CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

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Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432

Roundtable 3: Thursday, April 10, 2014 (3:30 pm – 4:30 pm)

Other Similar Incidents

"The Fly in the Ointment"

Products liability cases that are generally defensible claims often become more problematic when plaintiffs introduce evidence of "Other Similar Incidents" (OSI) to prove a pattern of conduct or knowledge by manufacturers. The result can be that national and international product manufacturers have to defend repetitive claims for similar products. Even in separate trials, plaintiffs' attorneys attempt to introduce OSI that involve the same product(s) developed in the same time frame. Considering product manufacturers have to respond to lawsuits and claims in a multitude of different jurisdictions, both nationally and internationally, it can be difficult to maintain consistent, coordinated defenses.

This panel will examine strategies in how to manage national defense tactics in dealing with OSI claims and how to prevent OSI's from being introduced into evidence. Additionally discussed will be practical examples of how to mitigate the impact of any OSI that may be introduced into evidence.

We will be presenting 4 different product scenarios and discuss effective management techniques from the perspective of in-house counsel, trial counsel and an insurance carrier. Audience participation is encouraged.

CASE FACT OUTLINES

Garcia v. American Motors Co.

On December 25, 2012, Ms. Garcia was operating a 2010 MY American Motors (AMC) vehicle when she was involved in an intersectional accident. As a result of the side impact in the accident, her vehicle rolled passenger side leading three (3) complete rolls coming to rest on its wheels. Ms. Garcia was found ejected from the vehicle, and suffered paraplegia. Ms. Garcia and her attorneys have sued AMC claiming that she was properly wearing her driver's seatbelt and that it "inertially released" during

the impact event causing her to be ejected. More specifically, they claim that during the vehicle-to-vehicle collision event, her right hip struck the back of the seatbelt buckle causing the buckle to release.

The 2010 AMC vehicle is a member of the 2006-2010 MY AMC passenger car generation. However, the particular buckle in question has been used by AMC for the last twelve (12) model years in its entire vehicle line.

The Plaintiff Attorneys have filed the following document request:

1) Please produce a copy of all claims and lawsuits alleging any unwanted release of the same type and kind seatbelt buckle used for the driver position of Ms. Garcia's vehicle or any substantially similar buckles.

(a) Please also produce all photographs, accident reports and expert reports of any party to these claims and lawsuits.

Testa v. Sunny RV, et al.

On September 11, 2011, Mr. Testa was on a creeper under his 2005 Class A motorhome doing an inspection and making repairs for an upcoming trip. While he was under the vehicle the vehicle began to slowly lower pinning him to the point that he was not able to move; however, with his cell phone he made several calls to his mother who was in the house only 200 feet from the garage where he was working, and additional calls to his girlfriend who was driving to work. Unfortunately, all of Mr. Testa's telephone calls were not answered before he asphyxiated, and he did not call 911. His mother was in the shower at the time of Mr. Testa's unanswered phone calls, and his girlfriend did not take calls while she was driving, and figured she would call him when she arrived at work.

Mr. Testa's mother, Stella and his surviving children brought suit for products liability, claiming that the vehicle spontaneously and defectively lowered without warning which is the direct cause of Mr. Testa's untimely and dreadful death.

There have been various pre-suit inspections in an attempt to determine the alleged malfunction before Plaintiffs have brought suit against several defendants, including:

1. RV Manufacturer – Sunny RV
2. Chassis Manufacturer – Checker Chassis
3. Hydraulics Manufacturer – Blue Hydraulic Co.
4. Valve Manufacturer – ABC Valve & Pipe

Plaintiff attorney has obtained documents from an unknown source that the Checker Chassis claims are trade secrets. While Checker is attempting to reclaim the confidentiality of the documents, the other defendants are trying to ascertain the point of alleged defect, which is proving to be more complex that all had anticipated. The finger pointing and derision amongst the defendants may prove to benefit only the Plaintiff case.

Richards vs Rollfree Walkers

Deceased claimant had acquired insured's rolling walker 4 months prior to his accident at the age of 78. He claims to have been seated on the walker in his driveway, while adding trash to a garbage can, when the walker leg suddenly broke. He was found by a neighbor lying in a culvert alongside his driveway. He was taken to the hospital via ambulance and ultimately died seven months later, after requesting no further medical intervention.

A carotid endarterectomy was performed approximately one week later after his wife reported that her husband acted as though he had sustained a stroke upon returning home. Claimant never fully recovered from that surgery and, subsequently endured a number of painful complications that led to his demise of renal failure and pneumonia. His wife maintained a detailed hand-written daily diary documenting various complications and the ensuing care issues, as well as her anger at "the broken leg on that damned walker" for causing all of his misery.

Once the insured noted the cluster of problems arising from a certain walker model, they undertook metallurgy and engineering tests. As a result, it was determined that the frames of some of these walkers had been compromised by substandard aluminum alloys which had been unknowingly purchased from alternate suppliers, as the popularity of these walker increased along with the number of orders. Additionally, it was determined that adjustment and cable holes in the frames weakened them, causing failure when the substandard metal was stressed. Subsequently, corrective design revisions as well as improved manufacturing processes were implemented, including testing each batch of steel to ensure each met specifications.

The challenge with defending this and similar claims related to requests for OSI information through the discovery process. Various of the methodologies we will be discussing were employed in limiting the defendant's exposure, resulting in a favorable settlement.

Davidson vs.Inflatable Pool Company

On July 1, 2011, twenty seven year old Michael Schmidt was using his family's in-ground pool. In conjunction with the pool, he had erected/installed a vinyl slide. The slide has a base, sliding mat and arch. A water hose is connected to the slide to provide a spray on the downslope of the slide. The slide can partially deflate. The belief is that this partial deflation created a defective condition that allowed Schmidt to strike the concrete edge of the pool causing his neck fracture and paralysis. The product has been recalled.

