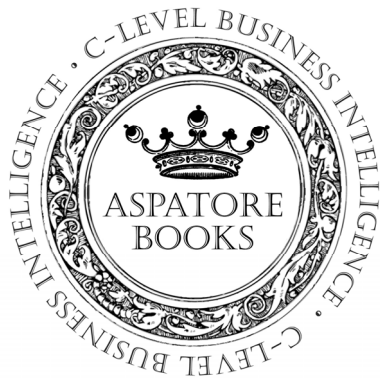


I N S I D E   T H E   M I N D S

# Product Liability Litigation and Dispute Resolution

*Leading Lawyers on Strategizing for Trial,  
Defending Cases, and Negotiating Settlements*



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First Printing, 2008

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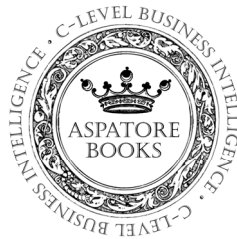
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# Be Prepared, Be Proactive, and Be Patient

Steven D. Allison

*Partner*

Dorsey & Whitney LLP



## **Approaching Product Liability in a Litigation Context**

My product liability work is almost exclusively litigation-based. Specifically, I represent companies in disputes relating to claims that their products are in some way defective and/or responsible for harm, whether to an individual or a group of individuals. In some cases, the claim may be brought by a business entity, but these cases are relatively infrequent. While I do some counseling of clients to avoid litigation altogether, the vast majority of my work involves representing companies in actual product liability defense and dispute resolution.

I am typically hired after a case has been filed or the client has been given notice that a dispute is on the horizon. There are also certain clients I work with on an ongoing basis, as they have repeat product liability cases. Given the nature of their product or business, these clients can expect a certain number of cases to be filed in any given year.

One of the greatest assets I can offer my clients in a product liability matter is early evaluation of their case. It is very important to look closely at the legal allegations, the claimed defect, and any alleged damages in the context of the client's business objectives. In many instances, litigation is viewed by both lawyers and businesspeople as separate from the business itself—a temporary setback that must be dealt with before the company can move on. However, I believe that even in litigation, both the attorney and the client should remain focused on the business goals of the company within the context of the litigation. What this means, in a practical sense, is that any settlement strategy should be created to dovetail with the company's business objectives.

Of course, when a litigation dispute arises, one must be prepared to take the case to trial if need be. The most productive negotiations and the best settlements usually arise only after the opposing side has been convinced of your willingness to try the case. This puts the defendant in a stronger negotiating position, and it thus increases the chances of a settlement that meets the company's objectives.

## **The Direct Financial Value of a Product Liability Attorney**

At the end of the day, product liability litigation is part of the cost of doing business. Companies should understand that product liability litigation involves a number of financial implications, including not only the cost of potential judgments or settlements, but also defense costs, increased product development costs, and even the potential costs of a product recall. When dealing with clients that have regular product liability litigation—typically large companies whose products ultimately are used by a wide array of consumers—the financial considerations are more sweeping. For this reason, one cannot approach a single case with blinders on. Rather, it is necessary to look across the entire business to determine the total product liability exposure, the total cost of legal fees each year, and the overall business strategy for handling product liability litigation. While the exposure of one specific case may not be extensive, many product liability cases over time will impact a company significantly. For example, many small \$100,000 problems can add up to a larger \$10 million problem rather quickly.

Of course, in dealing with a company that faces lawsuits infrequently or rarely, one must take a somewhat different approach to the financial considerations of product liability. The cost to defend a single case may financially outweigh a potential settlement, and given the limited potential for increasing future liability, in these cases the company may be better off pursuing settlement options. In any case, the attorney should look at the overall liability exposure of a company before making any determination about the financial impact of a settlement of the matter at hand.

### **Client Pitfalls**

Overall, there tends to be an overemphasis on disclaimers, particularly in companies that have not faced much product liability litigation. With good reason, companies assume the mere fact of having enough disclaimers in place is a panacea that will shield them from liability issues. Unfortunately, and depending on the jurisdiction, the extent to which disclaimers will shield a company from liability may be quite limited. So, while well-written disclaimers are certainly advisable, the company needs to be aware of their continued risk despite those disclaimers.

Furthermore, companies that are inexperienced in product liability litigation often tend to be somewhat too quick to try to settle cases without first undertaking some aggressive defense activities. The fact of the matter is that product liability cases are a business for the vast majority of the plaintiff's bar, and they ultimately view each case in financial terms. If the plaintiff's attorney sees the defendant is unwilling to take the case to trial and make them work to prove their case, the settlement demand will often not come down to a reasonable level, and certainly not until closer to the eve of trial. At that point, however, the company will have spent a large portion of the fees they were presumably hoping to avoid with an early settlement. While saving attorneys' fees and achieving a quick settlement is not in itself a bad thing, companies should know when to be proactive and perhaps even a little aggressive about their defense. Ultimately, a stronger stance will benefit the company by driving a better settlement.

