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Products Liability Defense: A Consistent, Team-Oriented Approach

I. The Approach

A. The Team

One approach to handling products liability claims for large manufacturers involves the use of a consistent team to protect the company's interests. Such a team would generally consist of the following key players: (1) risk manager; (2) national counsel; (3) local counsel; (4) an outside expert; (5) an in-house representative with technical expertise; and 6) if possible, the same claims representative from the insurance company.

While this approach is not appropriate for all situations, it can be especially effective when there are multiple claims involving the same or similar products. The benefits of utilizing this approach are consistency and efficiency. By way of example, the risk manager and national counsel can ensure consistency with respect to positions taken on discovery (what exists and what will be produced), expert opinions and dealings with co-defendants who will frequently be business partners. This can help avoid the situation where positions taken in one case involving a particular product come back to haunt the company in a case filed in another jurisdiction years later. This approach also makes the defense process more efficient. For example, it allows in-house personnel to deal with the same attorney when gathering documents and providing testimony. This not only creates a comfort level but helps to ensure that things will not be missed—it is easier to gather documents responsive to discovery requests when the attorney has a good handle on what documents generally exist in that client's files.

B. Implementation

1. Local counsel selection

It is obviously important to retain a local attorney familiar with the law and courts in the jurisdiction where the suit is pending. It almost goes without saying that you want to choose someone who is experienced and competent in products liability defense as well. Just satisfying those elements, however, may not be enough in this type of situation. In this type of program, it is also essential that the firm and/or attorney serving as local counsel understand and accept its role in the process. That role can vary. Depending on the nature and size of the case, national counsel may be the one trying the case. In other cases, national counsel's role may be far more limited. The specific role the firm and/or attorney is anticipated to play should be discussed prior to retaining local counsel–any confusion in that regard can lead to a less productive relationship, which does not serve the client well. In that same regard, it is important to make sure the attorney understands and is comfortable with the fact that positions on certain issues (discovery, experts, etc.) cannot be taken without agreement from national

counsel and the risk manager. Many firms are used to simply filing documents or retaining consultants as a matter of course. It is vital to ensure that the firm and/or attorney understand the program up front–many are not comfortable giving up that degree of control.

2. Expert selection

Experts obviously play a critical role in products liability cases. Indeed, many times we do not truly learn what the case is about until the other side's expert issues a report detailing the alleged design defects, manufacturing defects or failures to warn. Because these cases often involve such a degree of uncertainty, it is important to have your own expert involved from the beginning. An expert provides guidance and assistance to national counsel throughout the litigation, noting potential theories that might be pursued and advising as to what can be done during fact discovery to defeat potential theories. This type of assistance is essential to even the most technically-savvy attorneys. Retention of the right expert should start as soon as possible, and the person should certainly be in place by the time of the initial product inspection.

In terms of the selection process, qualifications are obviously crucial—you need a person with experience in that field. It is also important to make sure that the person is a "teacher." By that, we mean someone who can teach the attorneys about the technical aspects of the case and ultimately, if needed, teach a jury. It is often difficult to find such people, but two of the best ways to do so are via in-person interviews and investigation into testimony they have previously provided. Given that products liability cases frequently turn on the expert opinions and their ability to explain complex engineering issues to a jury, this is one of the most important steps in the process.

Another point to consider, at least with respect to a testifying expert, is whether to use the same expert on multiple cases. That is obviously an efficient way to proceed but does subject the expert to criticism if he or she reaches the same conclusion each time. Decisions in this regard depend on the nature of the cases and the products. If the decision is made to use the same person, they need to be prepared to answer questions that will be asked regarding bias.

3. Document production

With products liability cases pending in different states and venues across the county, it is easy to have inconsistent productions of information. That is a recipe for disaster and one of the main reasons for having a consistent team working on each case. Prior to producing documents in a given case, national counsel and the risk manager need to agree regarding which categories of documents should be produced and the format of the production. Positions on privilege need to be consistent. If such an approach is not followed, and documents are produced in one case, those same documents (or categories of documents) will likely be subject to discovery in all future cases. A mistake in one case can thus have significant consequences that go far beyond that specific lawsuit.

