Your discovery plan for a juvenile-products-liability case

Tailoring your discovery to prove the case when a child is injured by a dangerous product

By Charles C. Kelly, II

A successful juvenile-products-liability case requires aggressive and effective discovery tactics. You need to have the product and have a plan for investigating your case.

• ***Make sure you secure the product immediately.***

If you do not have the product, send a spoliation letter. Often, either the police or Child Protective Services have impounded the product pending their investigation. Be sure to send a letter requesting that the agency contact you before destroying the product. If the client still has the product, you should tell the client not to alter the product in any manner.

• ***Begin mapping a discovery strategy.***

As soon as you have retained the client, you need to begin mapping out a discovery plan and strategy. In developing a discovery strategy, you should consult with other attorneys who may have handled a similar case, or even better, an expert with experience in the particular product manufacture and design.

What information do you need about the product?

• ***Consider the elements of each cause of action***

In preparing a discovery plan for a juvenile products case, as in any case, one needs to consider the elements of each and every potential cause of action and determine what facts must be obtained from the defendant or other third party to prove each element.

In a typical juvenile products case, there are usually several products-liability causes of action, a negligence cause of

action, and in some instances, a Consumer Legal Remedies Act deceptive practices claim.

• Consider the parties and the information in their possession

Most of the discovery will be directed to the manufacturer, distributor, and retail defendants. The hot-button topics, generally, will be some the following:

• What actual or constructive knowledge did defendants have of the defect and its dangers; how does the design or manufacturing process create the defect;

• What alternative designs were considered; and

• What modifications to the design or manufacturing process were considered before or after your client's injury?

In regards to the Consumer Legal Remedies claim based on deceptive practices, you will need to discover all of defendants' advertising and marketing materials.

• Consider third-party discovery

There are instances when third-party discovery may be necessary. For example, you may need to serve a subpoena on the "independent" industry standards organization, American Society of Testing and Materials ("ASTM"), in order to discover information pertaining to the testing of the product, the testing protocols adopted by the industry, and the input provided by the manufacturer and industry into that process, as well as the information the industry had regarding defects and dangers of the product. Typically, you will also have to subpoena all investigations by the police, Child Protective Services, and any other public agency, which may have investigated the child's injury.

A word about e-discovery: Where is the information stored?

As in any case, at the outset of the litigation, you should send an e-discovery letter requesting that defendants preserve all evidence held in electronic form. During discovery, consider sending special interrogatories to learn how electronic information is stored, in what drives or servers it is stored, and who the person most knowledgeable is regarding electronic information storage. If a significant amount of information is in electronic form, it may have to be searched using key words. Design your investigation and early discovery with an eye to learning what keywords may yield the most "hits" and generate the most information. For example, consider what terms or phrases are used to describe a component part or design process. Doing key-word searches can be time consuming and expensive, so be prepared to identify key-word terms that will yield the most relevant results.

Discovering how your client was injured

You will need to determine who knows how your client was injured, who possesses important information and how you can get that information.

• First responders and agencies

• Think about subpoenaing first responders, investigating police officers, coroner, Child Protective Services' investigator and take their depositions and obtain their reports.

• Prepare and serve a Freedom of Information Act request on the Consumer Product Safety Commission to obtain its investigation.

Besides your client's caregiver or other lay witnesses, these agencies and individuals will be the first on the scene of the accident. The information developed by these individuals at the scene of the accident will be crucial in understanding how the defective product injured your child. These individuals will be able to answer such questions as how the product was being used, the condition of the product at the time, and the position of the child after the injury. First responders must be questioned as to what they did to disturb the scene when they were attending to the injured child. For example, you should ask whether or not they re-positioned the child, or removed a safety strap.

You must be able to answer these questions because the defendant will always look for facts to support an argument that the product was being misused at the time of the injury or that safety devices were not in use. Obtain all reports, photographs, videotape, and statements made or taken by these individuals or agencies.

• Lay Witnesses: family, friends or other third parties

Additionally, contact and statementize or depose other lay witnesses such as family, friends or other third parties who may have either witnessed the accident, the assembly of the product, or modifications made to the product. These third parties may provide testimony that may sway a jury because the third-party is perceived as neutral.

Discovering whether defendant knew about the risk/defect

In a product-liability, failure-to-warn claim, plaintiff must prove whether the risk or danger of the defect was known or knowable to defendant but failed to adequately warn or instruct on risk. (*Carlin v. Superior Court* (1996) 13 Cal.App.4th 1104.) To this end, you must prepare special interrogatories, requests for production, and deposition notices of persons most qualified designed to elicit information that shows or tends to show that the defendant knew or should have known of the risk of the defect at the time it was sold.

• Have there been prior similar incidents?

The best evidence is, of course, if there were prior similar incidents to your client's known to defendant. These prior similar incidents show not only defendant's knowledge of the defect but support the existence of the defect itself. (Similar incidents after your client's injuries are also evidence of the existence of the defect and should also be discovered.)

• Was the product tested? Have the product warnings changed?

