

CREATIVE DISCOVERY IN PRODUCTS LIABILITY CASES

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I. Introduction

Products liability cases are often won during discovery.

The numerous often highly technical documents in the Defendant's possession constitute an important body of evidence that the Plaintiff must collect and analyze for trial. They may well include incriminating data and "smoking gun" memos. Devoting a significant amount of time and creative energy during preparation of a products liability case is a condition precedent to achieving success at trial.

For example, in Eimers v. Honda Motor Co. Ltd.ⁱ (No. 90-25, W.D. Pa., Judge Glenn E. Mencer. Case filed January 1990 and verdict rendered June 1, 1993), the Plaintiff was riding his Honda motorcycle without knowing that the bike's side-stand was down. After the side-stand struck the road, the motorcycle flew out of control and hurled the Plaintiff to the ground. He sustained severe spinal cord injuries which rendered him a quadriplegic.

The Plaintiff filed suit alleging a defective design. The defense claimed that the stand was up and that even if it had been down, it would have moved up automatically upon contact with the ground. During discovery, the Plaintiff requested the Defendant's in-house experts' files. After the Defendant objected, the Plaintiff filed a motion to compel production which was granted by the Court. As part of their expert file production, the Defendants produced videotapes of testing conducted by their research and design experts on the same model and year motorcycle as the one the Plaintiff was riding when he was injured. After analyzing the footage, the Plaintiff's attorney noticed in several sequences that the motorcycles' side-stand failed to retract when it contacted

with the ground. He immediately isolated those excerpts from the Defendant's own videotapes and produced his own videotape for trial.

The Defendant videotaped a new series of tests which showed that the side-stands retracted when it contacted with the ground and showed it to the jury. On cross-examination, Plaintiff's counsel showed his videotape to the jury. The effect of the videotape was devastating in discrediting Honda's claim that the side-stand should have retracted upon contact with the ground. During jury deliberations, the only videotape the jury asked to see again was the Plaintiff's video which was made from the Defendant's own footage.

The result was a jury verdict of \$19.8 million against Honda for negligently designing the motorcycle side-stand which caused the Plaintiff's injuries. As the foregoing case illustrates, hard work during discovery and a little creativity in presenting the evidence to the jury can be rewarding.

This paper explores the numerous tactics employed by the Defendants to subvert Plaintiff's discovery of vital product information. After examining each defense tactic, this paper discusses various available counter-measures. Further, this paper discusses the various sources available to help Plaintiff's counsel adequately acquire information in a products liability case during both the pre-suit and post-suit investigation phases of discovery.

II. Hardball Discovery

A. The Defendant's Advantage

Initially, in products liability cases, the corporate manufacturer and its defense counsel enjoy an advantage over the Plaintiff's attorney in several areas. First and foremost, they possess relevant technical data and internal documents reflecting the basis of corporate decisions

concerning the design, development, manufacturing, and distribution of the product. Second, they employ and/or have access to witnesses who are familiar with the product. Third, they have access to a collaborative mechanism usually established and organized by the Defendant's in-house counsel to assist local counsel in case preparation. Fourth, they usually have superior economic resources.

In order to overcome this inequity of resources favoring the Defendant, Plaintiff's counsel must devote a significant amount of time to planning and performing discovery. It is usually counsel's hard work, diligence, and creativity which converts a superficially, innocent-looking memo or research report into a real "smoking gun". Thus, one purpose of discovery is to find out facts and to translate those revealed facts into powerful evidence at trial.

B. Defense Tactics and Plaintiff's Counter-Measures For Success

1. Protective Orders Preventing Information Dissemination

Defendants in defective products cases typically seek to prohibit future Plaintiff's counsel from sharing information by obtaining restrictive confidentiality orders that forbid the dissemination of discovery materials to litigants involved in similar cases. Counsel are placed in a difficult situation because refusing to agree to a protective order could jeopardize a proposed settlement, while, at the same time, agreeing to such an order clearly disadvantages other future Plaintiffs and their attorneys.

As discussed previously, one of the advantages Defendants enjoy is the fact that their counsel have the benefit of a collaborative discovery mechanism typically organized and implemented by Defendant's in-house counsel. A protective order effectively bars and isolates

Plaintiff's counsel from similar collaboration. Essentially, duplicative discovery is required, thereby, increasing the time and costs associated with discovery.

To combat these disadvantages it is crucial that the Plaintiff's bar, as a whole, combat these repeated attempts to bar dissemination of vital information. Many important benefits result from a collaborative discovery mechanism between the Plaintiff's bar.

a. The Court Battle Over The Protective Order

Normally, after the Plaintiff has filed a request for discovery, the Defendant moves the Court under Rule 26(c)ⁱⁱ for a protective order. The Defendant has the burden to show that "good cause" exists for the order. The Plaintiff must show relevance and need for the materials. The Court must then balance that relevance and need against the harm of production.

