Handling Difficult Issues in Products Liability Actions: Subsequent Remedial Measures, Similar Accidents, Recalls, and Foreign Defendants[†]

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I.
Introduction

Products liability actions are not easy cases to prepare, nor are they easy cases to try. More often than not, such cases involve complex industrial or consumer products, monumental amounts of documents, intricate theories of liability and defense, and horrific injuries. Defense counsel must navigate a variety of complex issues, presenting a coherent and cohesive theory of defense to the jury. Obviously, the defense attorney who successfully prevents "extraneous" issues from reaching the jury will be far ahead of the game. The purpose of this article is to apprise defense counsel of three potentially fatal areas of pretrial discovery and trial testimony in products liability actions – evidence of subsequent remedial measures, evidence of other accidents, and evidence of product recalls – and to provide suggestions regarding alternate ways to deal with such evidence. The final section of this article will discuss some interesting issues that often arise when defense counsel represents a foreign product manufacturer or distributor.

II.
Subsequent Remedial Measures

Manufacturers almost always are interested in making their products better, faster, more efficient, and safer. The demands of the marketplace require that product manufacturers change and adapt with the times to avoid the repetitive production of stagnant products which preserve the status quo. As corporate America has embraced the motto, "change is good," defense attorneys increasingly have faced the challenge of keeping evidence of subsequent remedial measures from the plaintiff's attorney or from the jury. Subsequent remedial measures generally are defined as evidence of measures taken after an event which, if taken previously, would have made the event less likely to occur.

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One objection to discovery seeking evidence of subsequent remedial measures made to a product often posits that providing such evidence would require the defendant to divulge trade secrets. Federal Rule of Civil Procedure 26(c)(7) protects against discovery of "a trade secret or other confidential research, development, or commercial information." Some courts have expressed reluctance to order disclosure of trade secrets without a clear showing of an immediate need for such information by the opposing side.[1] If an argument can be made that the information sought by the plaintiff regarding subsequent remedial measures is a trade secret, such an objection should be lodged by the defendant's attorney.

Another objection often germane to requests for information about subsequent remedial measures is that the discovery sought is burdensome or expensive. Federal Rule of Civil Procedure 26(c) provides that parties may seek a protective order from discovery which will result in "annoyance, embarrassment, oppression, or undue burden or expense." In analyzing whether a discovery request is unduly burdensome, a court usually will consider the following factors: (1) the amount of research and time required and the cost thereby incurred; (2) the necessity of the information sought; (3) whether the benefit gained by the requesting party outweighs the burden placed on the responding parties; and (4) whether the information sought has been sufficiently disclosed in response to other discovery requests.[2]

In addition to the objections outlined above, defense counsel may wish to object that the discovery sought by the plaintiff regarding post-accident design modifications is irrelevant because: (1) it involves products substantially dissimilar to the one at issue; (2) conditions surrounding the use or testing of the modified products are substantially different from conditions surrounding the use or testing of the product involved in the suit; or (3) the

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[1] *See, e.g., In re* Agent Orange Prod. Liab. Litig., 104 F.R.D. 559 (E.D.N.Y. 1985).

[2] James M. Campbell & Thomas E. Stahr, *Discovery of Subsequent Modifications*, DRI Products Liability Pretrial Notebook, 2-16.

information sought about modifications made to the product concern events too remote in time to the accident at issue for the information to be relevant.[3] Use of an expert's affidavit provides a viable means to present these arguments to the court. Defense counsel should note that a few courts have been receptive to the argument that discovery regarding changes made to later models of the injury-causing product is irrelevant.[4]

Given the paucity of cases holding that discovery regarding subsequent remedial measures should not be allowed, and the lower standard of relevance governing discoverable information, defense counsel should hold no confidence about successfully thwarting the plaintiff's efforts to obtain such information. However, even assuming discoverability, Federal Rule of Evidence 407 strictly limits the introduction of such evidence at trial. Federal Rule of Evidence 407 provides as follows:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Federal Rule 407 specifically was revised in 1997 to include strict product liability actions within its parameters. As some commentators have noted, revised Rule 407 adopted the position espoused by a majority of federal and state courts that evidence of subsequent remedial measures should not be admitted in strict liability actions in order to prove a defect in a product or its design, or in order to prove that a particular warning or instruction should have accompanied the product.[5]

Whenever the plaintiff attempts to introduce evidence of a subsequent remedial measure for the express purpose of proving a defect in a product or its design, or to prove that a specific warning or instruction should have accompanied the product, defense counsel

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[3] *Id*. at 2-17.

[4] *See, e.g.*, Handlos v. Litton Indus., Inc., 51 F.R.D. 23 (E.D. Wis. 1970); Hammill v. Hyster Co., 42 F.R.D. 173 (E.D. Wis. 1967); Needles v. F.W. Woolworth Co., 13 F.R.D. 460 (E.D. Pa. 1952).

[5] Kevin M. Reynolds & Lori E. Iwan, *Amended Rule 407: The Good, the Bad, and the Ugly*, 40 FOR THE DEFENSE 15, 16 (Oct. 1998). It should be noted that these authors emphasize that Revised Rule 407, in addition to helping defendants, also harms defendants. Under the revised rule, the triggering event regarding subsequent remedial measures in a products liability case is not the date of the design, manufacture, or formulation of the warning, but instead has been changed to the date of the accident. This revision means that subsequent remedial measures that were formally inadmissible will now be admissible because they occurred after a design or manufacturing change but before the subject accident. *Id*. at 17-18.

should file a well-crafted and well-reasoned motion in limine seeking to bar admission of that evidence. A successful motion should include:

(1) A discussion of the law in that particular jurisdiction demonstrating application of the exclusionary rule to product liability actions. When arguing for application of the exclusionary rule, defense counsel should stress the two reasons why evidence of subsequent remedial measures is not admitted to prove a defect: (1) that the evidence is not sufficiently relevant to the issue of antecedent negligence, and (2) its admission would discourage manufacturers from taking corrective action. Evidence of subsequent remedial measures in a products liability action has little to no probative value and lacks all indicia of reliability in regard to proving the existence of a defect. Subsequent alterations to a product may result from technological advancements and improvements generated by actual use of the product or an evolution of the state of the technological art. It is patently unfair to penalize a manufacturer for making improvements to its products which would render the products safer and perhaps more marketable;[6]

(2) A specific statement as to whether the issues of feasibility, notice, ownership or control are controverted (if they are not, there is no reason to admit the evidence under Rule 407);

(3) A discussion of whether the product change relates to the defect alleged by the plaintiff (if there is no such relationship the evidence should not be admitted); and,

(4) A discussion regarding the date of the product change in relation to the date of the product's design, manufacture, or sale, and the date of the occurrence (post-occurrence changes are much more likely to be excluded).

