

Product liability:
Emerging risks pose
challenges for insurers
and defendants



Product liability: Exposures rising as new risks emerge

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Source: Civil Judicial Business 2016

Product liability exposure is garnering a growing amount of attention from defendant companies and their insurers for a plethora of reasons. Among these are emerging risks arising from new technologies and novel approaches to litigation by plaintiffs. In addition, the US administration has pledged to enlarge the manufacturing sector by encouraging US companies to onshore their operations and use domestic suppliers.

Such moves will raise the risk profile of many businesses, increase the likelihood of claims and potentially create demand for additional liability insurance capacity. This paper explores some of the emerging risks in product liability, their impact on the US insurance marketplace and how defendants and carriers should manage product liability exposures in their portfolios.

To understand what the near future may hold for defendants and insurers in product liability claims, it is helpful to consider the landscape for product liability. The US is known to have a litigious climate, and various legal venues have plaintiff-friendly reputations. Regardless of how much the actual number of product liability lawsuits may increase, product liability litigation initiated in the US will increase the expenses related to defense.

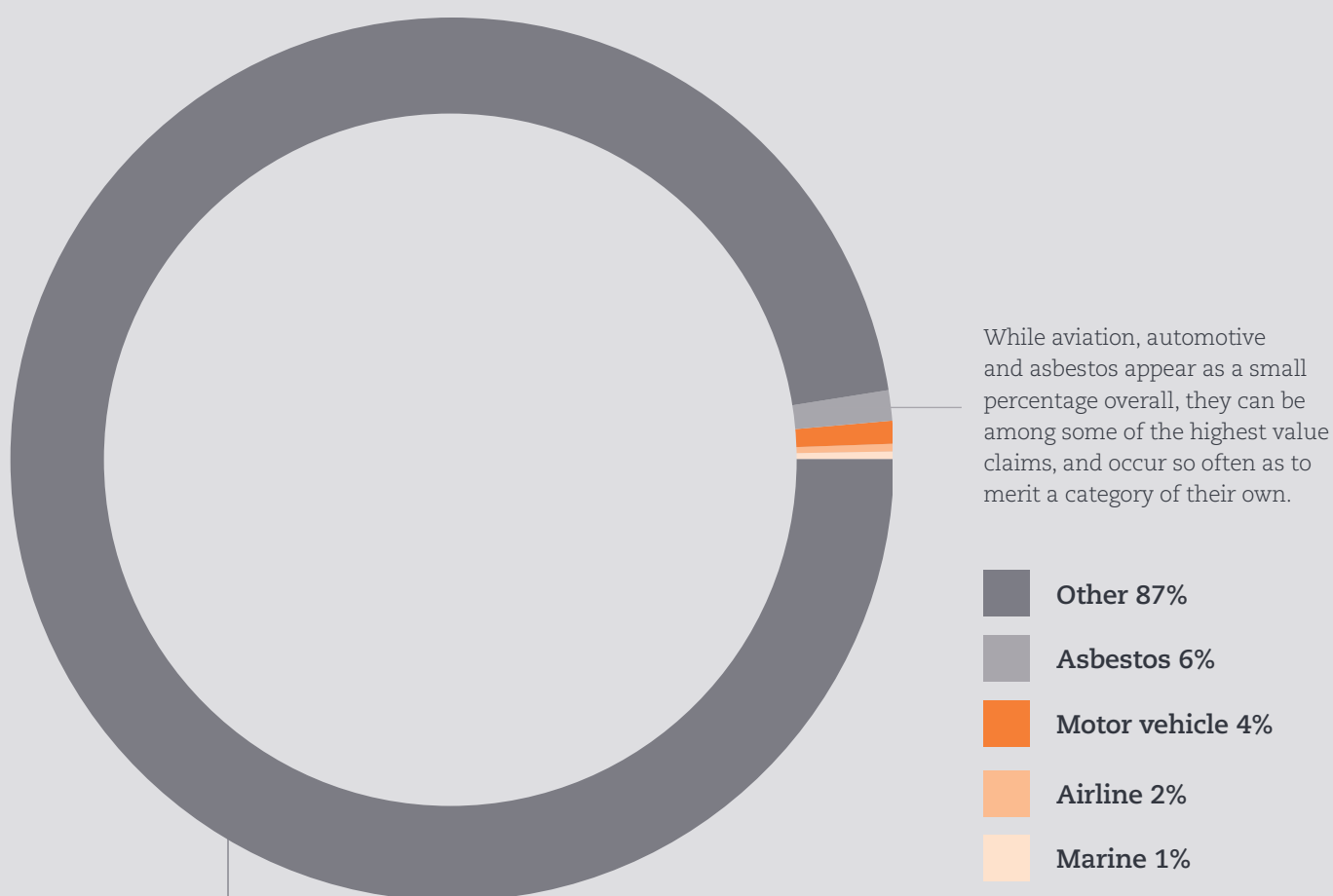
That is a matter of concern for defendants and their insurers, whether they are seeking prompt settlement or final adjudication.

