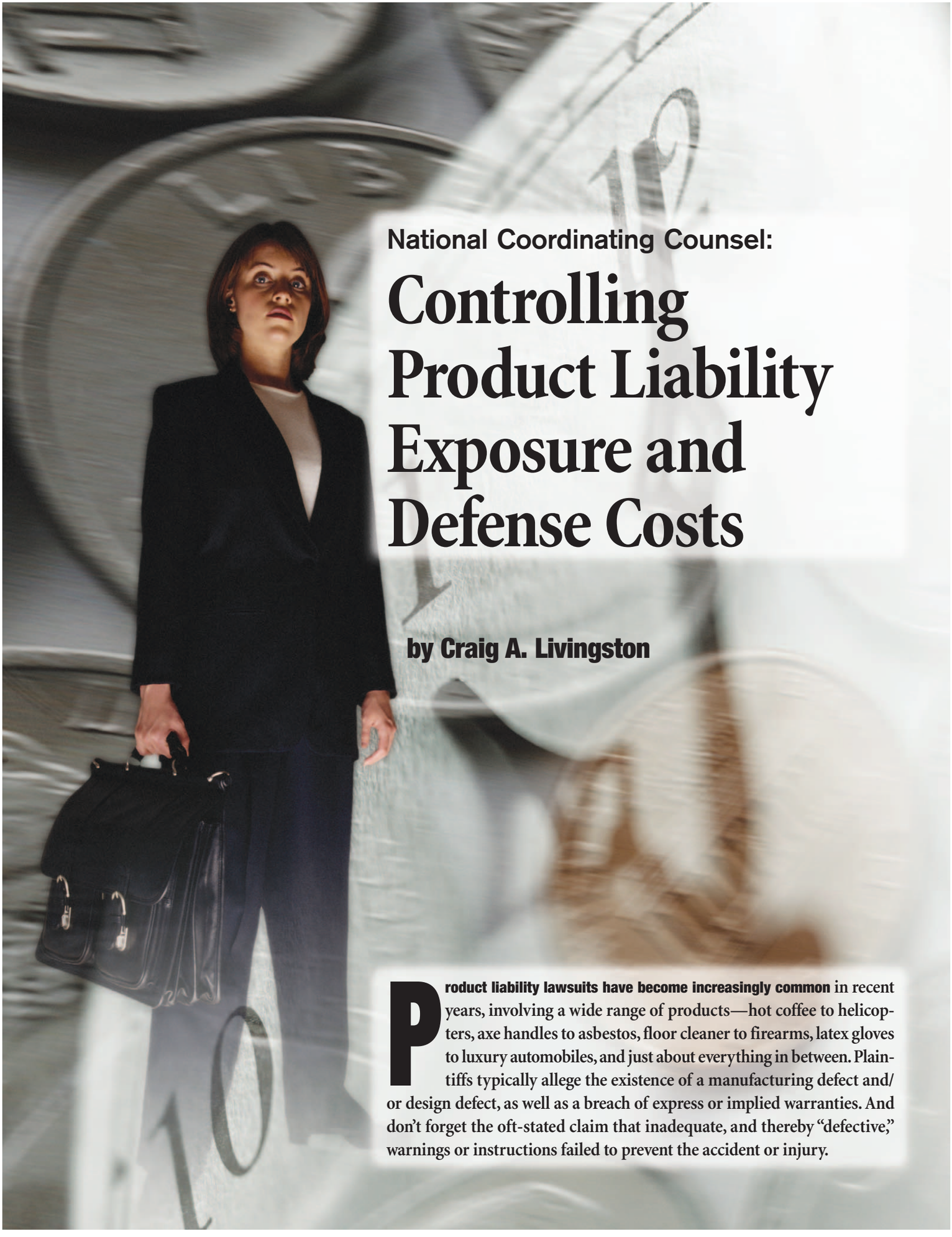

National Coordinating Counsel:

Controlling Product Liability Exposure and Defense Costs

by Craig A. Livingston

Product liability lawsuits have become increasingly common in recent years, involving a wide range of products—hot coffee to helicopters, axe handles to asbestos, floor cleaner to firearms, latex gloves to luxury automobiles, and just about everything in between. Plaintiffs typically allege the existence of a manufacturing defect and/or design defect, as well as a breach of express or implied warranties. And don't forget the oft-stated claim that inadequate, and thereby "defective," warnings or instructions failed to prevent the accident or injury.

Most recently, as has been seen in the national tobacco and firearms litigation, the plaintiffs' bar has become enamored with claims that focus on the manufacturer's action (or lack of action) in marketing the product—so-called "negligent marketing" or "negligent distribution" claims.

