CLM 2018 Midwest Conference
June 14-15, 2018 in Chicago, IL

Narrowing the Scope of Discovery: Tales from the Battlefield

Introduction

The plaintiffs' bar has become highly organized and information sharing among plaintiffs' attorneys has become a widespread practice. Plaintiffs often have access to extensive databases of documents from prior litigation. Naturally, the plaintiffs' bar wants to be able to use this information as much as possible and so they seek discovery on dissimilar products relating to dissimilar incidents and for unreasonable periods of time. This panel will discuss how to properly reign in the scope of discovery and focus litigation on the product actually at issue.

Framing the Argument

Complex product liability litigation in the United States can be an expensive proposition for all parties and their insurers, and the majority of time and money spent is usually during the discovery phase. While defendants tend to want to limit discovery, plaintiffs seek to broaden it. Typically, an aggressive plaintiff's attorney will send excessively broad discovery requests seeking documents regarding a host of products, which may require the production of thousands, even millions, of pages. This usually leads to numerous depositions and significant pre-trial motion practice. Instead of passively filing objections or offering certain documents or witnesses while objecting to the production of others, an alternative strategy is immediately to go on the offensive to prevent unnecessary protracted litigation time and expense. Federal Rule of Civil Procedure 26(b)(1) states in relevant part: "<u>Unless otherwise limited by court order</u> the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense..." (*emphasis added*).

Essentially, defendants should immediately move for a protective order setting the scope of discovery in a manner consistent with the law. In doing so, the defendant takes the lead, stands up first and says: "Enough." A defendant, and its insurer, should not be burdened with responding to irrelevant and unlawful requests that are not limited to similar products, not limited in time and which may also seek confidential, proprietary and/ or trade secret information without necessity.

<u>**Limiting the Scope**</u>

There are methods by which defendants and their insurers may limit scope because it is a discoverability issue based on relevance, not (as plaintiffs' attorneys argue) an admissibility issue. As the Southern District of Florida has stated, "succinctness is a virtue in the use of pre-trial discovery rules. Lawyers must fine-tune their questions as well as the responses thereto. In this operative procedure, use a scalpel, not a machete" (*see O'Connor v Kawasaki Motors Corp.*, U.S.A., 699 F. Supp. 1538 (S.D. Fla. 1998).

In framing the argument, it should be kept in mind the case is about one product and the jury will be asked only whether that product is defective and caused the damages alleged by the plaintiff; the product is on trial, not the company. Consequently, defendants can point to the absurdity of plaintiff's attempts to discover information regarding other products. By framing the argument as one of relevance, it places the burden on the plaintiff, and this approach is supported both by Federal Civil Procedure Rules and case law (*see SEC v. Ameritrust Funding, Inc.*, 2008 WL 926587 (N.D. Tex. April 7, 2009) ("The burden lies with the moving party to show clearly the information sought is relevant and would lead to the discovery of admissible evidence"; *AIlen v. Howmedica Leibinger*, 190 F.R.D. 518 (W.D. Tenn. 1999) ("Following a relevance objection, the burden shifts to the seeking party to demonstrate relevance to the subject matter.")

Importantly, the plaintiff is not permitted broad discovery to develop new claims not already identified in the pleadings (*see Koch v. Koch Industries Inc.*, 203 F.3d 1202 (10th Cir. 2000) (holding that a plaintiff who pleads in indefinite terms without knowing of specific wrongdoing and then hopes to find wrongdoing through massive discovery is abusing the judicial process).

Almost universally, discovery in a product liability action is limited to the product at issue and only those other products that are "substantially similar" (*see Alvarez v. Cooper Tire & Rubber Co.*, 75 So.3d 789 (Fla 4th DCA 2011); *Orleman v. Jumpking Inc.*, 2000 WL 1114849 (D. Kan. 2000); *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377 (8th Cir. 1992);

In re Richardson- Merrell, Inc., 97 F.R.D. 481 (S.D. Ohio 1983); but also see *Petersen v. Daimler Chrysler Corp.*, 2007 WL 2391151 (D. Utah 2007) (holding the plaintiff did not bear the burden of establishing "substantial similarity" for discovery, but would have the burden of establishing "substantial similarity" for admissibility of evidence at trial).

This limitation assures comparison of "apples to apples" (*see Piacenti v. General Motors Corp., 173 F.R.D. 221 (N.D. Ill. 1997*). Furthermore, if a plaintiff seeks discovery regarding other products, it is the plaintiff's burden to prove "substantial similarity" with evidence - not mere argument of counsel (*Alvarez*). Notably, several trial judges have been reversed for permitting discovery on other products.

Detailed Evidence and Trade Secrets

Despite the burden being on the plaintiff, defendants should submit detailed evidence distinguishing the product at issue from other products for which the plaintiff seeks discovery (*Barcenas v. Ford Motor Co.*, 2004 WL 2827249 (N.D. Cal. 2004) (holding that whether tires are "substantially similar" for purposes of discovery is determined by considering the specifics of each tire's design and manufacture).

The more specific the differences, the more difficult plaintiff's burden will be. Product liability cases frequently involve trade secrets (i.e., the manner in which products are designed, manufactured and tested). Courts typically place heightened burden on plaintiffs to show necessity to discover trade secrets (*see* Fed. R. Civ. P. 26(c) authorizing the court to make any order... "to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including... that a trade secret... not be revealed..."; *Centurion Industries Inc. v. Warren Steurer & Associates,* 665 F. 2d 323 (10th Cir. 1981) (holding that once trade secret is established under Fed. R. Civ. P. 26(c)(7), the seeking party must show disclosure is relevant and necessary).

Importantly, even if a protective order of confidentiality is in place to protect documents from disclosure outside litigation, plaintiffs still must meet a heightened burden when seeking trade secrets (for example, *Hajek v. Kumho Tire Co Inc.,* 2010 WL 503044 (D. Neb. Feb., 8, 2010). Further, ordered disclosure of "cat out of the bag" trade secrets can lead to immediate appellate review (*see Hartley Pen Co v. US District Court*, 287 F. 2d 324 (9th Cir. 1961) (issuing writ of mandamus directing trial court to set aside an order compelling manufacturer to disclose secret testing procedure); *see also American Express Travel Related Services Inc. v. Cruz,* 761 So. 2d 1206 (Fla 4th DCA 2000) (directing trial court to make findings of fact as to whether the requesting party had

"necessity" for materials requested such that "meaningful appellate review" can take place).

Conclusion

Defendants (and their insurers) should not be passive in the face of overly broad discovery and are assisted by recent changes to Fed. R. Civ. P. 26, highlighting the importance of "proportionality" in setting the scope of discovery. Perhaps most significantly, one change removes the "reasonably calculated to lead to the discovery of admissible evidence" crutch on which plaintiffs have historically relied. Ultimately, defendants can and should be the aggressors once overly broad discovery has been served and seek an order setting the scope of discovery. Thereafter, defendants should control the argument as one of discoverability and relevance to ensure the burden is properly on the plaintiff to tailor its discovery requests related to the product at issue, and not open the flood gates of discovery into other dissimilar products, which can exponentially and unnecessarily increase the time and expense incurred in defending such cases.

Prepared By:

Clyde & Co, Miami Office

Fred Fein, Eric Ruben, & Carly Celmer