BEWARE THE ABYSS

TRYING THE PRODUCT LIABILITY CASE INSIDE A LEGAL MALPRACTICE CASE

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By Tim Grabe
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Oregon citizens need lawyers who will step up and handle legal malpractice cases arising from good products cases gone bad. These aren't common. But when one does come down the pike, it can present a lawyer with that rarest of rewards: the opportunity to help someone's life change dramatically, for the better. A benefit to society is that we can shift the heavy costs of lifetime care onto insurers who are responsible, rather than shifting the costs onto taxpayers.

The big picture

Here are some tips to consider when deciding whether and how to help someone in a products case gone bad based on my experiences in helping a badly-injured Pendleton cowboy create a happier life-in-recovery. The take-away is that despite the difficulties, you can help someone in a big way.

However, it is tough to prove harms and losses caused by legal malpractice stemming from a product liability case gone awry. Don't represent this type of client unless you're willing to go to trial. Why not? Our generally-well-managed adversary (and insurer of our own malpractice), the Oregon State Bar's Professional Liability Fund (PLF), doesn't function like an ordinary insurance company. While its business model is built on maintaining certain monetary reserves, outside counsel can exert a lot of influence on the claims department, and in-house PLF claims attorneys have more discretion than ordinary commercial claims adjusters. The PLF claims system has blind spots where those who ought to oversee big cases can be left out. And the dual goals of the PLF — protecting the public and protecting Oregon attorneys — that held sway in its early days, are a quaint relic of the past. The result is the PLF will randomly push any case to trial when it really should settle. This behavior is encouraged by the PLF's winning record. So be prepared.

How to get started

The client may present with a grievous injury caused by a defective product, and a story of a lawyer who mishandled the claim so that the client got nothing. Before jumping to handle the client's claim, you should picture the end game — if my case is any indicator. We went to trial some two years after I met the client. I invested 1,000 hours and a king's ransom in costs into the case. The trial went a full week. Our judge read Oregon Uniform Civil Jury Instruction (UCJI) 45.05 to the jury, "To decide whether a breach of duty of care caused harm to the plaintiff, you must compare the actual outcome with the outcome that would have occurred without the breach. If the actual outcome is less favorable to the plaintiff than the outcome that would have occurred, then the defendant caused harm to the plaintiff."

The judge also read UCJI 45.06, "You must follow the instructions I am about to give you to decide what the outcome would have been in the original case without the breach…" The uniform instruction envisions the judge instructing the jury about product liability, negligence, causation, damages or whatever other issues are alleged in the complaint and answer.

This means a plaintiff can't win by proving that the botched products case had a settlement value that ranged between $250,000 and $500,000. Oddly, the jury instruction requires the legal malpractice jury to assume the plaintiff's product liability case would have gone to trial, and that no defendant would ever pay to settle. Thus, the plaintiff starts off

with a high bar to clear. The plaintiff must prove he or she would have won the underlying case at trial. The way lawyers and insurers (those not with the PLF) value such products claims — that settle 95 percent of the time — is not even a factor.

Rules of the road

A product case wrapped inside a legal malpractice case raises a host of trial-planning and psychological concerns. In applying Friedman's "Rules of the Road" approach, should you focus on rules violated by the negligent lawyer? Or rather, focus on rules violated by the product manufacturer? Similarly, when you incorporate Keenan and Ball's "Reptile" techniques in building and presenting the case, is a juror more concerned about a danger caused by the negligent lawyer? Or the negligent product manufacturer and designer? Or, what if the PLF's trial counsel, as happened in our case, fights the case on all fronts for a year, but on the eve of trial admits the defendant lawyer was at fault, while still denying the product manufacturer was negligent? The answer is you must prepare a rules of the road and reptile strategy that focuses on both the lawyer and the manufacturer, while being nimble enough to turn on a dime if the defense concedes the lawyer's fault on the morning of trial. Defense counsel may tell the jury that the negligent lawyer is doing the right thing by admitting fault but denying causation and damages. It's difficult, perhaps impossible, for the plaintiff to show that the defense aggressively denied fault until yesterday. This may eliminate a plaintiff's ability to show the defendant lawyer violated any rules of the road.

Let's assume the product was dangerously defective, and that a jury would have made a manufacturer accountable for causing a plaintiff's harms and losses, but for a lawyer's serious mistake. Stuff happens. Legal mistakes occur. In the products context, the only mistakes that matter are big ones that caused a client to not recover significant sums. These mistakes, or violations of the rules of the road, are generally not goof-ups at trial — lawyer conduct at trial in a products case generally isn't actionable as negligence unless the lawyer shows up stoned or the equivalent. Instead, legal negligence in a product case typically means errors that prevent the client from even getting to trial. These can include blowing a statute of limitations or losing a summary judgment motion because of failure to sue the right party. These are signs that a client may have a meritorious case.

