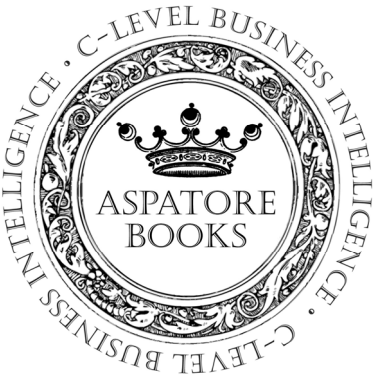
INSIDE THE MINDS

Strategies for Limiting Product Liability

Leading Lawyers on Preventing Claims, Developing Company Policies, and Mitigating Risk



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ISBN 978-1-59622-846-7
Library of Congress Control Number: 2007940268

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First Printing, 2007
10 9 8 7 6 5 4 3 2 1

Preserving (and Even Enhancing) the Client's Position in the Marketplace

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The Role of a Product Liability Lawyer

One of our firm's roles as product liability lawyers is as national coordinating counsel for clients that have repetitive products litigation. We assemble the relevant documents, develop the corporate witnesses, manage the company's discovery, develop and coordinate experts, manage the local counsel, and, with in-house counsel, figure out and implement the company's strategy. We also help in-house counsel decide which cases to try, which to settle, and how to handle different types of cases. We have provided these services for individual companies and for a consortium of twenty companies for years. Additionally, we have done this work through joint defense groups as well as with multiple clients that are coordinating their defenses in a less formal way. We have also done early risk assessment for clients before lawsuits develop. These are clients that know they have a potential problem, and we help them figure out how to deal with litigation if it arises.

We have done a fair amount of due diligence for companies that are buying other companies. That involves figuring out their product liability risks, the insurance and litigation problems, the documentation requirements, and other issues to mitigate the risks and determine whether the company is a sound purchase. We have advised companies on corporate veil issues.

A Valuable Client Resource

In the midst of litigation, we add value by figuring out a way to manage the situation economically and achieve decent results. We try to master the facts quickly. It is crucial to think proactively before the client has a lawsuit and make sure the corporation is thinking about potential product liability issues down the line. The lawyer should know more about the product and how it is marketed than the client does by the time the process is over. Not only does the lawyer have to understand physical details about the product and how it is or was used, but it is important to understand the medical and scientific literature concerning the risks posed by the product, and how that literature changed over time (if it did). The mastery of this product and risk information allows a lawyer to be creative and effective in figuring out ways to defend the cases. Are there ways to challenge the plaintiff's evidence, are there special sorts of experts that might be useful, are there particular legal

theories that might help defend the case? The lawyer often needs to manage various public relations challenges and local counsel so everyone's role is clear and the company's response to the issue is fully coordinated, both in and out of court.

Generating Financial Value

One facet of generating financial value for the client is managing litigation to mitigate the cost-to-risk ratio. How much does the client pay for the defense in relation to settlement? There is a ratio between cost and risk, and the lawyer has to manage it. Obviously, a client would prefer if the lawyers spend less to work up the case than it would cost to settle. On the other hand, in repetitive litigation, settlements of multiple claims at transaction cost values can add up, with the result being that plaintiffs' lawyers are encouraged to file more cases. So, many times a client has to be prepared to be tough and to pay sufficiently for the defense because, in the long run, it will save the client money. The most favorable settlement results come when the plaintiff's lawyer knows the defendant is fully prepared and represented by lawyers prepared to go to trial. But it is important to be cognizant of the cost-to-risk ratio, and not to waste client resources on cases that can be settled cheaply without unfavorable settlement precedent. It is also important to manage local counsel cost. Cases need to be defended, but part of national counsel's job is to keep his or her eye on the bottom line so neither defense nor indemnity costs get out of control.

Overall, it is the national counsel's job to keep the litigation in check. National counsel has to be able to formulate a settlement/trial strategy that will keep the number of claims and the costs as reasonable as possible under the circumstances. National counsel needs to guide the client to settle claims that can be settled at acceptable levels and to defend claims that can be defended or that need to be defended to keep settlement and overall litigation costs reasonable.

