

Preparing the Defective Product Case



Richard Alexander is a trial lawyer in San Jose, California, specializing in negligence, chemical, avia-

tion, defective product and consumer fraud litigation for individuals in class actions. He received his J.D. from the University of Chicago in 1969, National Honor Scholar. Mr. Alexander was the first recipient of the "Man of the Year" Award by the Women's Fund, a "special recognition for supporting women and significantly contributing to the betterment of women in today's world" in May 1989. Mr. Alexander is married to Nancy Biebel, has two children, Marshall and Meridith and resides in Palo Alto, California.

by Richard Alexander

and if anyone should have second thoughts about buying a wrecked Bronco, a Jeep that rolled or a vehicle that has a gas tank that failed, keep in mind that it is comparatively inexpensive to buy a wrecked car, for example, compared to the value of a successful product liability case and if worse comes to worse it can be sold, but once it is lost it is gone forever.

Once you gain ownership of the defective product, lock it up in a facility that you control. Never assume that no one will want the wreckage of a destroyed automobile. In two cases against BMW alleging the gas tanks in models 1600 and 2002 were defective, the hulks mysteriously disappeared. In another case in which four teenagers burned to death in a 1978 Dodge Ramcharger equipped with a plastic tank, an investigating service believed to have been retained by Chrysler offered to buy the burned hulk from the wrecking yard. In the case of the BMW, investigators for the car manufacturer photographed the evidence six months before the injured plaintiff retained his own attorney. Major manufacturers carefully read newspapers and whenever possible secure evidence to deny plaintiffs the ability to pursue claims.

If the evidence cannot be bought, at a minimum put everyone on

notice, including owners, tow operators, wrecking yards, police impounds, and the like, that they must take every step to preserve important evidence and the failure to do so will subject them to being sued for allowing evidence to be destroyed.

When the product is in the possession of a third party or one of the anticipated defendants, immediately file an independent action for a temporary restraining order and a preliminary injunction to avoid alterations or destructive testing. The temporary restraining order should be carefully drafted so that anyone receiving notice of the order and in control of the article will be required to deliver it to the possession of a neutral person and to initiate preventive measures against damage in transit.

Next, obtain the complete history of the article. Determine the date of the original sale, identity of the dealer, distributor, subsequent purchasers, lessees and users. Locate the instruction booklet, assembly booklet, warranties and all other written material that accompanied the new product at the time of the original sale and distribution. Determine whether the article was modified or otherwise changed after it left the possession of the manufacturer and distributor and, if so, the identity of the persons or entities which made the modification and the dates involved.

Obtain the basic background data. This includes a complete description of the article, the manufacturer, distributor, sources of all

Introduction

A products case is won or lost in the early days following the accident, when the preliminary investigation must be initiated. This article will offer some suggestions on how to proceed in order to increase the client's chance of success.

Immediate Investigation

The first priority is to call an experienced products liability attorney who will make sure that all evidence is preserved. Remember that the product must be secured immediately. Never be afraid to buy wreckage

component parts and all written materials pertaining to the product; advertising brochures, instruction booklets, technical data, parts manuals, repair manuals, operating manuals, catalogs, technical and lay advertisements, blueprints and diagrams of the article and component parts.

Buy two or more duplicate products for later testing and use at trial. Often designs and product literature will change or are simply not available as trial time draws near. Buying exemplars at the beginning of a case can pay important dividends later when the defendant manufacturer explains that the original engineering drawings no longer exist as a result of a corporate destruction program. If you own exemplars it does not matter if you do not have the original plans.

Defendants

The potential defendants in a products case include the manufacturer, assembler, component supplier, testing laboratories, advertising agencies, distributors, retailers and repairers. [see generally, 8 Pacific L.J. 865 (1977), 9 Univ. of Cal. Davis L. Rev. 421 (1976).]

