Work Together

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Considerations for Product Liability Claims Simultaneously Brought Against Manufacturers and Dealers

For product liability claims, manufacturers and dealers frequently find themselves listed as co-defendants. Here's how to succeed in those cases.

Your recreational product manufacturing client forwards you a complaint in a new lawsuit or a claim letter for a new matter. Immediately, you notice that not only is your client a defendant, but a recreational product dealer is also being sued. What implications does the dealer's involvement in the matter have on your defense of the case for the manufacturer? For product liability claims, manufacturers and dealers frequently find themselves listed as co-defendants. Manufacturers are thus faced with a number of decisions with regard to the dealer—their new "frenemy." Do they attempt to coordinate a joint defense? How do they evaluate the claims at issue? Are there jurisdictional considerations? How does one work with the co-defendant dealer? What if the co-defendant dealer decides to reject the manufacturer's offer to coordinate defenses? As discussed below, manufacturers should consider a number of factors in working with a co- defendant dealer.

Coordination, Claims Analysis, and Other Initial Considerations

Why Coordinate with the "Frenemy"?

To successfully establish a product liability claim, a plaintiff typically must show that a product defect existed when the product left the control of the party against whom the claim is made. As a result, in the case of a manufacturer, the product must have been "defective" at the time it was sold and delivered to the next entity in the stream of commerce. In the case of a dealer, that time would be when the product is sold and delivered to the customer/plaintiff.

For the manufacturer, coordination with a co-defendant dealer may be beneficial for two reasons. First, coordination can avoid the need to fight on two fronts against a plaintiff as well as the dealer. Typically, when co-defendants point fingers at each other, the plaintiff is the winner by default. Second, coordination may provide a manufacturer with the opportunity to set the




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course and strategy of the defense and gain efficiencies (if the manufacturer is willing to take the laboring oar).

For the dealer, coordination with a co-defendant manufacturer is helpful for two reasons. First, coordination allows the dealer to rely on a manufacturer with likely more sophisticated product liability/litigation experience. Second, by relying on the manufacturer, a dealer has the potential to reduce or share litigation costs.

However, as discussed below, prior to determining if coordination will be beneficial to either party, it is necessary to evaluate the claims at issue, the underlying facts supporting the claims, and several other considerations.

Analyzing the Claims

Once a manufacturer becomes aware of a complaint, its first step should be to analyze the claims at issue. The following provides a brief synopsis of the types of claims one can expect to see in a typical product liability action.

Strict Liability

In a product liability case, in order to establish strict liability, a plaintiff must show that the product was sold in an unreasonably dangerous condition (i.e., was defective), the defendant expected and intended the product to reach the plaintiff in that condition, and the plaintiff was damaged by the defective product.

Strict liability is typically the predominant theory in most product liability cases. A strict liability claim is rooted in the product itself and focuses on whether the product is defective. There are three primary types of defects alleged: design defects, manufacturing defects, and warning defects. Strict liability claims are attractive to plaintiffs because they are not dependent on the defendant's conduct.

Negligence

In order to establish negligence in the product liability context, a plaintiff must prove that the defendant owed the plaintiff a duty of reasonable care with respect to the product, the defendant breached that duty, and the plaintiff has suffered damages as a result of such breach.

Negligence is often pled in the alternative to strict liability. The claim is based on the assertion that the manufacturer engaged in unsafe or unreasonable conduct (either overtly or by omission) in connection with the design, manufacture, marketing, or sale of the product.

Fraud

In the context of a product liability claim, in order to establish fraud, a plaintiff must prove that the defendant made certain representations about the product that it knew were not true (or were unlikely to be true), such representations were made to induce the plaintiff to buy the product, the plaintiff justifiably relied on such representations, and the plaintiff was damaged as a result of such false representations.

Similar to negligence, claims of fraud are often pled in the alternative to a strict liability claim. Fraud claims are held to a higher pleading standard and must be pled with specificity.

