

# Preparing for Success: The Keys to Building a Winning Products Liability Case

by

*J. Cole Portis<sup>i</sup>*

Many people outside of the legal profession have the misconception that a case is won or lost solely because of what happens in the court room. A good attorney knows, however, that the work that goes into drafting the complaint, deposing witnesses, discovering documents and choosing experts is every bit as determinative of the outcome of a case as anything that happens at trial. Adequate preparation in all these phases helps guarantee success at trial.

## 1. The Complaint

The first procedural step in any lawsuit is the filing of a complaint. Unfortunately, this is also one of the most neglected areas when it comes to adequate preparation. All too often, attorneys hastily file a complaint before they have made a thorough investigation of the facts and circumstances surrounding their client's claims.<sup>ii</sup> In doing so, attorneys unknowingly give away control of how the case will proceed.

The plaintiff's attorney in a products liability/AEMLD action may accomplish a great deal before the complaint is filed. Plaintiff's counsel may complete the fact

investigation, statementize the fact witnesses, secure the offending product, and choose liability experts all before the defendant manufacturer is even aware of the lawsuit. This allows the complaint to be as factually specific as possible, which in turn forces the defense to answer in a more definite manner with respect to affirmative defenses.

The is especially important in products liability under the AEMLD because of the seeming overlap between several of the available affirmative defenses.<sup>iii</sup> The more specific the facts in the complaint, the better able plaintiff's counsel will be able to pin down the manufacturer as to which affirmative defenses are truly applicable and then move to dismiss any alleged defenses that do not apply as a matter of law. This helps to prevent the manufacturer from responding the complaint with a "boilerplate" answer, which simply denies all allegations and asserts all the affirmative defenses available under the AEMLD.

If the manufacturer still answers in "boilerplate" form despite the factual specificity of the complaint, the plaintiff's counsel may file a motion, under Rule 12(e), for a more definite statement from the defendant manufacturer. This motion can be particularly important if the manufacturer alleges some kind of contributory fault attributable to a third party, because the more quickly information on the third party can be obtained, the more quickly the third party can be joined in the action. Besides forcing the defendant to comply and answer

specifically, the motion also gives the plaintiff's attorney a chance to demonstrate to the trial judge his level of preparedness.

Time spent in preparation of the complaint is time that is denied the defense counsel once discovery begins. Plaintiff's counsel has the advantage when discovery begins if they have already done their preparatory work before filing the complaint. If possible, all of the plaintiff's initial discovery requests should be served with the complaint. These should include a first set of interrogatories, first request for production of documents, and a Rule 30(b)(6) notice of oral depositions of the manufacturer's designated agents. This amount of preparation before filing gives the plaintiff more control during discovery and forces the defense to move at the plaintiff's pace.

## 2. Discovery

### a. Pre-trial conference

The thorough preparation of the complaint gives plaintiff's counsel an advantage at the beginning of discovery. In order to keep this advantage, however, the attorney must push both the defense and the court to adhere to a discovery schedule that caters to the plaintiff. This can be done by arranging a conference with the court and defense counsel for preparing a discovery scheduling order.

The order should set forth deadlines for discovery and procedural matters. At a minimum, it should include deadlines for amending the pleadings, joinder of additional parties, identification of expert witnesses, filing of dispositive motions, and for the conclusion of all discovery.

The deadline for amending the pleadings is especially important, because, after this date, any affirmative defenses not put forth by the defendant are waived. This deadline will also preclude any third party cross claims that may be asserted as more facts are discovered by the manufacturer. This deadline allows the plaintiff's counsel to have a clear idea of the issues and parties involved in the case at the earliest possible time.

b. Depositions

While the plaintiff's counsel has an advantage having served the first set of interrogatories with the complaint, he must not rush into depositions before receiving full and satisfactory answers to the interrogatories from the defendant. A deposition is most effective when the attorney has as much knowledge as is available concerning the facts of the case. Much of this knowledge will be hidden from the attorney until the interrogatories are answered and the requests for documents are filled. Therefore, it is best to approach discovery with a step by step approach. First,

obtain all pertinent documents and interrogatories from the defendant, and second, make sure you have answered the defendant's requests for production. Promptly and fully responding to the defendant's requests for information helps to keep the discovery process moving smoothly and makes a positive impression on the court.

In the rush to finish the discovery process, many attorneys give in to defense offers to file scaled down responses. This only operates to hinder the case and leaves plaintiff's counsel at a disadvantage going into the deposition phase of discovery. Full production must be insisted upon and the use of a motion to compel should be used if need be.

If the defense has all the documents it has requested, there is less danger of requests at the deposition, and, all documents related to the questions being asked the deponent will be in the possession of the defense, making reference to them more convenient. This will result in more productive depositions, since any documents referred to in questioning will be in possession of the parties.

There are further concerns about the timing of depositions as they relate to joinder of parties. As discussed before, it is important to set a firm date for joinder of parties. If your client is deposed before the deadline, further joined parties have the right to depose your client again. This should be kept in mind, and, if at all possible, your client should be deposed only after the

deadline for joinder has passed. This not only saves your client from further inconvenience, but denies the defendants a second chance to perhaps find inconsistencies in your client's story that did not arise in the first deposition.

