INSIDE THE MINDS

Litigating Products Liability Class Actions

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Products Liability Class Actions: Early Case Assessment

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Introduction

The following article addresses the importance of early case assessment in products liability class actions. Class actions can, for many organizations, become "bet the company" litigation. Therefore, assessing whether an early settlement comports with the organization's business objectives and strategies is extremely important.

Oftentimes, simply opening a dialogue with the plaintiff's lawyer early on can change the tenor of the litigation and can facilitate a mutually beneficial resolution of the case.

Class Action Products Liability Cases: Strategy and Challenges for Early Resolution

The most important strategy for products liability class action cases is Early Case Assessment (ECA). This involves a critical assessment of the case's validity and potential risk, which is essential in determining whether the case is amenable to early resolution or is one that will necessitate protracted and expensive litigation.

To determine whether the litigation is one that can be resolved in a way that is consistent with the organization's business objectives, you need to institute ECA procedures. ECA procedures create a collaborative process between the organization's assigned case manager, outside counsel, and the business client for evaluating the risk and potential exposure presented by the matter so that the appropriate resolution strategy may be developed and pursued. The objective of ECA is for all involved to make a concerted effort to evaluate the matter sufficiently in the first ninety days after it is assigned to outside counsel to determine whether settlement is efficient, responsible, and prudent before engaging in protracted discovery, motion practice, or other expensive and time-consuming judicial procedures.

ECA provides a win-win mechanism for the parties to a dispute where settlement is an option to be considered or a likely outcome. The fact is that the longer a dispute goes on, the more hardened the parties' positions become, and the more expensive the ultimate resolution is to everyone in terms of time, money, and damage to relationships. Emotions including

pride, anger, and greed often turn otherwise reasonable people into intractable opponents.

Key Elements of the ECA Process

In its simplest definition, ECA is a process designed to obtain sufficient information in a short period of time so that a reasonable assessment of the costs and risks of the dispute can be made.

The key to defining the elements of ECA is to approach the "case" as a business transaction rather than an adversarial dispute. The objective is to determine whether the company should enter into a particular business transaction (in this case, settlement), and whether it is in the company's interest to act quickly in order to maximize the benefit of this particular transaction. With that objective in mind, you will need to define the elements of ECA for each particular case you are faced with.

What is "sufficient" information?

The answer will depend on what the claim involves. Keeping the business transaction approach in mind, ask what information you need to know in order to "buy" a resolution of the particular dispute and what information you need to make available to the claimant in order to convince him or her to "sell" you the commodity you seek—i.e., peace and finality, including elimination of the risk. Also, make a checklist of the essential information you need. For instance, in a case involving a claim of product defect your checklist would include: 1) specifics of the plaintiffs' injuries; 2) identity of the product involved; 3) examination of the product; 4) review of medical records; and 5) collection of facts supporting a claim of defect, including statements or depositions of the plaintiffs and witnesses.

In the case of a breach of contract claim, your checklist would include 1) the contract itself; 2) the specifics of the claimed breach; 3) the facts or documents supporting the claim; 4) the statements of the individuals involved in the negotiations and performance of the contract; and 5) the specifics of the damages claimed.

Next, and equally important, you should make a checklist of information you will make available to the plaintiffs by listing those items that would be essential to you if you were representing the claimant. For example, pricing of the product at issue (wholesale and retail); amount of product sold; geographical area in which the product was sold; documents evidencing complaints about the product and/or injuries from the product.

What is a "short" period of time?

If the business objective is to close the deal, and the sooner the deal is closed the more valuable it is to your client's company, you must determine the shortest reasonable period of time during which the business people on either side of the transaction can collect the essential information and arrive at their respective "closing" positions. The assumption is that a finite time period is essential to maximize benefits to everyone involved in the dispute: to the corporation in order to achieve elimination of the risk and reduction of costs; to the claimant(s) in order to receive compensation for their loss or injury at the earliest possible date; and to the plaintiffs' attorney in order to receive a fee contingent on the result and to move on to the next case in order to maximize revenue.

My recommendation is that the time for the collection of information in the ECA phase, depending on the type and complexity of the case, should be not less than forty-five and not greater than 180 days. During this period, all involved must have a vested interest in closing the deal in order to maximize their respective benefits.

