

AGGRESSIVE DISCOVERY

IN COMPLEX PRODUCT LIABILITY CASES

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WHAT IS PRODUCT LIABILITY?

Product liability refers to the legal liability of designers, manufacturers and sellers to compensate buyers, users, and even bystanders, for damages or injuries suffered because of defects in goods purchased. A tort (i.e. a civil wrong) which makes a manufacturer liable if his product has a defective condition that makes it unreasonably dangerous to the user or consumer.

Product liability cases usually involve death and/or serious bodily injury. Product liability cases demand the attorney's time and financial resources. Successful product liability cases require aggressive and effective discovery tactics.

Discovery in product liability cases begins as soon as the attorney secures the case. Securing evidence and information assists the attorney in assessing the case and preparing the case. Information used in determining whether to accept or decline a product liability case is also important for discovery purposes.

Discovery in product liability cases can be summed up in looking at the 5 W's: Who, What, When, Where and Why.

WHO

Who are the targets of aggressive discovery? Many of the persons who have relevant information to the case should be contacted before the case is filed. The first target of aggressive discovery is your potential client, assuming he/she is alive. Have your client explain the circumstances leading up to the incident. From there the attorney can begin to build their case. Other persons to be contacted and interviewed are:

Investigating officer: In automobile defect cases, law enforcement will be called to the scene to investigate the incident. Obtain his report and get a statement from him about his investigation. It is advisable to have the investigating officer meet you at the scene of the incident to recreate his investigation. This information is crucial to assessing your case and is crucial information for your accident reconstructionist. You may also discover that the officer made a mistake or ignored crucial evidence. The officer's notes may also contain information that was omitted from the official incident report. The investigating officer's report will lead you to the next person(s) who should be interviewed, witnesses.

Witnesses: Witnesses are important because they carry a lot of credibility with jurors. Generally, they don't have a dog in the fight so what they say will go a long way in helping or hurting your case. The attorney should identify all witnesses and take a statement or affidavit for later use. Since product liability cases take time to file and more time to prepare for trial, a witness may not be deposed until years following the incident. It is not uncommon for them to forget what they saw. More importantly, after the case is filed attorneys or investigators from the opposing side might plant unfavorable testimony by suggesting the facts are different from what the witness remembers. Statements or affidavits are effective means of refreshing the witness's memory or impeaching him/her if necessary.

EMT and other Emergency Personnel: These persons are great sources of important information. Oftentimes, they arrive to the scene before law enforcement. More likely than not, they will be the first individuals to move your client and may notice information that is crucial to your case. In automobile defect cases, they will often know the condition of the vehicle itself. They are in the best position to give an independent account of the position of your client. Consider a case where seatbelt use is important. The physical evidence might be inconclusive. The officer arrives and notes the victim is not wearing his seatbelt. If your client is alive, she may tell you she was wearing her seatbelt and always wore her seatbelt. If your client is deceased you could be forced to live with the investigating officer's report. Many times the EMT or other Emergency Personnel will have unbuckled the seatbelt before the officer arrived. Speaking with these individuals as soon as possible can garner crucial information.

Experts: Another source of important information before the case is filed is expert witnesses. If at all possible, hire experts who have had experience with the particular project and the particular defendant(s). An expert who has been in the trenches with the identical product and defendant will have a wealth of information to provide the attorney in assessing and prosecuting the case.

Defendant(s): After the case is filed, the plaintiff may seek information from the defendant(s). At this point, the chess game begins. Remember, the defendant has likely been sued before and has a goal of denying you the very information you are seeking.

