



CLM 2021 Focus: Diversity, Equity & Inclusion, Management Liability, Medical
Malpractice, Product Liability, Professional Liability, Transportation, Claims & Litigation
Management Conference
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Narrative

Hot Topics in Product Liability

I. Introduction

Join an interactive discussion about what product liability topics to watch in 2022! We will discuss the latest trends, verdict highlights, and what you need to know right now. From expert discovery rulings to blockbuster verdicts, you will not want to miss these industry insights.

It is critical that adjusters handling product liability claims are aware of current events and trends in product liability law. Insurance adjusters will gain insight into the latest decisions on topics ranging from expert discovery to evidence preservation, appellate decisions on important topics such as scope of discovery and expert testimony standards, and regarding the latest insightful verdicts. As a result of this course adjusters will be better prepared to manage such product liability claims.

II. What's Trending in Product Liability Law

a. Jurisdiction

i. Recent US Supreme Court Opinion

In *Ford Motor Co. v. Mt. Eighth Judicial Dist. Ct.*, 141 S.Ct. 1017 (2021) the United States Supreme Court issued an 8-0 decision holding that Ford was subject to specific jurisdiction because the auto maker had 120 dealerships in the two subject states where it sold, serviced, and advertised the allegedly defective car models. The Court found that Ford was subject to specific jurisdiction regardless of whether Ford's contacts with the subject forum were a cause of the injury.

ii. Distinguishing *Ford*

Despite the fact that the *Ford* opinion does not disturb the Court's prior rejection of specific jurisdiction over claims by non-resident plaintiffs against a non-resident defendant whose product allegedly injured the plaintiffs, this recent opinion is nonetheless concerning to product manufacturers as plaintiffs may attempt to misapply *Ford*.

b. Scope of Discovery – A Refresher

i. Discovery is Huge

Discovery is estimated to make up approximately 90% of all litigation costs. Lawyers for Civil Justice, et al., *Litigation Costs Survey of Major Companies 3* (May 2010) studied legal fees and discovery costs in "major" closed cases (defined as cases with litigation costs greater than \$250,000) for Fortune 200 companies. The average company paid discovery costs per case of \$621,880 to \$2,993,567.

Companies at the high end of the range paid discovery costs per case of \$2,354,868 to \$9,759,900. The ratio of pages discovered to pages entered as exhibits was up to 1000/1. As a percent of revenue, multi-national companies spend a disproportionate amount on litigation in the U.S. relative to foreign jurisdictions.

ii. The New Standard

Many still forget that Federal Rule of Civil Procedure 26(b)(1) changed in 2015. In Federal Courts the current scope of discovery is as follows: "Unless otherwise limited by court order 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..." The

Proportionality Rule is implemented meaning that discovery sought must be proportional to the needs of the case considering:

- Importance of issues
- Amount in controversy
- The relative access to relevant information
- Parties' resources
- Importance in discovery of resolving issues
- Whether burden or expense outweighs likely benefit

iii. Takeaway

The "reasonably calculated" standard is no longer applicable. Why the Change? The "reasonably calculated" standard was being used incorrectly to define the scope of discovery. Due to this problem, this phrase has been removed. In essence, discovery was becoming too broad and burdensome. Relevancy alone is no longer sufficient, discovery must also be proportional to the needs of the case. The parties and the Court have the collective responsibility to consider proportionality during discovery and in resolving discovery disputes. Courts have addressed some of the cost burdens of discovery to satisfy the proportional standard by ordering cost-shifting in certain instances. Ordering staged discovery, especially when certain claims are subject to pending motions to dismiss. Some courts have held that the burden rests on the resisting party to show that the discovery requests violate the proportionality standard...while others have held that parties seeking discovery bear an initial burden of showing relevance and proportionality.

c. Challenging Medical Bills

i. Challenge Phantom Damages

Challenging phantom damages in personal injury trials is treading as defense attorneys try to prevent jury verdicts that don't reflect the actual costs of medical care.

ii. Defend Against Large Verdicts

It is a problem when the jury only hears about the billed price of medical expenses. The price of billed medical expenses is not the actual amount paid by an insurance company, for example, because they negotiate discount prices with health care providers. A jury hearing artificially inflated figures for past medical expenses leads to inappropriately large verdicts against defendants and a windfall for plaintiffs.

iii. Challenge Plaintiff and Doctor Collusion

Defense bars and insurance lobbyists are fighting evidence of these artificial medical bills or phantom damages and they are taking on personal injury attorneys who collude with physicians to artificially inflate medical bills in order to get paid more. “Letters of protection” act like liens that defer payment and entitle the physicians to a cut of any injury verdict, a practice that does not exist outside of civil litigation.

III. Unfavorable Venues and Blockbuster Verdicts

a. Watch Out for These States

The panel will discuss states that are notoriously unfavorable to defendants in product liability cases such as California, New York, and Georgia and what states to watch in 2022.

b. Recent Blockbuster Product Liability Verdicts

The panel will review the most recent blockbuster verdicts and discuss the “takeaways” for product liability defendants.