Defending America's Manufacturers

Challenges, Rewards and Successful Strategies

By

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Once considered just another aspect of a general civil litigation practice, product liability law has indeed become a specialty area where a relatively small cadre of lawyers is involved in some of the highest stakes cases in the country. To be sure, some of the biggest jury verdicts in 2002 were recorded in products cases involving automobiles, tobacco and asbestos. In addition, five cases on the *National Law Journal's* "Top 10 Defense Wins" list were also products cases. And there are no signs the product liability litigation trend will change any time soon. In today's litigious society, manufacturers are viewed as the ultimate "deep pockets." The plaintiffs' bar earnestly promotes this concept and it has now become common for relatively few cases involving a particular product to explode into industry-wide litigation. With so much at stake in product liability cases, who are the lawyers who defend America's manufacturers and what are they made of?

What Makes an Exceptional Product Liability Lawyer

In the civil litigation world, there are trial lawyers and there are pre-trial lawyers or "litigators." Litigators are skilled at getting a case ready for trial; they chart a course for the case and set about conducting the necessary discovery to steer that course. Litigators gather the facts necessary to present the best case in trial and they are adept at utilizing a wide range of discovery devices and pre-trial motions to accomplish this often Herculean task. A top-notch trial lawyer, on the other hand, can try cases of all types, and it matters not whether the subject matter is a patent dispute, real estate contract, employment discrimination claim or serious personal injury. Trial lawyers are masters in the art of persuading juries to find for their clients' positions and their skills cross over from one subject matter to the next. Indeed, "I can try any case," is a common refrain from sought-after veteran trial attorneys.

I believe successful product liability lawyers are both litigators and trial lawyers. During the work-up of a case, they appreciate the significance of exhaustive fact gathering through focused formal discovery and creative informal discovery. They have the desire and aptitude

to immerse themselves in the details surrounding the involved product, from the initial design process through manufacturing and all the steps in between. Product liability lawyers seek to understand how the product was built, how it is properly used and how it can be misused and abused. They can speak the language of the designers, test engineers, assembly-line workers and service mechanics. Then, at trial, these same litigators become persuasive advocates who can skillfully distill their knowledge of the product and the accident and present it to the jury in the context of simple, easily understood defense themes.

In my experience, effective product liability lawyers seem to possess certain common personal qualities and skills. They have the ability to communicate effectively with people up and down the company's hierarchy—those involved with product development, design, testing and manufacturing, as well as with those who service the product or the "grease monkey" types. Take construction equipment, for example. Skilled product liability lawyers in this area are unable to interact with mechanics who work on the equipment, a necessary skill since product abuse and related maintenance issues often arise, particularly in those cases where the product has been in use for some time. Being able to communicate effectively with these individuals is just as important as communicating with upper management who may have set relevant company policies.

Top product liability lawyers also tend to have the desire and the aptitude to learn the how and the why behind the product. They have the inclination and the ability to roll up their sleeves and devour all the information they can about the product from both the design and manufacturing aspects.

Successful product liability specialists are also willing to spend the time and energy necessary to immerse themselves in the industry and develop a solid understanding of what's involved, including relevant industry practices and applicable regulations and laws covering the product and/or its use.

Finally, I believe in one key aspect good product liability trial lawyers are not too different from good trial lawyers in the sense that they can take complex concepts, such as engineering principles, and communicate them to a jury of laypeople while at the same time persuasively supporting key defense themes.

Challenges and Rewards of a Product Liability Practice

The most challenging aspect of a product liability practice is trying to master the wide variety of products, including the science and engineering behind them, that are involved in my active cases. To be successful in this area, it takes more than just scratching the surface to get the edge on opposing counsel. One must master those products and diverse subject areas; that is the challenge. However, I believe it is this willingness to immerse oneself in the field that separates the average product liability lawyers from those who are proven winners.

But with this challenge comes the reward of learning so much about a variety of industries, almost all of which I would not otherwise be exposed to. For example, I might be working on a bicycle case one week and have the opportunity to interact with engineers and retained consultants who are fantastically talented in this field. The next week might involve similar experiences but in a crane case or a firearms case. The result is that you learn quite a bit, but it is indeed a never-ending challenge to know the products inside and out.