Finally, in this era of electronic data storage, companies often face problems in the area of evidence, including physical evidence and electronic document retention. This is one area in which clients must be proactive about developing a good document retention plan. Additionally in a product liability case, companies must be concerned about the physical evidence and potential claims of destruction of evidence, or "spoliation." It is a must, therefore, to have a good plan for handling any physical evidence, data testing records, and key information throughout the product development process. While these measures require a certain amount of up-front expense, it would be far more expensive to suffer a large loss or pay a high settlement due to discovery or destruction of evidence issues in an otherwise defensible case.

### **Working Together: The Attorney/Client Relationship**

Generally, defendants tend to be reactive rather than proactive. The plaintiff files the case and bears the burden of proving the case, while the defense has a tendency to sit back and take a wait-and-see approach. However, I usually encourage my clients to do the exact opposite. I want to be the first one to send out discovery requests, take depositions, and be aggressive about defending my client's position.

There are several ways a defendant can benefit from a proactive approach. As stated above, the plaintiff's attorneys typically view litigation as a business. If the plaintiff sees there will be a cost to pursuing the case and that there is no chance for a quick and easy settlement, the defendant will be in a stronger negotiating position. Furthermore, it is important for the defense to evaluate its case early, as it is typically counterproductive to take an overly aggressive stance at the beginning, only to discover that the facts are unfavorable and that early settlement would have been a better option. There is a delicate balance between being proactive and taking time to conduct early evaluation. But in the end, the defense is better off setting the stage and litigating the case on its own terms as much as possible.

In these efforts, as stated previously, the product liability attorney must understand the client's business and its business objectives. Sometimes litigators fall into their own world as defined by the courtroom, and they lose sight of the connection between litigation and the client's actual business. Being involved in linking the case with the objectives of the client is the best way to not only help the client's case, but also build a good relationship and strong partnership with the client.

In that regard, there are three major categories into which most companies can be placed and which influence their overall objectives: companies that rarely get named in liability suits, companies that occasionally face suits, and companies that are frequent defendants. The attorney should be sensitive to the client's position based upon the category into which they fall. While it is important not to generalize, the more frequent the product liability litigation, the more important it is to include in the evaluation of any particular case or potential settlement the impact on the whole portfolio of product liability litigation the company faces, and the possibility of encouraging or discouraging future suits.

### **Obtaining Critical Information**

In the first meeting with a client, it is important to obtain some basic, essential information about the case. Lawyers generally like to talk about themselves, and while I suppose I am no different, I have learned over time the importance of learning about the client's business and goals. In the first meeting, I ask the client to explain the product: how it is developed, how it

is marketed, who the key people involved are, where it is manufactured, whether certain components are manufactured by third parties, and so on. In addition, I like to get a sense of the financial position of the company, including whether it is public or private, what the major funding sources are, and what the major financial challenges and/or opportunities are. All of this information helps me put the case in the proper context. Once this information is laid out, I am in a better position to start talking about the specifics of the case and the particular product involved.

I am also interested in the client's prior experiences, if any, with litigation. It is important for me to gauge how those experiences have shaped the client's attitude toward litigation. If the client has had bad experiences, they may have some basic concerns about the process and their counsel's role in that process. Furthermore, I am interested in learning what the client liked and did not like about their prior counsel. For this relationship to be successful, it is important for me to understand what the client expects and needs from their attorneys.

As for staying current with general knowledge in the product liability area, I attend Defense Research Institute conferences on a regular basis. We also have an internal firm product liability team that conducts meetings and shares knowledge. In my opinion, however, there is no substitute for reading new cases in the product liability area in the jurisdictions in which I practice. I receive a daily report of the cases coming out of my jurisdiction, which is helpful in keeping tabs on local legal trends.

### **The Art of Negotiation**

At the end of the day, as with most cases generally, product liability cases are settled. As a result, a settlement and negotiation strategy must be part of any case preparation.

The art of negotiation requires giving the opponent a reason to settle within the range in which one's client is willing to settle, based on their business objectives. The real challenge is determining the most persuasive reasons for the opponent to accept that settlement. The first step in my strategy to achieve a favorable settlement is to learn the case as thoroughly as possible and as early as possible. If you are better prepared than your opponent, it

will be much easier to drive the negotiation process in your favor. Simply put, there is no substitute for doing your homework.