To safeguard the corporation's confidential financial and proprietary information from disclosure to the public, competitors and future litigants, the corporation should also have a consistent policy regarding the use of non-disclosure agreements and/or protective orders. That serves two purposes. First, it obviously protects against the disclosure of confidential and proprietary information such as design, processes and financial information. It is important to make sure that competitors do not obtain such information.
Second, protective orders can be used to ensure that discovery produced in one case is not "available" to parties in similar actions going forward.

4. Inspections

Inspections of allegedly-defective products can occur pre-suit or during the pendency of the litigation. As noted above, it is crucial that an expert be retained by this time and for that person to attend.

It is also important to have a protocol that the key players are comfortable agreeing to with respect to the evidence. Familiarity with the product, and prior cases involving the product, should allow the company to ensure that evidence is preserved. Failure to do so can subject the company to claims that it destroyed evidence. Even if destructive testing is done with the consent of all parties, it can have negative repercussions—you might be agreeing to destroy evidence that will be needed in the future. Minimizing the risk of such consequences requires input from all team members drawing on their technical knowledge and experience with the product's design, manufacture, and history.

5. Corporate witnesses

Corporate witnesses are the face of the corporation. The corporation must typically select an individual from the corporation to appear at deposition and trial. Selection of this person is critically important to the defense for several reasons. First, it is essential that this person understand the product at issue. They need to be able to educate both counsel and the outside expert at the outset of the case.

Second, the corporation should choose a representative that the jury will see favorably as the face of the corporation. Many of these cases are laden with emotion, especially if the plaintiff in a personal injury case is seriously injured or worse. Juries tend to look favorably upon people they like. In these types of cases, the corporation will be viewed through the person who testifies and tells its side of the story. Cases turn on this person's testimony and the decision should not be made lightly—and certainly not based upon who is available to attend a product inspection on a given day.

6. The importance of having two technical "testifiers"

It is crucial that there is consistent testimony from both the outside expert and in-house representative—which means counsel must work as a liaison between the two, advancing ideas and theories to make sure the testimony (especially opinions) while not identical in terms of language, is very much in sync. This serves several purposes. First, making sure the positions are consistent makes it more difficult for opposing counsel to use inconsistencies in that testimony to undermine the credibility of the corporation and its positions. Second, it provides an opportunity to reinforce certain points with the jury. Next, it allows the company to paint a complete picture for the judge or jury—explaining everything about the product, including its design, manufacture and sale as building blocks for the opinions why there was no defect in the product. Trying to do that with just an expert is quite difficult because the expert was not involved in the design and manufacturing processes. Then, the expert can offer an independent opinion regarding that design and the alleged failure. Finally, it sends a message that the company believes in the theory of what happened in a given case and that it is not just an opinion from an expert that is paid for, usually at a high hourly rate.

7. Protecting privilege

Maintaining attorney-client privilege and assuring that certain conversations and correspondence are privileged is essential. To practice strong protection of the privilege requires training and diligence. Key players in the organization must understand that they should not be discussing issues related to a case internally, especially via email, with other employees. For example, in-house engineers will have a legitimate interest in understanding a product failure and will frequently discuss it with other engineers. Frank discussions can involve many theories and concepts that may not be accurate once all evidence is gathered. Those discussions will not be privileged. Such communication can be effectively used by opposing counsel to discredit any subsequent opinions and testimony from experts or in-house testifiers. While these types of discussions are important, they should be done in a way that they are privileged if at all possible. The key players should copy counsel on all email communication and involve counsel in any discussions relating to the matter.

C. Getting better— Lessons Learned After Each Case

1. Lessons learned after each case

At the conclusion of each products liability case, the team should meet to discuss the case, including what strategies worked and which ones were unsuccessful. While each case is different and involves judgment, calls based on sometimes incomplete information, the system and process can improve when all participants understand and learn from mistakes or adverse developments. That is the best way to minimize those mistakes in the future.

2. Sharing those lessons with new insurers and new team members

Naturally, key members of the team will vary over time. Policies may be placed with different insurers. New experts may be needed. People retire. In order to ensure continuity and that past lessons are not lost, it is important for the remaining key players to meet with new members of the team and not only educate them on how the process has worked, but make sure they understand what steps have had negative consequences.