An accurate number of product liability cases filed annually in the US is not available, because there are no centralized sources for state court filings. The overall number, however, is quite high, based on federal court filing data and the fact that most plaintiffs prefer to file in state courts due to expense and ease of access.

In fiscal 2016, a total of 41,221 product liability cases were commenced in US district courts, according to “Civil Judicial Business 2016,” the most recent statistical report released by the federal court system. Of these suits, the vast majority – 96.7% were for personal injury. By nature of suit, the personal injury complaints fell into five main categories: airline, marine, motor vehicle, asbestos and other. Suits categorized as “other” accounted for 98% of overall product liability claims in 2016. The “other” category represents a diverse set of claims, including consumer products, pharmaceuticals and health care products.

Product liability personal injury cases 2016

By nature of suit



Personal injury claims can arise from virtually anything a person eats, ingests, wears, uses or comes into contact with, as well as an alleged failure or defect of a related component part of a product.

This can cover a wide range of products from pharmaceuticals and food to household goods and toys to industrial equipment and construction materials.

While aviation, automotive and asbestos appear as a small percentage overall, they can be among some of the highest value claims, and occur so often as to merit a category of their own.

In addition to product liability litigation, other challenges for manufacturers, suppliers and distributors include regulatory compliance burdens and supply chain exposures. Supply chains for labor and materials have become increasingly international, even for smaller businesses.

The combination of just-in-time inventory management and diversified component sourcing exposes global supply chains to greater production pressures. From a claims perspective, product liability is more complex, and litigation is occurring more frequently in multiple jurisdictions, than in the past.

Litigation trends



The high cost of litigating product liability claims has led plaintiffs' attorneys to pursue lawsuits with a greater possibility of a large award or settlement.

Clyde & Co partners, who have significant trial experience, have observed several trends in US product liability litigation in recent years.

Plaintiffs are pursuing larger cases

A clear trend in the past several years in product liability has been a shift away from individual cases toward class actions, multidistrict litigation and mass tort actions.

"Many product liability plaintiff lawyers are entrepreneurs. They are accomplished lawyers and business people. Just as other entrepreneurs tend to invest in multiple opportunities, in the hope that one will become a unicorn, that is happening in product liability litigation today," said Frederick J. Fein, managing partner in the Miami office of Clyde & Co and US head of product liability.

Part of the reason for this shift, Fein explained, is the expense of litigation. Product liability cases often require a great deal of expert testimony and time to build and pursue, a process that can cost tens, and sometimes hundreds of thousands of dollars to develop the defense. This diligence can and has resulted in settlements that are a fraction of the initial demand and are occasionally less than the plaintiff's costs. For example, "A case in the Western US went on for seven years. The original demand was for \$250 million and settled just before trial for less than 5% of that demand, which amounted to peanuts compared to the cost of litigating," Fein said.