It is always important to name not only successor, but predecessor corporate manufacturers. [*Ray v. Alad* (1977) 19 Cal.3d 22.] In some jurisdictions, a purchaser of an existing business does not assume the liability of a former corporation unless such liability is expressly assumed in a contract of sale or under circumstances where two corporate entities have merged. In these cases it is important to name the predecessor corporation.

In addition, bailors and lessors can be held strictly liable. [*Foster v. Day and Zimmerman Inc.* (8th Cir. 1977) 502 F.2d 867. An employer who manufactured the defective product for sale to the general public can be liable in tort. [*Bell v. Industrial Vangus, Inc.* (1981) 30 Cal.3d 268.]

Governmental Assistance

In proving the plaintiff's case, a plethora of federal and state statutes,

regulations, and safety orders concerning a variety of products can assist.

The discovery of a violation gives the plaintiff's attorney an outstanding advantage. Not only may a statutory scheme such as the Consumer Products Safety Act, provide for a direct civil remedy, but counsel may also locate agencies concerned directly with the product which can serve as a basis for gathering further information. Federal statutes encompass aircraft, automobile equipment, boats and boating equipment, insecticides, medical devices, hazardous substances, highway safety, household refrigerators, packaging to protect children, mobile homes, motor vehicles, natural gas pipelines and occupational safety and health.

In California, as well as other states, the Legislature has provided standards for a broad range of products: animal fee, blood products, brake fluid, canned foods, barbecue charcoal, electrical power lines, excavations, fire extinguishers, flame retardants, bedding, ceramic tableware, fireworks, honey, water, paint, meat, milk, petroleum products, pipelines, cranes, trenches, plastic bags, radioactive materials, swimming pools and toys. In addition, the California Division of Industrial Safety issues safety orders regarding aerial trams, boilers, compressed air, construction safety, electrical safety, elevators, mobile equipment, plant equipment, dangerous machinery, power transmission equipment, high voltage electricity, sawmills, mines, oil drilling, oil refining, ship building, tunnels and window cleaning.

State police or the highway patrol should be checked for regulations concerning the use and equipment of motor vehicles. Most state fire marshals issue fire safety standards and basic building design and construction standards.

Numerous federal agencies can help the attorney prepare the plaintiff's case.

The U.S. Consumer Products Safety commission is an independent federal agency whose main

purpose is to reduce injuries. The Commission issues consumer product safety rules and can ban hazardous products. It maintains an Injury Information Clearing House to investigate and disseminate data relating to the cause of injuries associated with consumer products.

The National Technical Information Service of the U. S. Department of Commerce supplies a wide range of technical information and has a literature search service.

The Occupational Safety and Health Administration (OSHA) publishes numerous regulations and pamphlets on workplace safety and health standards, the use of industrial substances, and safety in industrial and construction operations.

Another source for information on regulated substances is the Environmental Protection Agency, which has the authority for air, water and pesticide standards.

Information concerning standards for various products and materials is available from the Office of Technical Information and Publications of the National Bureau of Standards.

The Food and Drug Administration should be contacted in cases involving food, drugs, medical devices or cosmetics. The FDA establishes the standards for regulated products and also has information on drug ingredients and food and drug manufacturing methods.

Electronic products which may emit radiation are regulated by the Bureau of Radiological Health, which has information concerning research, testing, and recall campaigns.

The National Highway Traffic Safety Administration develops and issues safety standards for all new cars, conducts research on accident prevention, investigates motor vehicle defects and enforces notification of defects to owners of record. Numerous publications are produced by the Administration for consumers and their lawyers. The Federal Highway Administration is concerned with improving highway safety and conducts highway safety research relating to trucks and buses.

The Transportation Research Board will conduct a computerized search and furnish abstracts of all engineering articles pertaining to highway topics.

The United States Coast Guard sets standards, makes factory inspections and conducts investigations of consumer complaints of defective boats. The Coast Guard notifies boat owners when defects are found.

Some other federal agencies that can assist the plaintiff's lawyer are the Federal Aviation Administration, the National Transportation Safety Board, and the Federal Fire Council.