If the plaintiff attempts to introduce evidence of subsequent remedial measures for the purpose of proving ownership, control, or feasibility, or for the purpose of impeachment, defense counsel should attempt to persuade the court to require the plaintiff to "go the extra mile" in justifying introduction under one of the Rule 407 recognized exceptions. It is interesting to note that no recent cases have relied on the ownership exception to Rule 407 – or a state law equivalent – in admitting evidence of subsequent remedial measures.

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[6] *See*, for example, Fed. R. Evid. 407, or one of its state law equivalents, such as Ariz. R. Evid. 407, Cal. Evid. Code § 1151, Mont. R. Evid. 407, Ohio R. Evid. 407 and Tex. R. Evid. 407. *See also* Robert E. Dryden & Laurene E. Wheeler, *Subsequent Modification, Design and Warning Changes, and Repair of a Product*, DRI Products Liability Trial Notebook, at 43.

The second exception, proving control, is more widely used and was well–recognized at common law.[7] Admitting evidence of remedial measures, when justified to show control, apparently proves the existence of a duty on the part of the defendant rather than a breach of that duty. Under this particular rationale, the subsequent remedial measure must be relevant to the issues of control and duty before it should be admitted into evidence. In those cases in which the defendant admits control over the allegedly defective product, proof of subsequent remedial measures should not be admitted into evidence to prove that fact.[8]

The third permissible use of such remedial measures is to prove the feasibility of such measures if they are controverted by the defendant. Federal Rule of Evidence 407 requires that feasibility be controverted in order for evidence of subsequent remedial measures to be admitted because, if that were not the case, the exception would swallow the rule. Thus, courts generally consider two things when deciding whether or not to admit such evidence: (1) the meaning of "feasible," and (2) whether feasibility is "controverted."[9] The majority of courts speak of feasibility in terms of technological and economic feasibility, not in terms of whether it was physically possible for the defendant to provide greater safety.[10]

When the plaintiff has indicated his or her desire to introduce evidence of a subsequent remedial measure in order to prove feasibility, defense counsel should strongly consider stipulating to the issue of feasibility in order to avoid the introduction of that evidence. If defense counsel removes the issue of feasibility, Rule 407 requires automatic exclusion of evidence of subsequent remedial measures. As the Second Circuit Court of Appeals recently noted, "'[f]easibility' is not an open sesame whose mere invocation parts Rule 407 and ushers in evidence of subsequent repairs and remedies. To read it that casually will cause the exception to engulf the rule."[11]

If feasibility is contested and the court has indicated its willingness to admit evidence of subsequent remedial measures regarding that issue, defense counsel should argue that certain foundational requirements must be met before proof of those remedial measures can be introduced into evidence. Defense counsel may premise these arguments on the trial court's discretionary power to exclude evidence where its prejudicial impact would outweigh its probative value. Defense counsel should argue that evidence of subsequent alterations cannot be introduced unless the plaintiff first establishes through expert testimony that the post-accident alteration was a feasible alternative within the state of the art at the time of manufacture, and that the alteration would not have been cost-prohibitive at that same time.[12]

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[7] *See* Mehojah v. Drummond, 56 F. 3d 1213, 1214-1215 (10th Cir. 1995).

[8] JOHN S. ALLEE ET AL., PRODUCT LIABILITY § 9.01[3] at 9-12 (1991).

[9] *Id*.

[10] *See, e.g.*, Fish v. Georgia-Pacific Corp., 779 F. 2d 836 (2d Cir. 1985) (the defendant's argument that there was no need for warnings because there was insufficient danger to require them was not an argument concerning the feasibility of a warning that would justify admissibility of subsequent remedial measures).

[11] *In re* Joint E. Dist. & S. Dist. Asbestos Litig., 995 F.2d 343, 345 (2d Cir. 1993).

[12] Dryden and Wheeler, s*upra* note 6, at 45-46.

Impeachment is the last permissible use of subsequent remedial measures evidence specifically listed in Rule 407. The greatest area of concern regarding the use of this evidence for impeachment purposes involves its use simply to contradict the defendant. Introducing evidence of subsequent remedial measures simply to contradict the defendant is troublesome since such broad use of the exception effectively would render the exclusionary rule useless. As a result, according to some commentators, in those cases where impeachment evidence is offered, the trial court must believe that the evidence has substantial probative value and that the issue is genuinely disputed before it allows the evidence to be presented at trial.[13] When attempting to draw the line between contradiction and impeachment, many courts have held that evidence of subsequent remedial measures can be used only if the defendant has testified in "superlatives."[14] Furthermore, some courts require an extremely close nexus between the evidence of subsequent remedial measures and the specific statement sought to be impeached.[15] In those cases in which a plaintiff is attempting to introduce evidence of subsequent remedial measures for the purpose of impeachment, defense counsel must be ever vigilant to ensure that plaintiff's attorney is not allowed merely to contradict the testimony of the defendant's witnesses.

One other point deserves brief mention. If evidence of subsequent remedial measures is admitted pursuant to one of the exceptions in Rule 407, defense counsel should insist that the court issue a limiting instruction advising the jury that it is to consider such evidence only for the purpose for which it was allowed, reminding the jury that it should not use that evidence in assessing liability. Moreover, in the event that evidence of subsequent remedial measures is admitted pursuant to one of these exceptions, defense counsel must rebut the inference of liability that arises by presenting evidence to establish legitimate reasons for the post-accident alteration.

III.
Other Accidents

It is not unusual for defense counsel to find him or herself dealing with the problem that the defendant manufacturer's product has caused injury or death to other purchasers or users at some time prior to the injury at issue in the given case. Thus, defense counsel should keep several points in mind when responding to discovery requests for information regarding other accidents or when faced with a plaintiff's attorney who wants to admit evidence of other accidents into evidence at the time of trial.

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[13] Allee et al., *supra* note 8, § 9.01[3] at 9-14.