The high cost of litigating product liability claims has led plaintiffs' attorneys to pursue lawsuits with a greater possibility of a large award or settlement, Fein said. "Plaintiffs' attorneys have made a concerted effort to pool their resources. It's not uncommon for plaintiffs' firms to partner with other well-funded firms and share the proceeds from successful actions," he said. Another problem that may enlarge product liability cases is occurring in certain class actions.

In some lawsuits alleging common-defect claims, plaintiffs seek to certify a class based on the stated product defect, trying to obtain for all purchasers damages for the defective product, while leaving open the right for individuals to pursue additional "second phase" damages allegedly caused by the defective product, said John R. Gerstein, a Clyde & Co partner based in Washington, DC. It "remains to be seen how far this approach can be pushed without running afoul of claims-splitting problems and the like," he noted.

More multidistrict litigation

Larger claims, such as airplane crashes and automotive defects, are increasingly seeing multidistrict litigation, noted Kevin Sutherland, a partner in Clyde & Co's San Francisco office.

“MDL can be a pro-defendant development, but it is impacting cases. One action gives rise to multiple actions. It definitely raises claim costs; it’s expensive to defend in multiple jurisdictions,” Sutherland said. “For example, one suit alleged a defect in a flight simulator used in Chicago. The simulator was manufactured in Canada, utilized software designed in another state and its hardware came from still another state. The product liability action led to actions in all those other jurisdictions,” he said. Even though the litigation may be consolidated in one jurisdiction, until that occurs, a defendant incurs expenses.

Document sharing by plaintiffs

Networking capabilities expanded over the past decade have enabled the plaintiff’s bar to become more organized, particularly around the sharing and compilation of documents used in trials.

The American Association for Justice, formerly known as the American Trial Lawyers Association, offers its members access to various Litigation Groups, to learn strategies and obtain documents from extensive databases. One such group is the Attorneys Information Exchange Group (AIEG).

AIEG is a national organization that maintains databases of documents and conducts seminars for plaintiffs’ attorneys.

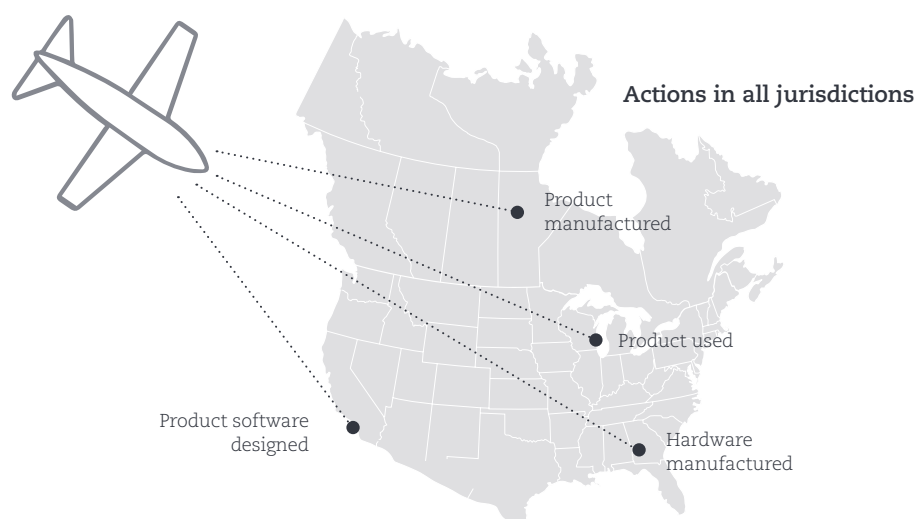
“Plaintiffs today are as informed about prior and existing litigation as defendants, if not even more so,” Fein said.

“It is absolutely critical for the defense to know who is networking with whom,” to anticipate evidence the plaintiffs may introduce and how they may approach litigation. “One of the first things I do when I’m defending a client in a product liability action brought by an unfamiliar plaintiff’s attorney is to investigate him or her and their firm. That can be as important as knowing the facts of the case.”