WHAT

What information are you seeking to obtain and what means are available to you to secure the information you are seeking? Although state laws and statutes differ, generally a plaintiff must prove he sustained an injury from a product that was defective and unreasonably dangerous for its intended purpose. Additionally, the plaintiff has the burden of showing that a safer alternative design was available to the defendant that would have prevented his injuries. Discovery requests, whether they be directed to the defendant or other resources should be directed at obtaining or examining this information:

The Product: It is almost impossible to maintain a product liability case without the product. The first step to be taken in a product liability case is to secure the product. The product should be stored in a secure facility to prevent spoliation or tampering. If another party owns or has possession of the product, send them a protection letter informing them of your client's interest and directing that party not to destroy, alter, repair or move the product. When possible, arrange to purchase the product. If the potential defendant has possession of the product or in the case of industrial incidents, the employer has possession of the product, request an inspection so that you and your expert(s) can assess the case. If either party is uncooperative, file a petition for pre-trial discovery requesting an inspection. See Federal Rule of Civil Procedure, Rule 27 or your state's corresponding rule for substantive and procedural requirements.

Once the case is filed, the defendant(s) should be bombarded with discovery requests designed to prove your prima facie case. The following are examples of discovery requests submitted to defendants in product liability cases.

Strode v. Freightliner, et al.

INTERROGATORIES

1. State the correct name and mailing address of this Defendant, as well as the name and address of any person(s) assisting in answering these interrogatories.
2. State the date of manufacture of the subject vehicle, date it left this Defendant's control, and who it was sold to as well as the name and address of the facility where the vehicle was manufactured.
3. State the names and addresses of the person(s) primarily responsible for the design or engineering of the cab structure of the subject vehicle.

4. State whether this Defendant performed any crashworthiness or roof crush testing on the subject vehicle prior to it being placed on the market.

5. If the answer to the preceding interrogatory is yes, please state in detail the following:

(a) The names and addresses of all persons or entities involved in such;

(b) The names and addresses of the facilities where such testing was conducted.

(c) A description of each test, which was performed with regard to such crashworthiness;

(d) A summary of the results of such tests.

6. State the full names, addresses and telephone numbers of all lay witnesses who have personal knowledge about the facts of this case.

7. Identify by full name, address and telephone number each person whom you expect to call as an expert witness at the trial of this case, and, as to each expert so identified, state the subject matter upon which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

8. Please give the name of all outside authorities, such as consultants, who assisted in any safety engineering or design with regard to the cab of the subject vehicle.

9. Please identify by name and part number each recommended piece of optional equipment, such as roll bars, and any books as to what equipment can be attached to the subject vehicle as of the date it was placed into the stream of commerce.

10. State whether this Defendant has done any studies, analyses or tests with regard to the subject vehicle's propensity to roll over. This includes tests, analyses and studies performed with optional equipment such as a tank as well as tests without any optional equipment.

11. If the answer to the preceding interrogatory is yes, please state the following:

(a) The number of such tests that were performed;

(b) A description of the methodology for each such test;

(c) The name or test number by which the test results are referred;

(d) A summary of the test results;

(e) The name and address of each person involved in the performance of such tests or analyses;

12. State whether this Defendant provided any information, warnings or instructions to buyers of Freightliner FL-80 trucks concerning attachments such as tanks to the truck. If so, attach a copy of such information.

13. State whether this Defendant provided any information to buyers of Freightliner FL-80 trucks concerning the proper method of attaching optional equipment to the truck. If so, attach a copy.

14. Give a summary of each complaint or incident from any source regarding accidents or incidents of rollover of Freightliner trucks.

15. State whether this Defendant has received any complaints prior to this incident, of any accident or incident resulting in personal injury or property damage, which allegedly resulted from the rollover of a Freightliner truck.

16. Does any part of this Defendant's defense in this case depend or rely upon any government or industry standard, custom or practice?

17. If the answer to the preceding interrogatory is yes, please state the following:

(a) A citation of any government standard and the names of any publications in which those standards can be found;

(b) A citation to any industry standards, customs or practices, and a listing of the authorities in which those industry customs, standards or practices can be found.

18. State whether this Defendant has received any complaint or inquiry from any governmental or safety agency regarding this incident or any other rollover incident.

19. If the answer to the preceding interrogatory is yes, please state the following:

(a) The date the complaint or inquiry was received;

(b) The nature of the complaint or inquiry;

(c) A description of any action that was requested on the part of this Defendant by the government;

(d) The source of the complaint or inquiry.