[14] *See* Muzika v. Remington Arms Co., 774 F.2d 1309 (5th Cir. 1985) (holding that a defense expert testifying to the excellence and standard-setting features of a rifle opened the door to impeachment by introduction of subsequent remedial measures).

[15] *See, e.g.*, Harrison v. Sears Roebuck & Co., 981 F.2d 25, 31 (1st Cir. 1992) (concluding that cases that have admitted subsequent remedial measure evidence for impeachment purposes tend to involve a close nexus between the statements sought to be impeached and the remedial measure at issue).

Initially and when appropriate to the case, defense counsel should not hesitate during discovery to object to producing evidence of other accidents on the grounds of attorney-client privilege or on grounds that the information is protected under the work product doctrine.[16] If objections based on privilege cannot be made, defense counsel may object to interrogatories or production requests on the grounds of materiality, relevancy, and breadth. Some courts have held that in order to be relevant and material to the case at bar, and therefore discoverable, information regarding other accidents must involve the same or substantially similar products, and the circumstances of the other accidents must be substantially similar to the facts at issue in the instant litigation.[17] A number of other courts have held that before evidence of other accidents will be deemed relevant, the accidents must have occurred within reasonable temporal proximity to the accident in question.[18] Other relevancy objections based on time limitations can be made in certain factual settings. For example, defense counsel can object to discovery seeking information about accidents that occurred after (1) the defendant began warning potential users about the risk of product use, or (2) the defendant made changes or modifications to the product.[19]

Defense counsel also may object to discovery requests seeking information about other accidents on the grounds that such requests are unduly burdensome and oppressive under either Federal Rule of Civil Procedure 26(c) or its state equivalent. This objection is particularly appropriate in situations where the product has been widely distributed in vast quantities over an extended period of time.[20] This particular objection also may be raised when the documents the plaintiff seeks are maintained in numerous locations. Depending on the circumstances, additional objections to discovery may include: that the information sought is unreasonably cumulative; that the information is obtainable from another source that is more convenient, less burdensome, or less expensive; or that the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues to the litigation.[21]

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[16] *See* Johnson v. Stemco Corp., 11 F.R.D. 603 (N.D. Ohio 1951) (sustaining defendant's objections to plaintiff's interrogatories seeking reports of prior accidents from a casualty company on grounds that such reports were privileged as confidential communications between a client and an attorney).

[17] *See, e.g.*, Culligan v. Yamaha Motor Corp., 110 F.R.D. 122 (S.D.N.Y. 1986); *In re* Richardson-Merrell, Inc. "Bendectin" Prod. Liab. Litig., 624 F. Supp. 1212 (S.D. Ohio 1985); Uitts v. General Motors Corp., 58 F.R.D. 450 (E.D. Pa. 1972); Frey v. Chrysler Corp., 41 F.R.D. 174 (W.D. Pa. 1966).

[18] *See, e.g.*, Weeks v. Remington Arms Co., 733 F.2d 1485 (11th Cir. 1984); Julander v. Ford Motor Co., 448 F.2d 839 (10th Cir. 1973); Holbrook v. Koehring Co., 255 N.W.2d 698 (Mich. Ct. App. 1977).

[19] Joseph A. Sherman et al., *Discovery of Other Accidents*, DRI Products Liability Pretrial Notebook 3-8.

[20] *Id.* at 3-3.

[21] *Id.* at 3-9.

If the plaintiff's attorney has successfully obtained information about other accidents during the course of discovery, defense counsel should anticipate seeing that evidence again at the time of trial. If the plaintiff's attorney does attempt to introduce information regarding other accidents at the time of trial, defense counsel must be ready to proffer objection on a number of different grounds.

To begin, a trial objection should be made on the grounds of relevancy. Some courts have held that in order for evidence of other accidents to be admissible at trial, the plaintiff must establish that the same or a substantially similar product was involved.[22] Different models of a certain product frequently have different characteristics, and those differences may impact the cause of an accident.[23] Other courts have determined that before evidence of other accidents is relevant and therefore admissible, the accidents must have occurred within a reasonable period of time prior to the accident in question.[24] If the plaintiff seeks to admit evidence of older accidents, a relevance objection should be lodged by defense counsel.

Defense counsel also should anticipate objecting to the admission of other accident evidence on grounds of relevance where no factual basis exists for such evidence. As one commentator has noted, "it is difficult to conceive of a more common claim than one made by a driver whose vehicle strikes another vehicle in the rear that 'my brakes failed.'"[25] Even if plaintiff's counsel were to compile police reports throughout the country involving particular models of automobiles, or to produce transcripts of testimony from other drivers, such evidence would not be probative of either a design or manufacturing defect in the vehicles. Permitting evidence of other brake failures, however, implies – without proof – that the claims have a basis in truth. Allowing a jury to hear evidence that other accidents occurred in a certain manner when they did not occur in that manner would be highly misleading and would lack probative value on any issue in the case.[26]

Closely related to the issue of relevance is the requirement that plaintiff prove substantial similarity between the circumstances of the other accidents and the accident in question. The degree of similarity needed generally depends upon what matter the evidence of other accidents is intended to prove. If the evidence is intended to show dangerousness, "a

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[22] *See, e.g.*, Belfry v. Anthony Pools, 262 N.W.2d 909 (Mich. Ct. App. 1977); Herman v. Midland Ag. Serv., Inc., 264 N.W.2d 161 (Neb. 1978); Williams v. Laurence-David, Inc., 534 P.2d 173 (Or. 1975).

[23] *See* Drabik v. Stanley-Bostitch, Inc., 997 F.2d 496 (8th Cir. 1993) (reversing verdict in favor of plaintiff, based in part on the fact that the trial court allowed plaintiff to introduce evidence of other accidents involving different models of a pneumatic nail gun); Prashker v. Beech Aircraft Corp., 258 F.2d 602 (3d Cir. 1958) (sustaining exclusion of evidence regarding accidents involving structural failure of various aircraft models manufactured by the defendant, noting that different model was involved in case at issue).

[24] *See, e.g.*, Julander v. Ford Motor Co., 448 F.2d 839 (10th Cir. 1973); Holbrook v. Koehring Co., 255 N.W.2d 698 (Mich. Ct. App. 1977).

[25] Robert A. Sachs, *"Other Accident" Evidence in Product Liability Actions: Highly Probative or an Accident Waiting to Happen?*, 49 Okla. L. Rev. 257, 259 (1996).

