AGGRESSIVE DISCOVERY IN THE AUTO PRODUCTS CASE

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I. INTRODUCTION

To be successful in any products liability case, the plaintiff must aggressively pursue discovery to prove his case and establish for the jury the manufacturers liability. When you consider that the defendant manufacturer has all the inside information regarding the product and has virtually unlimited resources to prepare a case against you, there can be no question but that discovery is the most critical aspect of the plaintiff's case. The only way for a plaintiff to level the playing field against the "mega-giant manufacturer" is to obtain critical information establishing the culpability of the manufacturer through the discovery process.

The strength of a products liability action usually comes from the manufacturer's own documents and testimony of the manufacturer's employees, including upper management, engineers, and marketing personnel. Obviously, the manufacturer will not willingly provide you with any harmful information and therefore the plaintiff's attorney must learn to be skillful and aggressive in obtaining damaging documents and testimony.

Generally, discovery consists of three stages for the plaintiff in a products liability case. The three stages are:

(1) Informal presuit discovery;

(2) Formal post suit discovery;

(3) Disclosure of expert opinions.

Before beginning the discovery process it is important to understand its purpose. From the

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products liability prospective, the discovery process is to assist the plaintiff in proving that the manufacturer created a hazard which injured the plaintiff. While the previous statement is a simple proposition, it is often times not thoroughly understood by the plaintiff's attorney. Because the manufacturer is the entity that created the hazard or defect, the manufacturer is legally obligated to effectively deal with the hazard or defect to make sure that it is not unreasonably dangerous for the end user. Essentially, there are four basic recognized engineering principles by which a manufacturer can deal with a hazard it has created;

(1) The most effective way for a manufacturer to deal with a hazard is to design the hazard out of the product. However, in most cases, the manufacturer will argue that an alternative design will substantially impair the intended use of the product and/or that the alternative design is not economically feasible.

(2) A manufacturer can protect the consumer from a known hazard by providing a passive guard. A passive guard requires no independent action or thought by the operator when using the product.

(3) Alternatively, the manufacturer can guard a hazard by placing an active guard on the product. An active guard requires some independent action or thought by the end user of the product in order for the guard to effectively deal with the hazard.

(4) Finally a manufacturer can protect the ultimate user of the product by providing adequate warnings related to the hazard and the consequences of the hazard. Obviously, warning against a hazard is the last and least acceptable method to protect the end user. Warnings alone should only be acceptable when none of the other three alternative methods of dealing with a hazard are technologically or economically feasible. In most cases, warnings are best used when combined with one of the other three methods of dealing with a hazard.

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The aforementioned engineering methods for dealing with a hazard are listed according to the best technique for dealing with a hazard to the least acceptable method for dealing with a hazard. With these methodologies for dealing with hazards in mind there are typically seven degrees of liability for a product manufacturer related to a hazard in a product. The seven degrees of liability set forth below, combined with the background of the methodologies for dealing with hazards should be the basis for pursuing discovery in any products liability case. The degrees of liability set forth below are provided in order of culpability with regard to a defect. In other words, the higher up in degree and the more degrees you can attach to a particular manufacturer, the easier it is to establish liability in a product liability case. Therefore, it is essential that the plaintiff's attorney aggressively pursue discovery in an effort to establish as many degrees of liability as possible. The degrees of liability for a products manufacturer are as follows:

(1) The product manufacturer has violated some known and/or recognized standard with regard to the particular defect.

(2) The product manufacturer offered as optional equipment on the product in question, one of the four techniques for dealing with a hazard that it created. In other words, the manufacturer offered as optional equipment a passive guard, an active guard, warnings, or a combination as a method for dealing with a particular hazard on the same product. If the plaintiff can prove this degree of liability, it provides a strong argument for punitive damages. Establishing this degree of culpability proves that the manufacturer recognized a hazard and shows that it had knowledge that the hazard needed a safety device or alternative design. This degree of liability also provides evidence for an argument that the manufacturer offered the optional equipment in order to make its product cheaper to the consumer. This degree of liability provides proof that the manufacturer elected economics over the safety of its consumers.

(3) The product manufacturer offered a safety device as standard

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equipment to effectively deal with a hazard on a different product. Again, offering a standard safety device on a substantially similar product proves that the manufacturer is aware of the hazard and the need for a safety device or an alternative design. (This degree of liability also exists when a product manufacturer offers an optional safety device on a different product that is substantially similar to the one in question.)

(4) A competing manufacturer offers an available alternative design with regard to the hazard as standard equipment on the same type product; a similar type product; and/or a different product, but where the same safety principles for dealing with the hazard are applicable. (This degree of liability also occurs where a competitor offers a better alternative design as an option on the same type product, a similar type product, or a different product.)

(5) The hazard created by the manufacturer could have been effectively dealt with by existing technology and was economically feasible although no one in the industry is providing the same fix or alternative design. It is no t uncommon for an entire industry to appear to have informally agreed not to deal with a known hazard so as to make competitors equal in the technology that is offered.

