Limiting Product Liability and Addressing Mass Tort Litigation

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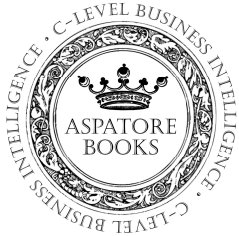

As a product liability attorney, I represent members of the business community in the defense and management of complex product liability matters, mass tort litigations, and premises liability cases. This includes representing manufacturers and distributors of consumer and intermediate goods and equipment, including asbestos-containing materials and pharmaceutical products. Members of my firm serve as national, regional, and local counsel in these cases. For example, we handle literally thousands of asbestos cases and hundreds of cases involving diethylstilbestrol, a synthetic estrogen drug.

As national and regional counsel, my firm advises clients on strategy, defenses, and various other issues from the inception to conclusion of cases. We have experience in all aspects of mass tort litigation, including supervising other law firms, serving as defense liaison counsel, drafting case management orders, standard pleadings, discovery responses, and legal briefs, developing fact, corporate, and expert witnesses, conducting depositions, hearings, and trials, and negotiating favorable individual and group settlements.

Preventative consultation is another important service my firm provides to some clients. We advise clients on new developments in the law and evaluate the nature and viability of specific claims other parties may bring against them. We also advise clients on potential acquisitions of other companies with respect to successor liability issues, and in some cases, we assist clients in obtaining indemnification agreements to ensure they are not assuming another company's product liabilities. One of the greatest skills we offer clients is our ability to help them understand and address complex medical, scientific, and technical issues, such as epidemiology and state-of-the-art issues, as well as our expertise in working with experts around the country, and managing and coordinating mass cases.

Main Types of Product Liability Cases

In many situations, our firm is hired by clients after they have been sued. Although in some cases, a client may learn of a potential product liability issue as the result of an internal communication within the company, such as a research and development report, or from other sources, and will seek out our legal counsel at that time.

There are four principal categories of product liability claims: (i) design defect, (ii) manufacturing defect, (iii) "failure to warn," and (iv) negligent manufacture or design. Design defect cases involve allegations that there is a flaw or defect in the way the client's entire product line was designed or configured that made the product unreasonably dangerous. For example, a car designed with only three wheels might be defectively designed if it tips over easily.

In manufacturing defect cases, plaintiffs claim injury because of a defect in the construction or assembly of a product at the time it was made. Thus, a manufacturing defect case essentially alleges that there was a mistake in the manufacturing process and/or the manufacturing process deviated from the design. For example, a car with an incorrectly bolted wheel may be considered to have a manufacturing defect.

In "failure to warn" cases, which we often see in the mass tort context, plaintiffs essentially claim there was a defect in the marketing or advertising of a product because it was sold without adequate warnings or instructions.

Lastly, a claim for negligent manufacture or negligent design usually alleges that a company did not use reasonable care in manufacturing or designing a product and, therefore, the product is defective.

Preventing Product Liability Claims

Adequate insurance coverage is often the most essential item in managing and defending against product liability claims. Therefore, as an initial matter, companies must make sure they have adequate insurance coverage, or are sufficiently self-insured, to protect against potential product liability claims. Often, we see clients who do not have sufficient insurance coverage to handle what is often an unexpected filing of numerous claims. Our firm also works with clients who have lost old insurance policies and therefore are unaware of how much coverage is available to them, or are unaware of the type of coverage they may have.

One way companies can limit product liability claims is to make sure they do not assume liabilities of other companies during corporate acquisitions. Conversely, when selling a company, one should try not to retain existing

liabilities. It is not unusual for a company's liability to be the result of a merger or acquisition. For example, in the asbestos context, several Fortune 500 companies are now defending themselves in tens of thousands of asbestos lawsuits—not because they manufactured, distributed, or sold a product that contained asbestos, but because they acquired a company that did, and assumed that company's liabilities. Thorough due diligence during the corporate acquisition process is often the best protection against assumption of certain liabilities.