[26] *Id*. at 259-60.

high degree of similarity will be essential."[27] If the evidence is intended to show notice, however, "a lack of exact similarity of conditions will not cause exclusion provided the accident was of a kind which should have served to warn the defendant."[28] Obviously, as the circumstances and conditions of the other accidents become less similar to the accident under consideration, the probative force of that evidence decreases.[29] When the plaintiff attempts to introduce evidence of dissimilar accidents, defense counsel should move to bar that evidence since, after all, "[t]he general rule of limiting the admission of other accident evidence to those events which were substantially similar ensures that the focus of the trial stays on the specific type of accident forming the basis of the case."[30]

Defense counsel also might consider objecting to the admission of other accidents based on hearsay. When the plaintiff attempts to introduce evidence of other accidents, rarely is any attempt made to produce testimony from individuals with personal knowledge of those other accidents. Typically, plaintiffs seek to introduce pleadings and other documents from other cases. These documents are clearly hearsay and frequently originate from biased sources, such as plaintiffs seeking recovery in another lawsuit. A number of courts have recognized the serious problems associated with admitting such evidence and have declined to do so.[31] Defense counsel should rely on this case law to support a motion in limine barring the introduction of other accident evidence on grounds that such evidence is inadmissible hearsay.

Finally, defense counsel might argue that the admission of other accident evidence would result in unfair prejudice or confusion of the issues, would mislead the jury, would cause undue delay, would be a waste of time, or would result in the introduction of cumulative evidence. In *Roundtree v. Seaboard Coast Line Railroad Co.*,[32] the court excluded evidence of other accidents at a railroad crossing in part because such evidence would generate confusion. The court likewise excluded evidence of another malfunction in a piece of electrical equipment because of potential confusion in *Olin-Mathieson Chemical Corp.*

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[27] 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 401[10] at 401-67 (1995).

[28] *Id.*, ¶ 401[10] at 401-68.

[29] Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261 (7th Cir. 1988).

[30] Drabik v. Stanley-Bostitch, Inc., 997 F.2d 496, 509 (8th Cir 1993). *See also* Trejo v. Keller Indus., 829 S.W.2d 593 (Mo. Ct. App. 1992) (affirming exclusion of evidence of other accidents because they did not occur in the precise manner in which plaintiff's accident occurred); Barker v. Deere & Co., 60 F.3d 158 (3d Cir. 1995) (reversing verdict for plaintiff because evidence of prior accidents dissimilar to accident in question was improperly admitted at trial).

[31] *See, e.g.*, Sode v. Freightliner Corp., 714 F.2d 498 (5th Cir. 1983) (reference made to the fact that complaints are unsworn hearsay allegations of persons seeking to recover money damages from the defendant); McKinnon v. Skil Corp., 638 F.2d 270 (1st Cir. 1981) (evidence from Consumer Product Safety Commission reports properly excluded by trial judge as untrustworthy hearsay); Cramer v. Kuhns, 650 N.Y.S.2d 128 (N.Y. App. Div. 1995) (owner surveys mentioned in a study by the NHTSA are rank hearsay and inadmissible).

[32] 418 F. Supp. 220 (M.D. Fla. 1976).

v. Allis-Chalmers Manufacturing Co.[33] and in *Brooks v. Chrysler Corp.*,[34] the court excluded evidence of other consumer complaints regarding brake piston seizure to avoid trial delay. Affirming the trial judge's decision in *Brooks*, the court of appeals noted that introduction of other consumer complaints would have resulted in a substantial delay of the trial, since Chrysler would have had to either "rebut the substance of each of the 330 complaints or to distinguish the nature of the complaints" from the alleged defect in the case at bar.[35] And in *Post v. Manitowoc Engineering Corp.*,[36] a case involving collapse of a crane, the appellate court upheld the trial court's decision to bar plaintiff from introducing evidence of a prior crane collapse since introducing such evidence would have "simply raised collateral issues in an already very complicated case."[37]

Products liability cases which involve only one product and one plaintiff already are becoming too complex, too confusing, too expensive, and too time consuming. Defense counsel must remind the court that when evidence of other accidents involving other parties, products, and circumstances are introduced into evidence, the case becomes a vehicle for litigating numerous collateral issues concerning other incidents. In far too many cases, the relevance of such evidence is simply not sufficient to warrant the confusion and prejudice thereby injected into the lawsuit.

However, if the trial court determines to admit evidence of other accidents in a products liability action, defense counsel should not despair. The introduction of other accident evidence actually may benefit the defendant. In a strict products liability action, the plaintiff must prove that the product was in unreasonably dangerous condition at the time it left the manufacturer's control. Clearly, the frequency or infrequency of product use with or without mishap has some relevance to whether or not the product is defective in nature. A history disclosing few previous claims or accidents can be used to bolster the defendant's position that the product was not unreasonably dangerous.[38] In addition, the length of time that a product is used without injury may be evidence of the reasonableness of its design.[39]

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[33] 438 F.2d 833 (6th Cir. 1971).

[34] 786 F.2d 1191 (D.C. Cir. 1986).

[35] *Id*. at 1198.

[36] 211 A.2d 386 (N.J. Super. Ct. App. Div. 1965).

[37] *Id*. at 391.

[38] *See* Minichello v. U.S. Indus., Inc., 756 F.2d 26 (6th Cir. 1985); Kolada v. Gen. Motors Corp., 716 F.2d 373 (6th Cir. 1983); Schwartz v. Am. Honda Motor Co., 710 F.2d 378 (7th Cir. 1983); Biehler v. White Metal Rolling & Stamping Corp., 382 N.E.2d 1389 (Ill. App. Ct. 1978).

[39] For example, if the plaintiff has proven that there were three prior accidents, defense counsel should endeavor to prove that although four people, including the plaintiff, were injured, the product has been in the marketplace for thirty years, tens of thousands of units have been sold, and the product has been used for over five million man hours. Such evidence is strong proof that the product in question is not unreasonably dangerous and was not defectively designed. *See, e.g.*, Fabian v. E.W. Bliss Co., 582 F.2d 1257 (10th Cir. 1978).