(6) Where there is no documented technology with regard to a better alternative design, the plaintiff's expert is able to demonstrate that an alternative design was economically and technologically feasible at the time the subject product was manufactured. This degree of liability would require that the plaintiff's expert show that the alternative design does not substantially impair the intended use of the product and the alternative design is economically feasible.

(7) The product manufacturer fails to provide any adequate warnings were there is no known fix for a recognized hazard.

Other important issues to keep in mind when preparing to embark on discovery include the frequency and severity of injury and/or death related to particular hazard or defect. The frequency and severity of injury or death to the end user by a known hazard or defect is an extremely important

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design consideration which should be explored through discovery. If the plaintiff can prove there have been numerous other similar incidents or injuries from a known hazard it shows that the manufacturer effectively dealt with the hazard or defect. An exception to this requirement is where the utility of the product is so great and there is no known way for effectively dealing with the hazard. In most cases, a manufacturer collects data in one form or the other which will assist the plaintiff in establishing that there have been prior injuries and/or deaths related to a particular defect.

In conjunction with proving that there have been frequent and severe injuries related to a particular defect, then by using statistics. Statistics related to the number of users injured will assist the plaintiff in proving his case of liability and also establish evidence for potential punitive damages. Statistics can also help the plaintiff in dealing with issues of contributory negligence. For instance, if there are 300 severe injuries or deaths contributed to a seat belt system over a two year period, the jury will understand that injuries or deaths are not necessarily related to the negligence of the seat belt user. The use of statistical information in this regard can be invaluable to the plaintiff and should not be limited to the defendant's manufacturer. Often times information related to the type of defect can be located industry wide and enhance the liability of the plaintiff's particular manufacturer.

Important in establishing liability against a manufacturer are tests and studies related to a specific hazard. In most cases, a manufacturer or its competitors have run numerous tests and studies on particular methods for dealing with a known hazard. Whether the studies relate to alternative designs or safety devices, this information can be important evidence with regard to proving culpability and damages in a products case. This information can also be useful to the Plaintiff's expert in recreated tests to show the defect.

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Finally, the plaintiff's attorney will probably discover that there are multiple fixes or alternative designs with regard to a particular hazard. It is critical to determine which alternative design or safety feature is best considering the utility in economics for the product and the technology available at the time the product was manufactured. Also in selecting an alternative design, the plaintiff's attorney will want to consider the defenses that might be used by the manufacturer to overcome use of the proposed alternative design.

II. INFORMAL PRESUIT DISCOVERY

Informal presuit discovery provides the plaintiff's attorney with one of the most valuable resources for pursuing a products case. The plaintiff's attorney has the advantage of learning about an injury and is able to investigate it before the defendant even knows about the incident. The value and importance of this should never be forgotten or overlooked.

Presuit discovery usually includes, (1) obtaining the results of formal investigations by others of the occurrence; (2) conducting your own formal investigation into the occurrence; (3) consulting with experts in the particular field; (4) locating and identifying the particular product; (5) obtaining statements from all fact witnesses, before the defendant learns of the matter; (6) securing the product in question. This is not a complete list of presuit discovery, but only an outline of some of the more important elements of presuit discovery.

The purpose of presuit discovery is to allow the plaintiff to start ahead and stay ahead in the preparation of your case. It is for this reason that suit should never be filed until the initial investigation has been thoroughly completed. The only exception to this rule should be if there is a statute of limitations problem necessitating immediate filing.

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A. Client Interview

The initial client interview is the process that will afford the attorney the opportunity to become acquainted with the client, the client's injuries, and the basic information necessary to embark upon a preliminary investigation of the case. The initial client interview also provides the attorney the opportunity to determine the potential liability of defendants and the theories of liability that will be pursued. The initial interview should be comprehensive enough to allow the attorney to determine (1) the viable legal theories available to the plaintiff; (2) anticipated defenses; (3) the nature and extent of the initial investigation needed; and (4) the type of expert needed for the case.

B. Preliminary Investigation

A preliminary investigation usually consists of obtaining any formal investigative reports that were prepared by others, determining the location of the product, and determining if there are any fact witnesses that need to be contacted. The attorney can also perform extensive preliminary investigation through the use of internet resources and other resource organizations and experts. Often times an attorney can complete any necessary preliminary investigation and obtain enough information inexpensively and limit the time and expense needed for actual field investigation.

C. Field Investigation

In most cases time constraints will not allow the attorney to actually perform all necessary field investigation and the attorney will have to rely on outside investigators. In a typical case, an investigator should be used to locate the subject product and secure the product. An investigator should also locate any fact witnesses and obtain written statements when appropriate. The field investigation is very important for documenting the conditions of the product and the environment of the incident as soon as possible after an incident. This documentation is important in assisting

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the attorney to establish that the product has not been altered since its original manufacturer and that the surrounding conditions of the accident area did not contribute or cause the plaintiff's injuries.