20. State whether this Defendant has conducted any investigation into the facts of this incident and, if so, state the names and addresses of all persons or entities who have been contacted for information regarding this incident.

21. State the name and address of all department heads responsible for the testing, designing, manufacturing and safety engineering of the subject vehicle.

22. State the names and addresses of all persons primarily responsible for the design, engineering and safety engineering of all equipment that can be attached to the subject vehicle, such as a tank.

23. Please describe and identify all alternative designs considered for the cab of Freightliner vehicles to protect the occupant in case of rollover.

24. With regard to any designs or methods identified in the preceding interrogatory, please state the following:

(a) The place of origin of the design;

(b) The name and address of the primary designer or engineer for that design;

(c) The reason the alternative design was not adopted by Freightliner.

25. Identify and describe in detail all warnings which accompanied the subject vehicle on the date it was placed into the stream of commerce, especially those concerning attachment of equipment to the chassis.

26. State the name and address of the primary person responsible for or involved in designing or formulating the warnings, which accompanied the subject vehicle at the time it was placed in the stream of commerce.

27. State whether this Defendant has ever incorporated or included a warning on the risk of rollover or improper attachment of added equipment on the subject vehicle or any similar vehicle. If so, please attach.

28. Identify and describe in detail any warnings which discussed the attachment of tanks available for use on the subject vehicle chassis. If any, please attach.

29. State whether this Defendant placed any warning on the vehicle that warned the user that the center of gravity of the vehicle will change when equipped with a tank.

30. State whether this Defendant performed any stability testing on any substantially similar vehicle with a tank attached. If so, please attach this information.

31. State whether this Defendant performed any “tilt testing” on the subject vehicle.

Young v. General Electric, et al.

REQUEST FOR PRODUCTION

1. A copy of the Operator’s Manual and installation instructions along with each warning label or instructional decal that was attached to the range at the time of initial sale or that was supposed to be attached by the installer.

2. An exemplar anti-tip retrofit kit for the model range at issue.

3. The complete safety review for the model range.

4. All correspondence, inter-office memoranda, reports, summaries, or other written or recorded items pertaining to range tipping, stability, or instability from 1975 to the present.

5. Any and all correspondence, inter-office memoranda, reports, summaries, or other written or recorded items sent to or received from the Consumer Products Safety Commission, the Association of Home Appliance Manufacturers, Underwriters Laboratories, The National Propane Gas Association,

and any other industry consumer or federal organization or agency pertaining to range tipping, range stability, or range instability.

6. The minutes and records of each design review meeting or other internal document that demonstrates consideration of range tipping or stability; stability testing; anti-tip devices; and the need for an adequate warning or instructional labels relating to the tip over dangers.

7. Any and all safety system analysis or other written methodology used to evaluate the tip over hazard in freestanding ranges.

8. All claims or notices of complaints and inquiries relating to alleged injuries or defects associated with range tipping from 1980 to the present.

9. Each test protocol, test result, analysis, summary, videotape, photograph, film, or other written or recorded item pertaining to range stability tests and tipping tests.

10. The stability design standard, performance standard, and constructional standard for the model range at issue.

11. This Defendant's corporate product warning, recall, retrofit campaign protocol, and documents showing any campaign undertaken relating to range tip over.

12. The warranty registration and records for the model at issue.

13. All invoices, contracts, installation orders, repair orders, or other documents pertaining to the sale, delivery, installation and repair of the subject range.

14. A copy of each patent or patent application for anti-tipping devices for the subject range.

15. A copy of each patent or patent application for anti-tipping devices for any range manufactured by this defendant prior to 1984.

16. Any and all engineering drawings, blueprints, and specifications for the subject range.

17. Any and all complaints or lawsuits filed by any plaintiff against this defendant relative to range tipping injuries.

18. Any and all documents, warranties, brochures, labels or other materials that were subsequently added to the subject range since the time of its manufacture.

19. An organizational chart, book or manual for this defendant which includes the departments, committees or groups involved in the design, distribution, sale and testing of the subject range.