Defense counsel can use evidence of other accidents – or more appropriately, the lack of evidence of other accidents – to turn the tables on the plaintiff's case. If there have been no other accidents involving the defendant's product, defense counsel should urge the trial court to admit evidence of a lack of other accidents as proof of the reasonableness of the product design or the safety of the product.[40] Indeed, various courts have introduced evidence of a lack of other accidents to prove lack of notice of a dangerous condition, the nonexistence of a defect or condition, that the accident was not caused by the defect or condition at issue, or that the situation was not dangerous.[41]

IV.
RECALLS

For product manufacturers, recalls are a double-edged sword. On the one hand, product manufacturers want to warn their customers of potential problems with the product that become apparent after the product has been manufactured and distributed to the consumer. Such an action benefits the consumer by helping to insure that apparent problems with the product will be fixed prior to injury and benefits the manufacturer by helping to ensure that loyal customers remain so. On the other hand, the issuance of a recall notice or letter raises very real fears that at some future date the recall letter will be introduced into evidence in an effort to prove the defective nature of the manufacturer's product. It is incumbent upon the defense attorney to recognize this paradox and find ways to deal with evidence of recalls in such a way that the benefits of the recall are realized while the drawbacks are minimized.

Essentially, there are two different types of recalls: voluntary and involuntary. Voluntary recalls occur when the manufacturer, through quality control programs or product review committees, recognizes a potential problem or safety risk regarding a particular product and decides to recall the product. Involuntary recalls occur when quasi-legislative, quasi-executive, or quasi-judicial entities force a manufacturer to recall a product when the agency perceives some threat or risk to public health, safety, or welfare. Some of the more prominent federal agencies which precipitate product recall include the Food and Drug Administration (FDA), the Consumer Product Safety Commission (CPSC), the Federal Trade Commission (FTC), and the National Highway Traffic Safety Administration (NHTSA). No matter which type of recall is involved, defense counsel must be aware of the documentation used to support a recall and how to deal with that evidence during discovery and at trial.

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[40] Some courts have permitted proof of the absence of other accidents, holding that it is strong evidence to prove the lack of a defect and/or lack of notice. *See* Eickelberg v. Deere & Co., 276 N.W.2d 442 (Iowa 1979).

[41] *See* Birmingham Union Ry. v. Alexander, 9 So. 525 (Ala. 1891); Zheutlin v. Sperry & Hutchinson Co., 179 A.2d 829 (Conn. 1962); Nubbe v. Hardy Continental Hotel Sys., Inc., 31 N.W.2d 332 (Minn. 1948); Menard v. Cashman, 41 A.2d 222 (N.H. 1945).

As soon as defense counsel knows that a product recall will be at issue in the case, he or she immediately must obtain from the defendant any and all relevant data and correspondence concerning the recall and the alleged defect in question. Relevant materials include correspondence between the defendant and the governmental agency requiring the recall (if appropriate) and all data supplied by the defendant initially in reporting the alleged defect or produced in response to an inquiry regarding the existence of an alleged defect or problem with the product. Defense counsel also should request copies of all internal company documents regarding the recall, including the following: customer complaints, orders for repair parts, product testing data, inspection results, quality control reviews, dealer reports, and reports of sales and service personnel. In addition, defense counsel must remember to request that the plaintiff produce copies of all documents in the plaintiff's possession regarding the recall, including any and all information received in response to Freedom of Information Act requests. Only after reviewing all of this documentation – and its evidentiary impact – can defense counsel begin preparing a defense strategy designed to limit the production of these documents or to bar their introduction into evidence.

Most courts take a liberal view regarding discovery; as such, it may be difficult to keep information regarding product recalls out of the hands of plaintiff's counsel. In a number of reported decisions, courts have held that in order to be relevant as discovery, the information requested need only be germane, conceivably helpful to the plaintiff, or reasonably calculated to lead to admissible evidence.[42] For example, in one case where plaintiff proceeded under a theory of defective design and sought information regarding dissimilar vehicles, the court determined that such information was relevant because the design of products is evolutionary in nature.[43] And in a second design defect case, the court allowed the discovery of recall information regarding unrelated motor mounts since, according to the court, such information was reasonably calculated to lead to the discovery of information regarding the issues of "notice, causation, and . . . whether or not prior defects of which the defendant was aware and which caused the defendant to recall the earlier [motor] mounts were completely eliminated by the subsequent [motor] mounts."[44]

Although the standard for discovery of information in a products liability suit is a liberal one, defense counsel must remember that the standard is not without limits. In *Uitts v. General Motors Corp.*,[45] the plaintiffs sought to recover for injuries allegedly caused by defective engine mounts. The plaintiffs alleged that General Motors was negligent in de-

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[42] *See, e.g.*, Parsons v. General Motors Corp., 85 F.R.D. 724 (N.D. Ga. 1980); Swain v. General Motors Corporation, 81 F.R.D. 698 (W.D. Pa. 1979).

[43] *Parsons*, 85 F.R.D. 724.

[44] *Swain*, 81 F.R.D. at 700.

[45] Uitts v. General Motors Corp., 62 F. R. D. 560 (E. D. Pa. 1974).

signing, manufacturing, testing, inspecting, and assembling the engine mounts in question. During the course of discovery, the plaintiffs requested information regarding recalls for a similar defect in models of cars distinct from the model involved in the accident generating the plaintiffs' claims. When General Motors refused to provide that information, the plaintiffs filed a motion to compel. The court denied the plaintiffs' motion on grounds that the information sought was not relevant or reasonably calculated to lead to the discovery of admissible evidence. The court was persuaded by defense affidavits from appropriate corporate officers and employees, detailing the configuration of the motor mounts in the plaintiffs' vehicle, and noting that the recall in question dealt with different motor mounts in different vehicles.

The *Uitts* case serves as a reminder that defense counsel should be ever vigilant in their efforts to limit discovery of information regarding product recalls. Defense counsel should argue, where appropriate, that the information sought is unduly burdensome, oppressive, and irrelevant. An argument regarding relevance should be entertained whenever the plaintiff is seeking recall information relating to products or defects not associated with the plaintiff's cause of action. Furthermore, every effort should be made to limit discovery of recall information in those situations where plaintiffs' counsel is seeking recall information regarding a product with an especially lengthy history or that has been widely circulated. Under these circumstances, an objection on the grounds that the request for production is unduly burdensome may be successful.