In dealing with the opposition, I strive to give a rational explanation of my evaluation of the case, coupled with an explanation of the merits of reaching an agreement and the consequences of failing to reach an agreement. For me, being rational and reasonable is the best approach, and it fits with my style. Furthermore, one must emphasize the importance of non-legal issues that can drive settlement, as many product liability cases are not based on a cost/benefit business evaluation for the plaintiff. Therefore, I try to discover the true motivation behind the plaintiff's case. Sometimes compassion and understanding is the best way to move an injured plaintiff. Other times, aggression and firmness is the right approach. Ultimately, even though I have a preferred approach, I strive to be flexible in my strategy and avoid taking a cookie-cutter approach to every case.

### **Working with the Key Parties**

I see myself as an advocate and facilitator, but never the ultimate decision-maker. While I strive to help my client understand their business objectives as they fit in with their litigation goals and strategy, it is not my responsibility to call the shots. At the end of the day, negotiations can be very difficult for both the client and the attorney, and it is important that the client understands the extent of their own responsibilities, and that they will be called on to make the final decision with respect to whether they should accept a settlement. While I want to achieve a good deal on their behalf, the client should also be able to rely on me as a vigorous advocate in case a deal cannot be reached. The client needs to know that if we walk away from a settlement, I am prepared to mount an aggressive defense and, if necessary, try the case.

In most product liability cases, the contingency fee arrangement is such that typically the plaintiff and plaintiff's counsel both have interests that must be considered in trying to negotiate a settlement. I have seen cases in which the plaintiffs themselves seem to be driving the case, while in other instances the plaintiff's counsel may be the true driving force. Furthermore, it is not uncommon for a spouse, parent, or other family member to be present across the table. While there is always a certain degree of financial

incentive and money is often a great motivator in these cases, there is often an emotional aspect to the case as well, particularly if someone has been seriously injured or died. While the plaintiff's counsel may view litigation as a business, the plaintiffs themselves are frequently influenced by non-monetary considerations as well. It is important for me, as an attorney and advocate for my client, to be aware of the motivations on the other side and take them into account in negotiations.

## **Approaching a Negotiation**

Preparation is a critical first step in any negotiation process. First, I want to know the facts of my case and the key relevant points of law. To whatever extent possible, I also want to learn about the likely motivations of the plaintiff and their counsel. Furthermore, whether in an initial telephone call or a formal mediation, I am always prepared to give a “mini” opening statement. In five minutes or less, I should be able to explain why my client is likely to win the case. If an attorney has taken the time to prepare and develop such a statement, it can be a powerful negotiating tool.

Because negotiations can happen when you least expect them, it is important to think through the negotiation strategy from the outset. Good preparation will ensure that you are ready for negotiations at any time. Proactive preparation and strategizing is particularly important for cases in which the client has decided an early settlement is their best option.

There are three major components of any settlement that must be addressed in negotiations: liability, damages, and payment terms. Liability issues—who is responsible for the injury—typically dominate the early stages of settlement negotiations. However, since both parties usually do not believe they are at fault, or at least not at a majority of the fault, negotiations will usually move to damages, which is where the heavy lifting begins.

Damages in product liability cases have three elements: actual economic damages (hard damages), non-economic losses such as pain and suffering (soft damages), and punitive damages. Hard damages are easier to quantify, as they involve medical expenses and/or lost wages. Soft damages, on the other hand, are where much of the most difficult negotiation takes place, as

they involve the alleged pain and suffering and emotional injury of the plaintiff, and they have no reliable guide other than past verdicts and settlements. In determining a reasonable range for the soft damages of a case, one must use experience, knowledge of the tendency of juries in the particular jurisdiction, and a sense of how sympathetic the plaintiff may be before a jury.

Product liability negotiations differ from other business cases in that they involve injury and a great deal of emotion. The dynamic in settlement negotiations, therefore, is distinct from a purely business dispute. As an attorney in this area, it is important to be sensitive to the emotional component of the negotiation process and, if using formal mediation, to secure a mediator who appreciates the potential emotional nature of the negotiations. At the same time, one must be aware that the human element on the plaintiff's side may cloud their rational judgment. The best maxim is not to ignore the emotional aspect, but neither should you give it more weight than it deserves.

### **Respecting Client Input**

Clients should play an informed and active role in their own defense, since they are the ultimate decision-maker. During the initial discussions, the client and attorney should first decide whether the case should be viewed in isolation or as part of a whole portfolio of cases. Ultimately, this is a question of what kind of message the client wishes to send to potential plaintiffs and the plaintiff's bar, as they may encourage other lawsuits to be filed depending on their course of action.