Breach of Warranty

In order to establish a breach of warranty in connection with a product, a plaintiff must show that an express or implied warranty applied to the product and the product did not satisfy the terms of such warranty.

The Uniform Commercial Code ("UCC") provides for three types of warranties: express warranty, implied warranty of merchantability, and implied warranty of fitness for a particular purpose. Each type of warranty has different requirements that are governed by the UCC as adopted in each jurisdiction. Damages under a breach of warranty claim are typically limited to economic harm.

Consumer Protection Statutes

A significant number of states have adopted some form of consumer protection statute that may apply in a product liability case. In certain cases, these statutes will enable a plaintiff to collect double or treble damages and/or attorneys' fees.

Analyze the Factual Pleadings

In addition to reviewing the legal claims raised in the complaint or claim letter, a manufacturer should also analyze the factual allegations that support the claims. This analysis involves a review of the conduct of the manufacturer and dealer as well as potential jurisdictional issues.

After-Market Modifications and Dealer-Performed Maintenance

It is important to consider whether a plaintiff alleges that the product was defective solely from a design/manufacturing standpoint or whether the conduct of the dealer is also at issue. For example, did the plaintiff allege that the product at issue was not assembled correctly or was changed as a result of any dealer-performed set-up, maintenance, or repair? Or was the alleged defect at issue caused by the addition of after-market parts by the dealer? Perhaps there is an allegation that the dealer recommended the wrong product for the intended use? In these situations, a manufacturer may find itself at odds with the dealer.

Jurisdictional Considerations

Plaintiffs typically prefer litigating claims in state courts and will frequently try to avoid federal court. As a result, it may benefit both the manufacturer and dealer to consider whether removal to federal court is available. Because the claims at issue are typically rooted in state law, removal to federal court will usually only be an option if diversity of citizenship can be established. Given that a co-defendant dealer may be the only reason that all parties are not diverse from one another, manufacturers should examine if the dealer was named in the action only to ensure the action remains in state court via a fraudulent joinder. Finally, if a manufacturer or dealer can act quickly and remove the case to federal court, prior to the forum defendant being served, removal may be upheld under the "snap removal" doctrine. (Note: the intricacies of snap removal depend on the specific law within each federal circuit court. Be sure to investigate this issue quickly given that time is frequently of the essence).

Further, at least 24 states have passed an "innocent seller" statute that enables the seller of a product to avoid legal liability when it can demonstrate that the product remained "sealed" or that it did not exercise any control over the product's design, manufacturing, packaging, or labeling relative to the alleged defect. Plaintiffs will attempt to plead around such statutes by arguing that the dealer exercised enough "control" over the product that the statute does not apply. Thus, manufacturers

should review applicable local law to determine if such innocent seller statutes are in place and the standard of pleading required under applicable law.

"Dealing with the Dealer"

As discussed above, establishing a relationship with the co-defendant dealer at the outset of litigation or claim can benefit both the manufacturer and dealer. However, what are the practical implications of "dealing with the dealer"? This section details practices to explore and utilize to maximize a recreational product manufacturer's relationship with a co-defendant dealer and achieve the best result for the client.

Initial Relationship Considerations Between a Manufacturer and Dealer

Make Contact Early

Now that you have the case, it is important to not only assess the claims against the manufacturer, but also to analyze the allegations against the dealer. What is the plaintiff claiming the dealer did wrong? Is this a warranty issue focusing on poor repairs? Did the dealer fail to provide an operator's manual or adequate warnings? Did the dealer make representations to the plaintiff? Did the dealer fail to properly assembly the product? Did the dealer install non-approved accessories on the product?

Having an idea of basic facts before contacting the dealer and its counsel is key to your defense of the case. After the initial analysis, communicate with the dealer as early as possible. Initial conversations with the dealer will help you, as the manufacturer's counsel, evaluate the extent to which the manufacturer's and dealer's interests align. Remember to keep in mind that the dealer is often the "boots on the ground"—it may know plaintiff, have sold the product to plaintiff, or have made repairs or performed maintenance on the product. The co-defendant dealer may have vital information because of its proximity to the accident, including identity of witnesses to the accident, marketing or training materials related to the specific product, sales and repair records, service history, plaintiff's reputation, and/or how the product was utilized by the plaintiff before the accident. Work to get this information from the dealer.