In resisting the entry of a protective order, Plaintiff's counsel can call the Court's attention to the increasing body of case law recognizing and endorsing the sharing of information between counsel with similar cases.ⁱⁱⁱ Patterson v. Ford Motor Co., 85 F.R.D. 152 (W.D. Tex. 1980), is a seminal products liability case in the area of information sharing by counsel. This case recognized the desirable effects of information sharing. In Patterson, the Defendant moved for a restrictive protective order for the stated purpose of preventing the use or dissemination of discovered information by the Plaintiff's attorney in subsequent litigation. The district court explicitly rejected the defense's argument of information sharing among Plaintiff's counsel as adequate grounds for the issuance of a protective order. Importantly, the court adopted the view that sharing information would reduce the time and expense of litigation and was consistent with the objectives of the Federal Rules of Civil Procedure ensuring the just, speedy and inexpensive resolution of litigation.

b. The Importance of “Sunshine” legislation

Another method of attacking protective orders and preserving the dissemination of valuable information in products liability cases is through “Sunshine” legislation. These laws are designed to facilitate public disclosure of all information pertaining to public health and safety. “Sunshine” legislation requires litigants to disclose all such public safety information and forbids the sealing of court records of these proceedings absent “good cause”. For instance, the Florida legislature enacted **Fla.Stat.Ann.** § 69.081 which prohibits a Court from entering a protective order “which has the purpose or effect of concealing a public hazard or any information concerning a public hazard. . . .” Also, that statute confers standing to any “substantially affected person” including members of the news media to contest an order or agreement restricting the disclosure of information pertaining to alleged public hazards.

At present, Florida, Virginia and Washington have passed “Sunshine” laws.^{iv} Texas, New York, Delaware and New Jersey have amended their rules of procedure to have this same effect.^v The Plaintiff’s bar should encourage Legislators in their respective states to enact “Sunshine” legislation in order to adequately counter Defense counsel’s repeated attempts to seek restrictive confidentiality orders.

2. Producing Voluminous Unorganized and/or Altered Documents

Defendants frequently attempt to subvert meaningful discovery by producing a large number of unorganized/non-indexed documents with no particular reference to any discovery request.^{vi} Another unfortunate defense tactic is to alter the documents requested.

These type of tactics made national headlines in the fierce discovery battle that ensued between the Phillip Morris tobacco company and ABC News. These hardball discovery tactics

escalated when Phillip Morris delivered 25 boxes of unorganized documents to ABC on hard-to-copy paper, dyed dark red, and allegedly treated the paper with chemicals so that it would smell foul.

One of Plaintiff's counsel's strongest weapons to guard against this type of abuse is Rule 34. Rule 34(b) provides that a "party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request." The failure of a Defendant to cooperate with Plaintiff's legitimate discovery requests may result in any of the applicable sanctions provided under Rule 37.^{vii}

For example, in T.N. Taube Corp. v. Marine Midland Mortg. Corp.,^{viii} the Defendant produced documents to the Plaintiff in a cardboard box in no apparent order and not labeled as responsive to any of Plaintiff's requests. The Court stated that it was not reasonable to require the Plaintiff to wade through a mass of documents in a vain attempt to locate relevant information. The Court ordered the Defendant to comply with Rule 34 by organizing the documents in a manner clearly indicating which of the documents respond to Plaintiff's specific requests for production. Further, the Court warned the Defendant that continuous attempts to thwart Plaintiff's legitimate discovery attempts would warrant sanction under Rule 37.

3. Evasive and Misleading Responses to Plaintiff's Requests

Often, Defendants will play on words to give the language of the Plaintiff's discovery request an unreasonably narrow interpretation in order to avoid production.^{ix} For instance, one Plaintiff's counsel had relayed such a situation to me during a recent trial lawyers' conference. In a products liability case alleging a design defect, he requested from the Defendant all records

generated by the Corporation's Computer Information System regarding similar accidents. The Defendant stated the Corporation did not maintain a "Computer Information System". However, it was later revealed that the Corporation did have a computer system storing such information, but it was called by a different name.

The most effective measure to undermine the Defendant's use of semantics and evasive discovery is to use the Defendant's in-house language in the discovery requests. Plaintiff's counsel can usually obtain the necessary language from its experts.

4. Delay

Defendants stall in furnishing discovery. A frequently cited justification is that the Defendant does not physically possess the information at the time of the Plaintiff's request.