20. Any and all documents regarding consideration and design alternatives to minimize the risk that could occur when ovens tip over.

Hardy v. Raymond Forklifts.

30(b)(5) & (6) DEPOSITION NOTICE

1. Testimony and documents concerning the design and manufacture of the subject forklift on which Mr. Hardy was injured and specifically the design of the forklift entry area and the drive and breaking systems on the subject forklift.

2. Testimony and documents concerning the design and manufacture of any alternative safety devices, including, but not limited to safety doors ever considered or utilized on the entry area of the subject forklift.

3. Testimony and documents concerning the design and manufacture of any alternative drive and breaking system on the subject forklift.

4. Testimony and documents relating to lawsuits, claims, notices or complaints of leg and/or foot crush injuries sustained while operating a stand up forklift manufactured by this defendant.

5. Testimony and documents relating to any safety analysis or risk benefit analysis of any alternative design to prevent leg and/or foot crush injuries on stand up forklifts manufactured by this defendant.

6. Testimony and documents relating to any testing of safety doors or any other alternative device to prevent or reduce leg and/or foot crush injuries on stand up forklifts manufactured by this defendant.

7. Testimony and documents relating to this defendant's knowledge to safety doors for use on stand up forklifts produced by this defendant or other entities.

8. Testimony and documents relating to this defendant's knowledge of the frequency and type of injuries suffered by stand up forklift operators equipped with a safety door.

9. Testimony and documents relating to this defendant's participation on the B56.1 Committee and the information shared with other manufacturer representatives.

10. Testimony and documents relating the all warnings regarding the risk of leg and/or foot crush injury when using stand up forklifts.

The Interrogatories, Request for Production and Rule 30(b)(5) and (6) Deposition notices are three different forms of discovery from three different cases; however, the information solicited in each is the same. All three seek information or documents relating to the design of the subject product, any safety analysis,

alternative designs, testing and other claims or suits. While all of these areas of discovery are important, the discovery of other similar incidents or OSI's is very important.

OSI's: Other similar incidents are documented accounts whether in the form of claims or actual suits that are substantially similar to your client's. OSI evidence is important for many reasons. Prior incidents are evidence of a defect and evidence of a defendant's knowledge of the defect. Additionally, OSI evidence is strong evidence to a jury that the product has injured innocent victims before and will do so again unless they act. Defendants rarely want to disclose evidence of OSI's. More often than not, defendant manufacturers, mindful of the usefulness of OSI's, will object and fight you tooth and nail to withhold such information. Be sure to follow up when they object. Be prepared to have to seek court intervention, via a motion to compel, to force the defendant to disclose the information. Do not allow a defendant to hold this information or unreasonably limit the scope of this discovery.

CASE EXAMPLES:

Bottoms v. Bush Industries

This case involved a defectively designed entertainment center. The entertainment center is similar to most you see in stores in that it had an area for a television and a stereo. The large area in the front had two glass doors. The glass was held to the wood using glue. After her son assembled the unit, our client opened the door and the glass fell out onto her foot like a guillotine. The glass severed a nerve in her foot that resulted in constant uncontrollable pain. Specialists attempted to transplant nerves from other parts of her body unsuccessfully. Even with such an injury, we were worried about filing the case for fear of insufficient damages. After filing the case we propounded discovery seeking information about OSI's. We uncovered over 500 similar incidents. We eventually resolved the matter for a seven-figure settlement.

Woods v Ford

This case involved a defectively designed seatbelt system in a Ford Escort. The subject vehicle utilized a passive restraint system (automatic shoulder belt with a manual lap belt). We utilized resources at AIEG and discovery responses to find numerous OSI witnesses. More importantly, we convinced three of the OSI's to give us a video deposition. One of the witnesses **agreed** to travel from West Virginia to Alabama for the trial. She, like our client, was a wheelchair bound

quadriplegic. This case was tried for one week and settled the day before plaintiff was due to call his only live OSI witness.

