HIT THE GROUND RUNNING - THE IMPORTANCE OF EARLY INTERNAL INVESTIGATIONS OF PRODUCT CLAIMS

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There are very few things more significant to a company then the reputation of its products. A product liability claim has financial, reputational, and precedent setting implications. As a result, it behooves defense counsel to understand the importance of these cases to a company and to act accordingly. Many lawyers get lulled into the doldrums of litigation and take a reactive approach to what comes at them. For instance, a lawyer that waits to receive requests for documents before seeing what documents a client may have. Assume that by the time a Plaintiff's attorney files suit, they have done their research and spoken with other Plaintiff's counsel who may be familiar with the client and product. By conducting an early internal investigation of the claim (pre-responsive pleading), an attorney may very well be able to set the cadence of the litigation, effectuate final resolution, and place him or her in a position to come out swinging and eventually triumph at trial.

A new product claim can present a daunting task, unless you have a plan in place. This paper is not meant to identify every item that an attorney should investigate but sets forth the basics of where to get started and where most information can be obtained. Every case and client are different and will require their own approach, but for large complex matters this is where to start.

Upon receipt of notification of a product claim and/or lawsuit, there are several important steps that should be taken:

- Determine the main primary contacts in the legal department and on the business side of the business that deals with this product category;
- Determine the appropriate product engineer and/or individual with the most product knowledge, including design, testing, approval, quality control, etc.;
- If possible, determine what components may be involved that are manufactured and incorporated from other manufacturers. This is particularly important because you may need to put other manufacturers on notice of the claim, request defense and indemnification, or invite them to an inspection or destructive testing in order to avoid any spoliation issues;
- Determine warranty history for the particular unit(s) and product generally;
- Determine whether any recalls have occurred that would implicate the product at issue;
- Reach out to opposing counsel to have a discussion of the case. It is often times surprising how much information the other side may be willing to share in a simple phone call;
- Contact potential witnesses, except as limited by ethical rules and considerations;
- Depending on the complexities of the case, you may want to visit the manufacturing site and visualize how components are integrated and the product comes together;
- Gather relevant documentation and analyze it. This includes, but is not limited to:
    - Correspondence/emails
    - Specifications
    - Component supplier documentation, contracts, specifications, testing, etc.

- Production part approval process documents (PPAPs)
- Product literature, installation, maintenance, care/use manuals, etc.
- Testing documents, internal and external
- Customer contracts for manufacturing and supply
- Documents evidencing any changes in manufacturing, materials, testing, quality assurance, etc.
- Merger and sale agreements. (These often delineate, particularly in older products, who remains responsible for any product liability issues or suits. This could also require immediate action to notify the seller/ purchaser of the company of the claim and require timely requests for defense and indemnification.)

All of these can lead to significant information that can shape the substance of any responsive pleading and defenses.

Conduct relevant interviews with individuals identified in the above materials. This could include product engineers, purchasing agents, suppliers, marketing personnel, production managers, witnesses, etc. These are the individuals that will know what is going on with a product, what issues may exist, if any and what potential pitfalls you need to be aware of. If the client employs counsel in various jurisdictions, determine whether another counsel has dealt with the same product and what information they that may have to help your investigation move faster. These are also the people that may provide you unexpected information to counter any arguments or points you've heard from the other side. They may have testing documents that support quality assurance positions. They may have manufacturing, installation, or warranty documents that delineate the responsibilities of the other side and clarify where any comparative or contributory negligence may be found. They may have long-term testing sites where product has been engaged in long-term testing that is seldom referred to or known by outside counsel unless the question is asked. This is particularly true when there have been mergers of companies or asset purchases where even in-house counsel may not be aware of a long-term testing or exposure site. They may have witnessed something particularly referred to in the pleadings. You don't know what you don't know, until you start gathering information.

Begin analyzing what experts you need and where you may want to obtain them from, both geographically and by specialty. Some cases are better suited for the use of in-house product engineers or customer care employees as experts. They generally are more familiar with and can discuss in greater detail and at a higher level, the design and performance of certain products. They are often more vested in the outcome than an outside expert. There are certainly other issues that arise from their employment position, including perceived bias on the stand, etc., but that is a decision that will need to be made against the ability/availability of qualified outside experts and their ability to adequately defend the product. Frequently, it will make sense to hire outside experts if the risk of bias is too great for an in-house expert, or the specialization and testing needed cannot be done in-house. Many cases are won or lost based upon a battle of the experts, so it is important to spend the time and effort to make sure you've got the right person with the right background, qualifications, personality, and ability to communicate their opinions to a jury. Further, it is

important to have discussions early on with your experts as to whether any component parts need to be tested, and whether that testing should be done by an independent lab as work product or through the experts themselves. There are pros and cons to both, much of it centering on discoverability, particularly based on the risk that the outcome of testing is not the desired result.

Begin to develop a theory of your case. This will help inform you as to whether you've conducted a sufficient investigation, that you understand the case in front of you(given the limitation of information you have from the other side), or whether there are additional initial matters you need to look into. You need to understand where the battleground will lie and whether there are any significant issues that may be central to what you will have to defend.

All of this can help direct the manner in which you respond to a Complaint, conduct discovery, and focus initial subpoenas, etc. As always, defense strategy needs to be fluid with an ability to bob and weave, but you should have some general basic understanding of the strengths and weaknesses of your case and the best way to go about defending it, not only at the pleading, motions, and discovery level, but when you actually arrive in front of a jury. Successful attorneys are the ones that prepare the case for trial, not for discovery. Being better prepared than the other side is often where you will gain leverage.