In the product liability arena, I also find it very satisfying to work with manufacturers in the defense of products the company is proud of and stands behind. I try to never lose sight of the fact that when I represent such clients I am necessarily defending real people—the engineers, testing personnel, marketing people and the corporate managers. All of these individuals have very personal feelings about a lawsuit in which someone is claiming the product they created, built and sold is “defective” or otherwise caused an injury. So the clients tend to have very strong emotions.

A recent case, for example, involved the design work of an engineer who had been with the company for nearly 20 years and had been the project manager for the involved product. The accident which gave rise to the lawsuit was clearly the result of misuse, but the plaintiff claimed, as usual, that the product was defectively designed. For this particular engineer, the lawsuit was a very personal thing. No only was the quality of his work on trial, his professional reputation was being challenged as well. Indeed, it was his signature at the bottom of the design drawings. Given what was at stake for this man, it was very gratifying for me to work closely with him to successfully defend both the product and his reputation.

The Role of the Product Liability Lawyer

Lawyers who have become experts in the defense of manufacturers often take on many roles. These can range from advisor to gumshoe to spokesperson to courtroom gladiator. But the common objective, regardless of the particular role being played at any given moment, is the reduction of product liability exposure for the client, whether it be the elimination of adverse verdicts or the control of defense costs and fees. Product liability lawyers are generally not involved in product development. At this stage, the company's design, testing or manufacturing engineers are in charge. One common exception, though, is in the area of warnings and instructions. Here, we do get involved, although the warnings and instructions are generally developed toward the end of the product development cycle.

Take a crane or a boom-lift, for example. Here, a given machine goes through the concept development stage, initial design engineering, subsequent refinements, testing, prototype testing, etc. Toward the end of that process, as prototypes are being built, the warnings and instructions are being drafted. Like other product liability specialists, I will often be asked to review those as an objective third party. I will critique the warnings and instructions from the perspective of a future user who is (hopefully) going to read and heed them. The task may be as simple as confirming that the instructions truly match the diagrams or the photographs in a manual, or making sure that the part names, operational terms and other jargon are used consistently throughout. However, I am frequently asked to pick apart the instructions and warnings from the perspective of a plaintiff's lawyer. Generally speaking, it is after a product is developed and out on the market that product lawyers tend to get involved.

The days of creating a product without much thought are long gone, and I believe manufacturers today really do make an effort to develop and market safe products. As a result, I also believe that the majority of product-related accidents are caused by product misuse or other comparative fault of the user. And if I am correct, early accident investigation is critical to successfully gather the facts necessary to support these defenses.

In light of the importance of early accident investigations, in my role as coordinating counsel for certain clients I am involved in spearheading the efforts of a team which does just that. This is a group consisting of defense counsel and outside experts who respond to a serious accident scene as soon as a company is notified. In construction equipment cases, for example, the manufacturer typically learns about the accident shortly after it occurs. The accident investigation team may include a safety engineer or risk manager, as well as an outside expert we have worked with before and who will likely be used as a testifying expert

should the case later go to litigation. The primary reason for such investigations is that you can never completely re-create what you find at the accident scene. In other words, you don't get a second chance to gather facts and evidence as easily and accurately. Indeed, fact gathering after a lawsuit is filed will always be at a greater expense, because formal discovery is an expensive proposition—this is the stage of a case where lawyers travel around the country going through the awkward and time consuming deposition process to learn facts that you may have been able to gather and record at the scene months or years earlier. So, early accident investigation is really critical for manufacturers.

Obviously, litigation can't be avoided entirely, but there are some programs I have used successfully in an attempt to either minimize litigation, or help defend the company once litigation has commenced. I call one such program "Write Smart." It was developed to get the manufacturer's personnel—whether they be from product development, design engineering or testing—all thinking carefully about what goes into or onto documents, and to minimize the risk of creating documents that will be harmful in future litigation. For example, when an engineer is making a design change or considering a modification to a component part, the potential for creating problematic documents exists. What he or she does in connection with the paperwork that formalizes the change will likely be discovered in future cases, and may ultimately become an exhibit at trial. Therefore, if that document has handwritten notes on it that are inappropriate or weren't well thought out, it may make things more difficult for the defense effort or embarrassing for that person who later may take the witness stand at trial. In these seminars, we discuss those types of issues and the need for thinking critically about the documents that are generated and what is contained in them, always with an eye toward eliminating their harmful nature should a future case arise. One tool I try to use to communicate the importance of this issue is to have the employee visualize him or herself sitting in trial next to a poster-size blow-up of the document. Using this technique, it takes only a few examples of problem documents to drive the message home.

