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TRYING THE DIOXIN CASE FROM A DEFENDANT'S POINT OF VIEW*

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The trial of toxic tort cases in the United States, which includes dioxin cases, involves the implementation of various theories and strategies that are premised on traditional tort principles utilized in personal injury and product liability litigation. However, unlike personal injury and product liability litigation, the trial of toxic tort cases presents highly complex legal, technical, scientific, medical and factual issues that have led to the development of unique trial strategies and defenses to counteract novel claims set forth by the plaintiff. Some of these strategies include: 1) the filing of motions in limine to prohibit the plaintiff from raising irrelevant and/or prejudicial issues at trial; 2) attacking the plaintiff's inability to conclusively establish product identification and proximate causation; 3) developing statute of limitations and statute of repose defenses; and 4) contesting emotional issues relating to cancerphobia and increased risk of disease. This article explores the use of these defense tactics at trial from the defendant's perspective.[1]

The term "dioxin" conjures up many negative images, such as Times Beach, Agent Orange and Vietnam, in the minds of the general public and potential jurors. These images, obviously, can inure to the extreme detriment of corporate defendants. In litigating a dioxin case, the defense counsel must ensure that

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irrelevant, inflammatory and prejudicial evidence will not be introduced at trial. This objective can be accomplished through the use of motions in limine, which request the court for rulings on the admissibility of evidence before the evidence is sought to be introduced.[2] It protects against the jury hearing evidence relating to emotional and prejudicial facts which can sometimes blur the actual burden of proof, and, as such, forces the plaintiff to prove each element of his[3] cause of action based on the specific, relevant issues and facts of his case. A motion in limine to exclude evidence should be sought prior to the actual trial, or during the trial before the presentation of the evidence. This prevents the plaintiff from proffering evidence which may be so inflammatory and prejudicial that the mere attempt to offer the evidence itself would be disastrous to the defendant's case, even if a proper objection by the defendant is sustained.

In the trial of dioxin cases, the plaintiff must prove that his injury was caused by a specific product that was sold, used or manufactured by the defendant, not by any other product that was manufactured by any other defendant.[4] In many fact circumstances or jurisdictions, establishing product identification and proximate causation is often difficult for the plaintiff because of the highly technical and obscure nature of exposure and related diseases. In a chemical exposure case, the plaintiff's injury often does not manifest until a significant number of years after exposure. An individual may be exposed to many substances during his lifetime, including substances that are not in issue in the lawsuit. Therefore, it is often difficult for the plaintiff to identify the specific substance to which he was actually exposed, and even more difficult for him to identify the defendant who manufactured that substance. This works to the detriment of the plaintiff when trying a dioxin case.

Defense counsel, however, should not passively rely on the plaintiff's inability to prove product identification and causation. Defense counsel must establish that the plaintiff is

not in fact injured, or develop alternate causation defenses to demonstrate that there are other possible causes of the plaintiff's injury. It is often no longer sufficient for defense counsel to argue to the jury that the cause of the plaintiff's injury is medically unknown, but that the defendant's product did not cause plaintiff's injury. Rather, the defense attorney, when possible, must assist the jury in finding an etiology for plaintiff's injury other than the defendant's product.

Additionally, at trial, the affirmative defenses of statute of limitations and statute of repose should be pursued. The bases of these defenses are legislative acts designed to bar the prosecution of otherwise valid causes of action because the plaintiff failed to timely file the lawsuit. Statute of repose differs from statute of limitations in that the former prohibits the plaintiff from filing a suit after the expiration of an established time, which runs from the date of manufacture or sale of the product that allegedly caused the injury.[5] Statute of limitations requires the plaintiff to file suit within a specific time after the cause of action "accrues."[6] The "accrual date" is critical because exposure, manifestation of symptoms, and the plaintiff's knowledge of the cause of the injury may all occur at different times.[7]

The statute of limitations and statute of repose defenses depend on various findings of fact. Therefore, the defense counsel must establish, through testimony and other evidentiary mechanisms, that the plaintiff discovered the injury and its cause through medical diagnosis and conversation with treating physicians or through general literature and failed to file suit within the applicable statute of limitations, or that the plaintiff used a product which was purchased many years before he filed suit and failed to bring a cause of action within the applicable statute of repose. This requires the defense counsel to cross-examine the plaintiff and plaintiff's witnesses on facts specifically geared toward demonstrating that plaintiff's

cause of action is not within the applicable statute of repose, that plaintiff discovered the injury and failed to bring a cause of action within the applicable statute of limitations, and that plaintiff failed to exercise due diligence in discovering and prosecuting the claim.

