

Narrowing The Scope Of Discovery For Substantially Similar Products

Bradley C. Nahrstadt

A danger lurks for the defendant in every products liability case: that overly broad discovery by the plaintiff will lead to misleading distractions in the courtroom.

PRODUCTS LIABILITY ACTIONS are not easy cases to prepare, nor are they easy cases to try. More often than not, such cases involve complex industrial or consumer products, monumental amounts of documents, intricate theories of liability and defense, and horrific injuries. Defense counsel must make sense of a variety of

complex issues and present a coherent, cohesive, and streamlined theory of defense to the jury. Obviously, the defense attorney who is successful in preventing the introduction of “extraneous” issues to the jury will be far ahead of the game in terms of limiting the scope of the case and concentrating the jury’s focus on the

Bradley C. Nahrstadt is a partner with Williams Montgomery & John Ltd., in Chicago.

salient legal issues. One of the most successful ways of limiting the introduction of "extraneous" issues is to prevent the plaintiff's attorney from finding out about them during the course of discovery. The purpose of this article is to discuss various strategies that may be employed by defense counsel to narrow the scope of discovery requests seeking information regarding other products manufactured by a products liability defendant and to discuss relevant case law in which the court has been asked to decide whether a defendant should be compelled to provide information regarding other products.

THE PROBLEM • Every defense attorney who has ever handled a products liability action is all too familiar with the unbelievably broad discovery requests propounded by plaintiffs' attorneys. More often than not, plaintiffs' attorneys serve defense counsel with interrogatories or requests for production of documents which request volumes of information regarding not only the product at issue, but other products that have also been manufactured by the defendant. These interrogatories and requests for production of documents often request information regarding the design, manufacture, production, distribution, and sale of any product the defendant has ever manufactured which is remotely similar (or in some cases not even remotely similar) to the product which the plaintiff claims caused his or her injury.

When faced with such expansive discovery requests, defense counsel must take a restrictive, conservative approach to providing information to plaintiff's counsel regarding products other than the product at issue in that particular case. The reasons for serious, aggressive attempts by defense counsel to limit the amount and type of information supplied about the manufacture of other products should be obvious. Evidence regarding other products, including evidence of problems encountered with

other products, if admitted into evidence during the course of a trial, can confuse the jury and may lead it to wrongly conclude that the product at issue is defective. In addition, the more negative information the plaintiff's attorney can present to the jury about the defendant's products, the more likely it is that the jury will return a plaintiff's verdict based not on quality, but quantity. Most importantly, improper introduction of damaging evidence concerning other products manufactured by the defendant can make the difference between a plaintiff's verdict and a defense verdict, an award of punitive damages as opposed to only compensatory damages, or a moderate compensatory damage award and an excessive compensatory damage award.

OBJECTIONS BASED ON PRIVILEGE • Often, plaintiff's counsel will serve interrogatories or production requests which ask the defendant to identify and discuss the contents of, or to produce, all documents, whether of an internal or external origin, which in any way refer to or deal with alleged incidents of injury incurred while using a product similar to the product being used by the plaintiff at the time of the injury or any product manufactured by the defendant. Undoubtedly, a literal response to interrogatories or requests for production of documents which seek this type of information would result in the disclosure or production of material protected by the attorney-client privilege or the work product doctrine. For that reason, requests such as these should be objected to on the grounds that producing such information would violate a privilege held by the defendant or its attorneys.

Making The Privilege Showing

Defense counsel should keep in mind that when making a claim of privilege, the burden is on the defendant to affirmatively show that the

information sought by opposing counsel is subject to such protection. Formally claiming a privilege should involve identifying the information and documents claimed to be privileged, and the precise nature of the privilege asserted. This is especially true when the nature of the information or documents the plaintiff seeks does not reveal an obviously privileged matter. Defense counsel would be well advised to prepare a detailed privilege log identifying, with specificity, the information or documents sought to be withheld pursuant to a privilege, the date or some other identifying information that can serve to readily identify the documents in question, and the precise nature of the privilege asserted. *See, Paulsen v. Case Corporation*, 168 F.R.D. 285 (C.D. Cal. 1996); *Kerr v. United States District Court, Northern District of California*, 511 F.2d 192 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976). In addition, defense counsel may want to consider asking the court to conduct an in camera inspection of those documents which the defendant claims are protected by a privilege. Such an inspection, coupled with a detailed privilege log and persuasive argument by counsel, may very well convince the court to protect the documents from disclosure.