Another program that has had a lot of success is an in-house engineer deposition "boot camp." This is an intensive program I designed to educate in-house engineers and design and testing personnel about the deposition process. It includes educating them about the common land mines and traps in product liability depositions. In addition, I help these critical defense witnesses learn how to begin communicating trial themes during the deposition process. This type of program can be very successful because most engineers are not the type of people who are terribly comfortable in a deposition, speaking in front of a group or testifying in a

trial setting. it is not because they aren't intelligent or are unwilling, rather, engineers are typically not at ease in the rough and tumble world of depositions and trials. But with focused training they can become some of the most persuasive witnesses for the defense. One of the main goals of this program is to make in-house engineers more comfortable with the process. The more comfortable those witnesses are, the more effective they will be, both in deposition and at trial.

Today, depositions are frequently videotaped. With a key deponent like an in-house engineer, videotaping is almost a certainty, particularly if the potential exposure is great. In my view, a videotaped deposition is no different than trial testimony, because the jurors are going to see the deponent on the video monitor in court just like if they were sitting on the witness stand. So if the deponent is uncomfortable, flustered or otherwise doesn't make a good impression, the results can be devastating. This is yet another reason why I believe witnesses being put up for depositions must be properly prepared.

Building a Defense

My personal strategy in defending product cases is to do everything I possibly can to communicate to the outside world and, ultimately, to the jury that my manufacturing client is a "safe" company. I believe this has to be central in every product liability case, because jury research has proven again and again that a juror's perception of a manufacturer as a "safe" company has a very high correlation with a subsequent finding of no liability. In other words, if a juror has been persuaded that the manufacturer is concerned about safety and tried to make a safe product, that juror is very likely to find that the product was not defective. But the converse is also true. For a juror who does not think the manufacturer had safety as its primary concern, he or she is much more likely to vote against the manufacturer on liability.

Sometimes you do not have the best facts to work with in developing this "safe company" theme. If you are defending a Fortune 500 company, which will likely have an entire department devoted to the issue of safety, then the job is easier. But when you are defending a smaller manufacturer who makes fewer lines of products, you may not have a well-staffed safety or engineering department. In those cases, defense counsel need to be innovative. A recent example is a case I tried late last year in which I represented a ladder manufacturer with no engineering department and no safety department. In fact, it didn't have a single degreed engineer on staff. In this particular case, I had to work with my client to assemble

facts I could then use to communicate the "safe company" theme to the jury. We successfully defended the case so we communicated the right themes, but I really had to work hard with the client to identify those key facts, however miniscule, and then package them the right way for trial.

I am a firm believer in the old adage, "I'd rather try a case with good facts than one with good law." This is so because jurors react to facts, trying to fit them within their perceptions of the safe company. Even if the jury instructions contain law that is favorable to me as a defendant, it is really the facts that I'm looking for, and so much of my strategy in defending the case is to uncover as many favorable facts as I can. The bottom line here is facts win trials, laws wins appeals.

Frequently, those facts are discovered as a result of good old-fashioned investigative work. After college and before law school I spent five years as a police officer. That experience really taught me the value of informal "discovery" to gather what can often be critical information. I think a lot of lawyers coming out of law school believe that the only way to get information in a case is to send out an interrogatory or take a deposition. While those are indeed essential discovery devices, the most valuable information is often gathered by simply looking in the telephone book and finding a key witness before the other side does. Then, by talking to the witness like a regular person, not like a big shot lawyer in a deposition room, you can often learn things that would never have emerged in another setting. Sometimes meeting a potential witness over lunch or dinner can provide the kind of relaxed environment that will get him or her to open up. I have had a number of cases where I've done just that, and I have uncovered crucial facts from these witnesses that I am certain I would not have learned in a deposition. It all gets back to winning a case with good facts, and doing what you need to do to marshal them. This must be an overriding strategy because jurors really react to facts, not the legalese they hear from a judge who drones on and on at the end of the case.