Some plaintiffs' lawyers will try nearly anything, from complicated procedural maneuvers to ignoring venue statutes, to file a product liability lawsuit in courts known to be sympathetic to plaintiffs. It is not at all uncommon for a manufacturer to find itself facing juries in Jackson County, Mississippi, one month, Cook County, Illinois, the next, and Alameda County, California, the month after that—each a plaintiff-friendly jurisdiction that can send chills up the spine of any risk manager. Similarly, the Central Division of Los Angeles County Superior Court produces verdicts so large that the plaintiffs' bar lovingly refers to the court as "The Vault."

Aside from the financial burdens and risks the suits create, manufacturers facing frequent product liability actions often encounter a common, secondary problem—a proliferation of suits can lead to increased, perhaps prohibitive, insurance premiums. The manner in which a product liability caseload is handled can have a profound effect on this process. The carrier often makes the crucial decision—which lawyer to defend the manufacturer—with little or no input from the manufacturer. Instead, the insurer bases its decisions on factors having little to do with a quality defense, *e.g.*, keeping legal fees and costs billed to the carrier as low as possible. Moreover, a claims representative typically dictates the defense strategy for the lawsuit; the representative's primary consideration too often is the avoidance of risk rather than the defense of the product's reputation. As a result, the decision to settle rather than try a case usually hangs on little more than a formulaic analysis of defense costs and risk. Product related suits that produce even nuisance value settlements are frequently publicized among plaintiffs' lawyers groups around the country. This, in turn, tends to spawn new lawsuits. The insurer, to maintain profit margins in the face of mounting product litigation, then raises insurance premiums. The vicious cycle is complete.

Much product litigation nowadays is conducted on a multi-state, or national, level. Products of manufacturers large and small are distributed throughout the United States. Alleged defects in the same product can therefore be claimed by buyers/users in a number of different states, with resulting lawsuits in each state. The manufacturer may choose to engage local defense lawyers in each state. To ensure that its local lawyers are fully conversant with the defenses being raised by the manufacturer, and to ensure that the defense in each jurisdiction is proceeding in a uniform manner, a "national defense center," headed by a national coordinating counsel, is needed.

Thus, in an effort to maximize the chances of prevailing in multi-state litigation and ultimately increasing profits, many manufacturers have chosen to adopt some form of national coordinating counsel. The author has served as national counsel for manufacturers of a variety of products and has seen firsthand the tangible benefits these clients receive.

What is a "National Coordinating Counsel"?

Typically an individual lawyer or small group of lawyers at one law firm, a national coordinating counsel becomes the first line of legal defense for a manufacturer who is required to defend against product-related claims that arise in several jurisdictions. In manufacturing companies with no in-house counsel, national coordinating counsel is generally the first legal representative contacted when an accident occurs or some other event takes place that might give rise to product liability exposure. Even manufacturers with an in-house legal department often retain outside national counsel to deal solely with the product liability caseload, usually an assortment of reported accidents, pre-litigation claims made by injured users, and actual lawsuits in various stages of trial readiness. The particular claims or lawsuits typically stem from a limited universe of alleged defects in the manufacturer's products. The lawyer uses his expertise in defending against these claims to lead the defense effort nationwide and also "coordinates" the efforts of local or regional counsel in preparing a consistent defense, a defense that is more effective and cost-efficient than the individual, separate, and uncoordinated efforts of local counsel.

National counsel is generally an experienced trial attorney well versed in handling product-related litigation. He or she also has an expertise in various states' statutes, regulations, and industry practices that govern the manufacturer's operations. For example, national counsel for a construction equipment manufacturer will be intimately familiar with applicable ANSI standards and OSHA regulations. National counsel for firearm manufacturers are often experts in federal, state, and local firearms statutes and ordinances, manufacturing standards, distribution schemes, and firearms storage and safe handling issues.

Most product manufacturers market and sell theirs goods regionally or nationally. For that reason, coordinating counsel usually has experience handling products actions in courts around the country. He must have the personality and demeanor to feel at ease wherever the manufacturer finds itself haled into court. He must also have the sound judgment to select and rely on local counsel to handle a particular lawsuit, especially when the suit is in a court that may have a reputation for hostility against national manufacturers.

Some manufacturers have found that a relationship with one firm acting as its national counsel works best, whereas others find that a "regional counsel" arrangement better suits their needs. In the latter arrangement, a manufacturer chooses several law-

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yers from different regions of the country to coordinate or handle cases in those regions exclusively. The manufacturer may hold periodic conferences to keep its regional counsel informed of product changes, refinements to defense or settlement strategies, changes in expert witnesses, and similar developments.

National counsel must also have the ability to manage a large, active caseload with matters in various stages of litigation and in various locales. Depending on the size of the caseload, this may require an experienced staff, which can include associate attorneys, investigators, legal assistants, and file clerks. All of them will understand the need to gather, analyze, and systematically file important—often critical—documents such as investigative reports, attorney-client communications, pleadings, written discovery, and expert witness materials. Thus, "national counsel" can be a single lawyer or a large team, depending on the manufacturer's needs.

