DISCOVERY DESIGNED TO WIN YOUR NEXT PRODUCTS LIABILITY CASE

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Too often we fall into the trap of doing discovery by "the numbers." We start the case by sending form interrogatories, special interrogatories, requests for production of documents and a series of depositions. This is just the way the defense wants you to approach the case because it controls the flow of information.

You will start having more success in products liability cases if you are creative from the beginning. Do not wait to do this in your opening statement. Spend some quiet time identifying your theme, roll up your sleeves and focus on informal discovery and do your formal discovery last when it will be more effective.

I. PRE-DISCOVERY STRATEGY

Before initiating any discovery, you have to identify the winning theory or theories. There is one in every case worth taking. Ask yourself what it is about the case that made you take it in the first place. What acts or omissions would upset a consumer sitting on a jury? Have a brainstorming session with your partners or associates and then try out the theories on real consumers, i.e., your spouse, friends, hairdresser/barber, etc. You do not need an expensive focus group to do this. Good trial lawyers were doing this years before the advent of focus groups.

Many attorneys are too lazy to do this. Remember that we are salespersons and we have to package our product to make it marketable.

Examples of cases where good themes are easy to develop follow:

1. Lots of prior similar accidents. This will help you prove notice and defect (Ault v. Int'l Harvester [1974] 13 Cal.3d 113) and even possibly callousness, aka conscious disregard of safety for punitive damages (C.C.P. §3294). This is the defendant who would rather get the most out of its insurance premiums than do anything meaningful to protect the public.

2. Safety is a cheap fix. Here you establish that it would be relatively inexpensive to fix the problem and there was no reason for not doing so. You emphasize the words of BAJI 9.00.5 by showing the minimal "financial cost of an improved design" and there would be no "adverse consequences to the product or consumer." A purely economic approach to safety is one that is difficult to defend when the fix is reasonably priced.

3. Design improvements for safety and no notification of current owners. The manufacturer forgot about its past customers leaving them in the dark to fend for themselves. See Lunghi v. Clark (1984) 153 Cal.App.3d 485 and Torres v. Xomax Corp. (1996) 49 Cal.App.4th 1.

4. The defendant who tries to run and hide. If you have a defendant who has had a claims history that has led it to use the bankruptcy system, always consider investigating whether the product still is being made by someone else, somewhere else. You may be able to establish successor liability (Ray v. Alad [1977] 19 Cal.3d 22) and/or alter ego liability (Associated Vendors, Inc. v. Oklahoma Meat Co. [1962] 210 Cal.App.2d 825).

Of course, there are tougher cases and some examples follow:

1. There are no reported prior accidents - yours was the first one. Don't despair. The fact that they have no reports or accidents may be due to a non-existent or poor accident reporting system. See Benson v. Honda (1994) 26 Cal.App.4th 1337, which can be used to exclude this potentially harmful evidence of lack of prior accidents. You also might be able to show that your accident was, in fact, the first reported accident but it is the first of a predictable series of accidents due to latent design and/or manufacturing defects in the product that will become apparent with use. This creates a good theme for the jury in that it can do something to prevent future injuries and protect consumers.

2. The safety device, e.g., guard, was removed or altered by the plaintiff or his employer. This is the misuse/alteration defense. Of course, there is ample law on foreseeable misuse (Self v. General Motors [1974] 42 Cal.App.3d 1 and Huynh v. Ingersoll-Rand [1993] 16 Cal.App.4th 825) which is more aptly referred to as reasonably foreseeable use as found in BAJI 9.00.5(5). Ask yourself why your client or his employer did what they did. You may find the design actually induced this alleged comparative negligence or employer fault. For example, the guard may not have been well conceived or was an afterthought

that was not part of the original design process. A poorly designed guard can be worse than no guard at all. It may invite user sabotage and may create a false sense of security.

To explain the interaction between the design and human behavior that led to the removal or alteration of the safety device, you will need a human factors engineer. The goal is to establish that the alleged "negligent" human behavior was reasonable under all the circumstances.

3. The warnings were clear and they were ignored. What do you do when the warnings appear to be well written and obvious? The first approach to this situation is to understand that warnings are in last place in the safety hierarchy. The first thing a designer must do is try to eliminate the hazard. If that cannot be done, the next step is reducing the risk with guarding or other safety devices. A warning is the last resort. You cannot remedy a defective product with good warnings. A good warning is no excuse for a defective design. The second approach is to retain a good warning label expert who usually is a human factors expert with a background in psychology and human behavior.

II. GATHERING THE PROOF YOU NEED TO WIN YOUR CASE THROUGH DISCOVERY

A. Informal discovery This is the most important discovery you can do and it should come before you do any formal discovery.