Costs of trial

A plaintiff in a legal malpractice case arising from a products case must pay to play. A lawyer should not represent a client if he or she cannot afford the time and money to win at trial. The defense may spend from the PLF's $350,000 insurance policy, but the plaintiff's lawyer must make a cold-eyed assessment of costs and benefits. A rule of thumb is that damages should exceed $100,000. Trial preparation costs may include an engineer, doctors, a vocational rehabilitation counselor, a life care planner or economist, focus groups, discovery and deposition costs, plus a legal-malpractice expert with the qualifications to testify about standards of care. Cost-shifting to the defense is rare. Each side normally bears their own costs and fees.

Good and bad plaintiffs

A client gets referred in, or maybe you drive to where he lives. Do you like him? Will a jury? Or do you smell cigarette smoke on him and wonder whether you can tolerate a week-long trial sitting next to him? Will the defense blame a slow-healing surgery on smoking? What about that restraining order taken out by the client's ex-girlfriend? Is the client's 14-year-old felony conviction admissible? Is a client's stiletto heels something

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that a jury will blame for her failure to heal from a trauma-related anterior cervical diskectomy? Can you cover up the client's full-sleeve tattoo? Will that supersized cross around her neck offend an atheistic juror? The first thirty seconds often gives you a gut feeling on whether to represent a prospective client. Trust your gut: say "No" or "Yes," based in large part on intuition. As one of my mentors used to say, "Listen to your tummy."

In our case, our client had suffered a career-ending toxic exposure brain injury while working on a defective machine that monitored nerve gas. He'd been a civilian employee at the U.S. Army's Umatilla Chemical Depot. I understood and liked the guy, but the defense hated, hated, hated him. Why? The client wore a cowboy hat and boots caked with horse manure and straw from cleaning a stable — appropriate for the community (Pendleton) where we met. We compared our common histories of barrel racing quarter-horses, target shooting, moving irrigation pipe on ranches and struggling to help our kids with math homework. But I'd been accurately forewarned: the client's verbosity turned into spewing bizarre nonsense. The client's guardian put a hand on his shoulder to calm him down. He apologized. His behavior fit the classic pattern of toxic encephalopathy or loss of the brain's cognitive function. The prior lawyer's calamitous error of failing to timely file the product liability claim against the machine manufacturer thus became actionable.

The client had seen honorable military service in the Vietnam era. This Eastern Oregon cowboy was a true-life horse whisperer. His hobby was helping Native American kids train their horses. His record of good health in meticulously-written annual physical exams, while working 18 years for the same Army supervisors, jumped out as key. A plaintiff needs that kind of health history to fend off a blitzkrieg of defense attacks that will inevitably come.

Maximize your advantages

Unlike many jurors who have a blue-collar background, PLF claims attorneys and outside defense counsel in product liability cases often have little or no farm, ranch, factory or other hard physical work history. Jurors — and plaintiffs — who sweat and get dirty and work with their hands to put food on the table mystify some PLF claims attorneys and many of its outside attorneys, whose lack of a physical labor background can turn into suspicion of plaintiffs. The defense commonly assumes that plaintiffs hurt by defective products are malingering, or are loving their months and years of not working any more. The PLF and excess

The U.S. Army's Umatilla Chemical Depot stored some of the most dangerous gases known to man. Oddly, the driver of the testing vehicle (van to the left) was injured by carbon monoxide leaks from a gas-powered generator engine, similar to that used by a law mower.

coverage insurers hire superb lawyers who are the best of the best, yet many defense lawyers, sitting in glitzy office towers, gazing at Ivy League diplomas on the wall, thinking about trying to hit their billing targets, cannot properly evaluate blue-collar plaintiffs and cannot connect with working jurors.

Another plaintiff's advantage is to meet with treating doctors early in the case. This allows time to select the best doctor(s) to testify, and to use the treating doctors' testimony as a foundation for a vocational rehabilitation expert's testimony on loss of earning capacity and/or a life care plan that deals with future medical costs.

The PLF's defenses

The uniform jury instructions that deal with product liability are set forth in UCJI 48.01 through 48.08. In addition to defenses explained in those instructions, the PLF has an array of additional affirmative defenses and motions that can make hash out of a plaintiff's claims. An often-fatal defense is that the claim was not brought within the two year statute of limitations. The clock starts ticking when the plaintiff knew, or should have known, that the lawyer's negligence caused damage. The PLF can raise the defense through an ORCP 21 motion, an ORCP 47 motion for summary judgment or as an affirmative defense that can be decided by a judge or a jury if facts are in dispute.

The PLF has a lesser chance of prevailing if it argues that the two years started running when the defendant-lawyer was still representing the plaintiff.

A SOUR taste

In the product liability context, Oregon's statute of ultimate repose (SOUR) may also rear its ugly head, as it did in our trial

After the dissolution of the Soviet Union in 1989, the U.S. and Russia entered into a treaty to get rid of nerve gas weapons. In 1992, the U.S. Army bought dozens of mobile testing laboratories, which were basically customized TV news vans designed and manufactured by small business manufacturers. The Army used these vehicles to test for escaping nerve gas from earthen storage bunkers at the Umatilla Army Depot near Hermiston, in eastern Oregon. The Army hired civilian workers to operate these trucks, each one crammed with testing equipment. Two gas-powered generators attached to the sides of the van ran the equipment.