What is a "reasonable" assessment?

Analyzed in terms of the premise that closing the "deal" in the allotted time period is in everyone's best interest, "reasonable" in this context must be a "ballpark" or "best guess" analysis of risk and reward. If the parties agree at the outset that the failure to "close the deal" will lead to years of battle and ultimately a jury verdict, and its attendant uncertainty in both amount and collectability, there should be a joint incentive, at least initially, to being "reasonable." The same analysis should be made in the ECA model that is made in the typical case settled on the eve of trial. To be sure, the basic information necessary to make that analysis after

years of discovery battles, court delays, and posturing is generally available or could have been gleaned early on. Whether the analysis is done in the first 120 days or on the eve of trial, the parties will assess the facts, each other, the venue, the merit or lack of merit of the claim, the injuries or other losses, and the verdict ranges. The difference is they will be doing it earlier, and with less information and anger. The key is to make sure each side has "enough" information, and to replace anger and posturing with cooperation and openness. The question must be asked: "What do I really need to know?" Experienced litigants only need to reflect on all the totally unnecessary, virtually useless, (but very expensive) information they have amassed in previous litigations to figure out how much is "enough" and what is essential to know in order to make a "reasonable" assessment of the value of the claim or risk involved in any particular case.

Valuing the "costs" and "risks"

Business people intent on closing a transaction on a timetable have to balance the cost to close versus the cost and risk of not closing when deciding how much information they need and where to compromise on substantive positions that would kill the deal. In the context of litigation, companies regularly set reserves to cover risks. This is not a new exercise, and it is not unlike the assessment that is made by business people in "closing" a transaction for the benefit of the company.

Again, wearing a business hat instead of a litigation hat, the same analysis can be made. As an example of just one way to assess the "value" of eliminating a risk, assuming that the company's risk analysts calculate that a reserve in the amount of $5 million must be maintained to cover the risk of an adverse verdict in a particular case, that analysis is the same one that should be employed in the ECA process. However, a "reasonable" assessment of the value of an early resolution must account for costs saved as well as risks eliminated. Again, this process is not new or unique. The ECA model just puts it upfront, rather than at the end of the process. Once the risk analysis is completed and a "reserve" is set, a company can calculate a "closing" price that recognizes the cost savings and the early elimination of risk while convincing the other side to calculate the monetary benefit of time and expenses saved, as well as the value of "a bird in the hand" versus "two in the bush." An early resolution should not only save costs but it should provide a "present value" discount.

Developing a New Litigation Strategy for Class Action Cases

Implementing the process for developing a litigation strategy in class action cases can be broken down into several steps:

Step One: Begin collecting and organizing as much relevant information as possible. The goal of this internal review is so that counsel can examine and thoroughly assess key facts, witnesses, evidence, plaintiffs' allegations and the organization's defenses. (See Appendix E: ADR Case Evaluation Worksheet). This process would include:

1. obtaining and reviewing relevant documents and records;
2. interviewing in-house and other non-party witnesses;
3. conducting an onsite visit, where appropriate;
4. conducting public records/Internet research for product comments and blogs regarding the alleged defect.

Step Two: Identify the key players within the organization and issue an internal document hold. This will preserve relevant evidence and is essential for proper compliance with discovery obligations.

Step Three: Consult with the organization's public relations department to prepare a press statement and internal corporate statement. This will ensure that the organization is issuing statements consistent with the legal position, overall agenda, and strategy agreed upon by the client and counsel. It is important for all branches of the organization to be on the same page.

Step Four: Evaluate the plaintiffs' counsel and named plaintiff(s), and conduct initial research on the plaintiffs' attorneys to determine whether they have brought similar actions against other organizations. If so, retrieve pleadings and motions from these other cases to try to discern the plaintiffs' counsel's strategy and agenda. It is also helpful to determine which defense firms have been adverse to these plaintiff firms in the past and in similar litigations. Determine whether the named plaintiffs are serial class representatives.

Step Five: Perform an evaluation of the judge to which your case is assigned. Determine whether the judge has experience in products

liability class actions or class actions in general. Pull all decisions on dispositive motions in class actions as well class certification opinions by the judge to which your case is assigned, and try to determine the judge's outlook on class certification and settlement issues.