Another effective strategy companies may use to help limit product liability claims and/or liability is to have indemnification agreements in place with the various entities in their chain of distribution—including suppliers, manufacturers, distributors, and sellers. For example, some manufacturers obtain indemnification agreements from suppliers of component parts, in which the supplier agrees to indemnify the manufacturer for any liability or costs it may incur from use of the seller's component part. Similarly, distributors may be able to obtain indemnification agreements from manufacturers, and sellers should try to obtain such agreements from distributors.

The use of adequate warnings on products advising users of potential dangers involved in the use of a product is one of the easiest and least expensive ways to help limit product liability claims. Perhaps equally important is for companies to make sure they provide proper instructions on how to use and dispose of their products. In addition, making sure there are established quality control policies and procedures in place with respect to a company's research, development, design, manufacturing, and marketing processes is generally another good way of limiting product liability claims.

The ultimate method of limiting product liability litigation, and perhaps most drastic, is filing for bankruptcy protection, which results in an automatic stay of any litigation against the company. For some companies, filing for bankruptcy protection is necessary, and for other companies it makes good business sense. For example, in the national asbestos litigation, more than seventy companies have filed for bankruptcy protection because of the tens of thousands of asbestos claims filed against them. Several prominent companies that manufactured or sold asbestos-containing

products, such as Johns-Manville Co., Babcock & Wilcox, W.R. Grace, U.S. Gypsum Company, and GAF Corporation, have filed for bankruptcy to limit their product liabilities. In these situations, trust funds are sometimes established to address these claims, instead of the companies having to go through the litigation process.

Responding to Claims

The very first step a company should take once it receives a product liability claim is to inform its insurance carrier that it has been named in a product liability action. Insurance funds are vital to defending product liability claims, and thus placing carriers on notice as soon as possible is essential to recovering the insurance funds necessary to adequately defend these actions. Depending on the type of case and/or the magnitude of claims, it may also be critical that a company notify its officers and board of directors that they have been sued. It is vital that officers, directors, and sometimes shareholders understand the uniqueness of certain product liability cases, such as mass tort cases, and the costs and efforts needed to adequately defend these cases.

After a claim is received, it is especially important for a company to retain experienced counsel who can provide invaluable advice and assistance in preparing and coordinating its defense efforts, particularly in mass tort litigation. Experienced counsel are knowledgeable and adept in handling a large influx of cases, and have existing relationships with judges, discovery referees, plaintiffs' counsel, and other defense counsel, all of which can assist in successfully defending these complex cases.

In mass tort litigation, a system for tracking complaints may be important, because it will prevent a company from being overwhelmed by the tidal wave of complaints it may receive. Such as system will also ensure that no case gets lost and that every case is handled by the proper counsel. In addition, a company may want to create a budget of appropriate resources needed to handle the costs of litigation and funding of the internal mechanism needed for processing and tracking complaints.

Some of the next steps a company should take in defending these cases are locating and identifying key documents, some of which may be many years

old; locating documents from current and former subsidiaries, divisions, and departments that may be relevant to liability for acquisitions, mergers, or divestitures; and identifying key witnesses, including current and former employees who may have knowledge about some of the relevant issues.

It is also important for a company to monitor its internal communications, including e-mails and correspondence, and be sensitive to the fact that internal e-mails and correspondence between employees may not be protected by the attorney/client privilege or the work product doctrine and, thus, may become discoverable during the course of litigation.

Documentation and Coordination

Companies must be aware of the importance of implementing a document retention policy. Certainly, companies must retain all existing documents that may be relevant to the litigation once they have been sued, but it is also necessary for companies to have existing document retention policies to prevent documents relating to product development, design, manufacturing, and marketing from being destroyed. The particular litigation in which a company is involved may necessitate changes to an existing document retention policy to prevent certain documents from being destroyed.