Additional evidence that may show defendant's knowledge of the defect includes product testing, customer complaints, all iterations of the product warnings and instructions, internal memoranda and e-mails relating to the

product and Consumer Product Safety Commission ("CPSC") communications and reports.

You should have the defendant identify the Person(s) Most Qualified ("PMQ") on the subjects of product testing, customer complaint logging and protocols, regulatory compliance, including logging and investigating CPSC Epidemiological Investigation Reports, quality assurance, and product packaging, warnings and instructions for use.

While you may consider noticing these depositions with documents relating to the particular PMQ, the better practice is to allow time for review and analysis and thus to request documents relating to these PMQs through a Request for Production of Documents well in advance of the depositions. Depositions of these persons must then be done.

• ***What did the industry know at the time?***

While conducting this discovery on the defendant, you should simultaneously be investigating the industry trade groups to which the defendant belongs and begin perusing the trade groups' publications and conference presentations to determine whether or not the dangers and risks of the product were discussed. This information is vital because a product defendant is liable even if you cannot prove actual knowledge. The defendant can be liable if the danger or risk was "knowable" in light of the scientific or industry knowledge at the time. (*Anderson v. Owens-Corning Fiberglass Corp.* (1991) 53 Cal.App.3d 987.)

• ***Keep your discovery narrow.***

Your discovery should be narrowly tailored in time and scope. Usually no more than 5-10 years before the injury and directed to the product or specific model of product that caused your client's injury. For example, in a crib case, if the component that caused injury is the drop-side, you should tailor your inquiry to include all cribs manufactured by defendant with a drop-side. Narrow discovery avoids objections, but more importantly, reduces the chance you will waste your time reviewing irrelevant information. Here are some examples of narrowly tailored discovery:

• **Special interrogatory**

1. "State whether you have received any complaints prior to or after this incident of any accident resulting in personal injury after the drop-side detached from the headboard."

2. "Describe the substance of each complaint you received prior to or after this incident of any accident resulting in personal injury after the drop-side detached from the headboard."

• **Request for production**

1. "All documents relating to any complaints prior to this incident of any accident resulting in personal injury after the drop-side detached from the headboard."

2. "All documents relating to any testimony or presentations on drop-side crib safety at an ASTM committee meeting."

Discovering the role of the defendant

As mentioned above, juvenile product manufacturers play a large role both in crafting industry standards and in lobbying the CPSC regarding industry regulation. While industry standards and CPSC regulations are not admissible in strict liability products claims, they are admissible in a negligence claim.

Therefore, discovery must be done to ascertain the role that the defendant played in either crafting industry standards or CPSC regulations. You must find out what industry or trade organizations to which defendant belongs. You should obtain from defendant all written submissions, presentations and papers made to the organizations. At trial, the jury will have to be educated on the role that industry plays in creating the lowest possible standards and specifically, the role your defendant played. This will counter defendant's argument that it could not be negligent because it met industry standards or complied with all federal regulations.

To that end, you should depose the person most qualified on regulatory affairs as well as industry standards. You should inquire into the positions held by the company, the role it played in drafting the standards or regulations, and the basis for those standards and regulations. Additionally, you should inquire into how the industry-wide testing protocols were established, and the role defendant played in creating those testing protocols. For example:

Deposition of person most qualified

Subjects of testimony

• The person most qualified to testify regarding defendant's participation in the ASTM sub-committee on crib safety.

• The person most qualified to testify regarding defendant's participation in drafting ASTM safety standards on cribs.

• The person most qualified to testify regarding defendant's participation in drafting ASTM crib testifying protocols and standards.

Discovering whether the product could have been made safer

In both a products-liability negligence case and strict liability risk-benefit case, you will need to prove that there were alternative designs which were feasible at the time that the product injuring your client was manufactured. To establish this, you should request the design file pertaining to the subject product including all alternative designs considered, modifications to the product made before or after the manufacture of the subject product, as well as internal design memoranda, e-mails, and other communications. You must determine why the other designs were rejected. For example, other designs may have been rejected relating to cost, safety, and/or profit margins. Take the deposition of the PMQ of design and review each design iteration and the basis for either accepting or rejecting each design iteration.

You should buy and examine exemplars of other similar products. Determine the differences in design and whether those differences make the product safer.

In a failure-to-warn case, you will want to obtain all iterations of warnings and instructions for use sold with the product. Find out if changes were made to the warnings at any time before or after your accident.

Conclusion

It is important to be thoughtful, clear, and precise when preparing and executing a discovery plan in a juvenile-products case. Failing to do so can lead to wasting money or being inundated with useless information and documents. Stay focused on what you need to prove and be aggressive in getting it.

Charles Kelly is a partner with Hersh & Hersh *in San Francisco. He received his JD from Indiana University at Bloomington School of Law (Bloomington, Indiana) in 1985. He litigates catastrophic injury cases in diverse areas including premises liability, product liability, and medical negligence. In his spare time, he practices Thai kickboxing, snowboarding, as well as hiking and mountain climbing. Visit Hershlaw.com for more information.*


Kelly