1. Control the product in issue. If possible, obtain the product that caused your client's injury and keep it in a safe place keeping chain of custody issues in mind. You do not want the defendant to get it. This will make it easy for your experts to view it and you will have it to review with your client before his deposition. It will be the number one trial exhibit.

If you can't obtain the product because it was destroyed, was too big or expensive to purchase or the owner will not part with it, obtain or rent an exemplar. Do this as soon as you can to increase the chances of getting an identical product. If the product is inexpensive, buy several.

2. Networking with other attorneys. Use the local (Jury Verdicts Weekly), national (National Products Liability Database Report) verdict reports to locate cases

involving your product. Contact plaintiffs' counsel and get information regarding his case, his discovery and, possibly, his experts.

3. Using the Internet. Look for the home page of the manufacturer which can contain a wealth of information about the defendant and its product.

4. Patents. Contact the Sunnyvale Patent Library (408-730-7290) and obtain all patents concerning your product. Be sure to request the patent applications, too. These may contain remarkable representations about the product.

5. Identify and contact competitors. Determine the competitors and obtain their advertising concerning similar products. You may find the competitor's product is safer and/or its warnings are better. This will help you on the issues of mechanical feasibility (BAJI 9.00.5) and state of the art.

6. Locating former employees. This can break open your case and it is perfectly permissible to do this. You even can contact former officers, directors and managing agents (i.e., corporate control group members) as long as they are no longer employed by the defendant. See Jorgensen v. Taco Bell Corp. (1996) 50 Cal.App.4th 1398 and Nalian Truck Lines v. Nakano Warehouse (1992) 6 Cal.App.4th 1256. These people can provide impeachment evidence and can identify documents you should request and people you should depose. They can give you great insight that will allow you to look inside the defendant's company in a way you could never do through formal discovery.

If you cannot establish a relationship of trust with these people, have your private investigator preserve their testimony in a statement taken under penalty of perjury to protect you in case the defendant decides to convince them not to cooperate.

The problem with former employees is that the defendant will argue they are biased because of sour grapes, i.e., they were laid off or fired. The strategy is to overcome this defense, including obtaining any letters of recommendation the employee received, any departure settlement agreement and using the former employee to help you network with other former employees who will support the first employee's story. There is strength in numbers.

7. Early search for the best experts. Don't wait until the eve of expert disclosure to look for an expert. You need at least one good one in the beginning to examine the

product and help you formulate your discovery strategy.

Don't settle for a generalist - look for someone who is familiar with your type of product and has experience with it. Educational background is important but you will find experience with the product sells better than anything. You may find the expert does not have all the degrees the defense expert has but he is credible due to his experience.

One approach is to get a generalist with an impeccable educational background and team him up with someone whose main credential is experience. This is more expensive but you get the best of both worlds.

8. Organize accident information. As soon as you start collecting accident data (e.g., accident reports, photos, depositions, interrogatories, etc.) from other attorneys put it in a notebook and organize it. Then when you get additional data during formal discovery you can put copies of it in the notebook. This will be helpful to prepare your experts for deposition, to prepare trial briefs and you will have a trial exhibit ready to go.

B. Formal Discovery

You may not have the luxury of completing your informal discovery before you have to start formal discovery due to fast track limitations. Whatever you do, put the depositions off as long as you can. Early depositions educate your opponent and you will be in a much better position to set up impeachment if you wait.

1. Form Interrogatories. It does not hurt to send form interrogatories early. Of course, you are particularly concerned with insurance issues and witnesses. Interrogatory No. 16.1 also is important. Now that we are living in a Proposition 51 world (Civil Code §1431, et.seq.), you want to know who else the defendant may be blaming. However, be aware that if strict liability is your only theory, you do not have to worry because anyone in the chain of commerce, e.g., suppliers, distributors, etc., are jointly and severally liable for economic and noneconomic damages. (Springmeyer v. Ford Motor Co. [1998] 60 Cal.App.4th 154.)

Be sure to send the form interrogatories at least one or two more times as the case matures to get defendant's responses to the affirmative defense question (No. 15.1) and the contention questions (Nos. 16.1-16.10).

2. Special Interrogatories. These are a good way to identify people to depose and documents to obtain, however, the easiest way to get the documents is to use a well-crafted request for production.

With special interrogatories, you will want the defendant to identify its president, product safety engineer aka safety engineer, chief engineer, custodian of records, persons in charge of advertising, sales, marketing, warranty, quality control, labeling, warnings, creating and maintaining operation and service manuals, maintaining data regarding the identity of customers, and the person in charge of collection of accident data. You also will want to know if the defendant has job descriptions for various job positions and whether it has a company organizational chart.