Used effectively, national counsel initiates and controls an investigation from the moment an accident is reported. Later, if a lawsuit results, national counsel directs the handling of the litigation, managing the type and timing of discovery, coordinating the company's own discovery responses, preparing company witnesses for deposition and trial, coordinating the work of experts, and actively preparing the case for trial. He or she may even act as lead trial counsel; however, where appropriate, local defense lawyers can be used to provide local knowledge and minimize the risk of getting "hometowned" by local plaintiffs' lawyers.

When national counsel plays an active role in the case from beginning to end, the manufacturer can rely less and less on local defense counsel. This should reduce defense costs and fees. Hands-on participation by national counsel also reduces the need for local counsel to spend time becoming familiar with the manufacturer's operations. The latter lawyers can make routine court appearances and handle administrative tasks, further reducing legal costs. When the system works efficiently, the manufacturer has the benefit of experienced, knowledgeable defense counsel with a national perspective, while retaining the ability to rely on capable local counsel when the need arises.

Who Retains National Counsel?

Manufacturers often retain national counsel directly. A risk manager or other manufacturer's employee charged with controlling product liability exposure seeks out an attorney or firm. By engaging national counsel directly, the manufacturer forms a strong allegiance with its choice. As a result, the manufacturer can be confident that national counsel has its best interests at heart, even when disputes arise with primary and excess insurers.

A national coordinating counsel becomes the first line of legal defense for a manufacturer who is required to defend against product-related claims that arise in several jurisdictions.

Unfortunately, this is not always the case. In the typical insurance defense situation, the insurance company hires an attorney to represent an insured manufacturer. The attorney in this three-part relationship clearly has a dual allegiance—to the insured being represented in the lawsuit *and* to the insurer who made the choice—in spite of the almost universally accepted principle of legal ethics that the lawyer's primary loyalty must be to the insured.

Though not often referred to by carriers, the freedom to select and retain national counsel can be a negotiated endorsement in the manufacturer's completed products insurance policy. A standard attorney selection provision can look something like the following:

> The insured has the right to select defense counsel and national coordinating counsel, to assume charge of the defense or settlement of any claim made against the insured within the self-insured retention amount. Upon payment of the self-insured retention amount, the Insurer shall have the right and shall be given the opportunity to appoint additional counsel as it deems necessary to work in conjunction with the insured and its selected counsel in the defense and control of any claim, suit, or proceeding, in which event the insured and the insurer shall cooperate in the defense and control of such claim, suit or proceeding.

With such an endorsement in place, the manufacturer can have confidence its national counsel will be actively involved in its defense even after a self-insured retention is satisfied and defense and indemnity costs become the responsibility of the primary or excess insurance carriers.

Though manufacturers more commonly initiate the use of a national counsel, insurers also engage them, especially when a particular type of lawsuit has become regional or national in scope. Insurers have found the same benefits to having national counsel as manufacturers have—more efficient and effective representation in lawsuits requiring a specific expertise, brought in courts in several states. National litigation involving prescription drugs, latex gloves, automobiles, and firearms, to name a few, has all involved some manufacturers represented by insurer-hired national counsel.

How Do National Coordinating Counsel Operate?

Manufacturers who have retained national counsel directly generally establish an accident or claim reporting system as the first order of business. Through the use of a custom-tailored report form that is often sent to the manufacturer on the day of the accident, the goal is for national counsel to become involved in the investigation at the earliest possible opportunity. Once notified, the lawyer can direct the investigation in consultation with or in place of the manufacturer's representatives. National counsel therefore becomes responsible for alerting appropriate insurance representatives. They take charge of reporting the claim, an important but sometimes neglected task. This can be crucial when an insurance policy contains the usual exclusion for late-reported claims.

National counsel can also retain local investigators who will document the condition

of the accident scene and involved product, usually with photographs, videotape, measurements, and the like. They can involve appropriate experts, both outside experts and in-house technical personnel, in the site/product inspection process when the severity of the injuries warrants it. Clearly, accidents involving only minor injuries, or no injury at all, usually will not justify the expense. However, even minor injury cases sometimes call for involving experts and counsel at the early inspections—like those where a particular mechanism of injury has developed. The manufacturer must be concerned about punitive damage exposure should a future, similar accident result in more severe injuries.

Insurance companies that have established programs for specific types of litigation follow similar procedures. One significant difference, however, is that the insurer usually has an accident reporting system already in place and maintains a list of investigators nationwide with whom it contracts directly. This minimizes national counsel's role in coordinating the initial investigation. National counsel nonetheless plays a significant role in directing any ongoing investigative efforts, as well as in preparing for and handling subsequent litigation.

