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Practice Tip

Be Proactive in Document Production

By Kirby Griffis

In many kinds of litigation, document production is a dirty term. Even when done carefully, responsibly, and well by both sides, the process of producing documents (and, for the other side, the process of dealing with documents that have been produced) is tedious, thankless, and consumes a remarkable amount of resources. Things become much worse when the parties clash over what should be produced and how, and worse still when the party receiving the documents is more interested in using the discovery process to inflict pain or to generate a record for sanctions motion practice than he is in getting documents to help him prepare his case.

As a party producing documents, you can't change the way the other side will behave, but you can still set up your document production to make it much more likely that things will go well. Anticipate your document production needs when a case is filed, not when you first receive written discovery requests. If the litigation is on a brand-new subject for which no documents have previously been gathered, get started on the process. If it is serial or otherwise familiar litigation, consider what unique discovery might be required by this case, and look into it.

Take the initiative by offering the document production on your

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An Unexpected Evidentiary Battleground

The 'Causation' Element in Consumer Protection Claims

By Jay Mayesh, Jonathan Englander and Victoria Haje

Ordinarily, the focus in a product liability case is on the defendant-manufacturer's duty to design and manufacture a safe and useful product and to warn adequately of any risks associated with its use. But an interesting and unexpected battleground can arise from a tag-a-along consumer protection claim. Here is the scenario: Plaintiff, in an individual action, sues defendant-manufacturer for injuries allegedly sustained in connection with the use of defendant's product. Plaintiff sues under traditional product liability theories as well as under the state's consumer protection statute, which proscribes deceptive and misleading trade practices. In particular, plaintiff alleges a consumer fraud has occurred because she has been injured by a product that, she claims, had been sold in connection with deceptive sales practices; in this case, certain allegedly false or misleading advertisements.

Plaintiff has testified at her deposition that she has not seen or heard the advertisements in issue. Nevertheless, she proposes to admit the advertisements because, she points out, the state consumer protection statute under which she is suing does not require that she *relied* on the alleged misleading sales practice. (While the majority of courts hold that proof of actual reliance is *not* required under the state consumer protection statute, proof of reliance is required in some jurisdictions. Be sure to check your particular state's consumer protection statute and interpreting case law.) Compare *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000) (no reliance required) and *April v. Union Mortgage Co.*, 709 F. Supp. 809, 812 (N.D. Ill. 1989) (same) and *Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 98 (Cal. App. 1996) (same), with *Pauley v. Bank One Colo. Corp.*, 205 B.R. 272, 276 (D. Colo. 1997) (reliance required) and TEX. BUS. & COM. CODE ANN. §17.50(a)(1)(B) (same). If the plaintiff succeeds, she would enjoy an evidentiary advantage, in that the potentially damaging advertisements will go to the jury and presumably influence their determination of liability on the product claims.

In response, the defendant contends that the advertisements are inadmissible because the consumer protection statute under which plaintiff is suing has not dispensed

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PERIODICALS

Jury Service, Reform and Fair Trials

By Victor E. Schwartz and Cary Silverman

Product liability trials are difficult for juries. They are long. They involve highly technical subjects, the testimony of conflicting "experts," and what may or may not be scientific evidence. Jurors may be asked to consider and decide the feasibility of two or more alternative designs for a product with which they are unfamiliar.

Commentators have suggested several options to meet this challenge. Some have proposed scrapping the lay jury for a jury of technocrats or those with expertise in the field at issue, known as "special" or "blue ribbon" juries, in complex cases. A few have proposed that jurors meet certain educational qualifications for such trials. While there is merit to these ideas, there is an easier way to ensure that juries are competent to hear complex cases while preserving the traditions of our jury system: to ensure that people of all backgrounds have both an opportunity and obligation to serve on a jury. The collective wisdom of a truly representative jury would provide the foundation for hearing and deciding product liability cases in a fair and balanced way.