II. Dealing with Divergent Interests of the Insured, Additional Insureds, Co-defendants, the Insurer, and Foreign Suppliers

A. Whether to accept a tender of defense … even if not technically required

Tenders of defense are common in the products liability context because of contracts that frequently exist between manufacturers, suppliers, distributors and sales representatives. While the technical answer to whether a tender should be accepted pursuant to language in a contract or insurance policy is often simple, other factors can make the decision more complicated in the products liability context.

For example, in many situations, the question of whether there is a duty to accept the tender may not be ripe due to factual issues or a denial may be readily appropriate. Simply denying a tender or deferring a decision, however, may not be in the best long-term interests of the company or its insurer. For example, a party may not technically be entitled to a defense, but its role might be such that liability

is unlikely and their cooperation and testimony could be very helpful to your defense. Another frequent scenario encountered is when the decision regarding whether there ultimately may be a duty to defend will be based upon facts not yet in evidence (at least for some counts) but it seems clear that the duty will likely be triggered once further facts become available.

In such scenarios, the party and their insurer need to consider whether it is in the interests of the client to accept the tender and have the defendants defended by the same attorneys, presenting a united front. That can remove the incentive for the tendering party to point the finger at your client, potentially increasing the company's exposure or creating issues of fact that might preclude a victory on dispositive motion. Each situation is different, but these are questions that should at least be explored. It is also important that the decisionmakers openly discuss these issues and the ramifications. That will help prevent second-guessing down the road.

B. The impact of using foreign suppliers

1. Suppliers of Complete Products

2. Component Part Manufacturers

U.S. companies increasingly rely on foreign suppliers of complete products or component parts. In doing so, they often lose/cede control over the design and manufacturing process, relying on Quality Control procedures that in practice may not be as robust as those expected in North America. Unless the foreign company in question is one that operates or has assets in a country that will enforce U.S. judgements, however, holding them responsible for defects in a product a U.S company sells can be difficult. China is an excellent example. Although China signed the Hague Conventions on Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S 163, and therefore mainland Chinese companies can be served by American consumers and companies, service is expensive and slow. Because serving a Chinese company by mail is not effective, *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir. 1981), *cert. den.*, and pleadings must be translated into Mandarin, service can take one year or more. Sometimes Chinese manufacturers are never served. And because there is no treaty nor reciprocal arrangement between China and the United States regarding the recognition or enforcement of civil judgments, Chinese courts can and do disregard them. Dan Harris, *"How to Sue a Chinese Company. Part III. Litigation Strategies and Enforcing Judgments"* China Law Blog (November 10, 2010).

While the issue of international enforcement is going to exist in many practice areas, it is especially problematic in the area of products liability. Restatement (Second) of Torts § 402A and Restatement (Third) of Torts § 2 both impose strict liability on every entity in the chain of commerce through whose hands a defective produce passes before reaching the consumer. As such, while there are exceptions and the law vary from state to state, a U.S company that actually had no role in the design or manufacture of a product can be liable for design or manufacturing defects—with no remedy against the true manufacturer. This can be true even when the manufacturer is identified and even technically subject to jurisdiction in the United States.

By way of example, in *Cassidy v. China Vitamins, Cassidy v. China Vitamins, LLC*, 89 N.E.3d 944, 947, *appeal allowed,* 94 N.E.3d 654 (Ill. 2018), and *aff'd and remanded,* 2018 IL 122873, Illinois's First District Appellate Court upended a provision of Illinois' Distributor Statute, 735 ILCS 5/2-621, which allows reinstatement of a lawsuit against a non-manufacturer seller where "the court determines that the manufacturer is unable to satisfy a reasonable settlement or other agreement with the plaintiff." 2-621(b)(4). The court read this "unable to pay" provision to include not just those defendants who do not have the means to pay, but also those who simply choose not to pay and avoid collection. *China Vitamins* held that a foreign company with "insufficient assets within the court's jurisdiction to satisfy the judgment" will be deemed to be "unable to satisfy" that judgment. *Id* at 954.

The holding in *China Vitamins* is significant outside of Illinois. Minnesota's "unable to pay" language is identical, Minn. Stat. Ann. § 544.41(2)(4), and Missouri's statute is quite similar. Mo. Rev. Stat. § 537.762. Other states may also have language that courts could interpret to effectively gut seller protections vis-à-vis judgment-proof foreign manufacturers.