In 2004, my client, who worked as a mobile lab operator, was diagnosed and treated for injury from carbon monoxide poisoning. Ironically, while testing for nerve gas leaks, he was poisoned by the poisonous gas coming up into his vehicle from the two gas generators — think of two lawn mower engines.

A co-worker in the van also suffered symptoms. The client and his guardian

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retained me in 2010 — a mere 18 years after the manufacture and sale of the defective product. In the midst of California litigation handled by the client's Oregon lawyers, a judge had dismissed the product liability claim, finding that the two year statute had expired in 2006. That was 16 months after the client had retained his initial Oregon lawyer.

Oregon has an industry-friendly 10-year statute of ultimate repose. The PLF raised this defense as a bar to our claim. I suspected that mobile-lab upgrades made after 1992 would give us a new statute of ultimate repose within 10 years of our 2010 legal malpractice case filing date. I invited the PLF's defense attorney to the Umatilla Army Depot (and their engineer, if they had one) to watch our engineering consultant inspect the defective machine. Sure enough, our consultant, Rick Gill (out of Spokane), wriggled under the truck and found defective upgrades that had caused the truck to fill up with toxic levels of carbon monoxide.

Getting the Army's help

You might think the U.S. Army would resist helping an injured civilian worker. You would be wrong. Yes, the Army does prohibit its treating doctors from testifying in civil trials. That hurt our case. But the Army does not want its civilian workers to be injured by defective products made by private contractors. So, we got an Army lawyer to fly from Utah to Umatilla several times to make witnesses available and to dig out boxes of old engineering records. The digging paid off. The Army had determined in 1999 that defects in mobile labs made in 1992 were "safety critical," and had contracted with a Fortune 500 military contractor to make them safe. The contractor gladly billed U.S. taxpayers a bundle. But its crappy-yet-expensive 2001 upgrades only worsened the operator's exposure to toxic levels of carbon monoxide, at least in the plaintiff's

vehicle.

After we pled the 2001 negligent upgrades, the PLF withdrew its summary judgment motion, which had asserted the case was barred by Oregon's statute of ultimate repose.

Proving a case within a case

An engineer or engineering consultant is necessary to win a legal malpractice case based on a product defect. In our trial, our consultant testified to a myriad of defects in ventilation of toxic gases in the 1992 design and to the defects that were worsened in the 2001 upgrade. The PLF essentially steps into the shoes of the product manufacturer, and asserts whatever defenses the manufacturer raised. It is an open issue in Oregon as to whether the PLF can raise defenses the manufacturer did not raise in the underlying case. The better rule is it cannot raise defenses that were not in fact raised before, because raising them now would constitute trying a different case. In any event, a plaintiff should expect the defense to call an engineer who will tell the jury the machine was safe. Luckily for our client, the PLF failed to call its engineer to the stand.

Get co-workers to testify

As in any brain injury case where doctors make a diagnosis of brain injury based on a 20-year medical history and other facts, but where there are no objective diagnostic tests such as MRI or EEG that can show brain injury on a cellular level, the defense may claim the plaintiff is a liar, cheater and faker. The defense has access to the same witnesses you do. Plaintiff's counsel should contact these witnesses early, before the defense can scare them off. In our case, that meant I spoke with and met the client's Army supervisors. They willingly committed to giving helpful testimony. By the time the defense attorneys tried to talk to the client's supervisor, he wasn't interested in helping them and it was too late for them to subpoena Army witnesses for depositions (the Army has its own internal rules).

The nerve gas testing vehicle used extension hoses to carry the generator exhaust away from the vehicle. Unfortunately, gaps in the pipe/hose connection allowed carbon monoxide to escape and seep into the vehicle.

Tips and traps

A few glitches in the PLF system can make handling a case like this harder than it should be. The PLF's claims handling manual does not prioritize resolving litigated cases early through mediation. And the PLF will not necessarily agree to a statute of limitations tolling agreement, for various reasons. This tends to push cases into the advance stages of litigation, when early mediation would serve everyone better.

Then, during litigation, the process can be driven by the billing requirements of defense counsel, who never can obtain enough documents, take enough depositions and obtain enough defense medical exams. Consequently, the defense may say it cannot evaluate the case until close to trial, after racking up legal fees for a year. These cases should all be mediated early.

Also, the PLF's "burning" policy can hurt a plaintiff with large damages. Oregon lawyers have a $300,000 mandatory PLF policy, with another $50,000 to cover defense claims expenses. The $350,000 in limits can create a conflict of interest between the defendant who wants to settle without being exposed to an excess judgment, the defense attorney who is billing against those limits and the plaintiff. Excess insurance is often not there. In our case, only $92,000 was left after the defense counsel got done trying the case. That didn't quite cover the $980,000 plaintiff's jury award (which did get paid, but that's another story).

Looking ahead

Taking on a product liability case wrapped inside a legal malpractice case can be a rewarding experience — if you look ahead, trust your gut and feel that a little boldness and creativity can overcome the overwhelming advantages for the defense. Clients are so appreciative when you resolve a claim successfully — and that's why we're here.

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