After all of the plaintiff's discovery requests have been filled, the next step should be to depose any corporate agents of the defendant under Rule 30(b)(6). There are two different approaches that are usually taken in this situation. One is to depose the higher ranking company officials first and then work down to the more "hands on" employees. The second approach is to begin with the "hand on" employees and depose the higher ranking officials later.

Lower level employees are generally more open about company policy and are more aware of their company's actual day to day practices. Therefore, it is often more helpful to depose them first, as their statements may provide more information that will help in subsequent depositions and may further help the plaintiff's counsel to decide which company representatives need to be deposed.

The bulk of an attorneys concern over depositions usually lies with the deposing of adverse parties. The most important deposition to a products liability case, however, is often the deposition of the client himself. The role of plaintiff's counsel at the deposition of the plaintiff is usually a passive one. This is not to say, however, that the attorney merely watches in silence and relative

helplessness. Careful consideration must go into the preparation of the plaintiff for the deposition itself.

The first step in preparing a client for deposition is to review all of the substantive material upon which the deponent may be asked questions. This may include reviewing documents, going over interrogatories, re-examining the defective product and even going back to the scene of the injury. The more familiar the deponent is with the facts, the more accurate and consistent their answers at the deposition will be.

Next, it is important to explain the nature of the deposition to the client. It must be emphasized that while the atmosphere at the deposition may be relaxed, it is still an adversarial meeting. Furthermore, because of the broad scope of a deposition, and the lack of direct judicial control, the deponent must understand the importance of keeping control of his testimony and not being afraid to ask for clarification if he does not understand a question.

The deponent must be made aware of what theories the defense will hope to prove, and how they will try to elicit testimony which best suits their needs. The deponent must be told to tell the truth, but not to offer anything that is not directly asked for. Above all, the deponent must be made to feel that he is in control, and that if he needs a rest, needs more time to answer a question, or simply needs clarification of a question, all he needs to do is ask.

Deponent's counsel must also consider what stipulations are to be agreed to for the deposition. The most common stipulation preserves all objections until trial, except those directed to the form of a question. This stipulation is usually advantageous to both sides, because it prevents an accidental waiver of objection as to the relevance of any questions, yet still allows the deposition to flow smoothly, without constant interruptions for objections.

Finally, plaintiff's counsel must give support to his client during the deposition by making his presence known. If he sees his client needs a break, he should request one. If his client starts to lose concentration, the attorney should step in to allow the client not to feel rushed or badgered. The deponent must feel he can rely upon his counsel and must be made to understand that if the attorney objects, he should not answer until the attorney says it is appropriate. Above all else, the attorney should never let the deponent be abused. The deponent's attorney may end a deposition if the other side is not carrying on in good faith. If the deponent's counsel decides to end the deposition, it is advised that he state for the record the reasons for stopping the deposition. It may also be appropriate to seek a protective order on these grounds to prevent further harassment.

#### c. Expert Witnesses



The deposition of expert witnesses raises a unique set of problems that differ from that of regular witnesses. Both the timing and substance of the expert's deposition can effect the expert's usefulness at trial. In particular, it is important that the plaintiff's expert witnesses not be deposed until after the plaintiff has been deposed. The reason for this is that the expert's testimony must specifically fit the facts set forth by the plaintiff. If the expert is deposed before the plaintiff, the attorney runs the risk that the facts assumed by the expert will differ materially from those testified to by the plaintiff. This will render the expert's testimony useless.

In preparing the plaintiff's expert for deposition, it is not enough to merely go over possible questions and responses with the expert. The attorney must be sure that the expert's opinions are well grounded in fact and not mere speculation. The attorney should review any texts the expert is relying upon in forming his opinion to assure that they do not contain information that would be contrary to the expert's opinion. Furthermore, the attorney should review any articles or studies published by the expert to make sure that they in no way contradict the opinions the expert will testify to in his deposition. Finally, it is important to make sure that the expert has not had anything occur in his professional career that would reflect badly upon his credibility or the validity of his opinions.

## Conclusion

Preparing a products liability case for trial is sometimes an ominous task. The identity of the parties involved can be difficult to determine. The number of witnesses and experts that need to be deposed can seem overwhelming. By thoroughly preparing a case before filing, the plaintiff's attorney gains an advantage in time and control over the case that translates into an increased chance of success at trial.

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<sup>i</sup> Cole Portis is a shareholder in the firm of Beasley, Wilson, Allen, Main & Crow in Montgomery, Alabama.

<sup>ii</sup> This author notes that a looming statute of limitations sometimes limits the amount of preparation and investigation that may go into a complaint before it is filed.

<sup>iii</sup> The affirmative defenses of contributory negligence, assumption of the risk and product misuse are closely intertwined and very easily plead if the complaint is not very specific as to the facts surrounding an injury caused by a defective product.