Next, it is important to review the details of the present case with the client. Clients have a responsibility to the owners of their business to conduct a thorough cost evaluation in terms of legal fees versus expected outcome. Furthermore, they must consider the burden placed on the company by the litigation process, including lost time, and the general disruption to the business from interviews, document gathering, and depositions. Together, attorney and client should evaluate both the big picture and the details of the case before determining a settlement strategy.

As previously stated, the client is the ultimate decision-maker in any case. They are responsible for running the business in the best interests of their shareholders or other owners of the company. While I am happy to offer them all available options and discuss the merits and demerits of each, not every client will take my recommendation every time. As an attorney, I must respect and accept client decisions even if they may run counter to my advice.

### **Successful Settlement Strategies**

Formal mediation is increasingly used in all types of litigation. When selecting a mediator, it is important to evaluate the type of mediator a case requires and strive to make a good match, whether based on personal experience or colleague recommendation. Because the mediator will handle much of the communication between the parties, it must be someone both the attorney and the client can be comfortable with.

Personally, I am more concerned with mediator style than with their expertise in terms of specific subject matter. Increasingly, I prefer mediators who can communicate effectively with the parties and understand the financial and emotional issues in the case. I also prefer private mediation to court-sponsored mediation, since the plaintiff must typically pay for some of the expense and is therefore more invested in the process. Sometimes, however, the plaintiff will not accept private mediation for this reason. In those circumstances, if mediation is an important goal, you may need to accept a court-sponsored mediator.

Achieving a successful settlement requires patience. Settlement efforts may not be successful the first time or even the second time, and litigation negotiations do not often proceed in a particularly linear fashion. Furthermore, depending on the scope of the case, early settlement simply may not be an option. The ultimate goal of negotiation efforts is to achieve the client's business objectives, and it is critical to keep one's eye on that goal throughout the process. I have had successful settlements for zero dollars, as well as for large sums of money, with happy clients in either case because the settlement achieved their objective. The success of a settlement is not decided by the dollar amount, but by how well it has achieved the client's goals.

The three most important keys to success in product liability negotiations are to be prepared, be proactive, and be patient. In one case where we achieved a settlement that was significantly less than anticipated, the settlement negotiations included not only the injured plaintiff and his attorney, but also his wife who was suffering from a long-term debilitating illness, which was unrelated to the allegations about my client's products. The wife was deposed during the case and attended her husband's deposition. During breaks at the deposition, I took the time to talk with the wife, treating her with patience and kindness. Even though the facts had been fully developed, settlement negotiations conducted directly with the plaintiff's attorney had been unsuccessful, despite numerous discussions. As a result, we scheduled a formal mediation with a skilled mediator, and the case was settled on favorable terms. The mediator later told me he believed we reached such a good settlement because I was so patient, and I took the time to pick up on what was important to the plaintiff. Likewise, the best settlements are those that achieve both the client's objectives as well as the plaintiff's. At the end of the day, these cases involve individual human beings, and they must make the decision to settle with you. Prepare the case, proactively litigate, be patient with the human element, and a favorable settlement can often be achieved.

**About the Author: Steven D. Allison, Partner, Dorsey & Whitney LLP**

Steven D. Allison is a Partner in Dorsey & Whitney’s Southern California office and is currently Co-chair of Dorsey’s California Trial Group. His litigation practice includes products liability, complex commercial, insurance coverage, health care, intellectual property, and class action and strategic litigation. In addition, he counsels clients prior to the filing of litigation to avoid disputes.

Steve has successfully represented several companies in significant high-stakes product liability litigation including a leading provider of asphalt emulsions in a dispute against a large, multinational chemical company and a major rental company as lead counsel on all significant California product liability matters relating to their truck rental fleet. Steve has also represented a variety of other clients on products and technology liability matters.

Outside of the office, Steve is an active member of the community and has been a volunteer with the Orange County United Way since 2000. He currently is a member of the Board of Directors for the OC United Way, Vice-Chair of the Community Investment Cabinet and a member of the organization’s Alexis de Tocqueville Society. Steve is also a member of the Public Law Center’s Annual Dinner Committee.

Steve received his bachelor’s magna cum laude from Messiah College in 1990, and his J.D. magna cum laude and Order of the Coif from Georgetown University Law Center in 1994. He was also an editor on the Georgetown Law Journal.

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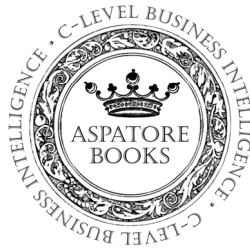
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