OBJECTIONS BASED ON SCOPE • Many times, the plaintiff's attorney will serve interrogatories or requests for production of documents which ask for "any and all" information concerning a product, for example, "any and all child restraint seats" manufactured by the defendant; "any and all" documents regarding the design, testing, manufacture, distribution or sale of "any and all" table saws manufactured by the defendant; or "any and all" reports of injury involving "any and all" automotive lifts manufactured by the defendant. Discovery requests formulated in this manner are objectionable on the grounds that they are overbroad.

Test For Overbroad Requests

Some state courts have held that requests for production of documents and, arguably, by extension, interrogatories, are not overbroad if they are:

- Limited to the time frame in which the product was manufactured;
- Limited to the production model of the product involved and the alleged defective components involved; and
- Limited to the issues of alleged defects raised in the plaintiff's complaint.

See, e.g., State ex rel. Kawasaki Motors Corporation v. Ryan, 777 S.W.2d 247 (Mo. Ct. App. 1989); *Herman v. Andrews*, 1999 Mo. App. LEXIS 2441 (Mo. Ct. App., Dec. 21, 1999).

Obviously, interrogatories and requests for production of documents such as the ones detailed above are not limited in terms of time frame, the production model or components involved, or the issues of alleged defects raised in the plaintiff's complaint. When faced with discovery requests such as these, it is incumbent upon defense counsel to object. If plaintiff files a motion to compel, defense counsel must argue that in order to be appropriately answered (assuming the court would order them to be answered), plaintiff must provide the defendant with detailed information regarding the specific defect at issue, the specific product at issue, and the specific theory or theories of liability at issue.

"Any And All" Lacks Particularity

Defense counsel should be aware of the fact that some courts have determined that requests that begin with the phrase "any and all" fail to describe items with reasonable particularity and therefore need not be answered. *See, e.g., State of Missouri ex rel. Wilson v. Copeland*, 685 S.W.2d 252 (Mo. Ct. App. 1985); *State of Missouri ex rel. The Upjohn Company v. Dalton*, 829 S.W.2d

83 (Mo. Ct. App. 1992); *In re: IBM Peripheral EDP Devices Antitrust Litigation*, 77 F.R.D. 39 (N.D. Cal. 1977) (stating that such discovery goes beyond a mere fishing expedition and rather seems designed to “drain the pond and collect the fish from the bottom”).

Other courts have held that interrogatories and requests for production of documents which seek information for an extended period of time are overbroad. *See, e.g., Wooten, Honeywell & Kest, P.A. v. Posner*, 556 So.2d 1245 (Fla. Dist. Ct. App. 1990) (holding that a request seeking documents covering a time span of eight years was overbroad and unduly burdensome); *Toyota Motor Corporation v. Greene*, 483 So.2d 130 (Fla. Dist. Ct. App. 1986) (holding that discovery requesting information concerning defects in the manufacture, installation, operation, or maintenance of a cruise control system for 10 years was overbroad); *Ralston v. Smith & Nephew Richards, Inc.*, 1999 U.S. Dist. LEXIS 12171 (D. Kan. July 29, 1999) (interrogatories requesting information regarding intramedullary nails after the date that the nail implanted in the plaintiff failed held to be overbroad and irrelevant). Whenever discovery requests are propounded which fail to contain reasonable time limitations (generally three to five years before the manufacture of the product or the date of the alleged accident) or seek information which is not limited to the model involved or the defect at issue, counsel must vigorously protest the production of such product information.

OBJECTIONS BASED ON RELEVANCY AND MATERIALITY • Perhaps the strongest objection which can be made to interrogatories or requests for production of documents which seek information regarding products other than the product alleged to have injured the plaintiff is an objection based on relevancy and materiality. In initially raising an objection to the pro-

duction of information regarding “similar products,” defense counsel should be prepared to argue that only information regarding the very make and model of the product at issue in the plaintiff’s complaint is relevant and, therefore, subject to production. Some courts have specifically held that there is no relevancy objection when interrogatories and requests for production of documents request information solely concerning the same model of product that is at issue in the plaintiff’s case. *See, e.g., Scaturro v. Warren & Sweat Manufacturing Company, Inc.*, 160 F.R.D. 44 (M.D. Pa. 1995).