Benefits of Using National Counsel

The involvement of coordinating national counsel can result in tangible savings, such as contained litigation and discovery costs, favorable resolution of pre-litigation claims, increased leverage in settlement negotiations, and more favorable verdicts at trial. Additionally, a "clean" loss savings can result from lower insurance costs. A "clean" loss run—the report that evidences few or no sizable judgments or settlement pay-outs—usually translates into lower overall insurance costs. Moreover, when it retains national counsel, the manufacturer is demonstrating its commitment to managing its product liability exposure, making it a more attractive insured.

Thus, there are two broad areas of benefit the defense can enjoy by using national counsel. They are: controlling claims and litigation costs; and controlling product liability exposure. These two areas are discussed below.

Lower defense costs mean greater profits for a manufacturer. It is that simple. Minimizing product liability exposure is also about saving money and maximizing the value of every dollar spent on the resolution of a product claim. National counsel can make a tangible difference.

Claims and Litigation Cost Containment

Long before a product liability case reaches the courtroom, manufacturers can spend huge sums on costs and fees associated with accident investigation and pre-trial discovery. National counsel can help manage these expenditures in a number of ways.

Coordination of more timely accident reporting and investigation

With the possibility of being sued always in mind, a product manufacturer must be alert to learn about any accidents/injuries involving its product. The most effective way to ensure this occurs is to use accident report forms. These carefully drafted one- or two-page forms solicit only essential information without inviting unnecessary and oftentimes harmful or embarrassing commentary from the report writer. Distributed to customer service representatives, the outside sales team, distributors, and dealers, these forms provide wide coverage in the field for the timelier reporting of accidents. They are often sent directly to national counsel or to a designated in-house individual. Armed with the factual information contained in these forms, the lawyers can initiate an immediate and thorough investigation.

Early investigation of accidents

One need not be a seasoned police detective to know that the sooner an accident is investigated, the more information will be yielded to determine its cause. In this simple respect, product-related incidents differ little from automobile accidents or even criminal investigations. As the coordinator of the product accident investigation, national counsel views the scene and early evidence collection effort with an eye toward the introduction of that evidence at trial. Accordingly, witnesses are interviewed and/or statements taken in such a way as to maximize their use in future adversarial litigation. Similarly, chain of custody issues for items of physical evidence, like broken or altered component parts, receive proper treatment from the outset. This results in better evidence for the defense in discovery and at trial. Early investigations invariably result in: (1) the identification of a greater number of witnesses; (2) improved recollections when witnesses are contacted and interviewed; and (3) the discovery and preservation of key evidence at the accident scene and related sites.

For example, in incidents involving equipment such as cranes, boom lifts, and materials handlers, the construction tradesmen who are potential witnesses may have moved on to job sites several states away in the weeks and months following the accident. As a result, it becomes extremely difficult, if not impossible, to locate these witnesses when a lawsuit is filed one, two, or perhaps even three years later. When contacted early on, however, these witnesses invariably provide a much more detailed account of the facts and circumstances surrounding the accident.

The fruits of an early investigation also include significant cost savings. Recorded statements taken by competent yet relatively inexpensive investigators (typically $75 per hour or less) cost very little when compared to the cost of formal depositions taken later by lawyers. In the latter scenario, the time necessary to locate, prepare for, and depose a run-of-the-mill percipient witness months or years after the accident, along with investigator and attorneys' fees, can easily push the cost to $4,000 per deposition. Add to this the cost to transcribe and/or videotape a typical four-hour deposition, and the total costs and fees can approach $5,000. Now consider the costs when there are eight or ten witnesses for the accident alone.

The long-term benefits of early accident reporting and investigation are readily apparent from a real case involving a scissor lift accident at a construction site. In this particular incident, a pipefitter carelessly drove the lift into a large depression in a concrete slab and tipped the lift over, causing very serious injuries. The lift manufacturer's local dealer received word within hours of the early morning accident and faxed an accident report form to national counsel. He, in turn, notified the insurance carrier and requested the immediate assignment of a local investigator.

National counsel and the investigator were both on-site by the end of the workday. They obtained the names of those tradesmen who witnessed the accident. They carefully inspected and photographed the lift, which was unmoved from its post-accident position. The national counsel was familiar with the types of defect claims leveled against the product in prior cases. He therefore directed the investigator to take specific photographs of various aspects of the lift. In the following days, after receiving direction from national counsel on specific liability-related questions to ask, the investigator interviewed witnesses and obtained signed statements from the most important of these for the manufacturer's future defense.

