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Top Product Liability Motions And How To Win Them

By **Erin Marie Daly**

Law360, New York (July 13, 2009) -- The stakes are higher than ever in product liability litigation, with millions — and sometimes billions — of dollars in damages on the line in some cases. While scoring a victory on one motion in such actions may not necessarily win the war, it can help sway the course of the litigation.

Here, several top product liability litigators have rounded up the most important motions in a product liability lawsuit and some of the key strategies to bring home a win.

Motion for Summary Judgment

Obvious but crucial, this is often the very first motion that should be drafted when beginning the defense of a product liability case, according to experts.

Its preparation requires knowing the avenues available for summary judgment, both legal and factual, according to Mark Miller, a partner at Wildman Harrold Allen & Dixon LLP whose clients include medical device, pharmaceutical, heavy equipment and consumer products manufacturers, among others.

“Drafting this motion early on in the case creates a blueprint and will govern defense discovery and other case development issues,” Miller said.

Each product liability case is different, and a strategy must be developed in each case to fit the case facts, the venue and judge, and the client's goals, according to George Soule, a managing partner at Bowman and Brooke LLP who focuses his practice on commercial, personal injury and product liability litigation defense.

Summary judgment motions, Soule said, may be used to dismiss inappropriate legal theories — such as consumer fraud or deceptive advertising claims — or other claims

that are not legally viable, such as breach of warranty claims barred by the statute of limitations.

“Summary judgment may also be used to obtain dismissal of failure-to-warn claims when the plaintiff will not be able to prove that the alleged failure to warn caused the accident, such as when the product user did not read the warning or the user already knew the product's danger and chose to encounter it anyway,” he said.

In addition, Soule said, summary judgment may be used to dismiss weak punitive damages claims.

“In these instances, summary judgment is used to narrow the claims and focus the litigation on the contested issues that will be the heart of trial,” he said.

Occasionally, summary judgment may be based on a defense that will result in dismissal of the entire complaint, Soule added.

“While it may be difficult to obtain pretrial dismissal of a claim of defect, there may be strong causation defenses that may result in summary judgment,” he said. “Even if the defense does not hit a home run with such a motion, the process may educate the court better on the defendant's claims and may flush out more of the plaintiff's arguments.”

James W. Huston, a partner at Morrison & Foerster LLP whose practice focuses on product liability matters, both in litigation and counseling product manufacturers, said summary judgment motions were one avenue through which expert opinions could be identified and eliminated.

“This switches the burden to the plaintiffs to state what happened and how the injury was caused,” he said.

Motion to Strike Cause of Action

Depending on the size of the case, the jurisdiction, and how carefully or sloppily crafted the complaint is, a motion to strike certain causes of action may be in order, according to Huston.

“You still find people that draft complaints as if it were 1960, when the rules were much different, and are very sloppy about including causes of action that are unnecessary or improper,” Huston said. “You have to ask yourself whether it makes sense to try to narrow the case down to the causes of action that are correct for that particular jurisdiction.”

Such a motion can be helpful, to some extent, because it can help the plaintiffs understand the hurdles they'll have to get over once the complaint is boiled down to its essence, Huston said.

“Often, you'll want to force them to state what it is that failed, and how it failed,” he said. “But you have to be careful, because it's very unlikely you'll get out of the case completely at the pleadings stage.”

A motion to compel interrogatories is often a logical next step, Huston added.

“These motions provide a follow-up on discovery that forces the plaintiffs to state with specificity the nature of the alleged product defect,” he said. “You can't just make it up. You have to have evidence, and sometimes it makes sense to have them state clearly what it is that happened and crystallize the issues in the case.”

Motion to Require Re-Enactment

This motion is crucial in cases involving a tangible object or a piece of equipment, and if successful, it will require the plaintiff to demonstrate on videotape how the alleged accident happened using an exemplar of the product, according to Miller.

“The specific ways in which the plaintiff used the product are often key to the defense's case,” he said. “It's very difficult to secure this information in an ordinary oral deposition. When arguing the motion, it's key to make the point that the plaintiff can and likely will make the same demonstration for plaintiff's counsel, and the defense is entitled to the same information.”

Motion to Exclude 'Other Accident' Evidence

This motion can take various forms, depending upon the forum and procedural idiosyncrasies of the case, Miller said.

The thrust of the motion, no matter what form it takes, is to limit the scope and number of "other accidents" that are in play during the case, he said.

“Not only do other accidents play well with the jury, plaintiffs' experts can also rely upon them to support their defect claims, and also to bolster the argument that the defendant had notice of the defect,” Miller said. “Other accident discovery and trial evidence should be limited to those occurring under substantially similar occurrences, on substantially similar products and within a reasonable time period preceding the sale of the product.”

According to Soule, plaintiffs' discovery about other accidents will likely be broad, and the defendant may want to limit disclosure of other accidents.

“If plaintiff moves to compel production, the defendant has a chance to explain to the judge why other accidents involving different products or accident circumstances will not be admissible and/ or reasonably lead to admissible evidence,” he said. “The defendant will have to tell a detailed story — with photos, diagrams or other demonstrative evidence — as to why the products or circumstances are different.”

Motion to Strike Punitive Damages

The timing and form of this motion will vary greatly from case to case, but it is worth trying to get punitive damages out of the case as soon as possible, Miller advised.

Keeping punitive damages out restricts the scope and depth of relevant discovery and ratchets down the overall profile of the case, he said.

“Cases with lower profiles get less attention in a busy plaintiffs lawyer's office,” he said. “Taking this off the table also helps the manufacturer focus on defending the case, rather than on a potentially devastating punitive damages assessment, which is not likely to happen in most situations.”

Motions in Limine

Motions in limine are essential to bar prejudicial evidence or improper arguments at trial and to get the case focused on the critical issues, according to Soule.

“Motions in limine should be used judiciously so that the court can focus on the most important evidentiary issues,” he said.

In Huston's estimation, motions in limine are incredibly important, but are dealt with too briefly by many attorneys.

“Lots of attorneys believe that if an expert reviews something and relies on it, the expert can automatically be admitted into trial, but it's just not true,” he said. “These motions can be very strong, and can be very difficult to overcome in some cases.”

Daubert Motions

Another important tool for defense lawyers is the Daubert motion, a special type of motion in limine raised before or during trial to exclude the presentation of unqualified evidence to the jury.

According to Soule, these motions should not be used indiscriminately, but must be focused on critical lapses in the opposing experts' qualifications or methodology.

“As with summary judgment motions, Daubert motions must be well-planned and -executed throughout the course of the case, especially in depositions of fact witnesses and experts,” he said. “Of course, defendants must also ensure that their experts are bulletproof, that their qualifications are strong and well-matched for the case, and that their opinions are supported by good science, experience and/ or testing.”

Motion to Bifurcate Trial

The ability to bring this motion and general timing will greatly vary from case to case, but in those jurisdictions where the procedure is available, it is usually a good idea to try to limit the jury's scope to deciding whether the product was defective, according to Miller.

“This is especially true where there will be a great deal of sympathy for the plaintiff,” he said. “I would not, however, file such a motion if the plaintiff's damages evidence lacked credibility, in hopes that lack of credibility on damages would bleed over into a lack of credibility on liability issues too.”

Jury Instructions

While not a motion per se, being creative about trying to limit jury instructions can also be crucial to the outcome of a case, Huston said.

“Many attorneys don't think of these arguments as 'motions,' but that's essentially what they are,” he said. “At some point, when arguing before the judge about jury instructions, you'll have to present why certain instructions should or should not be admitted, and this is a big tool you can use to try to advance your side of the case.”