In many instances, a co-defendant dealer is provided counsel through its insurer. The dealer's attorney is likely a seasoned insurance defense attorney—but may not be a product liability specialist. It will be important from the initial meeting with the dealer and its counsel to educate them on the specific product-related claims and to ask claim-specific questions.

In these early conversations with the dealer, it is essential to promote the open exchange of information. At first, there may be a hesitation to discuss the case with you. However, building rapport with the dealer and its counsel is key. Remember, first impressions make a lasting impression – know what information you need to gather, what questions to ask, and strategize how to foster a sense of cooperation from the first interaction.

Review Agreements Between Manufacturers and Dealers

It is important to analyze any agreements and contracts between the manufacturer and dealer carefully at the outset of litigation. Agreements may contain indemnity and hold-harmless language running from the manufacturer to the dealer (or the reverse). Also, consider the effect of statutes on any obligation to indemnify. Many states have statutory protections, even absent a written obligation to indemnify, and there is also the potential for common law indemnity. Review your jurisdiction's statutes, in addition to any written agreements, contracts, or invoices between the parties that may contain indemnity language. These will vary from state to state.

Contracts between the manufacturer and dealer may also require one party to list the other party as an additional insured on its insurance policies. As a result, there may be insurance issues that must be considered in the tender analysis.

If the manufacturer is considering tendering its defense to the dealer, it is important to know whether the manufacturer has the right to choose its own counsel. The manufacturer should consider whether there is a risk of counsel being provided by the dealer that does not provide the level of representation to which the manufacturer is accustomed.

In addition to the language of any insurance contracts or agreements, the initial focus in analyzing the tender issue will center on the plaintiff's allegations. This may not be readily apparent from the complaint, which may cause some confusion as to which party is ultimately responsible. However, it is important to address tender issues early.

Joint Defense Agreements

A joint defense agreement ("JDA") is another matter to consider early in the litigation. JDAs are particularly effective where co-defendants' interests are, essentially, completely aligned. Situations where JDAs may make sense arise in the defense of cases where the final product manufacturer and component part manufacturers are co-defendants, or when a parent company and subsidiary company are co-defendants. When a JDA is in place, the attorney-client privilege extends between the co-defendants and their counsel and provides for an easier, protected exchange of work product between them. However, in cases involving product manufacturers and dealers, the parties' interests may not be so aligned that a JDA is appropriate. In most cases, it is likely a JDA will not be pursued between a product manufacturer and dealer.

If the manufacturer and dealer do not enter into a JDA, it is still important to think about protecting communications with the dealer in the litigation. The dealer and manufacturer should communicate through counsel—not directly. The exchange of written material between counsel for the dealer and manufacturer is more easily protected. However, there is still a chance it will be discoverable. As a best practice, do not take that chance and assume that communications with the dealer's counsel will be discovered. If sensitive case information or strategy needs to be discussed, pick up the phone to call the dealer's counsel.

Communications with Plaintiff(s)

In the event a claim or lawsuit is filed, obtaining early information from the claimant or plaintiff can be especially important to craft a strong defense. While formal discovery is a key tool, informal discovery can also help explore the facts,

claims, and defenses early in the litigation. Reaching out to the plaintiff's counsel and asking them about the claim can help develop an early sense of the case, plaintiff's claims, and opposing counsel. Ask the plaintiff's counsel what happened in the accident, if the product is preserved and where it is located, and what the plaintiff's claimed injuries are. Obtain any photographs or videos of the scene or product, as well as medical records and bills.