Discovery rules clearly indicate that a party has an affirmative duty to investigate and attempt to locate and furnish information that is reasonably available to him/her. Rule 33(a) requires a party answering interrogatories to furnish such information "as is available to the party." Rule 34(a) mandates a party to produce documents and items within the party's "possession, custody or control." Rule 36(a) states that an answering party may not give lack of information or knowledge of documents as a reason for failure to admit or deny an answer unless he has made a reasonable inquiry and that the information he knows or has readily obtainable is insufficient to enable him to admit or deny.

The extent of the discovery investigation by the Defendant does not, however, require "extensive" or "independent" research outside the Defendant's organization.^x The burden is on the Defendant to show that it cannot readily obtain the requested information and that a reasonable inquiry has been conducted.

For example, in Simon v. Searle & Co.,^{xi} the Plaintiff attempted to obtain a study regarding IUDs from the Defendant's expert consultant who resided in another jurisdiction. The Defendant objected and argued that it would be required to produce materials in the physical control and custody of another person. In ordering production, the Court held that the Defendant had control over or custody of the documents in light of the fact that the Defendant funded the study.

Further, in In re Richardson-Merrell, Inc.,^{xii} the Plaintiffs sought production of documents from the Defendant drug manufacturer. The Defendant objected to searching for the documents since it was in the hands of a foreign subsidiary. The Court stated that the Defendant could not avoid a proper discovery request by utilizing a record keeping system which conceals rather than discloses information. The Court ordered the Defendant to conduct a search and to produce all responsive documents.

5. Concealing Relevant Information

The suppression of relevant information by the Defendant in products liability cases is the subject of many recent cases. This usually occurs because the Defendant controls the relevant documents, the Defendant is aware of the information's potentially damaging effects, and the Defendant unilaterally decides what should be produced. Some Defendant corporations have even gone so far as to establish record retention systems to conceal information or even have them located in other jurisdictions.

But, Courts have consistently held that a company cannot escape discovery by maintaining a record retention system which is designed to conceal relevant information.^{xiii} Thus, Courts will be intolerant toward any behavior which is designed to thwart the expeditious and effective

resolution of a complex products liability case. If a party continuously acts in bad faith during discovery, Plaintiff's counsel should request the Court to impose sanctions under Rule 37.

In Kozlowski v. Sears, Roebuck & Co.,^{xiv} the Plaintiff requested records of all complaints and communications concerning personal injuries and death allegedly caused by the burning of children's nightwear which had been manufactured and marketed by the Defendant. The Defendant objected on the grounds that it would take a herculean effort to locate the documents. The Court rejected the Defendant's argument. The Court stated that the Defendant cannot excuse itself from compliance from Rule 34 by using a system of record keeping that conceals rather than reveals relevant information or makes it unduly difficult to identify and locate them.

6. Spoliation of Evidence

Defendants destroy damaging documents or evidence in order to reduce potential liability. Corporations order defective products destroyed or offending memos shredded.

In order to prevent spoliation of evidence, Plaintiff's counsel should send notice to the manufacturer requesting preservation of the product early on in the investigative process. Also, requests for production of the product should be filed as early as possible. Additionally, motions for a protective orders under Rule 26(c) can be filed asking the Court to order the Defendant not to destroy or modify the defective product. For instance, in In re "Agent Orange" Product Liability Litigation,^{xv} a suit alleging exposure of United States armed forces servicemen to certain herbicides, the Court ordered the government to not destroy, under the government's document destruction program, information requested in the Plaintiffs' motions to produce. If the product has been destroyed, Plaintiff's counsel should seek an exact copy or replica of the offending object as it was originally manufactured and used.

If the Defendant destroys damaging documents or the actual product, that fact may be admitted into evidence. Depending on the state law in question, the jury may be allowed to draw adverse inferences from the Defendant's destruction of evidence. For example, in In re Agent Orange Product Liability Litigation,^{xvi} the Court permitted discovery of the circumstances surrounding the ill-timed destruction of documents by the Defendant so that the Court would know whether or not it will affect the proof and inferences that will be permitted at trial.

III. Alternative Sources of Information

A. Pre-Suit Investigation

Pre-Suit discovery in products liability cases is as important as post-filing discovery. Initial investigation outlines the breadth of the claims to be made. It is in this period that Plaintiff's counsel obtains his/her education about the offending product and retains experts. There are a number of pre-suit sources that provide vital product information and aid in the identification of important fact witnesses.

1. Experts

Experts often focus the direction of pre-suit investigation. They should be retained to educate counsel on all the technical aspects of the offending product, to identify all necessary technical sources of information on the product, and to assist in pre-suit informal discovery.

2. Manuals, Contracts, Warranties, Labels

Copies of the purchase contract, warranties, maintenance records, and labels should be obtained immediately from the client, retailer or distributor. The owner's manual, service manual, and repair and replacement parts manual must also be obtained. All these documents can provide invaluable information about the product.