Unfortunately, by the time a product liability case makes its way to voir dire, litigators may be surprised at how few people are left in the jury pool. Many citizens are exempt from jury service. Some prospective jurors may easily avoid jury service; some take advantage of the vague standard to obtain an excuse for "hardship." Others may legitimately need to be excused from jury service due to poor jury service laws. The result may often be a jury that does not include the wide range of experience and values of the community.

The parties, as well as the justice system as a whole, suffer harm when the jury fails to reflect the diverse expertise and abilities of the community, especially in product liability trials, given the complexity of such cases.

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Why Do Citizens Avoid Jury Service?

While many citizens cringe at the idea of serving on a jury and would avoid jury service if given the opportunity, most think of our jury system as the fairest method of determining guilt or innocence and consider juries to be the most important part of the justice system. There are several reasons for this apparent conflict in attitudes:

- Some state laws contribute to a jury system that is inflexible and does not respect citizens' time and lives by failing to offer rescheduling opportunities, requiring jurors to spend several days or weeks at the courthouse, or remain "on-call" for months at a time.
- Few states require employers to pay their employees during jury duty and most states provide a mere $10 to $30 per day to those who serve, giving some individuals no choice but to ask to be excused from jury service for financial hardship.
- In some states, employment protections for jurors are weak and working citizens may be asked to sacrifice their vacation or annual leave time to serve on a jury, or worse.

Jury service can be improved. The American Legislative Exchange Council (ALEC), the nation's largest bipartisan membership organization with 2,400 members nationwide has adopted a model "Jury Patriotism Act." This model legislation safeguards a citizen's right to serve on a jury as well as a litigant's right to a jury representing a true cross section of the community. The Jury Patriotism Act has taken off with momentum rarely seen in civil justice initiatives. In 2003, legislation based on the model act was introduced in 17 states. In just a few months since ALEC's release of the model act, it has become law in Arizona, Louisiana, and Utah.

Solving the Problem

Flexibility in Scheduling. The Jury Patriotism Act provides more flexibility to those called for jury duty by providing each juror with one automatic postponement of service. This means that a citizen may postpone service to another time, simply by contacting the appropriate court official via telephone, electronic mail, or in writing. The only requirements are the requestor must not have previously received a postponement and must provide a date on which he or she will appear for jury service within 6 months.

Reducing the Length of Jury Service. The Jury Patriotism Act also makes jury service more appealing by guaranteeing potential jurors that they will not need to spend more than 1 day at the courthouse unless selected to serve on a jury panel. This practice is generally known as the "one-day/one-trial" system. Over the past 3 decades, about 50% of state courts have moved to the one-day/one-trial system as a response to high excusal rates, the inconvenience and hardship resulting from lengthy terms and the frustration and boredom imposed on jurors by longer terms. In an early study, nine out of 10 jurors preferred the one-day/one-trial system and a majority did not object to being called again. This system is good news not only for jurors, but also for employers, who favor the policy because it allows employees to return to work more quickly.

Protecting Employee Rights and Benefits. Many states can do more to protect the employment rights of citizens called for jury service. Some state laws prohibit an employer from discharging or threatening to discharge any permanent employee who is summoned to serve as a juror so long as the juror provides the employer with reasonable notice of the summons prior to commencement of jury service. The Jury Patriotism Act suggests that states strengthen juror employment protections through two legislative reforms. First, states should amend the law to clarify that an employer may not take *any* adverse action against an employee because he or she serves on a jury. Second, the law should explicitly state that a business may not require its employees to use their annual, vacation, or sick leave time for jury service.

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Jury Reforms

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An employee should not fear for his or her job or be asked to choose between responding to a juror summons and sacrificing an annual vacation.

Fair Compensation for Jurors Serving on Lengthy Trials. One provision of the model act that is especially helpful for product liability cases is its innovative "Lengthy Trial Fund." This Fund would provide wage replacement or supplementation (up to $300 per day) to any juror who serves on a trial lasting longer than 10 days and who is not fully compensated by his or her employer during jury service. The Fund would be financed through a minimal court filing fee — in essence, a small "user fee" on litigants who utilize and benefit from the jury system.