This early investigation determined that all of the lift's operational controls were functioning correctly, all warnings were in place and visible, and the machine's operator manual was properly on the lift's platform. The investigator photographed the uncovered concrete depression just before workers arrived to fill it in. A few days later, upon his return from the hospital, the injured party gave the investigator a recorded statement that effectively locked him into an accident scenario that was favorable to the manufacturer. The injured worker later filed a product liability lawsuit. However, when plaintiff's counsel discovered the compelling evidence that had been marshaled in the manufacturer's defense many months earlier, he dropped the lawsuit.

Sound like a job well done? It was: it eliminated the countless hours of investigator and attorney time that surely would have been incurred during formal discovery. In fact, the chore of simply finding the tradesmen witnesses many months or years later would have been a monumental, if not impossible, task. Once located, their memories would have dimmed. Any interest they may have had in "getting involved" in a lawsuit would have long since waned. The post-accident statement taken from the injured party was indispensable. After he retained an attorney, an informal interview would have been out of the question. At that point, a noticed deposition would be the only way to obtain a detailed account of the accident, and the injured party would no doubt be well prepared for defense counsel's questions. Similarly, without the benefit of an early investigation, the task of re-creating the lift's exact configuration and position at a later date would have been a nearly impossible task. Construction site accident scenes change rapidly. Within months, a completed building may stand where an accident occurred.

Unless the manufacturer has photographs and measurements to depict accurately the accident scene for the jury, an injured plaintiff will generally have an advantage over the defendant in explaining how the accident happened. The defendant will incur significant costs and fees for defense liability experts who are left to hypothesize as to foundational facts without the determinative documentary evidence. Muddied deposition transcripts, often with only rough estimates of time, distances, and positions, are often the best "evidence" with which the experts have to work in formulating their trial opinions. Again, the extra time and effort needed to make sense of this evidence quickly translates into higher fees for the experts, many of whom are billing their time at an hourly rate that exceeds that of defense counsel.

Reduced costs and fees during the written discovery phase

When a claim becomes litigation, formal written discovery can be a long and expensive process. National counsel can assist the manufacturer in controlling costs and fees during this phase of a case.

With one lawyer or firm in control of written discovery for claims arising in several states, local counsel is no longer left to reinvent the wheel with each new set of interrogatories, document requests, or request for admissions. National counsel will maintain substantive information in a variety of subject areas. This can be easily inserted into responses for each state's cases. For example, while the exact wording of interrogatories will vary from jurisdiction to jurisdiction, plaintiffs can seek to gather prior accident information or product testing details for a specific product in only so many ways. Thus, standardized responses are often used with only minor changes (*e.g.*, varying time frames).

In addition, national counsel quickly develops a strong personal relationship with key employees of the manufacturer who are assigned to gather information for inclusion in the discovery responses. That means less time tracking down facts for responses to new or different written discovery. With national counsel preparing the bulk of the discovery responses with the assistance of in-house personnel, local counsel's role is limited to simply finalizing the responses and formatting them to satisfy the local court's requirements.

More efficient preparation of witnesses for deposition and trial

As with written discovery, the more familiar national counsel becomes with a client manufacturer and its history, culture, managers, engineering staff, and documentation, the better able he or she is to prepare witnesses for deposition and trial. After several depositions, national counsel has crested a rather steep learning curve. As a result, subsequent preparation sessions take much less time for both the lawyer and the witness. This is simply not possible when new lawyers are involved in each successive deposition or trial, as happens when the insurance company retains several different in the lawsuit.

In addition to the obvious efficiencies, definite benefits arise from having only one or two lawyers working with key manufacturer witnesses in preparing for deposition and trial. When individuals work closely together over time, whether it is Fred Astaire and Ginger Rogers or Steve Young and Jerry Rice, they naturally develop a familiarity with one another. The same is true when national counsel meets with and prepares the same witnesses over and over. In depositions, this familiarity often translates into anticipated answers or objections, nonverbal communication, and trust between the lawyer and the witness—a trust that results in a more prepared and relaxed witness and one who will appear more credible to the jury.

In today's product liability environment, which includes an extremely well organized plaintiffs' bar, each company witness deposition is a serious matter. It should go forward only after thorough preparation. A deposition transcript containing problematic or downright harmful answers will likely find its way into the hands of plaintiffs' attorneys in future cases. At best, these prior depositions can serve as fodder to the plaintiff's attorney for cross-examination of the company witness. At worst, they can sound the death

knell for the manufacturer in future lawsuits involving the same witness or same product. National counsel is best suited to ensure the preparation gets done effectively.

Negotiation of cost-saving support agreements

In the last few years, the number of national vendors who service the legal profession has increased dramatically. These include court reporting firms, videographers, subpoena services, copy services, and document imaging services. As with most businesses, these support vendors are eager to add new clients, particularly clients who will become regional or national accounts, and are therefore willing to provide significant cost and fee reductions for volume work. National counsel typically negotiate agreements favorable to their manufacturing clients because of the volume of work they do with such vendors. In addition to reduced costs and fees, the relationships national counsel has with its vendors usually engender excellent customer service—an important benefit in litigation where tight time constraints and rush jobs are the norm.