Common Client Troubles

At the outset of litigation, several things must be kept in mind. First, you should make sure the client's discovery responses are accurate and consistent. The client needs to spend money up front to figure out the

issues, get the documents in order, interview witnesses, and get the right people involved so when the client submits discovery responses, they are accurate. In repetitive litigation, those answers never go away. They will be admissions by the company that can be read to the jury until the litigation is over. The same goes for the corporate witnesses. You should take care to develop them and make sure they are giving accurate and helpful testimony. The company will have to live with corporate depositions forever, and you do not want to regret that you did not do a better job because you did not spend the time and resources at the start of the case to have the witnesses well prepared. It is important to make sure every piece of discovery goes through a central coordinating unit, because otherwise some local counsel might give a different response and the company will be explaining that response until the litigation is over. Communication within the company is very important. Mistakes create a punitive risk. If marketing people are talking too loosely in a way that could be interpreted as indicating they do not care about risks to consumers, or that they care about sales more than risks, those communications will help create a claim for punitive damages that the company will have to face.

Personal Strategies

We know the plaintiffs' bar, and we know who brings the cases and their strengths and weaknesses. This knowledge enables us to develop both litigation and settlement strategies that take these strengths and weaknesses into account. There are people a client needs to settle with, and there are other circumstances where if the client waits for the trial, the client will get a better deal. You have to know your judges as well. Our group has the benefit of thirty years of experience on our side, an asset not everybody can bring to the table. We are not reinventing the wheel. We know the potential problems, and we try hard to keep abreast of any developing law on product liability. We can tap into a network of local and trial counsel throughout the country, which puts us in the position to have reliable, cost-effective counsel in every jurisdiction.

Generating Success

One important ingredient to success is to have an honest relationship with your client. This relationship will enable you to give unvarnished advice.

You have to be able to pick up the phone and talk things through with the client and not be concerned that you may be the bearer of bad news. It is much better to understand the problems up front than to get into the litigation and then find out things are not going very well. You have to keep the company from panicking the first time they have to try a case. The answer is not to overpay a case to settle, because the company will have to live with every settlement it makes for a long time. You have to inform the clients of the risks but also advise them that some risks need to be taken. Some clients are more comfortable about risk than others are, and the attorney has to understand how the client approaches risk and the ramifications for the client internally and in terms of reputation and publicity.

Keeping an Edge

To keep up with the changing times, we read everything related to our field. We try to stay on top of the law. We read several newsletters and case services, and we work with many local counsel across the country who alert us to significant developments in their local trial courts. We routinely send alerts to our clients whenever a significant case is decided. We have enough contact with the plaintiffs' bar so we know what they are thinking before they have filed a lawsuit. We also read plaintiffs' Web sites and try to see what kinds of clients they are recruiting, which means we can sometimes anticipate areas of expanding litigation before the cases are filed.

Questioning the Client

When a client is concerned about product liability, we begin by focusing on the product at issue. It is important to find out information from the client on any health and safety risks associated with the product and what testing has been done already. Has the client received any complaints about the product? How has the client handled these complaints? What is the government doing? What are other companies that make the same or similar products doing? You have to get a sense of what is out there, because the client may have to defend actions taken in years prior to the litigation. To find this information, you have to observe what the government is regulating (or thinking about regulating), what government research shows, what medical and scientific literature shows, and what other

companies are doing. We often do a hazard assessment for the client, during which we review the client's warnings, procedures, record-keeping, and handling of the product. Issues also arise when companies buy other companies and do not understand what they have bought. The purchasing company may not have any records as to what the selling company sold in the past, and the purchasing company may not have done enough product risk due diligence on the purchase. We often need to analyze where the client may have fallen short and created risk. And we need to figure out what the client can do at this stage so the company is prepared to defend its actions if suits are brought.

Risk Tolerance Conversations

To discuss the client's risk tolerance, you have to talk through internal pressures within the company and the publicity issues. Have they ever tried a products case? What was their experience? If they have never tried a case, is there a reason, other than the fact that they have not been sued? What is their settlement history? If it is too high, you have to make it clear that you may be able to bring those numbers down, but it will require going to verdict in some cases. You can pick the cases carefully and minimize the risk, but if the client is unwilling to try any cases, they may have a problem. The only way to get good settlement averages is to have trial credibility. Trial credibility is necessary to manage the litigation and eventually get the company out of the litigation. You have to persuade clients of these facts. Some clients reason that if the claims are all covered by insurance, they should just pay the settlements and never risk a trial. But a company has to live with the settlements it pays, whether they are paid from insurance money or the company's money, and very few companies have unlimited insurance. Insurance is a company asset and should be treated as if the insurance reserves are the company's own money.