Field investigation will also provide an investigator with the opportunity to obtain product documents such as owner's manuals or maintenance manuals. Other examples are advertising materials, labels, warranties or invoices regarding repairs or maintenance. Patents, blueprints and other specifications related to a product are not usually obtainable at this stage, but must be required during formal discovery. Of course, it is imperative for the investigator to obtain a model number, serial number, year and model, and/or brand name to make a positive identification of the manufacturer and to identify any manufacturer of any particular component parts.

Field investigation is also important with regard to witnesses to establish the facts of the case. This formal investigation will enable the plaintiff's attorney to obtain written statements and other facts at an early stage and preserve the information in the event that a witness forgets what they saw or attempts to change their story at a later date.

III. FORMAL POST SUIT DISCOVERY

Once presuit discovery has been completed, the plaintiff's attorney should have sufficient facts and information related to the product to file suit. Once suit is filed the plaintiff must begin formal post suit discovery. Post suit discovery relates to discovery to be conducted after suit has been filed. However, the plaintiff's attorney should not overlook the importance of filing appropriate discovery with the complaint to ensure that the plaintiff can maintain the advantage in the litigation process over the defendant. Again, the critical rule is staying ahead in the discovery process.

A. Formal Discovery: Interrogatories and Request for Production

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When suit is filed then discovery should be propounded to each defendant. The discovery should be tailored to the specific defendant. The discovery should be tailored with the four basic methods of handling hazards or defects in mind, as well as, being mindful of the seven degrees of liability.

Formal discovery also allows the plaintiff to obtain information which could not be obtained through informal presuit discovery. For example, specific information related to the particular defendant's methodology and testing of a particular product may not be available in the presuit discovery phase. However, do not forget that other entities may have performed testing on the particular product. This information may be available through internet resources and other resource groups.

Paper discovery will also provide you with the opportunity for learning the identities of those persons involved in making the decisions as to the design and use of the particular product. However, in jurisdictions where there are limitations on interrogatories and request for production, it is advised that you do not exhaust this number in the initial discovery filed with the complaint. Obviously, responses to the initial discovery will provide opportunities and avenues for seeking additional information.

An important aspect of paper discovery requires the plaintiff's attorney to be persistent in obtaining responses. Often the defendant manufacturer will not respond in a timely fashion and/or will not respond completely. The plaintiff's attorney should accurately calendar when responses are due and immediately review responses when they are received. Should responses be late or inadequate, the plaintiff's attorney should immediately file a Motion to Compel in order to have the discovery completed. Again, this returns to the theme of staying ahead in the discovery process and

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allows the plaintiff to stay in control of the lawsuit. Again, persistence is absolutely the bottom line to effective paper discovery.

B. Depositions

Once complete response are provided by the defendant manufacturer, the plaintiff should follow up with additional paper discovery as needed. Also, the defendant's discovery response will provide insights into the people and/or areas in which depositions should be taken. After receiving all of the paper discovery and coordinating the paper discovery with any documentary evidence obtained in the presuit investigation and/or from third party sources, the plaintiff should begin taking depositions necessary to establish the seven degrees of liability and establishing the technique used by the manufacturer in dealing with the hazard or defect.

Depositions provide an opportunity for the plaintiff's attorney to actually see and understand the people involved in the manufacturing and design process. Depositions also provide the plaintiff's attorney the opportunity to follow up and learn more information that may not have been fully disclosed in the written responses to earlier discovery. More importantly, depositions provide the plaintiff's attorney with the opportunity and to begin laying the ground work necessary to assist the plaintiff's experts in rendering opinions in the particular case.

IV. EXPERT OPINIONS

After all the parties have been deposed and all other needed depositions taken, and after all paper discovery has been answered the plaintiff should be in a posture to provide the necessary information needed by an expert to render opinions. In most cases, the defendants will attempt to have the plaintiff put up an expert without the benefit of all the discovery being completed. Of course, putting up an expert before obtaining all of the necessary factual and technical information

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opens the expert up for disqualification under *Daubert* and allows the defendant to undermine your expert through cross examination. Throughout presuit discovery and formal post suit discovery, the expert should be kept updated on all pertinent information. In all likelihood after reviewing the information collected by the plaintiff, the expert will ask for additional information which will need to be obtained from the defendants or other sources. Therefore, it is imperative to obtain complete and thorough discovery from the defendants and to provide the expert with this information as it is received. If the plaintiff's expert deposition is taken too early, it will necessitate the expert altering his opinions and the need for having his deposition taken more than one time. Again, for these reasons the plaintiff's experts should never be presented until all discovery has been completed.

V. CONCLUSION

The basic theme of discovery for the plaintiff is to get ahead and stay ahead. Aggressive discovery essentially requires plaintiff's counsel to follow-up with deadlines and insist that a defendant provide complete and accurate discovery responses. Aggressive pursuit of discovery will allow the plaintiff to control the tempo of litigation and help bring about a favorable resolution.

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