It is very important that companies involved in mass tort cases have a coordinated and consistent defense of these complex cases. In mass tort litigation, it is not unusual for some companies to be sued in hundreds or even thousands of cases, have cases pending in various states, and have these cases handled by different counsel in each state. Therefore, coordination and consistency, among client and local, regional, and national counsel, of pleadings, discovery responses, key documents, key witnesses, motions, expert witnesses, and pre-trial and trial preparation are absolutely critical to a successful and uniform defense.

Successful Strategies

Apart from our expertise in coordinating, managing, and defending cases, we believe our firm's success is also based on our ability to listen to our clients and give them advice that is consistent with their business needs and

goals. For some clients, this may mean maintaining a low profile by settling case quickly and quietly. In other situations, our clients prefer we take a more aggressive defense approach, including taking cases to trial. We strive to promote realistic expectations. We want our clients to know we are prepared to be as aggressive as necessary, but also to understand the risks involved at each stage of the litigation. It cannot be overemphasized, for example, that jurors are often sympathetic toward injured plaintiffs and antagonistic against companies, which is why jury verdicts in product liability cases, especially in mass tort litigation, can be extremely high.

One very important stage in defending product liability cases is the deposition. This part of the case is sometimes overlooked by inexperienced counsel, but often a deposition can make or break a case. Thus, it is critical that a company's attorneys be thoroughly familiar with all key documents and issues in the case, have performed all necessary factual and investigative research in advance of depositions, and be fully prepared to take and defend the various depositions in the case. A successful deposition may result in a settlement on extremely favorable terms to clients or, even better, in a dismissal of the case.

Meeting with the Client: Preliminary Research

One of the very first questions we always ask a new client is whether the company has been sued yet, and if so, what is the product at issue? We generally ask to see a number of documents, including the client's insurance policies, all documents related to the product at issue (including its development, design, manufacturing, marketing, and warnings), as well as documents, if any, about redesigns, remedial measures, or recalls. We also like to talk to the research and development people and the engineers early in the process. We strive to learn as much as we can about the product.

We also learn as much as we can about the client's relevant corporate history, including any prior acquisitions or mergers, in which liabilities of another company may have been assumed, and we review all of the company's indemnification agreements. In addition, we inquire about workers compensation claims, which can sometimes be relevant to notice (or lack thereof) of potential dangers associated with a product.

In most cases, our clients are looking to limit liability, maximize insurance coverage, and aggressively defend these cases. We do our best to satisfy these goals and establish an open dialogue with our clients through each stage of the litigation. We keep our clients advised about the progress of the case as it unravels, and if there are any delays, we explain the causes. It is especially important for the client to be aware of the potential financial ramifications in these kinds of cases, including the costs associated with defending such cases, and the potential jury awards.

Key Players in Product Liability Litigation: Creating a Team

Key players should be identified at the outset of a product liability case. The key corporate players may vary depending on the nature of the case. A company's research and development employees and engineers are often important players in product liability litigation, as they are the people who actually formulated and designed the product at issue, and may be potential witnesses in the case. Similarly, members of a company's marketing department may be important witnesses, as these individuals could have relevant information regarding warnings and instructions. In addition, individuals in a company's medical, health, and safety departments can potentially be important witnesses. Clearly, a company's general counsel, chief executive officer, and chief financial officer are other important corporate individuals, particularly in terms of approving defense strategy and developing a litigation budget.

Key players also include legal counsel. In mass tort cases, we generally develop a defense team that may include national coordinating counsel, regional counsel, and local counsel, who handle the day-to-day activities in their states and report to regional and/or national counsel. We may also assemble national trial teams, consisting of attorneys who are prepared and ready to try cases around the country, a strategy that allows us to present a coordinated and uniform trial defense and can serve as an effective settlement tool. If any of these cases actually proceed to trial, it is absolutely essential that the attorneys defending the company are fully prepared to try the case based on a developed strategy that has been approved by the company.