Private Sources of Product Information

Take advantage of the enormous amount of safety and accident prevention information published by insurance organizations. The Factory Mutual Engineering Corporation of Norwood, Massachusetts, publishes a catalog of books, pamphlets and films on the prevention of industrial accidents and data containing technical information for preventing losses by fires, explosions and machinery accidents.

The American Insurance Association maintains an engineering and safety service and has pamphlets concerning a wide range of accident prevention topics.

Technical and scientific information can be located in several indices which contain references to scientific books, articles and reports on almost every product manufactured. The Applied Science and Technology Index, Engineering Index, and Science Citation Index should be checked.

The National Safety Council, National Fire Protection Association, American National Standards Institute, American Chemical Society, American Society of Mechanical Engineers, American Water Works Association, and the Manufacturing Chemist's Association all have scientific and technical data.

The Automotive Safety Foundation in Washington, the Transportation Safety Department of Calspan in Buffalo, New York,

and the Highway Safety Research Institute in Ann Arbor, Michigan, all do research in the field of automobile design. The Society of Automotive Engineers in Warrendale, Pennsylvania, maintains a complete library on automobile components and safety standards.

Expert Advice

The search for product information is often an arduous task and in many cases will be assigned to an expert in the field. Finding a qualified expert at the outset is usually the major factor in successfully proving the plaintiff's case.

Although a university professor may make an excellent witness, the skilled technician or mechanic should not be overlooked.

Lists of experts in various fields can be purchased from the California Trial Lawyers, San Francisco Trial Lawyers and the Los Angeles Trial Lawyers Associations. The *Jury Verdict Reporter*, in addition to its monthly report of verdicts, publishes a valuable semiannual index of all experts who have testified during the preceding six months. The list is indexed by name and field and is cross-referenced to the reported verdict. Should a particular expert interest you, speak with the attorney for whom the expert testified. Determine the nature and extent of the expert's qualifications and his or her impact on the jury.

A literature search can usually provide a list of potential experts on the esoteric subjects or, at a minimum, will lead to qualified experts willing to consult with attorneys. In a recent case involving a vintage fire hose coupling which failed when placed under pressure, all identifying marks had been obliterated by use and the manufacturer was unknown. A literature search uncovered a San Diego author, an expert on fire hose coupling threads, who was able to identify the small Wooster, Ohio, manufacturer from a photograph of the coupling. After service the manufacturer admitted that the coupling had been originally designed with set screws to

prevent failure, but this safety device had not been utilized until after field complaints confirmed the need for this feature. This information flowed from a few hours in the library and a telephone call and short letter to the author.

Often a competitor of the defendant manufacturer will refer you to a recently retired employee "with forty years experience in the field" who is now consulting. While many such persons can never shake their "company" orientation, they are useful for referrals to other qualified persons in the industry.

A patent search also can be a source of potential experts, and most patent files contain numerous references to industry data not catalogued or otherwise indexed. In a recent case involving the loss of an eye from a chip of metal from a backhoe tooth, a technical manager of the original patent explained the thirty-year history of the product and how the accident backhoe tooth was never intended to be cast as a single piece and that this manufacturing method was in fact responsible for the plaintiff's blindness.

In addition to utilizing engineering testimony, consideration should also be given to psychologists or experts specializing in the field of human factors. On occasion a strict engineering approach fails to consider that a product must be designed so that people can safely use it. A bio-mechanical analysis can reveal a hidden trap for the unwary user or a practical way to prevent injuries. In a case against the manufacturer of a defective industrial switch that exploded and spewed burning oil, a human-factors consultant envisioned an inexpensive safety lock that could be added to the existing design at little cost and which would have prevented the plaintiff's catastrophic injuries.

In appropriate cases, testing, either destructive or nondestructive, may be necessary to determine whether there is evidence that the product failed or could fail in the manner theorized by the plaintiff.

Approaches to Discovery

The plaintiff's expert should also help determine exactly what information needs to be developed or obtained in the course of discovery.