Defense counsel also should keep in mind that Federal Rule of Civil Procedure 34(b), affecting the pretrial production of documents, and similar state rules require that a request must identify the items or category of items sought "with reasonable particularity." A request for recall documents that is couched in broad general terms often can be characterized as unduly vague and literally without scope as to time or specification regarding a particular design or model. In that situation, the mandates of Federal Rule 34, or its state equivalent, clearly are not satisfied. Defense counsel must object to such vague requests for production of recall documents in order to prevent the litigation from drifting so far afield from the central facts that the focus shifts to issues which are irrelevant, highly prejudicial, and completely devoid of any probative value.

If plaintiff's counsel is successful in his or her attempts to obtain information from the defendant manufacturer regarding product recalls, defense counsel can be confident that plaintiff likely will make every effort to admit such evidence at trial as well. However, various trial objections can be lodged, either through trial briefs or motions in limine, with an eye toward keeping such potentially damaging evidence from ever reaching the jury.

Should the circumstances of the case warrant, an initial objection should be made on grounds of relevance. Certainly, such an objection should be raised in those cases in which recall notices or letters deal with defects different from those alleged in the plaintiff's complaint. Even if the allegedly defective component in the recalled product is identical to the component cited in the plaintiff's complaint, a relevancy objection will lie if the product plaintiff was using differed in other respects from the product recalled, since the placement of other components adjacent to the allegedly defective component could affect the operat-

ing characteristics of the product.[46] A relevancy objection also should be made if the recall letter indicates that only some of the recalled products might contain the defect, and the plaintiff offers the recall letter as proof that the plaintiff's product was defective at the time of the accident.[47]

Defense counsel should bear in mind that two federal rules of evidence deal with the issue of relevance: Federal Rule of Evidence 401 and Federal Rule of Evidence 403.[48] Federal Rule of Evidence 403, or a similar state equivalent, is germane when evidence of a product recall, though relevant to the issues involved in the case, should be precluded based on its tendency to prejudice the defendant and confuse the issues in the case.[49] In those cases in which a plaintiff seeks to admit repetitive evidence regarding product recalls, defense counsel should rely on Federal Rule of Evidence 403 to argue that the introduction of recall evidence must be limited in order to avoid the "needless presentation of cumulative evidence."

In its truest sense, the recall letter also is hearsay evidence because it is an out-of-court statement offered to prove the truth of the matter asserted. Accordingly, efforts to introduce recall letters into evidence should be met with a strenuous hearsay objection, although plaintiff's attorney likely will argue that the recall letter constitutes an admission by a party opponent under Federal Rule of Evidence 801(d)(2) or its state equivalent.

In the event plaintiff argues an admission, defense counsel should be ready to counter that a recall letter is not a voluntary admission of the defendant manufacturer since recall letters issued at the directive of a governmental agency are not voluntary. The content of such letters is largely dictated by statute or regulation, and the manufacturer usually is precluded from including (particularly in regard to automobiles), "any statement or implication that there is no defect, that the defect does not relate to motor vehicle safety, or that

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[46] ALLEE, ET AL., *supra* note 8, at 9-63; *see also* Muniga v. General Motors Corp., 302 N.W. 2d 565 (Mich. Ct. App. 1980) (motor mounts in plaintiff's vehicle exhibited identical wear characteristics as the motor mounts in recalled vehicles, but recall letter properly excluded because engine compartments of the vehicles differed).

[47] ALLEE, *ET AL.*, *supra* note 8, at 9-63; *see also* Harley-Davidson Motor Co. v. Carpenter, 350 So. 2d 360 (La. Ct. App. 1977); Holmquist v. Volkswagen of Am., Inc., 261 N. W. 2d 516 (Iowa Ct. App. 1977); Landry v. Adams, 282 So. 2d 590 (La. Ct. App. 1973); Barry v. Manglass, 389 N.Y.S.2d 870 (App. Div. 1976).

[48] Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Federal Rule of Evidence 403 provides that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[49] *See* Vockie v. Gen. Motors Corp., Chevrolet Div., 66 F.R.D. 57 (E.D. Pa. 1975), *aff'd*, 523 F. 2d 1052 (3d Cir. Oct. 31, 1975) (Table 75-1349).

the defect is not present in the owner's or lessee's vehicle."[50] The recall letter is designed to encourage product owners to participate in the recall effort and offers no forum to the manufacturer for a balanced analysis of the safety risk of the recalled product or to provide the consumer with its side of the controversy. Quite simply, there is no presumption in the case of an involuntary recall that the statements contained in the recall letter are the voluntary manifestation of the declarant's belief in their truth. Hence, there is no admission. Indeed, at least one court has sustained a hearsay objection because the product recall in question was not voluntary; rather, it was required by the National Traffic and Motor Vehicle Safety Act of 1966.[51]

To the contrary, some courts have admitted recall letters over a hearsay objection on grounds that they constitute a party admission.[52] In those instances, defense counsel must be prepared to explain the circumstances of the recall to the jury. Defense counsel must inform the jury that the recall was involuntary, that the defendant was forced by a governmental agency to engage in the recall, and that the defendant believes that no such defect necessitated a recall of its product.

Defense counsel also should remember that in the absence of an adoption or authorization, an admission is admissible only against the party who made the statement. Accordingly, a recall letter is not admissible against a dealer or a retailer, as distinguished from a manufacturer.[53] Any defense counsel who represents a dealer or a retailer should take care to argue that recall letters are an admission only by the manufacturer, absent dealer authorization.

A few courts have indicated that the public policy that underlies excluding evidence of subsequent remedial measures also applies to recall letters – that manufacturers should not be prejudiced by or inhibited in their efforts to protect public safety and comply with their statutory duty.[54] This public policy, in particular the desire to fully engage product manufacturers in the recall of potentially defective products, precludes admitting recall letters into evidence.[55]

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[50] 49 C.F.R. § 577.8 (2004).

[51] *Vockie*, 66 F.R.D. 57.

[52] *See*, *e.g.*, Farner v. Paccar, Inc., 562 F. 2d 518 (8th Cir. 1977); Millette v. Radosta, 404 N.E. 2d 823 (Ill. App. Ct. 1980).

[53] Higgins v. Gen. Motors Corp., 465 S.W.2d 898 (Ark. 1971); *Millette*, 404 N.E. 2d 823.

[54] ALLEE, ET AL., *supra* note 8, at 9-65; *see also Vockie*, 66 F.R.D. at 61.