Finally, in my products cases, I tend to follow the rather common defense strategy of removing cases to federal court. Federal evidentiary rules, particularly since the *Daubert* decision and its progeny, are much more stringent about when experts can testify and what they can testify about. Conversely, in state courts, particularly in California, it's much more of a free-for-all. Out here, just about anybody can testify as an expert, and the jury is simply told to give that testimony the weight they think it's entitled. This frequently means woefully unqualified experts are able to offer "expert" testimony at trial, which then requires the defense to prepare a thorough and often costly rebuttal. The result is an added lawyer of expense and increased risk. Therefore, I almost always try to get the case into federal court,

unless there are other prevailing considerations. In some cases, however, the evidentiary issue is pretty critical, and avoiding a battle of the experts can have a huge impact on the case.

Dealing with Juries in Product Liability Cases

Everything a lawyer does in the civil litigation business is secondary to standing up in court and putting on his or her case in front of a jury. For me, that's the most exciting part of being a trial lawyer. But in this day and age, it doesn't happen as often as it used to. Today, nearly all cases settle—that's just a fact of life. And in most cases, reaching an amicable settlement is probably the best thing for the client if for no other reason than avoiding the cost of litigation. But it is only in trial that you finally get to sell your defense themes to those 12 people with an average 8th-grade education who will be deciding your client's fate, and that provides for real chills and thrills.

My No. 1 rule in products trials is to *never, never* allow the jury to redesign a client's product. As a defense lawyer, that really has to be a key overall defense strategy. I want my in-house witnesses and my outside experts to educate the jury about the merits of the chosen design. The last thing I want is to create the opportunity for the jury to redesign the products based on their own perceptions of "safe" design principles or, worse yet, the plaintiff's experts' opinions. Once the jury begins to believe it can redesign the product, bad things generally happen for the defendant. So over the course of the case, you need to develop the right group of witnesses, both inside and outside the company, to lead the jury to the correct result.

A significant problem arises in product liability cases when jurors equate product improvements—meaning normal product development over time—with the conclusion that previous iterations of a product are defective. The legal standard for whether a product is defective in its design, or that there is a defective warnings issue, is *not* whether there is some way the product or the warning can be improved. Rather, the standard is whether or not the existing product was unreasonably dangerous when it was manufactured and sold. Thus, it can be a real battle in a case to convince the jury that even if the product could have been changed or improved in some fashion, the existing product was not defective. Yet that's often what jurors think, and the plaintiff's bar certainly wants to try to communicate that idea.

Working with focus groups in a mock-trial setting has been an extremely valuable experience. As a trial lawyer, it all comes down to those 12 jurors in the box deciding your client's case, yet we never get the opportunity to sit in and listen to the jurors' interaction during deliberations. In real trials, the best we can hope for is to interview the jurors after the verdict is in—assuming they're willing to talk to us—to learn what we can about their thought processes. The only other way to gain insight into the jury's thinking in products cases is in the more controlled environment of focus groups and mock trials.

I have been fortunate enough to participate in a dozen or so of them, almost all in product cases, and it is just fascinating to hear some of the common beliefs jurors have in these types of cases. For example, many jurors think that if the product can't be made as safe as absolutely possible, it shouldn't be made at all. This is a pretty high standard for manufacturers, and yet that's something a lot of jurors believe. I do not care what jury instructions you give them, this belief is often going to guide their decision. So again, the ability to communicate the "safe company" theme throughout the trial is critical. To this end, you must constantly reinforce the safety theme, using the witnesses that you have at your disposal inside the company, as well as with the retained experts. Another common belief is that manufacturers always put profits ahead of safety. Here again, dispelling this belief and reinforcing the "safe company" theme instead is key. Unfortunately for defense counsel, this belief is more difficult to overcome in the post-Enron world. Indeed, recent jury research has shown that the traditional pool of pro-business jurors who could be counted on to lead the charge for the defense has shrunk dramatically. In other words, there are fewer jurors who are willing to defend the manufacturer in the jury deliberation room. This is a troubling trend that may take a long time to reverse, but product liability defense counsel need to be aware of it.