Step Six: Evaluate the forum and potential jury pool. Consider whether the organization wants to litigate in the venue where the claim has been filed, or wants to seek to transfer or remove the case. Determine if the organization has a "fair shot" in the jurisdiction in which the case has been filed, using survey class certification opinions and settlements approved by the judges in the district as well as the relevant appellate courts. With respect to the decision to remove a case from state to federal court, it is important to keep in mind that the Class Action Fairness Act (CAFA) imposes restrictions on class actions brought and settled in federal court that are not present in class actions brought and settled in state court. Also, consider whether removing the case may inadvertently enhance the significance of the case and generate similar suits. Plaintiff's counsel may be notified of the pending federal case via Pacer or other electronic notification services.

Step Seven: Assess the legal issues presented with specific focus on how they intersect with the class allegations. This would include:

1. determining whether there are unique legal issues;
2. considering filing counterclaims, cross-claims, and whether there is a potential for sanctions;
3. evaluating shared or covered liability potential; and
4. evaluating available defenses and claims.

Step Eight: Have an early conference with plaintiffs' counsel. Find out what they are trying to accomplish and explore the possibility of early resolution. (See Appendix E: ADR Case Evaluation Worksheet). This includes:

1. engaging in active discussion with opposing counsel regarding early resolution;
2. demanding a settlement package from opposing counsel;

3. proposing voluntary exchange of information with opposing counsel to promote early settlement;
4. proposing concessions of facts and arguments that would otherwise hinder early settlement;
5. proposing limited discovery to facilitate early resolution (See Appendix F: Sample Agreement to Exchange Information and Attempt Settlement);
6. pursuing only those motions designed to facilitate early resolution;
7. suggesting mediation or asking the court to order mediation; (See Appendix G: CPR's Model Agreement and Procedures for Resolving Product Liability Claims).
8. proposing stay of litigation pending mediation;
9. thinking creatively about the other side's objectives and ways to accomplish a win/win settlement, where feasible. For example, consider label changes coupled with attorney's fees and a limited cash fund for claimants with a *cy pres* for any cash remaining in the settlement fund after distributions are made;
10. conferring with the client frequently on ways to remove barriers to settlement; and
11. accelerating the pace of the litigation, if accelerating the pace will encourage settlement discussion.

Step Nine: Consider engaging separate settlement counsel.

Step Ten: Survey similar claims and settlements to determine how claims are typically being resolved and whether there are non-cash solutions such as coupons, *cy pres*, and label changes that have been approved post-CAFA in your jurisdiction and by your judge.

Step Eleven: Evaluate costs of litigation versus settlement. Try to estimate the value of the claim. Develop a "tree" of alternate outcomes For example, costs of litigating through summary judgment (assuming you prevail); costs of litigating up until trial and settling on the courthouse steps; cost of litigating through trial and settling before a verdict; costs of litigating through trial and prevailing; costs of litigating through trial and not prevailing; costs of settling at the outset of the

litigation after motions to dismiss are decided; costs of engaging in mediation and settling prior to any motion practice. Evaluate financial exposure, time involved in litigation, and disruption of business activities as well as public relations. Look at:

1. amount of claimed damages,
2. the number of people exposed to the product
3. potential for enhanced or punitive damages,
4. value of injunctive relief,
5. damages caps and any other factors affecting damages.

Conclusion

Taking the time to thoroughly assess a products liability class action the moment it comes through the door is extraordinarily beneficial to the client. Early settlement of a products liability class action, if it comports with the organization's objectives, is a win/win situation for all parties involved. Mapping out a strategy at the outset will save the client money and limit business disruption.

There is no end in sight for products liability class actions and in general, products liability cases have increased in number in the last few years. *See* Judicial Business of the United States Courts, Annual Report of the Director, at Table S-10 (2010). The best service to offer your client is to propose alternative methods of resolving class action cases and becoming an active partner in that resolution.