Although the number of jurors selected to serve on lengthy trials is relatively small, those who find themselves on a long product liability case may suffer severe financial hardship. As the Cincinnati Post recognized, the fee that jurors receive from the court "won't even cover the cost of parking and a bag lunch, much less begin to compensate people for the time away from their jobs if their employer won't let them serve with pay." This lack of adequate compensation for jurors has several unfortunate results. Those who work for employers who do not pay during jury service simply cannot afford to serve. Some jurors may opt simply to not show up in court for fear of being selected to serve on a long trial. Those with jobs who will lose their salary after the first day of service will plead with the court to be excused. As in most product liability cases, when it is apparent that a trial will be long and complex, it is likely that the court will excuse many working jurors due to the financial burden jury service will place on them, their families, or their businesses. Courts often find they have no other choice, given that they do not have the resources to provide any significant compensation above the jury fee. The Lengthy Trial Fund would lend considerable support to jurors serving on product liability trials and allow all people to decide these important cases.

Elimination of Occupational Exemptions. An easy step toward ensuring that juries reflect the collective knowledge of the community is the elimination of exemptions from jury service based on a person's occupation. About two thirds of the states have already taken this simple step, but other states have not. (Delaware exempts health care providers, full-time police officers or firefighters, clergy, and self-employed persons or those primarily on commission. Missouri disqualifies lawyers and judges from jury service, and provides that clergymen, doctors, osteopaths, chiropractors, dentists, pharmacists, and certain law enforcement officers are exempt upon request. Nevada may have the longest list of exemptions, including federal and state officers, judges, lawyers, various county employees and law enforcement officers, employees of the legislature, physicians, optometrists, dentists, and even locomotive engineers and other staff. Tennessee law is similarly broad.) These important perspectives are lost when deciding product liability and other cases.

On the other hand, in 1996, New York State eliminated all of its 26 occupational exemptions. Remarkably, the exemptions had excluded more than one million of New York's citizens from the jury pool. Following New York's reform, press reports hailed the increased diversity of the jury pool and the greater willingness of those summoned to serve.

Strengthening the Standard for Hardship Excuses. The Jury Patriotism Act also makes it more difficult for the privileged to avoid jury service by tightening the standard for hardship excuses. It moves away from vague and often undefined "undue hardship, severe inconvenience, or public necessity" standard followed by most states. Instead, hardship is limited to three circumstances: 1) when a person would be required to abandon a person under his or her personal care or supervision due to the impossibility of obtaining an appropriate substitute caregiver during jury service; 2) when the juror would incur costs that would have a substantial adverse impact on the payment of the individual's necessary daily living expenses or on those whom he or she provides the principle means of support; or 3) when the prospective juror would suffer physical illness or disease. The act also makes clear that requests for excuses must be supported by documentation and decided by a judge, rather than a clerk or other court staff. This approach will discourage people from inventing bogus hardship excuses.

Increasing the Penalties for No-Shows. A significant number of people who do not respond to jury summonses fail to do so because they have little fear of receiving a penalty, or believe that the penalty will be minimal — a mere "slap on the wrist," comparable to a parking ticket, for failing to appear for jury service.

For this reason, the Jury Patriotism Act suggests penalizing a juror's failure to appear as a misdemeanor. Alternatively, states might increase the potential penalty for no-shows and courts might establish better procedure for consistent enforcement of juror summonses.

WHERE DO WE GO FROM HERE?

It is important that juries include the wide range of knowledge and experience of the community to make informed and fair decisions in product liability cases. The state legislative reforms envisioned by the Jury Patriotism Act move toward a system in which every person has both an opportunity and obligation to serve on a jury. State legislatures and courts can also encourage jury service through enhancement of courthouse facilities, courteous and professional treatment of jurors, and trial reforms that make it easier for the jury to participate and weigh the evidence in a trial. Some responsibility falls on employers, who can and should adopt policies that encourage jury service. Finally, individual citizens, who are busy in their professional and personal lives, should recognize the importance of jury service to our civil justice system and what they can contribute to the process, and serve as jurors.