Substantial Similarity

In those jurisdictions where it is clearly apparent that the court will not limit discovery solely to the make and model of the product that allegedly caused the plaintiff’s injury, defense counsel’s argument should be that the defendant should only be required to produce information regarding substantially similar products. The heart of this argument is convincing the court that the only relevant information regarding other products is information about products that are substantially similar. Substantial similarity should be based on the sharing of pertinent characteristics with the product at issue. For example, one court has ruled that discovery requests seeking information regarding 38 different models of all-terrain vehicles were not relevant to the case at bar since, although the 38 different models had some common characteristics, all were not “substantially similar.” *See, e.g., Kawasaki, supra*. In the *Kawasaki* case, the court limited the plaintiff’s discovery requests to the same production model of ATV involved in the plaintiff’s accident. Another court has held that interrogatories and requests for production of documents regarding “substantially similar” intramedullary supracondylar nails sought irrelevant information since the discovery requests were not

limited to the type of nail imbedded in the plaintiff. See, e.g., *Ralston*, supra. The *Ralston* court also held that discovery requests seeking information about intramedullary supracondylar nails intended for use in locations of the body other than the femur (the area where the nail was inserted in the plaintiff) were irrelevant. Yet another court has held that where "similar products" were separately developed and had different applications, information regarding the other products was not reasonably calculated to lead to admissible evidence and, therefore, was not discoverable. See, e.g., *Bennett v. McNeilab, Inc.*, 1985 U.S. Dist. LEXIS 13481 (E.D. Pa., Nov. 26, 1985). All of these cases stand for the proposition that plaintiffs must demonstrate a substantial similarity between the product at issue and the other products they seek information about before the court will allow such discovery.

Other cases which have required plaintiffs to show substantial similarity between the product at issue and other products manufactured by the defendant include:

- *Goodyear Tire & Rubber Company v. Coeey*, 359 So. 2d 1200 (Fla. Dist. Ct. App. 1978) (discovery order overbroad in part because of lack of evidence that tires manufactured at plant were substantially similar to tire involved in case);
- *Prashker v. Beech Aircraft Corporation*, 258 F.2d 602 (3rd Cir. 1958), cert. denied, 358 U.S. 910 (1958) (court permitted discovery of three model years preceding the model of issue but denied discovery as to a still earlier model, finding it was too dissimilar);
- *Uitts v. General Motors Corporation*, 62 F.R.D. 560 (E.D. Pa. 1974) (plaintiff denied information about a vehicle recall when the models recalled did not have the same components as those at issue in the litigation);
- *Frey v. Chrysler Corporation*, 41 F.R.D. 174 (W.D. Pa. 1966) (request for discovery of models

with the same type of component as in the accident vehicle was denied on grounds that the word "type" was too vague and the court limited discovery to models with the identical components); and *Fine v. Facet Aerospace Products Company*, 133 F.R.D. 439 (S.D.N.Y. 1990) (requests for documents regarding other models of aircraft denied as irrelevant).

Defense counsel should be aware of the fact that a number of courts have held that discovery requests seeking information regarding other products are relevant, and therefore are required to be answered, even though the requests seek information about products that are not "substantially similar" to the product at issue. See, e.g., *McLendon v. General Motors Corporation*, 1990 U.S. Dist. LEXIS 13425 (M.D. Ala., July 26, 1990); *Kramer v. The Boeing Company*, 126 F.R.D. 690 (D. Minn. 1989).

Obviously, the standard for the admissibility of evidence concerning other products is far different from the standard for discoverability of information concerning other products. Although the purpose of this article is not to discuss the admissibility of evidence regarding other products, one particular issue deserves discussion. Sometimes plaintiffs will ask defendants to produce information concerning accidents involving other similar products. Some states, such as Florida, follow established rules that before similar accidents or incidents are either discoverable or admissible, the plaintiff must establish that the incidents are "substantially similar." See, e.g., *Perret v. Seaboard Coastline Railroad*, 299 So.2d 590 (Fla. 1974); *Caterpillar Industrial, Inc., v. Keskes*, 639 So.2d 1129 (Fla. Dist. Ct. App. 1994). In those jurisdictions where the court requires that circumstances of other accidents must be substantially similar to the facts at issue in the instant litigation, defense counsel must insist that the plaintiff present sufficient proof of substantial similarity before the production of other accident evidence. Evi-