3. The Need for Specific Contractual and Insurance Protections and Risks if Not Done Properly

With this caution in mind, there are ways to at least mitigate against these risks via contracts with the foreign supplier. Two contractual provisions are paramount. First, strong indemnification language should be included in every contract. For example, a contract should include language such as the following:

> Indemnification. Supplier shall defend, indemnify and hold harmless COMPANY and its officers, directors, employees, shareholders, subsidiaries and affiliates from and against any and all claims, losses, damages and expenses (including but not limited to court costs and attorney's fees, settlements and judgments, punitive and exemplary damages, economic loss and loss of profits, administrative costs, and fines and penalties) in any way resulting from or arising out of (i) the breach or failure of any representation or warranty set forth in this Agreement; (ii) the failure of any Products to conform to their specifications; (iii) any other breach, Event of Default (as defined below) or other default under this Agreement on the part of Supplier; (iv) any personal injury, death, sickness, disease or property damage relating to possession or use of the Products by COMPANY, its customers or employees or any third parties; (v) any negligence or willful misconduct on the part of Supplier or any of its employees, agents, subcontractors or suppliers; and (vi) any actual or alleged infringement or violation of any patent, trademark, copyright, trade secret or any other intellectual property rights resulting from the purchase, use or possession of the Products (except as otherwise expressly described herein). The obligations contained in this section shall survive and continue in full force and effect irrespective of the delivery of the products or the expiration or termination of this Agreement.

Second, the contract should require the foreign supplier to purchase insurance for products liability claims that would cover claims against the U.S. Company arising out of alleged defects in a product the foreign supplier designs or manufactures. This can be a separate policy or involve adding the U.S. company as an additional insured on an existing policy. It is also important that the policy be written with a company that does business, and is subject to jurisdiction, in the United States.

C. Potential conflict and interaction with co-defendants and managing competing expectations

1. Managing co-defendants with the same insurer

Potential conflicts may arise when two co-defendants share the same insurer. For instance, an insured may have concerns that a claims person for a co-defendant will have access to both parties' privileged information and strategy. Sometimes those concerns are expressed and sometimes it may cause a party to be less than candid with an insurer regarding the weaknesses in a case. Such a situation does not serve anyone's interests and can have a negative impact on the defense of the case. To alleviate this potential problem, the client and the insurer should have a frank discussion about protections that are in place to ensure that such information remains confidential and alleviate any concern.

2. Co-defendants' potential status as additional insureds

Frequently in products liability cases, a co-defendant is an additional insured on another co-defendant's policy. Typically, the CGL policy will contain an endorsement adding entities the co-defendant agrees to add via a written contract or agreement.

In these instances, the insurer must determine whether each insured co-defendant needs its own counsel and whether the insurer is required to provide independent counsel for one of the insureds. If both insured co-defendants have the same counsel, the co-defendants must accept that there is no privilege for the claims between them. Decisions in this regard are important and turn on a variety of legal and factual issues. Communication up front is essential to making the right decisions and avoiding second-guessing as the case progresses.

D. Conflicts between the Insured and Insurer

1. Defending the product vs. resolving the claim

2. Decreasing natural tensions

A corporation that is frequently accused of and/or sued for allegedly manufacturing, designing, and/or distributing defective products has an interest in ensuring that it is not an easy target for future litigants. Such a corporation also has an interest in defending the integrity of its product. If a judgment is entered finding that the corporation's product suffers a defect, plaintiffs in other cases can cite that judgment to support their claim. To prevent this from occurring, a corporation must aggressively defend

their product and may want to try a case (or settle it) to avoid negative impacts in litigation in the future.

On the other hand, an insurance company may be looking solely at the risk presented in a particular case. The insurer, for different reasons may desire to try a case or settle it on terms the company opposes. Navigating these divergent interests can be difficult and, if not dealt with in a manner that all can agree upon, can lead to disputes and litigation between the insured and its insurer. While it is not possible to avoid all such controversies, effective communication from the outset of a matter regarding interests and expectations can go a long way towards avoiding such disputes. That may require more than just emails and letters – face-to-face meetings seem to work much better.