

**Product Liability Discovery**

By: J. Scott Bowman, Esq.

Few practitioners have the luxury of focusing solely on one area of law, such as product liability. For instance, at my firm, in addition to handling product liability claims, we'll handle all variety of negligence claims as well as claims for medical malpractice, legal malpractice, 1983 claims, and insurance claims, to name just a few. When initiating a lawsuit, regardless of the topic, the first instinct is always to look back at discovery requests from past cases and then re-caption them for the new case. While there is sure to be useful materials from past cases, product liability cases are often won or lost based on paper discovery. Finding the documents necessary to win your case often takes a great deal of forethought, creativity, and dogged determination. It also requires that we resist the "cookie cutter" approach to paper discovery.

Large product manufacturers are often self-insured. This gives them the ability to choose their defense counsel. The attorneys they retain often handle nothing but products cases, and many times they have litigated the issue in your case many times over for their client. They are keenly aware of the damaging evidence their client holds, and obtaining it for your case can be daunting. That said, once we understand and ponder their approaches, we can initiate effective counter-measures to give us the best chance of obtaining the information we need.

A. The Protective Order

Before discovery commences, the defense will usually request that you agree to enter into a protective order. They mask the request as being necessary to protect trade secrets, even though there are typically competing products that are virtually identical, and competitors can obtain any information they want by simply reverse engineering the product. The protective order is a powerful tool for the defense because it requires that plaintiff's counsel return all discovery items at the conclusion of the case, thus thwarting the ability to network with other attorneys who have previously litigated cases involving the product. Plaintiff's counsel must make every effort to resist the protective order. The defense must show good cause for the protection and courts are often persuaded by the trade secret argument. Plaintiff's counsel can cite cases such as *Patterson v. Ford Motor Co.*, 85 F.R.D. 152 (W.D. Tex. 1980), and argue that the law favors information sharing between counsel to avoid duplicative discovery which needlessly increases time and cost. Additionally, in cases where there is a known "smoking gun," protective orders cannot limit the sharing of information between attorneys concerning what discovery was previously sought, which in essence, allows us to recreate the wheel. In cases with significant damages, practitioners might also consider co-counseling with an attorney who have had success in similar cases. Protective orders cannot compel counsel to unlearn what they have learned from previous discovery efforts.

B. Voluminous Documents

Defense counsel will often produce voluminous documents that are not identified as responding to any particular request. When attempting to compel further discovery defense counsel will often trumpet the large number of documents they have already produced in an effort to argue you are being unreasonable. Most judges see through this tactic once it is respectfully pointed out. In addition, Rule 34(b) requires that defense counsel provide documents in a reasonably useable fashion. It is best to specifically request that each document provided be identified as responding to a given request.

### C. Misleading Responses

Defendants will often attempt to narrowly interpret requests to keep the responses contained. It is necessary to depose the person most knowledgeable about record keeping. During this deposition it is important to get the witness to reveal what records are kept, how long they are kept, in what format they are kept, and the specific name of any computer systems used to store information so that you can then follow up with discovery requests that will not allow the defendant to escape production through the use of evasive semantics.

### D. Spoliation

In some cases defendants will destroy damaging documents or evidence in order to reduce potential liability. In order to prevent spoliation of evidence, counsel should send a letter requesting that the defendant suspend any practice of destroying documents in any way related to the product or the accident at issue. Plaintiff's counsel can also file a request for a protective order of their own asking the court to order the defendant to suspend any activity that might lead to the destruction of evidence. If the defendant has a retention policy that involves the destruction of documents after a set period of time, seek to have the policy admitted and push for an adverse inference instruction. Where the product at issue is the subject of repeated litigation there is a good argument that the defendant is on notice that the documents will be relevant to future litigation.

Product liability discovery is often frustrating and time consuming. Defense counsel knows this and the tactics they use often cause plaintiff's attorneys to give up. It is critical that you follow up evasive tactics with a well-documented meet and confer followed by a motion to compel. If you are not willing to go to these lengths to obtain the discovery you need you should evaluate whether you want to pursue the case from the outset. Most significant product liability verdicts and settlements occur because counsel was persistent and aggressive with discovery requests.