“The defense has to be as organized, if not more than, the plaintiffs’ bar regarding documents that relate to your product. It is always advisable to scan paper documents so they can be internally searched,” Sutherland said. “If a defendant discloses documents in litigation, it’s a good idea to seek a protective order that gives the defendant all of those documents back. Otherwise, you will start seeing plaintiffs’ lawyers with a library of documents in their possession.”



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Sanctions against defendants

Discovery and document production can be challenging for defendants in product liability actions. If electronic discovery and document retention requirements are not followed, a defendant can incur sanctions. Spoliation of evidence is a serious matter that can result in monetary sanctions or, in egregious instances, termination sanctions that dismiss the case or vacate a judgment. Even in the absence of monetary sanctions, courts have ordered adverse-inference instructions to juries, which can impair a defendant's case at trial.

What makes this even more challenging today is the level of organization mentioned earlier of the plaintiffs' bar. Documentation entered into evidence that is not expressly made confidential is typically collected and shared among plaintiffs' attorneys for use in future litigation.

An example: the plaintiff may produce an aged document from a prior case that the defendant may have inadvertently overlooked. Failure by the defense to produce documents can trigger plaintiffs to file motions for court sanctions. Courts have latitude to issue sanctions for misconduct, whether-by attorneys for the plaintiff or the defendant.

In a recent case, *Goodyear Tire & Rubber Co. v. Haeger*, a US district court awarded sanctions of \$2.7 million against Goodyear's attorneys. The 9th US Circuit Court of Appeals upheld the award, which the plaintiff's attorney

sought after discovering test results that Goodyear had made available in a similar prior case. The US Supreme Court reversed, finding the sanction to be unreasonably high, and remanded it to the trial court. "Sanctions are a strategy that plaintiffs use to obtain recovery," Fein said. "In most states, a sanction is shared with the plaintiff as a form of recovery."

Jurisdiction selection

Plaintiffs have long sought favorable venues in which to bring claims, and the US has historically had numerous such jurisdictions. "Venue affects product liability litigation tremendously," Fein pointed out. "A lot of time and money are spent on figuring out where best to bring cases."

Just as plaintiffs seek the most favorable forums, defendants can and do object, seeking to dismiss or move actions based on various grounds. One defense argument is the lack of a causal link between the defendant company's activities in the jurisdiction and the plaintiff's claim.

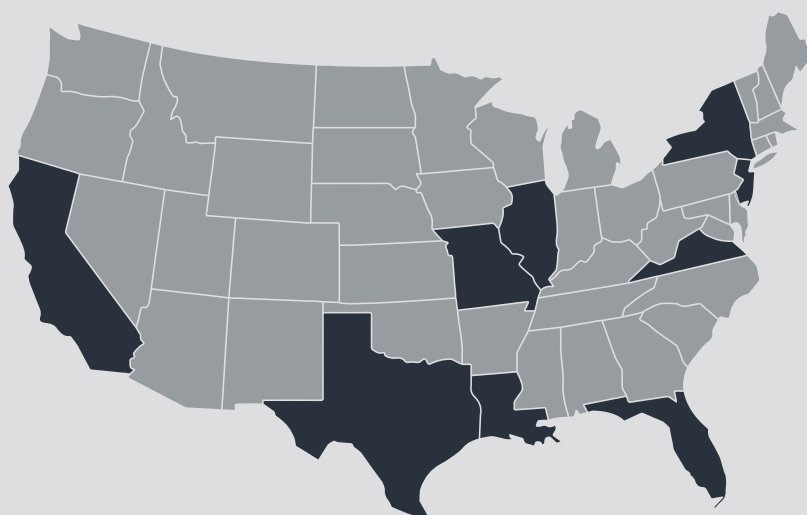
The Supreme Court of the US handed down a ruling in late May 2017 that may alter plaintiffs' ability to bring personal injury lawsuits in jurisdictions where they do not live or where the defendant had minimal operations. The ruling, in a case involving BNSF Railway, comes as the High Court is considering a similar, but different case.