Creation of case management databases

Law firms that serve as national counsel often have the capability to provide a comprehensive case management database to assist in effectively monitoring tens, hundreds, or even thousands of claims and litigation matters. These databases assist national counsel in the efficient preparation of accurate, consistent discovery responses. Some additional benefits of the system include: (1) ready access to the status of any case or claim; (2) easy preparation of status reports on such concerns as liability and damages exposure, attorneys' fees to date, total defense costs to date, and statute of limitations deadlines; (3) the ability to sort claims and cases by product type, mechanism of injury, or any other criteria which can help in managing exposure; and (4) the ability to track the involvement of opposing experts (with electronic links to prior expert reports, deposition transcripts, and trial testimony).

Implementation of document retention programs

For manufacturers that do not have a document retention program in place, national counsel can assist in tailoring the best system for their particular needs. A detailed discussion of document retention programs could be the subject of a separate article; however, a few benefits are worth noting. A comprehensive document retention program can save significant costs. Managing the volume of retained documents and storing them in one or several designated locations greatly reduces storage costs. A document retention system is also useful in preparing consistent, accurate responses to document requests. Key documents, such as engineering drawings, testing data, test reports, and engineering change records, are stored in specific areas and are easy to locate. Because these documents are generally quite helpful in the defending the company in litigation, it is important to reduce the chance that they could be accidentally misplaced or destroyed.

With one lawyer or firm in control of written discovery for claims arising in several states, local counsel is no longer left to reinvent the wheel with each new set of interrogatories, document requests, or request for admissions.

Controlling Product Liability Exposure

Apart from direct cost savings and lower attorneys' fees incurred, the involvement of national coordinating counsel can have an equally beneficial, and profit enhancing, result—reduced exposure in product liability litigation. Exposure in this sense refers to the unappealing possibility of using corporate earnings to pay for product liability settlements or, worse yet, judgments on jury verdicts. The use of national counsel helps the manufacturer secure the strongest possible position to defend itself against liability in the following ways.

Intimate knowledge of client products

The more familiar its lawyer is with the manufacturer's products, the more valuable he or she becomes in defending the company in litigation. While the initial attainment of product knowledge will cost some money, future savings in attorneys' fees make those early expenses seem trivial by comparison. Thorough familiarization with the manufacturer's products is not limited to an understanding of key safety features or operational idiosyncrasies. A complete understanding of the product's overall design, as well as manufacturing processes, is also essential. This includes being conversant with all applicable design standards and specifications.

In addition to becoming familiar with the product itself, national counsel will develop expertise in the dangers associated with its use and common forms of misuse. Having received thorough training in the proper use of the product, national counsel develops a practical understanding of the circumstances facing the product's users. Along with this information comes a working knowledge of component part names, operational jargon, and related information. This can prove invaluable during interviews and depositions of injured parties or percipient witnesses. Nothing is more frustrating than watching a lawyer representing a manufacturer struggle through a deposition without a firm understanding of key product terms, official part names, and an understanding of a product's proper use.

As the clearinghouse for all claims and lawsuits, national counsel quickly learns about the types of defect allegations brought against the manufacturer. Similarly, national counsel becomes an expert on the defenses raised in response to such claims and the most advantageous means of proving them at trial. In addition, knowledge of the types of defect claims advanced against the manufacturer facilitates claim management. National counsel can identify claims involving problematic products early on and settle them before

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written discovery provides plaintiff's counsel with the factual incentive to pursue a large verdict lawsuit.

Early retention of experts

Hiring a knowledgeable expert as soon as possible after the injury-causing accident allows for the prompt analysis of liability issues. As a result, manufacturers can resolve problematic cases quickly, sometimes before an injured party has retained an attorney.

Suppose an accident occurs in which operator error is at least a contributing factor. Suppose, too, that an early inspection of the machine by an in-house engineer and an outside expert reveal a manufacturing anomaly—a brake component with a hidden manufacturing defect—that was also a contributing factor. Wouldn't this be a case in which an early settlement might make sense for the manufacturer? It was. In real life, the manufacturer in this case paid for the injured party's hospital bills, several months of lost wages, and a reasonable lump sum cash settlement for his pain and suffering. All of this occurred before the injured party contacted a lawyer. These expenses no doubt paled in comparison to the costs and fees of the lawsuit that would have been filed had the injured party retained an attorney, particularly as the manufacturing defect would surely have been unearthed during the discovery phase of the case.

Conversely, early expert involvement can help ensure identification of defensible cases in their infancy. With early identification, national coordinating counsel can gather the evanescent evidence needed to win the case. This can result in significant leverage during early settlement negotiations or a strong litigation stance if the case proceeds toward trial.