Walter Davidson's seven year old son, Charles was using a similar model same vinyl slide when partial deflation on a windy day caused the slide to topple while he was on it. As a result, the slide overturned and he suffered a compound break to his left leg.

CPSC naturally maintains a database of complaints, injury statistics and consumer opinion surveys. Plaintiff has made a FIOA request for this data regarding all water slides made by Inflatable Pool Company.

Inflatable Pool Company has received a number of complaints for its water slides and has kept records of its response to such complaints. Plaintiff has requested all complaints, claims, and lawsuits involving water slides. They have asked for any depositions of corporate witnesses testifying regarding any cases involving Inflatable Pool Water slides.

DISCOVERY

Plaintiffs will seek information regarding other similar incidents during the course of discovery. These requests may center upon other accidents, claims and lawsuits. Responses should be tailored to substantially similar instances, but must recognize that modern day discovery is very liberal and anything that is reasonably calculated to lead to discoverable evidence should be produced. Furthermore, requests can be expected for "customer complaints." The hearsay nature of this information may make it easier to avoid production and later admissibility.

Third party discovery may also take place. To the extent a government agency such as the CPSC is involved in collecting complaints, a FIOA request should be expected. Typically, the governmental agency will assert privacy

ADMISSIBILITY

In Product Liability cases, OSI evidence can be introduced to demonstrate notice, feasibility of an alternative design, or the existence of a defect. Lovett v. Union Pacific Railroad Co. 201 F. 1074 (8th Cir. 2000); Borden, Inc. v. Florida East Coast 772 F. 2d 750 (11th Cir. 1985); *Majdic v. Cincinnati Machine Co.*, 370 Pa.Super. 611, 537 A.2d 334, 340–341 (1988). Nevertheless, this broad avenue to admissibility should be substantially narrowed to instances that are **substantially similar.** Further, limitations include limiting the use to instances in which the OSI evidence actually is relevant to establishing a disputed issue of fact. OSI evidence must be scrutinized because it directs the jury's focus on events that do not involve the actual plaintiff in the case as at issue. The burden of proof is on the party seeking to introduce the OSI evidence. The party seeking exclusion need not prove dissimilarity. Barnes v. General Motors Corp., 547 F. 2d 275.

SUBSTANTIAL SIMILARITY

Substantial Similarity can involve issues related to products as well as circumstances. First Security Bank v. Union Pacific Railroad Co., 152 F. 3d 877 (8th Cir. 1998). OSI evidence should be limited to the same product and specific model. Katzenmeier v. Blackpowder Products Inc., 628 F.3d 948 (8th Cir. 2010);Cole v. Kartridg Parks Co. 840 F. 2d 602 (8th Cir. 1988) Naturally, plaintiff lawyers will seek to introduce evidence of allegedly defective products manufactured by the same defendant, even though it involves different products or models. As you might surmise, the purpose of this attempt is to focus the jury on defendant's conduct and or "bad acts" of other defective products and not on the actual defect in the case at trial.

The substantial similarity test requires courts review the actual facts of the prior accidents. Barker v. Deere & Co., 60 F. 3d 158 (3rd Cir. 1995). Such a review can result in Mini-trials requiring a jury review of each of the prior claims. Such a procedure would needlessly lengthen the trial. In Uitts v. General Motors Corporation, 411 F. Supp. 1380 (E.D. Penn. 1974) it was the basis for excluding the OSI evidence.

Evidence of similar accidents occurring at substantially the same place and under the same or similar circumstances is generally admissible to prove a manufacturer's constructive notice of a dangerous or defective condition. It is not enough that the occurrence of previous accidents involved the very product at issue in the current litigation. *Soldo v. Sandoz Pharmaceuticals Corp.*, 244 F.Supp.2d 434, 550 (W.D.Pa.2003). For a court to make a finding of substantial similarity, and, therefore, to permit the admission of such evidence, the court "must be apprised of the specific facts of previous accidents."

UNDUE PREJUDICE

Although evidence of substantially similar incidents may be admitted in a products liability case, evidence of other injuries may also raise extraneous controversial points, lead to a confusion of issues, and present undue prejudice disproportionate to its usefulness. *Trejo v. Keller Indus., Inc.*, 829 S.W.2d 593, 599 (Mo.Ct.App.1992).

Evidence of other accidents can also prove notice of the existence of defects. *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1108 (8th Cir.1988). Furthermore, evidence of other accidents may be relevant to proving the defendant's knowledge/ability, i.e. notice, to correct known defects, the magnitude of the danger, the lack of safety for intended uses, or causation. *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 625 (8th Cir.1983). Some courts relax the standard for similarity, and thus, admissibility if the OSI evidence is being used to show notice of the allegedly defective condition. *Cook v. State*, 431 N.W.2d 800, 803 (Iowa 1988).

Although accident reports or other documents consisting of complaint statements made by consumers to a manufacturer constitute hearsay, and thus would be inadmissible for any purpose that assumes the truth of the allegations made in the complaints, such evidence could be admissible as tending to show the manufacturer's notice or awareness of danger, provided the incidents alleged in the complaints are substantially similar to the one at issue. In *Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 381 (5th Cir.1989) the court held that although accident reports from consumers to gun manufacturer were hearsay and inadmissible for any purpose that assumed the truth of the allegations made in the reports, the district court properly admitted 70 of the 570 consumer reports for purposes of proving notice and awareness of danger caused by misfiring of gun.