Testing: Documented testing of products is important and useful evidence. In the automotive industry, manufacturers are required to conduct specific tests on various components of the vehicle. The required tests are well known and are available through the defendant, government agencies and various other places. Some manufacturers test even when not required to do so. Testing results usually reveal defects; therefore, request testing on the product or any part components. Lack of testing in and of itself is evidence of deviating from the standard of care assuming testing would have disclosed the defect.

Alternative designs: Always seek other designs such as prior generation, next generation and/or contemporary designs that were considered but not used. Oftentimes, these alternative designs were safer but more expensive. Since one of Plaintiff's burdens is proof of a safer alternative design, it always better to be able to argue one existed and this defendant already has it. In this arena, also look to the designs of your defendant's competitors.

WHEN

When does discovery begin in a product liability case? Discovery begins as soon as the client walks in the door or as soon as the case is referred to your office. The key to a successful product liability case is to aggressively begin to gather as much information as possible, as soon as possible. One of the few advantages a plaintiff has in a product liability action is oftentimes, the defendant is not aware of the claim. The Plaintiff has an opportunity to investigate and develop case theories well before the defendant is ever put on notice.

Aggressive discovery tactics should continue after the case is filed. Normally, discovered information will lead to the request for additional information. When formulating discovery schedules, be sure to leave yourself adequate time to follow up on discovery. There is a delicate balance to be struck between getting your case to trial as soon as possible and saving yourself adequate time to get all the information that will be beneficial to the case. More often than not, discovery in product liability cases will continue up to discovery cut-off and/or your trial date.

WHERE

Where does the attorney look for the information they will need to successfully prepare their case? There are many resources available to the attorney.

AIEG: The Attorney Information Exchange Group is a national litigation group specializing in automotive and other product defect cases. If you are a plaintiff's attorney who handles automotive product liability cases and you are not a member of AIEG, join now! AIEG members share documents, depositions, pleadings, experts, case theories, etc. It's possible to gather most of the discovery you'll need before you ever file your case. AIEG membership allows the attorney to proceed without having to recreate the wheel.

ATLA: The Association of Trial Lawyers of America is an International coalition of attorneys, judges, law professors, paralegals, and law students, working to promote justice and fairness for injured persons. Like AIEG members, ATLA members share information. Unlike AIEG, ATLA is not limited to automobile related cases. ATLA members are involved in cases ranging from automobiles to industrial machinery. ATLA is a great resource for obtaining discovery in a product liability case.

Attorneys: Attorneys who have experience with a particular product, have previously sued your defendant or are currently suing your defendant can be a great resource for discovery. Another added benefit is the ability to compare the defendant's responses to discovery. It is not uncommon for defendants to produce different discovery responses the exact same requests. By communicating with other attorneys, you are not isolated and subject to discovery abuse.

CASE EXAMPLE:

McIntosh v. Uhaul, et al

This case involved a rollover accident that resulted in the death of our client's husband. They were traveling through Alabama to New Jersey driving a Ford Explorer pulling another vehicle using a Uhaul tow dolly. While going down a decline, the dolly started to fishtail and caused the Explorer to roll over. We had handled numerous rollover cases but not a Uhaul tow dolly case. We sent a search request over the ATLA list serve asking if anyone had ever sued Uhaul in a similar

case. I got a response from an attorney in Springfield, Missouri. He invited me out, put me in a conference room with boxes of information. When I left his office I had every document I needed to pursue that case.

Internet: The internet is a great source. The defendants' websites and any industry websites can provide important information.

WHY

The types of evidence discussed above are extremely useful in settlement negotiations and at trial. Manufacturers will protect public perception of their product at all costs. Favorable discovery will assist you in mediation and is persuasive evidence to juries. There is a recent trend with manufacturers agreeing to produce these items without a fight as long as the Plaintiff agrees to a confidentiality agreement. Generally, this confidentiality agreement will not allow counsel to share his information with other attorneys. These agreements can lead to isolation and inconsistent discovery responses. Agreeing to confidentiality agreements is acceptable only if it contains a sharing provision that allows you to exchange information with other attorneys.