Defending the Claims

Develop an Early Understanding of What Needs to Be Done

A key adage to remember when defending claims against a manufacturer and a dealer it is "the early bird gets the worm." After the manufacturer initiates conversations with the dealer and obtains information through informal discovery, the focus then shifts to "how to best defend the product." Avoid finger pointing between the manufacturer and dealer – focus on defending the design, manufacture, or warnings associated with the product.

Developing an early understanding of the things that can be done to defend the product usually begins with inspecting the product. There are several important considerations for inspections. What will the inspection entail? Is it a non-destructive inspection or will the product be disassembled? Who are the in-house experts who can provide key product knowledge and context on how the product is used? Work with your manufacturing client to draft an appropriate protocol. Will an expert for both the manufacturer and dealer need to be present at the inspection? The inspection is a key opportunity to gather information from the plaintiff and continue to build

rapport with the dealer. The inspection may also provide another opportunity to learn about potential witnesses.

Coordination Regarding Witnesses, Documents, and Experts

Coordinating witnesses, documents, and other materials between the manufacturer and dealer is imperative to defending the case. Work with the dealer to identify potential witnesses (including dealer employees) and determine what they know. Also, be prepared to offer guidance on preparing the dealer's fact witnesses if their depositions are requested.

Additionally, coordinating documents with the dealer is a necessary element of defending the case. The dealer will likely possess service and repair records for the product, the sales invoice, the operator's manual, and any documents provided to the plaintiff when he or she purchased the product. There may also be videos and photographs in the dealer's possession.

Finally, depending on the claim, the coordination of experts by the manufacturer and dealer may be helpful. Educate the dealer on the importance of hiring appropriate experts based on the plaintiff's claims. The manufacturer will likely have resources and experience concerning experts that are not available to the dealer—share recommendations with the dealer on what areas the dealer may consider hiring an expert and what experts might be best. Work with the dealer to consider whether each party should have experts on similar areas (such as accident reconstruction or biomechanics). If so, be sure to coordinate opinions so that the dealer and manufacturer's experts are on the same page. Consider sharing draft expert disclosures or reports to address inconsistencies early. If a JDA is used, consider whether a formal litigation expert conference between the dealer and manufacturer's experts is appropriate.

Mediation and Settlement Considerations

If the case is mediated, there are additional considerations that the manufacturer should address with the dealer. Selecting a mediator is the first of these considerations. Share information and provide feedback to the dealer and its counsel on which mediators you have used successfully and who will understand the case. In preparation for the mediation, consider whether it makes sense to share your case valuation and recommended settlement range with the dealer. Consider whether the dealer and manufacturer should reach an agreement on settlement allocation responsibility. For example, if the plaintiff's claims focus on the dealership's failure to properly install a component on the product versus a classic design defect claim, consider discussing how that affects percentage contributions.

For the mediation, like the defense strategy, it is important for the manufacturer and dealer to share common or complimentary defense themes. Discussing the common themes and strengths of the case with the dealer's counsel will be integral to a united front at mediation. Also work to have a consistent position on how the mediation will be conducted—will it be in person or remote, will openings be used or not? By getting on the same page before mediation, the manufacturer and dealer can properly position the case for a reasonable settlement.

The Lone Ranger: What to Do When a Dealer Says "No" to Coordination

Sometimes, the dealer and its counsel may push back. What if they say "no" to coordinating defense efforts? In this event, it is not the end of the world. The dealer's and its counsel's tune may change during the lawsuit. Regardless, it is important to continue to educate the dealer on liability and defense themes and cooperate as much as you can. Even if you do not coordinate your defense efforts with the dealer, continue to show the dealer that the manufacturer is not the enemy. Continue to focus on defending the product and not pointing fingers at co-defendants.

Conclusion

When defending a recreational product manufacturer in a co-defendant dealer case, engage the dealer and its counsel early. Work together to exchange information about the case and develop consistent and complementary defense themes. The plaintiff is the only party who wins when the manufacturer and dealer attack each other. Defend the product, minimize finger pointing at co-defendants, and make the plaintiff do the work to prove his or her claims.