dence of other accidents is admissible because the substantial similarity between the other incidents and the one in question may be used to support a reasonable inference of the existence of a dangerous condition. Therefore the courts should disallow discovery requests regarding products which are completely dissimilar, accidents which were caused by defects or conditions substantially different from those alleged in the instant case, or regarding products, however similar or dissimilar, manufactured during time periods which render the information inadmissible. *See, e.g., Lohr v. Stanley-Bostitch, Inc.*, 135 F.R.D. 162 (W.D. Mich. 1991); *Culligan v. Yamaha Motor Corporation*, 110 F.R.D. 122 (S.D.N.Y. 1986).

OBJECTIONS BASED ON BURDEN • Since most plaintiffs' attorneys are interested in obtaining all of the documents generated by a defendant concerning most or all of its products, defense counsel often will have an opportunity to argue that the scope of the plaintiff's interrogatories and requests for production of documents places an undue burden on the responding defendant. Some courts have held that interrogatories and requests for production of documents which seek information and tangible evidence regarding a large number of products are indeed unduly burdensome. *See, e.g., Caterpillar Industrial, Inc. v. Keskes*, supra; *State ex rel. Kawasaki Motors Corporation v. Ryan*, supra.

This objection is particularly appropriate in situations where the product has been widely distributed, in vast quantities, over an extensive period of time. When making an argument that requests for information concerning similar products are unduly burdensome, defense counsel would be well advised to quantify for the trial court the manner in which such discovery would be burdensome by showing the volume of documents involved, or the number of man-hours required for their production, or some

other quantitative factor that would indicate to the judge that production would require an expenditure of unreasonable amounts of time, effort, and money. In *Caterpillar*, supra, the court held that the plaintiff's discovery requests were burdensome based on an affidavit supplied by the defendant's technical support manager. In his affidavit, the technical support manager indicated that Caterpillar's technical support consisted of a small, very busy staff that did not include a secretary or paralegal. The affidavit went on to state that the identification, removal, copying, and return of any documents responsive to the plaintiff's production requests would require the skills of a knowledgeable technical person and would take at least three full working days to complete. Based on this affidavit, the court ruled that the requests were too burdensome.

OBJECTIONS BASED ON TRADE SECRETS/PROPRIETARY INFORMATION •

One further objection that can be made to discovery seeking information regarding similar products is that providing such information would require the defendant to divulge trade secrets. Federal Rule of Civil Procedure 26(c)(7), as well as a number of state rules of procedure, provide protection from discovery for "a trade secret or other confidential research, development, or commercial information." Some courts have expressed a reluctance to order disclosure of trade secrets without a clear showing by the opposing side of an immediate need for the information. *See, e.g., In re: "Agent Orange" Product Liability Litigation*, 104 F.R.D. 559 (E.D.N.Y. 1985). If an argument can be made that the information requested by the plaintiff's attorney regarding the design, development, manufacture or production of other products could result in the disclosure of trade secrets, such an objection should be lodged by the defendant's attorney.

Supporting The Objection

It is important to remember that if a defendant objects to the production of information based on the potential disclosure of trade secrets or proprietary information, the defendant must explain and support the objection with concrete facts. The support should come in the form of affidavits from knowledgeable employees regarding the nature and extent of the confidential information and very specific explanations as to how the release of that information to the other side would harm the defendant's position in the market. Again, defense counsel may wish to consider the possibility of having the documents reviewed by the judge in camera for the court to obtain the full flavor of the proprietary information at issue. If the court decides that documents containing proprietary information must be produced, defense counsel should request, pursuant to Fed. R. Civ. P. 26(c)—or the applicable state court rule of procedure—that a protective order be entered limiting the production of the proprietary information to plaintiff's counsel and plaintiff's expert witnesses. The protective order should also require that the documents, and all copies made thereof, be returned to the defendant at the conclusion of the litigation. At least one court has held that a defendant must seek a protective order under Rule 26(c), as opposed to simply refusing to produce the documents, when the defendant contends that the documents contain proprietary information. *See, e.g. Paulson v. Case Corporation, supra.*