3. Request for Production of Documents. This is the most important paper discovery tool in products liability cases. You will want to give it a lot of thought and you will want to review it with your expert before it is served. In every products case you will want certain standard documents and the following checklist is not meant to be an exhaustive list:

-The complete design file.
-All drawings and drawing revisions or all formulas and formula revisions.
-All engineering change notices and engineering change orders.
-All tests and experiments.
-All accident reports and records.
-All advertising and sales literature for your product and other similar models.
-All operator manuals and all revisions.
-All service/repair manuals and all revisions.
-All writings concerning recalls, retrofits, trade-in programs, and customer notification programs.
-The complete labeling and warning files.
-The parts list for your product.
-The sales writings for your product, i.e., the order, the invoice, the warranty, any return warranty cards and all service data.

Specs

After you depose someone, always be sure to follow-up with a request for production to supplement your documents.

4. Request for Admissions. Consider using a request for admissions to establish the elements of your case pursuant to the applicable BAJI jury instructions. Also use them

to rule out defenses. Whenever you propound a request for admissions, also serve form interrogatory no. 17.1 to determine the basis for the denial or qualified admission.

At the end of the case you might be able to use C.C.P. §2033(o) as a basis for recovering expert expenses and even attorneys' fees.

5. Depositions. Be prepared to make at least two trips to the defendant's plant to complete depositions. Sometimes it takes 3-4 trips depending on the size and complexity of the case. It is unwise to depose all of the witnesses in one trip because you need time to study what you have learned, regroup and respond. The order of deponents also is important.

The first deposition you should take is the custodian of records. Do it at the defendant's plant and use it to perform several functions:

-To mark and organize the documents so you do not have to remark them repeatedly for future depositions. One approach if the documents are not too burdensome is to create two or three bound volumes of marked documents for use in later depositions.
-To lay the evidentiary foundation for the documents defendant has produced so you can use them at trial.
-To find out more about the defendant's record keeping process. Where are the records kept? How long are they kept? Is there any document destruction policy? Has defendant produced all of the records you requested?
-To identify people to depose. If you do not have a company organization chart, create one at the deposition. You should then go back to your office and type it up for future reference.

You can follow the custodian of records depositions with the depositions of the designer and chief engineer so you can start to learn more about the product design and its history. If the defendant is out-of-state you should videotape these depositions because you will be unable to subpoena these employees at trial. Of course, just before trial you can make a motion pursuant to C.C.P. §187 (means to carry jurisdiction into effect) and Evidence Code §320 (power of court to regulate order of proof) to require defendant to produce officers, directors or managing agents (i.e., control group members) during your case at trial pursuant to C.C.P. §776, but that motion is not always successful and the people you depose may not fit in that category. It is

better to have a videotape.

Of course, when you videotape you have to realize that this might be played at trial so you have to be much more organized. This will become more of a trial deposition than a discovery deposition. This is the pay off from doing informal discovery first. You can set up the deponents for impeachment and you know a lot more because you are taking these depositions last.

After you take depositions of the design people, go back and digest the depositions and schedule at least one more series of depositions for people who are particularly important to your theme. For example, you may have a labeling or warning case so you will want to focus on these people. Again, remember to videotape these depositions.

6. Deposition of your plaintiff. Don't be so concerned with the discovery of the defendant that you forget to do a good job preparing your own plaintiff for deposition. If the defendant can establish large contributory negligence or assumption of risk, much of your work goes down the drain. There are two areas to watch out for in these depositions along with the usual traps:

-Prepare your client for state of mind questions that probe into his thinking process, i.e., what was going through his mind, what he knew, what he was taught, what he was considering, what he was concerned about, etc. A good defense attorney will use these questions to establish contributory negligence and\or assumption of risk.

-Prepare your client to explain what happened to him by demonstrating it with a product in issue. The defense can now do this pursuant to Emerson Electric Co. v. Superior Court (1997) 16 Cal.4th 1101, 1113.

-Do not let your client answer legal contention questions like the following: state all facts why you believe our product was defective? These are improper in a deposition but defense counsel get away with this all the time. They should not. See Pember v. Superior Court (1966) 240 Cal.App.2d 888 and Rifkind v. Superior Court (1994) 22 Cal.App.4th 1255.

7. Controlling the Employer. Employer fault can reduce your recovery considerably (Dafonte v. Up-Right [1992] 2 Cal.4th 593), so you want to do everything you can to cooperate

with the employer and deny defendant access to the product and to the co-employees. Remember that the employer is immediately concerned about the worker's compensation case and is in a defensive position primed and ready to blame its employee for what happened. You have to educate the employer and explain that this could come back to haunt him when he seeks recovery of his lien from the defendant. The defendant is a common enemy and you do not want the fox in the chicken house.

III. CONCLUSION:

There is a lot more to products liability cases than taking formal depositions. But if you consider the approach outlined above, your depositions will be much more meaningful and your chances of winning and winning big will be enhanced. You also will find that the product becomes safer and that is always a satisfying collateral benefit from handling a challenging products liability case.