In establishing these affirmative defenses, however, the defendant must skillfully avoid taking an inconsistent position on the issue of causation. The defense counsel wants to prove that the plaintiff knew that his injury was potentially caused by the defendant's product, but that the plaintiff failed to institute a cause of action within the applicable statute of limitations or statute of repose. However, the defense attorney also wants to prove that the plaintiff is not injured and, if the plaintiff is injured, the defendant's product did not cause the injury. Defense counsel must avoid creating the impression, or worse yet, making the admission that the defendant's product can and did in fact cause the plaintiff's harm. Defense counsel must be cautious not to sacrifice one defense for the sake of another.

A dioxin case may also involve claims for fear of cancer ("cancerphobia") and the enhanced or increased risk of cancer and other diseases. These issues usually arise in two situations: 1) where plaintiff cannot show actual present injury, but seeks damages for the enhanced risk of future illnesses and emotional distress;[8] and 2) where plaintiff can prove actual present injury, but also seeks compensation for feared future injury from the same tortious act.[9] The speculative nature of these claims have made the courts reluctant in awarding damages absent actual present manifestation of disease, or where plaintiff has failed to prove to a reasonable degree of medical certainty that future injury will occur.[10]

In defending claims that are based on cancerphobia and increased risk of cancer or other diseases, the defense counsel must evoke testimony to demonstrate that plaintiff's claims are mere conjecture or speculation. Defense counsel must show that the plaintiff's medical history is incomplete or inaccurate,

thereby resulting in an unfounded claim. Defense counsel must also demonstrate that the plaintiff's fear is unreasonable by eliciting facts relating to plaintiff's smoking habits and other health care practices, as well as showing that other individuals with similar experiences do not share plaintiff's fear. Additionally, the defense counsel must show that the plaintiff has pre-existing conditions that account for his fear, thereby rendering it unreasonable.

The trial of dioxin cases requires the defense attorney to be knowledgeable in traditional areas of personal injury and product liability litigation, keep abreast of the developing strategies involved in toxic tort trials, as well as have expertise in scientifically related areas. To effectively defend a dioxin case, defense counsel must walk a fine line in arguing to a jury that on one hand dioxin does not cause the injury alleged by the plaintiff; and if it does, the defendant's product did not cause that injury.

REFERENCES

[1]This Article is based on the Federal Rules of Civil Procedure and the Federal Rules of Evidence, but does not reflect the substantive law of any particular state.

[2]See Fed. R. Evid. 403 and 703. See also, McCormick on Evidence, §51 (3d. ed. 1984).

[3]For the purposes of this article, the terms "he", "his" and "him" shall include "she", "hers" and "her".

[4]See, i.e., Sterling v. Velsicol, 855 F.2d 1188 (6th Cir. 1988).

[5]See, e.g., Ariz. Rev. Stat. Ann. §12-551 (1978); RCWA 7.72.060 (1981); Indiana Code §33-1-1.5-5; Conn. Gen. Stat. §42-577a.

[6]Greer, Edward and Freedman, Warren, Toxic Tort Litigation, Prentice Hall, Rosenfeld Publications, p.3-3, 1989. See, e.g., Ariz. Rev. Stat. Ann. §12-542 (Supp. 1985) (within two years of accrual).

[7]Greer and Freedman, supra at 3-3

[8]Greer and Freedman, supra at 6-10.

[9]Id. at 6-11; see, i.e., Jackson v. Johns-Manville Sale Corp., 781 F.2d 394 (5th Cir. 1986); Payton v. Abbott Labs., 386 Mass. 540 (1982); Anderson v. Welding Testing Lab., Inc., 304 So.2d 351 (La. 1974).

[10]See, i.e., Sterling v. Velsicol, 855 F.2d at 1203; Ayers v. Township of Jackson, 202 N.J. Super. 106, 493 A.2d 1314 (N.J. Super. Ct. App. Div. 1985), aff'd as modified in part and rev'd in part, 106 N.J. 557, 525 A.2d 287 (1987); Vuocolo v. Diamond Shamrock Chemicals Co., 240 N.J. Super. 289, 573 A.2d 196 (N.J. Super. Ct. App. Div. 1990). See also, Note, Ayers v. Township of Jackson: Damages For the Enhanced Risk of Future Disease, 5 Pace Envtl. L. Rev. 257 (1987).