Reducing Risk

From my perspective as a defense lawyer representing manufacturers, I believe there are a few basic ways a company can mitigate product liability exposure. First, manufacturers need to incorporate this idea of safety and instill it in the employees from the bottom of the company to the top. From the moment a product is suggested as part of a development exercise, the people involved in that process must constantly have the idea of safety in mind. That goes for everyone from the project development engineers to the testing personnel to the marketing department. Everybody involved in this project needs to have a commitment to

safety, because that's ultimately what is going to protect them in courtrooms around the country.

Second, there is the need to document this process well. By that I mean there needs to be a complete paper trail showing the thought given to this process. Plaintiff lawyers oftentimes try to criticize products by suggesting to the jury that a design was basically done on the back of a cocktail napkin. We on the defense side must refute that as best we can, and one way to do it is through the documents the company generates. Corporate policies like document retention programs can ensure that favorable documentation—that is, the documentation that will support the "safe company" theme at trial—is available to defense counsel. Favorable documents can include anything to demonstrate that the product was well thought out, well designed, and well tested.

Third, manufacturers need to monitor trends with their products once they are out in the marketplace. In other words, manufacturers need to follow how the product is being used, and if accident reports start coming in, they need to do a good job of following up on those to determine if a particular type of misuse is becoming apparent and may need to be addressed through a product modification or an enhanced warning. If a manufacturer fails to adequately respond to reported accidents, two things can happen. First, plaintiff's counsel can develop strong evidence to undercut the "safe company" theme. Second, the "other accident" evidence that may be discovered, if plentiful, could support a punitive damages claim. As previously stated, if jurors learn of other similar accidents that were not addressed by the manufacturer, they are much more likely to find that it acted with a "conscious disregard" for the safety of subsequent consumers. In sum, when the product hits the market, it does not signal the end of the manufacturer's job. It's an ongoing process and often needs refinement along the way.

Fourth, manufacturers can reduce their product liability exposure and reduce defense costs by utilizing national coordinating defense counsel. In today's economy, it is not uncommon for even small manufacturers to distribute products in all 50 states; as a result, there is the possibility for lawsuits in both state and federal courts all around the country. For product manufacturers to effectively and efficiently defend themselves in these various venues requires a unified defense effort, and this is where I think national coordinating counsel comes into play.

It is no secret the plaintiff's bar around the country is very well organized. The American Trial Lawyers Association (ATLA), for example, has a very sophisticated product liability

arm that keeps track of verdicts around the country. They have repositories which house documents obtained from manufacturers. They also have extensive files where depositions of in-house engineers are maintained. Thus, if an engineer is deposed in another case, ATLA has the ability to access prior depositions along with huge volumes of other information relating to the manufacturer.

Indeed, in today's digital world, these deposition transcripts are just an e-mail away from one plaintiff's counsel to another. Knowing that, it becomes imperative for manufacturers to have uniformity in their written discovery responses, interrogatories and document request responses, as well as in deposition testimony. If a manufacturer prepares discovery responses in California that somehow differ from responses involving the same product in a case in Florida, it can create a veritable gold mine for plaintiff's lawyers who become giddy when inconsistencies arise. Inconsistencies allow opposing counsel to impeach witnesses at trial and to show that the manufacturer wasn't truthful or forthcoming in one case or another. Accordingly, having a unified defense effort is critical.

Finally, properly preparing in-house deponents is one of my most important jobs as a defense lawyer for product manufacturers. However, in a time when everyone is very cost-conscious, particularly with respect to defense costs, attorney fees, travel expenses and so on, there is often intense pressure to minimize the amount of time and energy that goes into defending the case. When it comes to preparing in-house engineers for depositions, this can have horrific consequences. Sometimes, these depositions may seem like a trivial thing in a small case, but that deposition is going to resurface again and again. Thus, a deposition taken in a small case in California, where the in-house engineer is not properly prepared to deal with the variety of engineering issues, may come back and haunt the manufacturer in a higher exposure case later on. So I'm emphatic with my clients about the need to spend the time, energy and money to properly prepare these in-house deponents for depositions, whether it's their first one or their tenth one—regardless of the product involved—because there is such a huge risk of those depositions harming the manufacturers in future cases if they go poorly. National coordinating counsel can have a very beneficial impact in this area, because they are familiar with the depositions that have gone on around the country and with the strengths and weaknesses of any particular product, and can really help prepare the in-house engineer for a deposition. This way, when that deposition comes up again down the road, the number of potential land mines is minimized.