Along the lines of defense strategy, it is important you understand the law in the jurisdiction where the dispute will be handled. It is amazing how many lawyers wait until they are at the precipice of trial before they begin looking at jury instructions and what the state and substance of the law is that governs their case. In reality, this is one of the first things a good lawyer should do. If you understand the law from the onset, you know how to shape discovery and your case overall in order to prepare it for what a dispute is ultimately about, how a judge and jury will view this at the end of the day. Lawyers often assume, based upon their years of experience, that they know the law, but all cases are different, they are intricate, they raise different issues, and frequently there are subtle changes in the laws via new decisions, statutory amendment, etc. that are not totally in alignment with what a lawyer thinks he or she knows about the current state of the law. There cannot be anything more embarrassing than going to a client a month before trial to inform them that you have a new issue that you hadn't been aware of, based upon a case, legislation or change to the law that existed prior to the filing of the lawsuit.

Drafting a responsive pleading is often times as much of an art as it is a factual analysis. Each case will demand a different approach to how a pleading is prepared, with the exception of some standard defenses. In the right case, it is sometimes valuable to include additional information that in other cases you may make the other side work to determine. A good example is a case where in a piece of correspondence, buried in thousands of documents received from a client that was reviewed prior to filing a responsive pleading, we found an email that was inadvertently sent to the client by the Plaintiff, a manufacturer the client supplied product to, on a group email intended for others. This was not attorney-client privilege or work product protected information. This was an email the manufacturer sent out to its ultimate customer about the product issues it was now complaining about. In it, the

manufacturer who incorporated the Defendant's component into their final product acknowledged a series of manufacturing issues on their end that potentially could have affected or even been the ultimate reason for the issues complained of. We included this information in the responsive pleading identifying the communication, author and date, because this was a foreign company, and we felt fairly confident that if we did not point out some of these issues in detail, the executives of Plaintiff who we knew were closely monitoring this case, would not be aware of the information for months or maybe years down the road. As the author was one of the higher ups at the company, we were confident counsel would have to inquire with them about this note. In this case, it had the intended effect and ultimately set the cadence for the case, and I believe resulted in an early resolution and very favorable outcome to my client. If we had not moved quickly on our investigation, it could have been months down the road before we discovered a pertinent piece of information already in our client's possession.

Take your client's temperature. In other-words understand their approach to litigation and figure out what their business goals are. Some clients will vigorously fight every claim that comes at them. Some will truly analyze whether they have an issue and will seek to resolve those where there is and fight those where there aren't. Some will avoid the courtroom at all costs. Each client will necessarily require the attorney to balance the legal and factual issues with their client's underlying business strategy and goals. Never lose sight of the fact that litigation is not a core component of any manufacturer's business strategy, it is more of a necessary evil.

Analyze insurance coverage issues. If the product claim has the potential to be covered under your client's insuring agreements, it is important to put carriers on notice. In fact, most policies require timely notice for coverage to apply. Coverage actions can be complicated enough as they are. Throwing in an issue regarding failing to provide timely coverage to an insurer is a self-inflicted wound that you do not want to endure. Take a hard dive into the coverage issues. Policies range from simple general liability to recall liability, etc. Creativity can be your friend in this instance. We have had cases where the insurer adamantly denied coverage under the your work/your product exclusion based upon the fact our client's component part did not "damage" the vehicles it was incorporated into. We took the position that while it did not "damage" the vehicles in the traditional sense, it did temporarily damage them, as the component part alleged to have been defective would have affected various electronic components on a temporary basis until replaced; including fuel flow and therefore temporary damage was suffered. This was enough to get the insurer to meaningfully participate in an early resolution of the case. If you are not comfortable with handling the coverage portion of the case, recommend bringing in a coverage attorney from another firm. It can be beneficial to have the coverage issues handled by another firm, and may be ethically required if the insurer is paying your fees. If nothing else, it takes you out of the position of protecting your client while an insurer is pumping you for information, which may not be for the benefit of your client. Let coverage counsel be the one that communicates directly with the insurer regarding the progress and nuances of the case.

Ultimately, litigation is an uncertain predicament for a company. Anyone who has gone through it knows that it rarely goes exactly as planned. You are at the whim of judges,

jurors, court administrators. You are at the mercy of witnesses, time, and unexpected events. For instance, who could have anticipated the world would be facing a pandemic that would shut down and/or significantly slow the progress of most cases in our court systems, both state and federal? For manufacturers, this has altered budgets, timelines, etc. In some cases corporate witnesses you had been counting on have moved on or joined the Great Resignation. You have to be prepared for the changes that ultimately occur during litigation, but at the end of the day, as Louis Pasteur famously said: "Chance favors the prepared mind." There is nothing attorneys can do that is more beneficial for their clients than to be well prepared. In fact an attorney has the ethical and legal responsibility to investigate and prepare every phase of his client's case.[i]

There are no magic bullets for investigating, preparing for or trying a product liability action. The key is to put your client in the best possible position they can be to come out ahead. The best way to do this is to hit the ground running by gathering as much knowledge as you can about the facts and issues you will have to deal with and to do so as early on in the case as possible. A good family friend, J.B. "Buck" McQuay has a wonderful saying, "The success or failure of a business depends on its employees' sense of urgency."[ii] The same holds true for the legal field and Buck's statement could easily be translated to, the success or failure of a business in litigation depends on its attorneys' sense of urgency.

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[i] Giaramita v Flow Master Mach. Corp., 234 N.Y.S.2d 817(1962).

[ii] McQuay, J.B. "Buck. "Buckisms, the art of Southern Speak." Ed. Fernando Aguirre. Charlotte: Fernando Aguirre independently published 2020.