Early retention of experts can also eliminate later conflicts of interest if an adverse party seeks to retain the same expert. Unscrupulous opposing counsel have been known to contact but not retain experts with whom manufacturers have worked for the express purpose of "burning" them in a new case—the process of relating enough case-sensitive information to create a conflict if the expert is later contacted by the manufacturer's lawyers. Engaging the expert shortly after the accident occurs usually ensures the availability of the best experts for the case.

Knowledgeable selection of local counsel

Imagine a manufacturer with operations in San Francisco sued in Louisiana state court in a small, rural parish on the Mississippi border. Wouldn't it be beneficial to have the case removed to federal court in a much larger city some 200 miles away? And wouldn't it be better still if the local counsel you retain turns out to be an old fraternity brother of the federal judge who is assigned to the case? In addition to increasing the chances of being treated fairly by the court, the federal jury pool is much larger (and more diverse) than the one present in the parish. Favorable developments like this can and do happen, but not by chance. National counsel with contacts around the country can help manufacturers implement the tactical moves that best serve their interests.

Frequent contacts with attorneys and consultants around the country allow national counsel to develop a list of local counsel. Particularly in rural areas and smaller cities and towns in America, the right lawyer or expert can mean the difference between triumph and disaster. An experienced national counsel should be in a position to consider the intangibles involved in this decision and improve the likelihood of selecting the best lawyer or expert for a lawsuit in a particular court.

Consistency and accuracy in discovery responses

As noted above, once national counsel develops a working knowledge of the manufacturer's products, design, testing and manufacturing practices, key personnel, and related information, the actual preparation of discovery responses becomes more efficient and less costly. National counsel's involvement in the discovery process provides another important benefit—more accurate and complete written discovery responses. These important documents, which are binding on the manufacturer in litigation, become more consistent from case to case.

With a sophisticated and highly organized plaintiffs' bar, opposing counsel will have access to elaborate databases and document repositories from prior cases. They will surely find and seize upon inconsistencies. In fact, more often than not, the plaintiff's attorney simply demands the production of prior written discovery responses in the pending case. It then becomes an easy task to compare the old with the new for the existence of material variations.

Should they appear, inconsistencies can spell doom for a manufacturer. A skilled plaintiff's attorney can often play on the distrust many jurors have of profit-seeking corporate America by asserting a sinister origin to the inconsistencies. Jury research has shown that jurors often decide a case based on their beliefs as to whether a manufacturer is a "safe" company and their perceptions of how a "safe" manufacturer should go about its business. Inconsistencies in discovery responses, even as to immaterial information, undermine a manufacturer's ability to portray itself as careful, precise, and detail-oriented.

Familiarity with opposing experts

Because the same opposing experts tend to surface around the country in lawsuits involving the same product, it is not uncommon for national coordinating counsel to have deposed or cross-examined a relatively small corps of experts on more than one occasion. National counsel typically creates and maintains extensive files on these experts, complete with prior reports and deposition transcripts. This information can prove invaluable in preparing for future depositions and trials. A discredited opposing expert increases likelihood of success for the manufacturer, whether in the form of a more favorable pre-trial settlement or a defense verdict.

Consistent, effective representation at trial

First and foremost, national counsel must be a skilled trial lawyer, a capable advocate for the manufacturer in the courtroom. With an intimate knowledge of the people, places, and things behind the product involved in the trial, the lawyer exudes a confidence that further enhances the manufacturer's odds of prevailing. He or she will be familiar with part names, manufacturing procedures, and testing standards. National counsel's extensive knowledge of the product and people behind it allows him or her to deal with the unanticipated issues that invariably arise in a trial.

The lawyer and both corporate and expert witnesses will speak the same language at trial. The familiarity they have with one another results in a more confident and credible corporate witness in the eyes of the jury. Having worked with the in-house and outside experts before, national counsel can get the most out of their appearances at trial. They can accentuate witness strengths and mask weaknesses.

Conclusion

Larger manufacturers have long realized the value of having a national coordinating counsel manage their product liability caseloads. For others, however, their exact role and the nature of their contribution are still widely

misunderstood. Some perceive national counsel as nothing more than an additional layer of expense. Even litigation savvy insurance companies sometimes balk at paying for national counsel, usually because they are obligated to engage local counsel in each case anyway. Another criticism relates to attorneys' fee rates. Given their expertise and abilities, a national coordinating counsel often has higher hourly rates than those of local counsel an insurer might retain directly.