[55] Defense counsel should be aware that a large number of states do not afford recall letters the same protection normally afforded to subsequent remedial measures. *See Millette*, 404 N.E.2d 823; Carey v. Gen. Motors Corp., 387 N.E.2d 583 (Mass. 1979); Rinker v. Ford Motor Co., 567 S.W.2d 655 (Mo. Ct. App. 1978); Barry v. Manglass, 389 N.Y.S.2d 870 (App. Div. 1976); Matsko v. Harley-Davidson Motor Co., 473 A.2d 155 (Pa. Super. Ct. 1984).

When a federal agency undertakes an investigation in advance of requesting a recall, a file is created that eventually will contain not only the information received from the manufacturer, but also complaints received from consumers regarding the product. That file may include tests and conclusions made by the Office of Defects Investigation (ODIN) as well.[56] Frequently, plaintiff's counsel will seek to introduce this information at trial.

These materials likewise constitute hearsay. In response to a hearsay objection, plaintiff's counsel undoubtedly will argue that they are proffered under the public records exception to the hearsay rule. However, two courts have determined that these types of file materials are not admissible at trial for a variety of reasons.[57] In *Vockie v. General Motors Corporation,* the court noted that the mere existence of such a file does not render its contents admissible given the great likelihood that the jury will afford excessive weight to file materials apparently bearing the stamp of approval from the federal government. In addition, the *Vockie* court observed that most of the file contents are not admissible because they do not satisfy the requirements necessary to comply with the public records exception to the hearsay rule.

In the case of *Fowler v. Firestone Tire & Rubber Co.*,[58] the court confronted the admissibility of certain reports and investigations that were conducted before the recall in question. In particular, the court was asked to decide whether a report prepared by the National Highway Traffic Safety Administration and a report prepared by a House of Representatives subcommittee were admissible to prove Firestone's actual and constructive notice of the propensity for its Firestone 500 steel-belted radial tire to fail. The court responded by reviewing Federal Rule of Evidence 403, and subsequently ruled the reports inadmissible. According to the court, the reports were based upon evidence which was inadmissible if independently offered at trial, such as the opinions of individuals who did not qualify as experts, testimony not subject to cross-examination, and potential hearsay. In addition, the court reasoned that because the reports were prepared by agencies of the United States government, their official nature would likely cause the jury to believe that the reports were more probative than appropriate.

Assuming that the trial court rejects defense counsel's argument that evidence of a product recall should not be admitted into evidence, defense counsel should bear in mind that an overwhelming majority of jurisdictions have agreed to admit such recall letters only for limited purposes. Nearly all courts have held that a recall letter is not admissible to prove that the product in question contained the specific defect noted in the recall letter or

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[56] John D. Cole & Scott A. Bachert, *Recall Letters*, DRI Products Liability Trial Notebook, at 91.

[57] *Vockie*, 66 F.R.D. 57; Fowler v. Firestone Tire & Rubber Co., 92 F.R.D. 1 (N.D. Miss. 1980).

[58] *Fowler*, 92 F.R.D. 1.

to show that the product was the cause of plaintiff's injuries. Typically, a recall letter is admissible only to prove that a defect existed at the time the product left the hands of the manufacturer.[59]

Furthermore, before evidence of a recall is admissible, the plaintiff must prove independently, through expert testimony or otherwise, that the defect precipitating recall existed at the time of the accident. Usually, direct proof of a connection between the defect in the product at issue and the defect precipitating the recall is required. Accordingly, defense counsel must insist that the plaintiff independently establish a defective condition in the product before introducing recall evidence of that product. In addition, where external forces or conditions created the risk of danger which led to the recall, e.g., rainwater causing the brakes to become inoperable, defense counsel must insist that the plaintiff establish by independent evidence that the conditions which created a risk of danger in the recalled product also existed at the time of the accident.[60]

Similarly, in those jurisdictions inclined to admit evidence of a product recall, defense counsel must ask the court to issue a limiting instruction. The limiting instruction should caution the jury that the recall letter cannot be considered as proof that the product in question contains the specific defect; rather, the letter is admissible only to prove that a defect existed at the time the product left the hands of the manufacturer. Defense counsel also may be successful in obtaining a protective order from the court sufficient to preclude the use of recall evidence in subsequent cases.

Finally, if evidence of a recall will be admitted into evidence at trial, defense counsel may wish to consider using the recall information to the defendant's advantage. For example, when evidence of a recall exists in the form of a recall letter, and that information was ignored by plaintiff, the defense can argue that the plaintiff's comparative fault in ignoring the recall letter should bar the plaintiff's recovery. A defense also may be predicated on the presence of an intervening cause, such as where the manufacturer advises of a defect and offers a remedial device, but the plaintiff refuses it. This defense may be applicable particularly when continued use of the product is not reasonably foreseeable by the manufacturer.[61] However, a defense involving intervening cause is likely to prevail only in

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[59] Harley-Davidson Motor Co. v. Carpenter, 350 So. 2d 360 (La. Ct. App. 1977); Landry v. Adams, 282 So. 2d 590 (La. Ct. App. 1973); Kane v. Ford Motor Co., 450 F. 2d 315 (3d Cir. 1971); Carey v. Gen. Motors Corp., 387 N.E.2d 583 (Mass. 1979); Manieri v. Volkswagenwerk A.G., 376 A.2d 1317 (N. J. Super. App. Div. 1977); Iadicicco v. Duffy, 401 N.Y.S.2d 557 (App. Div. 1978); Barry v. Manglass, 389 N.Y.S.2d 870 (App. Div. 1976).

[60] *See* Calhoun v. Honda Motor Co., 738 F.2d 126 (6th Cir. 1984) (recall letter concerning possible brake failure when motorcycle is driven in heavy rain not admissible because plaintiff failed to show that subjecting a motorcycle to heavy rain was tantamount to washing it at a car wash).

[61] *See* Ford Motor Co. v. Wagoner, 192 S.W.2d 840 (Tenn. 1946).

those limited situations where the product owner possessed a knowledge and expertise far greater knowledge than the ordinary consumer.[62]

Two other defense arguments may be available in certain cases where the court has determined that evidence of a recall will be admitted. Defense counsel might argue that receipt of a recall notice by the plaintiff removed the allegedly defective condition such that the product was no longer "unreasonably dangerous" after receipt of the recall notice. Furthermore, if the plaintiff proceeds under a failure to warn theory, the defense can identify the recall notice as evidence that the defendant in fact warned the plaintiff or that it attempted to warn the plaintiff of the alleged defect in good faith.[63]

V.
Foreign Defendants

With the advent of global communications, trade routes and markets, multinational companies today are operating across a wide variety of jurisdictions around the world. As a result, they often find themselves the target of a large number of lawsuits, especially in the United States where verdicts generally exceed those in other jurisdictions and the loser need not cover the winner's attorneys' fees. Although representing foreign defendants can prove a challenge to defense attorneys in products liability actions, defense attorneys can undertake some efforts to increase the likelihood of a favorable result for the foreign defendant.