INFORMATION REGARDING PRODUCT RECALLS • As soon as defense counsel knows that a product recall will be an issue in the case, he or she must immediately obtain from the manufacturer all relevant data and correspondence concerning the recall and the alleged defect in question, including correspondence between the manufacturer and the governmental

agency requiring the recall (if appropriate) and all data supplied by the defendant in initially reporting the alleged defect or produced in response to an inquiry concerning the existence of an alleged defect or problem with the product. Defense counsel should also request copies of all internal company documents regarding the recall, including: customer complaints, orders for repair parts, product testing, data, inspection results, quality control reviews, reports of dealers and reports of sales and service personnel. In addition, defense counsel must remember to request that the plaintiff produce copies of all documents in the plaintiff's possession regarding the recall of the product in question, or other products manufactured by the defendant, including any and all information received in response to Freedom of Information Act requests.

Since most courts take a liberal view regarding discovery, it may be extremely difficult to keep information regarding product recalls, including recalls of other products manufactured by the defendant, out of the hands of the plaintiff's counsel. In a number of reported decisions, the courts have held that to be relevant in a discovery sense, the information requested must only be germane, conceivably helpful to the plaintiff, or reasonably calculated to lead to admissible evidence. *See, e.g., Parsons v. General Motors Corporation*, 31 Fed. R. Serv. 2d 1186 (N.D. Ga. 1981); *Swain v. General Motors Corporation*, 81 F.R.D. 698 (W.D. Pa. 1979). Hence, in one case, in which the plaintiff was proceeding under a theory of defective design, and sought information regarding dissimilar vehicles, the court decided that such information was relevant because the design of products is evolutionary in nature. *Parsons, supra.* And in a second design defect case, the court allowed discovery of recall information regarding unrelated motor mounts since, according to the court, such information was reasonably calculated to

lead to the discovery of information regarding the issues of “notice, causation and...whether or not prior defects of which the defendant was aware and which caused the defendant to recall the earlier [motor] mounts were completely eliminated by the subsequent [motor] mounts.” *Swain*, supra, at 700.

Limits Of The Standard

Although the standard for discovery of information in a products liability suit is a liberal one, defense counsel must remember that the standard is not without limits. In the case of *Uitts v. General Motors Corporation*, supra, the plaintiffs sought to recover for injuries allegedly caused by defective engine mounts. The plaintiffs alleged that General Motors was negligent in designing, manufacturing, testing, inspecting and assembling the engine mounts in question. During the course of discovery, the plaintiffs requested information regarding the recall of vehicles for a similar defect in models of cars distinct from the model involved in the accident giving rise to the plaintiffs’ claims. When General Motors refused to provide that information, the plaintiffs filed a motion to compel. The court denied the plaintiffs’ motion to compel on the grounds that the information sought was not relevant or reasonably calculated to lead to the discovery of admissible evidence. The court was persuaded by affidavits presented by the defendant from appropriate corporate officers and employees detailing the configuration of the motor mounts in the plaintiffs’ vehicle and the fact that the recall in question dealt with different motor mounts in different vehicles. *Uitts v. General Motors Corporation*,

supra, at 562. Likewise, in the case of *Butkowski v. General Motors Corporation*, 497 F.2d 1158 (2d Cir. 1974), the court endorsed the denial of recall information involving component parts since the defect that allegedly caused the plaintiff’s accident differed from the defect that triggered the recall.

The *Uitts* and *Butkowski* cases serve as a reminder that defense counsel must be ever vigilant in their efforts to limit discovery of information regarding product recalls of the same or similar products. Undoubtedly, an argument regarding relevancy should be entertained whenever the plaintiff is seeking recall information regarding products or defects not associated with the plaintiffs’ cause of action.

CONCLUSION • Without a doubt, the “discovery deck” is stacked against defendants in products liability actions. State and federal courts believe that, in an effort to take the surprise out of litigation, both sides should provide each other with any information which is reasonably designed to lead to the discovery of admissible evidence. More often than not, this belief translates into “give them everything you’ve got and we’ll sort it all out at the time of trial.” Defense counsel, and the product manufacturers they represent, cannot afford to simply roll over and “give them everything you’ve got.” Discovery requests which seek information about products other than the product at issue must be resisted—seriously and aggressively—to streamline the defense and keep the focus where it belongs: on the product that was being used at the time of the plaintiff’s alleged accident.

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