Bristol-Myers Squibb appealed a 2016 California Supreme Court decision finding that suits alleging negligence, false advertising and product liability by nearly 600 plaintiffs from outside the state can proceed. The US Supreme Court is expected to rule on the Bristol-Myers Squibb case in June (*Bristol-Myers Squibb Co. v. Superior Court, County of San Francisco*, S221038).

The American Tort Reform Foundation, a division of the American Tort Reform Association, annually explores the most plaintiff-friendly venues in the US in a report, "Judicial Hellholes." Topping the ranking in 2016-2017 is the City of St. Louis, Missouri. The St. Louis Circuit Court has generated four of the past year's six largest product liability verdicts. Even though the awards may be reduced in appeals, the trial court nevertheless continues to attract out-of-state plaintiffs filing large claims.

US judicial hellholes

Nine venues among most plaintiff-friendly



- City of St. Louis, Missouri
- California
- New York City (asbestos litigation)
- Florida Supreme Court and South Florida
- New Jersey
- Cook, Madison and St. Clair counties in Illinois
- Louisiana
- Newport News, Virginia
- Hidalgo County, Texas

Source: American Tort Reform Foundation

New technology = new risks



The defense can argue the cause was not product defect but rather wear and tear, but a pro-plaintiff jurisdiction might let all that evidence in.

Various forms of technology are presenting emerging risks in the field of product liability, as a direct cause or as a tool for defending claims. It remains to be seen how these technologies will continue to develop and what demand their adoption may generate for specific insurance coverage.

Virtual reality

VR animation is increasingly used to illustrate products' functions, noted Sutherland. A growing area of use is aviation product liability litigation, where VR is used to re-create aircraft collisions where there were no witnesses. "VR technology renders highly realistic animation that is like being in the airplane. The issue is to what extent this kind of information will be admissible at trial.

Plaintiffs tend to fight to keep VR illustrations out of evidence because the simulations look real to jurors," Sutherland said. In product liability cases involving aircraft crashes, it can be very difficult to reconstruct what occurred, Sutherland noted. "Plaintiffs' theories of liability may be based on small pieces of equipment recovered from the crash site and microscopic evidence to suggest mechanical failure," he said. "The defense can argue the cause was not product defect but rather wear and tear, but a pro-plaintiff jurisdiction might let all that evidence in."

3-D printing

The development of three-dimensional printing has enabled almost anyone to design and manufacture objects. "From a product liability perspective,

this is a significant emerging issue, and a number of insurers are focused on understanding the risks," said Kevin Haas, a partner at Clyde & Co in New Jersey. What makes 3-D printing an intriguing, emerging risk is its application across industries and rapid growth. Although sources differ on amount, revenue from 3-D printing worldwide is forecast to at least double by 2020, with estimates ranging from more than \$8 billion to more than \$21 billion. Initial use of 3-D printing has been in product prototyping, though more businesses indicate they intend to create finished products with the technology.

Drones

Unmanned aerial vehicles, to use drones' formal name, are crowding the skies as hobbyists and commercial enterprises embrace this technology. A dominant use for civilian drones is observation, but other applications – including package delivery – are being explored. "Drones are another significant emerging risk, even though we have seen no claims yet," Haas said. "Liability can arise if a drone fails and causes other damage, such as crashing into something or someone. There is also the potential for personal injury/Coverage B claims" under commercial general liability policies.

Jeffrey Ellis, a partner at Clyde & Co in New York, noted that “there are questions about drones being used for terrorist attacks, for which the liability picture is not clear.” Consider the 1995 Oklahoma City and 1993 World Trade Center bombings. The terrorists in these events used ammonium nitrate, a widely available and commonly used soil amendment, in their attacks. The product was used for an unintended purpose. “When someone takes a benign product and modifies it for use as a weapon, there is generally a defense for that. However, there is also a foreseeable-use doctrine that allows claims to go forward,” Ellis said. “If damages are big enough, the claims will come and plaintiffs will be creative.”