Key Takeaways

- Performing a critical assessment of a class action case's validity and potential risk—i.e., Early Case Assessment (ECA)—is essential in determining whether the case is amenable to early resolution or if it will require protracted and expensive litigation. You need to work with the organization's assigned case manager, outside counsel, and the business client to evaluate the risk and potential exposure presented by the matter so that the appropriate resolution strategy may be developed and pursued.

- Make a checklist of the essential information you need. For instance, in a case involving a claim of product defect your checklist would include: 1) specifics of the plaintiffs' injuries; 2) identity of the product involved; 3) examination of the product; 4) review of medical records; and 5) collection of facts supporting a claim of defect.
- Determine the shortest reasonable period of time during which the business people on either side of the case can collect the essential information and arrive at their respective "closing" positions. The assumption is that a finite time period is essential to maximize benefits to everyone involved in the dispute.
- Implementing the process for developing a litigation strategy in class action cases includes collecting and organizing as much relevant information as possible; identifying the key players within the organization and issuing an internal document hold; evaluating the forum, judge, and jury pool; assessing the legal issues; having an early conference with plaintiffs' counsel; and evaluating the costs of litigation versus settlement.

Susan T. Dwyer, a partner in Herrick's Litigation Department and chair of the Product Liability Practice Group, has been on the forefront of handling national complex products cases for over two decades. Ms. Dwyer litigates in state and federal courts across the United States and serves as national and regional counsel for Fortune 500 manufacturing companies in mass tort litigation and consumer class actions. She has in-depth experience in post-recall litigation as one of Bridgestone Firestone's trial counsel in multi-district litigation involving the tires designed for the Ford Explorer. Ms. Dwyer defends companies in class actions and before state and federal agencies. In addition to her experience as a trial attorney, Ms. Dwyer specializes in conflict management outside the traditional litigation process to help clients control risks and costs through non-adversarial resolution of claims.

Ms. Dwyer has been a sustaining member of the Product Liability Advisory Council for the past twenty-five years and has served as a member of PLAC's Executive Committee. She is a frequent author, lecturer, and commentator in the products liability and toxic tort fields and has co-authored the Tort Law Desk Reference 2000-2010 Editions, Business Torts 2006-2011 Edition*, as well as* Products Liability in New York. *Ms. Dwyer has been recognized by Chambers USA as one of America's*

Leading Lawyers for Business in Products Liability and Mass Torts from 2007 through 2011. For the second consecutive year, Ms. Dwyer is identified as one of seven lawyers who qualified as a "Star Individual" in this section with a particular emphasis on automobile matters. She is a member of the Florida and New York bars.

Ronald J. Levine is co-chair of Herrick Feinstein's Litigation Department, and Chair of the firm's Best Practices Committee. An experienced trial attorney, his practice focuses on the defense of multi-party tort and contract actions. During the past twenty-five years, Mr. Levine has represented corporate defendants in such high-visibility matters as the Love Canal proceedings in New York; the toxic shock syndrome actions; the smoking and health litigation; the repetitive stress keyboard cases; the lead paint litigation; and the Firestone tire recall. He regularly advises clients on strategies and programs involving records management and discovery, and crisis management.

Mr. Levine chaired the New York State Bar Association's Committee on Legal Education and Admission to the Bar, and has served on numerous committees for the Association of the Bar of the City of New York. He was selected to serve as a sustaining member of the Product Liability Advisory Council, and is Trustee of the New Jersey Cancer Institute Foundation. He is the author of more than two dozen articles on trial practice, crisis management, and tort law, is an editor of the nationally published Product Liability Law and Strategy*, and recently authored a chapter for* Commercial Litigation in New York State Courts *(West 2010). He co-authored the record retention program that is offered by SAI Global. He has lectured for the Association of Corporate Counsel, the Defense Research Institute, the American Society for Industrial Security, and the American Insurance Services Group, among other organizations. Mr. Levine graduated with honors from Harvard Law School, and received his undergraduate degree summa cum laude from Princeton University. He is a member of the New York, New Jersey, Pennsylvania, and District of Columbia bars.*

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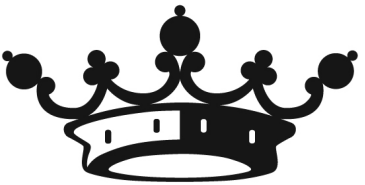

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