Client Goals

Clients generally come to us because they have a significant problem they want to go away, or they fear they are going to have a big problem and they do not have the time, resources, or expertise to deal with it themselves. They want to know the company is not going to be turned upside down in response to litigation. You have to help the company manage litigation

internally to spare the time of the executives or in-house people who need to be developing and selling products and doing their regular jobs. You have to make it easy for your client to manage litigation and manage risk. You also have to help the in-house legal people explain the risks and strategy to the businesspeople, so both the in-house people and you will have the resources necessary to manage the litigation effectively. And you have to think about the company's reputation and place in the market, and try to manage the litigation to preserve or even enhance the client's position in the marketplace.

Changes in the Laws

Recent changes in the law have been very positive for defendants. There has been tort reform in many states, which has been a significant change. Even in some places where there has not been change in the law, there has been a change in attitude, either because of publicity about competitiveness, publicity about tort reform, or abuses by plaintiffs' lawyers. That has been an overall positive thing for companies, which are doing better in the last five years than they have done over the past twenty-five years. The danger is that these pendulums swing back and forth. When things are going well, the industry tends to try to want things to go even better. Therefore, they overreach in legislative battles, which results in missed opportunities or causes the pendulum to swing back.

There is a trend in the states against joint and several liability. This trend is significant and will most likely continue. Several states have amended their tort law so defendants found liable only pay their own share of fault, and not shares allocated to absent or bankrupt defendants. This is a significant and positive development for companies.

Companies in recent years have done a good job raising public awareness of abuse in the civil justice system and the need for tort reform. This effort should be continued. But there still are some unfavorable jurisdictions that are inherently unfair, either because of the judges, the jury pool, or sometimes the state law. Public relations efforts need to continue even in jurisdictions that are presently favorable to defendants. Moreover, companies with a significant presence in jurisdictions where judges are elected should encourage the election of sound candidates. It can be hard to

convince companies that these efforts are worthwhile, but we firmly believe they are.

Simple Ways to Limit Liability

The lines of communication need to be open to limit the risk of liability. Different parts of the company need to talk to each other. The lawyers need to talk to the technical people and the health and safety people and to be very proactive about addressing problems before they turn into litigation. We have dealt with companies that have asked us to do an assessment of the product and how they are handling it. They have asked us to document the positive steps that have been taken with respect to the product and to develop the witnesses. It is much harder to develop witnesses after everybody who knows anything has retired and the documents have been discarded.

Companies sometimes fail to take these precautions because it is an up-front expense and it is not associated with income. The up-front analysis may not be covered by insurance, and it is a lot easier to ignore the problem until it is a reality. Some people in the company might not feel as though the legal department is part of the risk analysis team and a place they should be going for early advice. They think of the legal department only as the place they should go after the lawsuits are filed. Companies often fail to address future risk prior to actual litigation.

Five Stages of Product Liability Counsel

The first major step in the counseling process is to find out everything you can about the product. You need to find out what the health and safety people say about it, what the government says about it, what kind of complaints there have been, what internal risk assessments have been made, what the legal people have advised, and if there have been any claims by product users or workers compensation claims by employees who made the product. You have to investigate not just the status of the product in the company, but also the status of the product in the outside world. Then you need to prepare for the possibility of litigation or, if there already is litigation, you have to develop a plan to manage it.

In preparation for litigation, you have to decide whether there should be product warnings or design changes. When we come in, the client often has already engaged counsel and has litigated and lost or settled too high. The immediate need is to develop a strategy for lowering the client's profile and its settlement averages, and to develop a strategy to defend the cases, recognizing that the company has to live with the history it has made. If we had to divide our approach into five stages, we would describe them as follows:

1. Understanding the product and the claims that have been made
2. Understanding existing (and settled) litigation involving the company and the product
3. Developing the strategy for the litigation going forward
4. Implementing the new strategy
5. Reassessing and adjusting the new strategy to changing circumstances

The Key Players

The key players in limiting product liability are the health and safety people, the legal department, the risk manager, and the insurance group. This team should be proactive in deciding how to approach the problem. The health and safety people need to be able to explain the product risks, what is known, what the risk experience has been, and how the company has reacted to these risks. The risk manager and insurance team will know some of this same information and may know what has been disclosed or reported to insurers and other third parties. The legal department will know how existing claims have been handled, and they will be able to put the information from the various players in context—why and when warnings were given, why and when design changes were considered, and so forth.

Outside counsel needs to be proactive. If the general counsel sends out a letter to company employees and asks for all the relevant documents and little or nothing comes back, the goals have not been accomplished. When the documents do come back, that is usually just the first group of documents, and outside counsel have to interview people to know where the documents are. The goal is to make the job easier on the in-house

counsel, and you want to make sure they know what you are doing at all times.