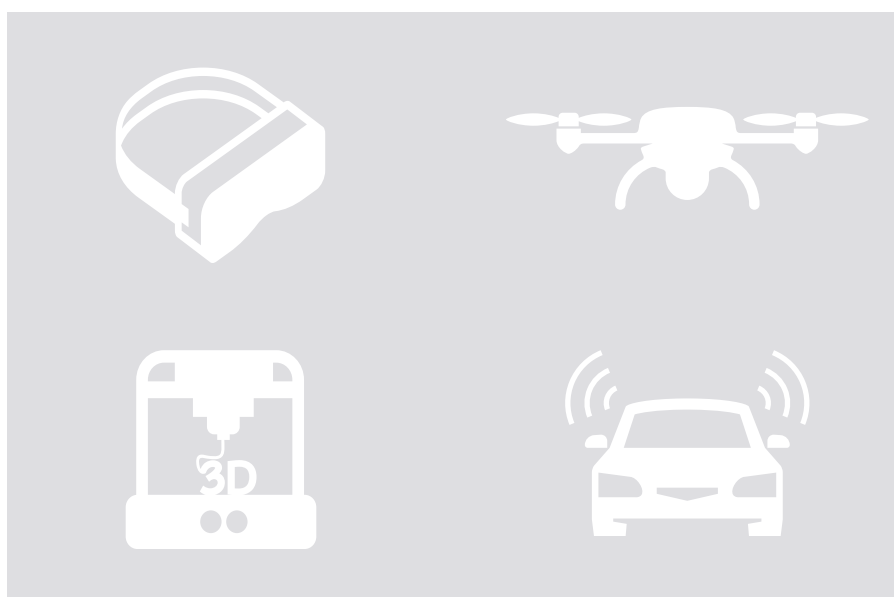
Autonomous vehicles

The emergence of semi-autonomous and fully autonomous vehicles will change notions of liability for various claims ranging from personal injury and property damage to business interruption and cybersecurity breaches, said Eric Ruben, senior counsel at Clyde & Co in Miami. The performance of the product, from its sensors and cameras reading the road to the software and algorithms driving the vehicle will all be scrutinized in litigation, he said.

“The National Highway Traffic Safety Administration currently recognizes five levels of autonomy beyond a Level 0, a fully driver-controlled vehicle. Starting at Levels 1 and 2, you see some autonomous systems like automatic braking or perhaps lane assistance.

At Level 3, the driver can begin to cede full control of the vehicle under some circumstances. At Levels 4 and 5, full autonomy comes into play where even a steering wheel is not required.

With full autonomy, the vehicle itself becomes the ‘driver,’ leading to entirely product liability-based claims absent things like faulty maintenance,” explained Ruben “The semi-autonomous Level 1 through 3 vehicles create an even more complex products liability claim as lawyers and experts sort through who or what is responsible.”



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Risk mitigation strategies



Negligence may apply, but the standard of care that a manufacturer should use is dictated by federal regulations.

Even as product liability risks increase, defendants and their insurers have a variety of strategies to implement to mitigate risk and defend against litigation. These strategies include:

Federal pre-emption

Federal regulations and standards offer defendants a means of defending against product liability claims alleging common-law negligence. The ability to demonstrate that a product meets or exceeds federal standards and that such standards pre-empt liability claims can be an effective defense, where private-sector companies can argue that responsibility should lie with the government.

In international airline crashes, for example, usually a treaty applies to compensate passengers and their families, noted Clyde & Co's Sutherland. "Although that may limit liability for airlines, it inevitably leads plaintiffs to sue product manufacturers," he said. "Plaintiffs' lawyers used to read the National Transportation Safety Board report following a crash and sue manufacturers where a particular part or system was deemed at fault. Now, it doesn't matter what the NTSB report says, plaintiffs sue anybody who touched the product."

A defense for aviation equipment manufacturers is to assert that federal regulation pre-empts product liability claims, "especially if the Federal Aviation Administration or Department of Transportation had approved a particular part for an aircraft," Sutherland said. "Negligence may apply, but the standard of care that a

manufacturer should use is dictated by federal regulations."