Carefully drafted interrogatories can be a strong tool to perfect the plaintiff's claim. Interrogatories should identify and locate blueprints and diagrams of the product and component parts, the materials used in manufacture and their suppliers, a breakdown and analysis of the manufacturing and quality control processes, the schedule of inspecting and testing of the product, patents and patent applications, dealer bulletins, advertising materials, trade journals and scientific journals.

In some instances, a manufacturer may have an indexing system to all its records. In the birth control pill litigation with Searle Company, manufacturer of Enovid, Searle denied that one of the known side effects was thrombophlebitis. In the course of discovery a computer printout listing complaints from doctors about the side effects was located which referred to numerous complaints of thrombophlebitis.

Interrogatories should also obtain information pertaining to subsequent design or manufacturing changes, since evidence of subsequent changes is admissible in products litigation. [*Ault v. International Harvester Co.* (1975) 13 Cal.3d 113.]

Interrogatories must identify pertinent standards issued by engineering associations concerning the product in question and locate the complete accident history file for the product and other similar models, and information concerning any other lawsuits. Counsel should determine if the manufacturer maintains a safety committee and whether or not minutes of discussions exist. Determine if there is a regular document destruction program and, if so, what documents have already been destroyed.

Interrogatories should identify each person connected with the design not only of the product in question but of similar products,

including employees of the manufacturer and others consulted concerning the design. Reasons for selection of the design in question from alternates should be explored, as well as a description of safety features, the persons designing such safety features and all subsequent testing of safety features.

Information regarding safety devices known to a manufacturer but not used should also be obtained. Much testing goes on during designing and a description of each test conducted with all test records should be elicited from the defendants. Counsel should also determine the intended use of the product when the design was originally considered and the contemplated conditions under which the product was to be operated.

Often answers to interrogatories will provide you with an opportunity to gain access to valuable test data and interoffice memoranda. During the MER/29 litigation against Richardson-Merrell Company, a number of skeletons were found hiding in corporate file drawers. [See *Toole v. Richardson Merrell* (1967) 251 Cal.App.2d 689.] MER/29 was developed and marketed to help reduce blood cholesterol. One side effect was the appearance of cataracts on the eyes of some users, which led to partial loss of sight in some cases.

Over a thousand personal injury claims were eventually filed. In the course of discovery a memorandum detailing cataracts in laboratory dogs and monkeys was found. The fact that Richardson-Merrell had concealed this knowledge was proved through interoffice memos obtained through discovery.

When doctors began to realize the side effects of MER/29 they were contacted by Richardson-Merrell employees. One interoffice memorandum advised a Richardson-Merrell employee to respond to a complaining doctor by cooperating with him in hope that it might keep him from publishing before Richardson-Merrell could "snow" him with data from other sources.

In a 1974 Paris air crash, 345 people were killed when an aircraft baggage

door opened unexpectedly. Detailed discovery was the key to the plaintiff's success. Two years before the accident, in June 1972, one of the defendant's engineers wrote a memo stating:

"The fundamental safety of the cargo door latching system has been progressively degraded since the program began in 1968. The airplane demonstrated an inherent susceptibility to catastrophic failure when exposed to explosive decompression of the cargo compartment in 1970 ground tests."

The Pinto case is another important example. [*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 791-792.] In this case internal Ford engineering studies concluded that the cost of paying victims for injuries and deaths would be less expensive than installing a device that could help prevent gasoline from escaping from vehicles in collisions. This famous "Crush" memo, named after its author, was the basis of a \$127 million punitive damage award.

These documents also prove the truth of litigator's adage that "the paper does not lie." Every successful product liability case rests on a solid foundation of thorough discovery of internal corporate records, which can provide unimpeachable, convincing proof of liability.

Conclusion

Because product liability cases require detailed preparation, an early determination of potential liability is essential before expensive discovery is undertaken. The importance of promptly securing the defective product and fully utilizing inexpensive sources of product information can reduce the cost of litigation and at the same time provide valuable aids for establishing liability.