Common Client Mistakes

Clients often make the mistake of not being proactive enough and waiting until it is too late. They turn the problem over to the insurance company to manage and then do not involve themselves enough to make sure the strategy is right, given the goals and approach to risk by the company. Or they might try to manage it ad hoc by a local lawyer in every jurisdiction. But this approach often means the clients have created a bigger problem. Companies frequently have a culture where people are not tutored on the risk of e-mails and other documents. Another common problem occurs when different departments in the company do not talk to each other. The health and safety people do not report issues they see to the legal department or to risk managers. So part of the company sees or knows about a risk but no action is taken because the information is not shared. These are the sort of company actions that can lead to large punitive damage verdicts, bad publicity, and, in some cases, bankruptcy.

Liability-Limiting Documentation

It is a good idea to have a general protocol as to how the corporation will deal with product liability problems and who would be involved on the team in different stages of decision-making. However, if the company makes the protocol a very narrow, specific document, the science and the events will often overwhelm it and the corporation will be held to that program. The company should have a framework document with goals, but too much detail can cause problems. When the corporation is doing things that are helpful, it certainly wants them to be documented so its lawyers will be able to use them later in litigation. All of these documents should be vetted through a lawyer.

There is a mentality in some companies that they should try to get rid of all documents as soon as they are not needed for current operations, but the problem is then that the company does not have the documents to prove positive actions later on. Product liability litigation often occurs many years after the initial sale, and document retention programs need to consider

this. Companies should carefully consider whether keeping some documents (such as sales and health and safety documents) might be useful, rather than just uniformly discarding most documents after a given period.

Important Agreements and Contracts

If the corporation is buying something that may engender a products issue, it should consider insistence on an indemnification contract or an escrow. If a corporation has to give an indemnification to sell something, it may want to have access to the lawyers or some control over how the litigation is handled going forward. This is a good idea, because the new company could mismanage the litigation by overpaying in settlement, resulting in a high profile, and it will end up costing the indemnifying corporation in indemnity payments.

Client Expectations

If the product liability problem at hand is the first one the client has experienced, the corporation may not have realistic expectations of the process. Executives often underestimate the up-front costs. If a proactive approach is warranted, it is going to result in significant up-front costs but with the hope of saving the money over the years ahead. On the other hand, if the company has a litigation that is totally out of control and burying the client, the lawyer's goal is to reduce costs and make the litigation response as smooth and predictable as possible. The timeline of events should not be a problem. We can turn things around to meet the client's time schedule. Some clients have a lot of lead-time, and others want it done more quickly.

A Speedy Process

If there is a recall or an article in the *Wall Street Journal*, lawsuits will happen in a matter of hours, not weeks. The lawsuits could be class actions involving millions of dollars. The plaintiffs' lawyers will go on the Internet and troll for clients. The Web sites are out there, and everything moves at a pace that is quite different than it was ten years ago. Plaintiffs have their own network to share information nationwide. A South Carolina problem will not be a South Carolina problem for very long if it is a big problem.

The timeframe between the bad event and the degree of the onslaught on product lawsuits has sped up immensely, as has the speed at which the plaintiffs share information.

Best Advice for Companies

Companies should be totally forthcoming with their lawyers. They should be careful to pick the right lawyer with the experience and resources to help them through the problem and the judgment to make it work. If the company does not have confidence in its lawyer, it should get a new one. The client should also help internally to get the lawyers what they need. Other parts of the company need to know a products problem is a serious issue and that they need to respond promptly.

Changes in Product Liability Law

The size of the problems in the product liability arena is getting bigger. The sophistication and resources of the plaintiffs' bar are greater, and their communications network is more extensive. As a result, corporate reaction time needs to be quicker. The risks have increased, and as a result, it is sometimes harder to convince the corporation to go to trial. Knowing when to settle and for how much is an art, and the plaintiffs are generally better at it than the defendants are. The defendants are also learning they sometimes have to combine a public relations approach with a litigation approach. Many of the tort reform efforts in the past five years have come about because companies realized that public relations efforts help win cases as much as good trial strategy. The plaintiffs' bar has known this for a long time, and the defendants are finally catching up.

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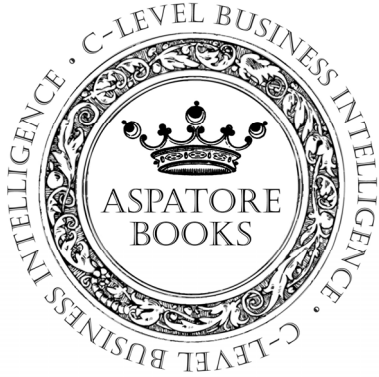
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