagreement as to what the next step should be in disassembling the product. While certain field decisions cannot be avoided, the majority of the protocol should outline the steps. Depending upon the product, parties who own the product may want to have the product put back in service, but that may not be possible until everyone is put on notice and has an opportunity to develop a protocol and perform necessary inspections. The product testing may not be completed at one time. You may need multiple dates of testing over the course of time. You may want to X-ray the entire product before agreeing to any disassembly. Based upon the results of the X-ray, you may develop a new protocol for the second phase of the product examination, and so on. A lot of this is dynamic and cannot be scripted until you get deeper into the process.

Be mindful of the timing of the destructive testing of the product. You will want to be at the proper stage of the process. An initial inspection may be only for product identification, and a subsequent for non-destructive testing. Destructive testing, by its nature, cannot be undone, and should proceed only when timely in the litigation. Ultimately, if you have a products liability case that involves a unique or novel application, your discovery might entail not only multiple inspections and protocols, but also development of your own prototype product.

While the above is not an exhaustive list of discovery in products liability cases, hopefully it is helpful on some issues you might need to address. Product liability cases range in complexity, as should the discovery for each case. •