These criticisms reflect an attitude that is penny-wise and pound-foolish, particularly in today's legal environment. Most manufacturers understand that juries, especially those in major metropolitan areas, can ignore the notion of personal responsibility. As a result, "deep pocket" manufacturers often must defend against lawsuits even when the underlying accidents involve amazingly careless if not bizarre instances of product misuse or abuse. The plaintiffs' bar no longer turns away meritless cases. Instead, they are prosecuted with the same vigor as lawsuits with more promise. For many manufacturers that find themselves defending against multiple lawsuits regionally or nationally, the use of national counsel can become a powerful tool in controlling product liability exposure and litigation costs. This translates into increased profits and an improved bottom line. Yes—paying for an extra lawyer can and will save you money. FD

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able" to a communication transmitted by e-mail. From the privilege perspective, e-mail should not be treated any differently than any other method of communication. To maintain privilege, remember a simple rule that applies to all sorts of traditional and modern means of communication. It may be easy and fast to send and receive e-mails, but if you want your business to remain your business, remember to treat it as if it is no one else's business.

A client's reasonable expectation of privacy may have an impact on the question of privilege. The client's expectation must be determined based on the totality of circumstances surrounding the sending and receiving of e-mail.

Although this discussion was limited to the employment scenario, the implications are broad: the same reasoning may apply to e-mail received or sent from any other location at which the user lacks complete control of his or her own privacy. FD

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deserving plaintiffs, at that—to succeed in product liability actions.

Extending the benefit of the doubt to product liability plaintiffs is sometimes justified by the objectives of promoting equality between a lowly consumer plaintiff and a wealthy corporate defendant. Others argue for a need to spread the losses incurred by individual product users across a broader consumer base, or to provide manufacturers with an added incentive to produce defect-free products. However, such over-zealousness in striving to ensure that no plaintiff goes under-compensated may simply foster (or indeed generate) lawsuits from people who would probably not have heeded any sort of warning. It thus opens the door to unmeritorious claims. This can only engender resentment and lack of confidence in the legal process, both among manufacturers and among consumers, who can only gape in disbelief as seemingly undeserving individuals are enriched at their expense.

Far from fairly spreading losses, the adoption by courts of the heeding presumption will serve merely to cause consumers as a whole, many of whom would have heeded a warning, to pay for the losses incurred by careless ones who may well have not paid attention to any warning. This approach could only be justified, if at all, by evidence—which does not exist—that a large number of meritorious claims would fail in the absence of a heeding presumption. The rules governing recovery of damages should not be relaxed on a vague and unsubstantiated suspicion that there may be some subset of valid yet unsatisfied claims.

Conclusion

The various justifications and rationales advanced for the use of the heeding presumption are not well taken. The belief that the heeding presumption will induce manufacturers to include more and better warnings on products—which warnings will be read, understood, and "heeded" by consumers, thereby resulting in a reduction of injuries—is flawed at each stage. The presumption imposes substantial unfairness on defendants and on the body of consumers as a whole. It unfairly enriches unmeritorious plaintiffs, and may even have an effect opposite to the one intended, by hindering consumers from performing a rational, careful, and well-informed risk-utility analysis before using a product. Lacking any logical or empirical basis, the "heeding presumption" is an artifice richly deserving of demise. FD

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factual scenario involving purely accidental injury, and presumes that people have no interest in protecting themselves by reading and following product warnings. In the event that the Third Restatement is applied in products litigation, defense counsel must be cognizant that it emphasizes product design over product warnings and the obviousness of the danger.

In those jurisdictions that adopt the Third Restatement, the defense practitioner must be prepared to address directly the issue of alternative product designs. Manufacturers should be encouraged to document extensively any alternative designs that were considered for a product, and to document the reasons why the alternative designs were not implemented. Trial strategy must concentrate on: the unreasonableness of alternative designs (this unreasonableness can be established by evidence of the prohibitive cost of alternative designs); the dangers that alternative designs present; or how alternative designs effectively destroy the utility of the product. Defense counsel should consider counseling their product manufacturing clients regarding the Third Restatement's position on warnings, and that documentation of the design phase of a product will be critical to a successful defense of their products. FD

CPSC Penalty Box, from page 15

mation manufacturers provide it during the course of an investigation. The Commission attempts to work cooperatively with companies. If there is a sense on the part of the staff that the company is not cooperating and the information it has received is intentionally inaccurate or incomplete (whether true or not), this attitude can change abruptly. Unless corrected, penalties will follow! This appears to have been what happened in an investigation involving Black & Decker. A $575,000 penalty was paid based upon the allegation that the company withheld consumer complaints and engineering documents during a CPSC investigation. In addition, the CPSC recently has proposed administrative sanctions for lawyers who have provided incorrect or misleading information. 65 *Fed.Reg.* 66,515 (Nov. 6, 2000).

Conclusion

The CPSC has made its point. Companies who do not take notice will, indeed, find themselves in the "penalty box." As, always the best policy is to take steps to prevent a penalty situation from developing. FD