Initially, the defense attorney should familiarize himself or herself with the facts supporting jurisdiction. If the foreign defendant has only minimal contacts with the jurisdiction in which the lawsuit has been filed, and the provisions of the "long-arm" statute are inapplicable, a motion to dismiss for want of personal jurisdiction is appropriate. Likewise, if the court lacks jurisdiction over the subject matter of the lawsuit, defense counsel should pursue a motion to dismiss for want of subject matter jurisdiction.

Assuming that jurisdiction is not an issue, a motion to dismiss based on the doctrine of *forum non conveniens* may be appropriate. The common law doctrine of *forum non conveniens* developed in Scotland in the early nineteenth century as a discretionary device designed to allow trial courts to decline jurisdiction when it appeared that the convenience of the parties and the interests of justice would best be served by trial in a foreign forum to

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[62] *See* Rekab, Inc. v. Frank Hrubetz & Co., 274 A. 2d 107 (Md. 1971) (operator of amusement park ride failed to install redesigned spindle shaft and bearing, sent by manufacturer to the operator together with a letter warning of the attendant dangers); *Wagoner*, 192 S.W.2d 840 (automobile salesman refused to install a safety latch provided by the manufacturer).

[63] Robert L. Fanter & Kevin M. Reynolds, *Discovery of Product Recall Information*, DRI Products Liability Pretrial Notebook at 4-9.

which there was no power of transfer.[64] In recent years, courts of competent jurisdiction in the United States have declined jurisdiction and dismissed actions brought on behalf of injured United States citizens who have been killed or maimed by products manufactured in foreign countries by foreign corporations. These decisions reflect a continuing awareness that foreign courts can perform their judicial functions as well as their United States counterparts.[65] Dismissal based on *forum non conveniens* may allow the foreign defendant to benefit from the expiration of a statute of limitations or the application of substantially more favorable substantive law.

When deciding whether to refuse jurisdiction under the doctrine of *forum non conveniens*, courts typically look to a variety of private and public interest factors. The private interest factors include the following: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process for the attendance of unwilling witnesses; (3) the costs of procuring the testimony of willing witnesses; (4) the possibility of viewing the premises or the product in question; and (5) all other practical matters that make trial of the case easy, expeditious and inexpensive.[66] The public interest factors include: (1) the administrative difficulties if litigation proceeds in a congested court instead of proceeding in a forum with closer ties to the litigation; (2) the burden of jury duty on a community with no relation to the case; (3) the local interest of the forum in deciding a case of local import; and (4) avoiding unnecessary problems in conflict of laws or the application of foreign law.[67]

Any inquiry into an alternate forum's availability initially focuses on whether the defendant is amenable to process in that forum. In order to eliminate a finding of unavailability, defense counsel should consider submitting to jurisdiction in the foreign forum, accept-

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[64] Desmond T. Barry, Jr., *Foreign Corporations: Forum Non Conveniens and Change of Venue*, 61 DEF. COUNS. J. 543 (Oct. 1994).

[65] In Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980) the court stated:

> Federal courts have recently begun to acknowledge that judicial unwillingness to dismiss actions to competent courts abroad on grounds of citizenship alone may merely reflect an unthinking orientation overly protective of American plaintiffs—even those who reside abroad—and "insufficiently sensitive to the ability of foreign courts to perform their adjudicatory functions fully as well as do the courts of the United States."

Id. at 796-97 (quoting *Recent Developments, Federal Courts: Forum Non Conveniens*, 20 HARV. INT'L L.J. 404, 412 (1979)). In further support of this proposition, *see* McInnes v. British Airways, No. 93-02484 (5th Cir. Nov. 18, 1993); Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 645 (2d Cir. 1956) (American citizen does not have absolute right under all circumstances to sue in American court); Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147 (2d Cir. 1980); Calavo Growers of Cal. v. Generali Belgium, 632 F.2d 963 (2d Cir. 1980); Farmanfarmaian v. Gulf Oil Co., 588 F.2d 880 (2d Cir 1978); Mizokami Bros. of Ariz., Inc. v. Baychem Corp., 556 F.2d 975 (9th Cir. 1977).

[66] Barry, *supra* note 64, at 547.

[67] *Id*. at 548.

ing service of process, making all witnesses and documents available in that forum, and agreeing to satisfy any final judgment entered by the foreign court. Such an agreement in fact may readjust the equities back in favor of the foreign corporate defendant.

One other point deserves mention. If the plaintiff has filed suit against a foreign subsidiary of a multinational company, the parent company must make every effort to preserve the presumption of separate corporate entities. This strategy can substantiate the convenience of the alternate forum while decreasing the risk of liability to the parent company. In order to succeed with a *forum non conveniens* dismissal, the multinational corporation must demonstrate the superior convenience and adequacy of the alternate forum and must satisfy the court that the alternate forum is more appropriate to both parties in terms of justice and remedy.[68]

Finally, if dismissal based on *forum non conveniens* is not appropriate, defense counsel might consider filing a motion to transfer venue based on 28 U.S.C. section 1404(a). The federal change of venue statute allows federal district courts to transfer any civil action to another federal district court where it might have been brought originally "[f]or the convenience of the parties and witnesses, [and] in the interest of justice." Because a section 1404(a) transfer does not require refiling, statute of limitations issues are eliminated; any pleadings and discovery filed in the transferor court are fully transferable to the transferee forum, and generally there is no change in the applicable substantive law. As a result, section 1404(a) transfers are significantly less disruptive to a plaintiff than a *forum non conveniens* dismissal.

VI.
Conclusion

Strategic resort to the issues and practical tips outlined above certainly will not guarantee a defense verdict in every products liability case. However, they provide counsel with an outline of pretrial and trial activities that are likely to improve the odds of success for a product manufacturer or distributor. In short, they just may supply the difference between winning and losing that big case.

[68] *Id*. at 546.