Quality Control and Product Recalls

Creating quality control measures in design, manufacturing, and marketing, including a quality control manual, is one effective way to help limit a company's potential for product liability litigation. Quality control procedures and/or manuals help set company standards for product development, design, manufacturing, testing, marketing, and providing warning and instructions. Some of the essential employees relating to a company's quality control efforts include corporate management, research and development, engineering, product developers, marketing, and the manufacturing department. Clearly, if a product is designed, manufactured, and marketed safely in accordance with quality control standards, it is less likely to be the subject of product liability lawsuits.

A product recall may help a company avoid product liability lawsuits, because once the product is removed from the market, it can no longer cause injury to consumers. Clearly, product recalls are recommended when a product is unreasonably dangerous or lacks adequate warnings or instructions. Other product recalls are sometimes undertaken as a business decision to avoid additional lawsuits, by removing an otherwise safe product from the market, because a company has begun to receive complaints and/or lawsuits about the product. It is important to keep in mind, however, that a product recall can be expensive. In addition, some product recalls may result in new and sometimes frivolous cases being filed based on negative publicity in the press.

Recent Trends: Tort Reform

One of the major trends in the product liability area, including in mass tort litigation, is tort reform. For example, in some states over the past few years, we have seen caps on punitive damages, caps on non-economic damages such as pain and suffering, statutes designed to prevent forum or venue shopping, limitations on attorneys' fees, allowing juries to consider "collateral sources" such as health and disability benefits in measuring damages, creation of inactive dockets (as in asbestos cases) for claimants with no physical impairment, inclusion of bankrupt companies in the apportionment of liability, and a move away from joint and several liability principles in favor of comparative fault or proportional liability.

Final Thoughts: Limiting Liability

In summary, some of the most effective preventative measures companies can take to help limit potential product liability claims, including mass tort cases, are as follows:

1. Line up adequate insurance coverage and retain all policies.
2. Do not assume another company's liabilities in an acquisition, and if you are selling your company, try not to retain liabilities.
3. Obtain indemnification agreements with appropriate entities in your chain of distribution, such as suppliers, manufacturers, distributors, and sellers.
4. Make sure you have implemented adequate quality control procedures and measures with respect to your research, development, design, manufacturing, and marketing processes.
5. Provide adequate warnings and instructions for your products.

Once a product liability claim has been filed against your company, you must:

1. Immediately notify your insurance carrier, officers, and board of directors.
2. Retain experienced legal counsel.
3. Identify and locate key documents and witnesses.
4. Examine your document retention policy and maintain relevant documents.
5. Review workers' compensation claims.
6. Create a litigation budget.
7. Work with legal counsel to develop an effective strategy to properly defend the cases.

In product liability litigation, particularly mass tort litigation, the stakes can be very high. With respect to publicly traded companies, for example, such litigation can have an impact on the value of a company's stock. As with most litigations, the vast majority of these cases eventually settle, although some of the cases may go to trial. Accordingly, it is critical to a company's success that it retain experienced counsel to assist in developing an effective defense that is strategic, coordinated, and consistent.

Craig Blau is a shareholder in the New York office of Anderson Kill & Olick PC. He is chair of the product liability group, chair of the paralegal committee, and a member of the hiring committee. He represents manufacturers and distributors of consumer and intermediate goods and equipment, including asbestos-containing materials and pharmaceutical products. He acts as national and regional counsel in complex multi-party mass tort litigations, and supervises the work of attorneys, legal assistants, and local counsel. Mr. Blau has substantial experience with medical and expert testimony and evaluation, and extensive experience with depositions and all aspects of discovery, motion practice, and litigation in mass tort. He serves as court-appointed defense liaison counsel in multi-party litigations, and he has continual contact with many judges.

Mr. Blau served as a law clerk to the Honorable Malcolm Muir of the U.S. District Court for the Middle District of Pennsylvania. He earned his B.A., cum laude, from the State University of New York at Binghamton and his J.D. from the Northeastern University School of Law. He is a member of the Association of the Bar of the City of New York, as well as the New York State and American Bar Associations.