There are, however, exceptions to defendants' ability to argue pre-emption. For example, the Supreme Court in 2009 ruled in *Wyeth v. Levine* that the Food and Drug Administration's regulation of pharmaceuticals did not pre-empt state law tort claims of product liability relating to Wyeth Laboratories' label warnings on its brand-name drug Phenergan. The high court rejected Wyeth's arguments that it could not comply with duties imposed under state law as well as FDA requirements.

Daubert motions

Following a landmark Supreme Court decision, *Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579 (1993), federal courts adopted a standard for admissibility of expert testimony. This standard offers both plaintiffs and defendants the opportunity to file motions opposing certain testimony. State courts in more than three-fourths of the nation's states have adopted the Daubert standard. Eight states, including California, Illinois, New Jersey and New York, continue to use an older standard known as the Frye standard. Three states -- Nevada, North Dakota and Virginia -- use both standards.

Frye, in use since 1923, takes a simplistic approach to admissibility.

As long as an expert's testimony is deemed to have used methods generally accepted in the relevant scientific community, it is admissible. Daubert raised the threshold for admissibility, directing trial judges to consider whether an expert's theory or technique can be tested, has been subjected to peer review, has an acceptable rate of error and enjoys widespread acceptance.

"As courts enforce Daubert, more plaintiffs are moving actions to Frye states," said Clyde & Co's Gerstein. "Some lawsuits have survived Daubert motions by going to states where Frye is the standard." Challenging plaintiffs' experts can be critical to combating theories of liability in defending product liability litigation.

Witness preparation

In product liability actions, witness testimony has always had a significant influence on the outcome. With new plaintiff approaches, such testimony is becoming even more important. "The benefits of good witness preparation cannot be overstated," said Fein.

Over the past decade, some plaintiffs' attorneys have adopted a neuroscience-based approach to deposing and examining defense witnesses at trial known as The Reptile Theory. This theory asserts that the human brain comprises three segments that each reflect stages of human evolution. According to the theory, the reptilian or primitive brain focuses on survival and avoiding danger.

In the context of arguments at trial, a Reptile Theory line of questioning is intended to lead witnesses to give vague or damaging answers regarding safety practices. Unless defense witnesses are educated and prepared to appreciate these tactics, The Reptile Theory can sway jurors to favor plaintiffs.

An example of a Reptile Theory question: Safety is the No. 1 concern of Acme Widget Company, isn't it? "If a defense witness says it's not, or is something else, a juror is likely to perceive the defendant poorly," said Clyde & Co's Sutherland. "Another type of question is, 'Isn't it important to design a product that does not have a single point of failure?' It is hard for the head of quality to answer that question in a way that won't impair the defense's position," he said.

"In the past, the preferred answers for a defense witness were 'Yes,' 'No,' 'I don't know' or 'I don't recall,'" Sutherland said. "That doesn't work anymore. Witnesses now have to push back and talk about what we need them to say for our defense."

The above point is particularly true as videotaped depositions have become the norm, Gerstein pointed out. "Old-school 'minimal' responses don't tend work well on video, where jurors can see a witness's demeanor and are expecting the witness to appear forthcoming," he said.

Gerstein also noted that the adage, "Don't ask questions of your own witness if the witness will be at trial," doesn't always apply in the context

of video depositions. "Clips played at trial, whether as used in cross-exam or where the witness becomes unavailable, can be powerful evidence before a jury," he explained. Gerstein suggested that "it is usually a good idea to develop a few 'counter clips' in your witness's deposition, and ideally the 'last word,' to play at trial as needed -- at least if the other side has scored any material points during the course of the deposition."

The world of product liability risk is continuing to evolve. From emerging exposures to plaintiffs' growing sophistication in litigating claims, defendant companies and their insurers need to prepare for more complicated product liability claims. Seeking the advice of experienced counsel, with vast expertise in product liability and a global focus on insurance, as well as a distinguished record in defending litigation, is a prudent step in that effort.



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