

Session n° 15

N. 42150

R. 41777

Product Liability /
Product Safety

by K.V. HART
Tuesday 12 Oct.

I. The Terms "Breach of Warranty", "Strict Liability" and "Products Liability" in American Law

The use of the general term "products liability" creates much confusion. Many courts and attorneys often use this term in a broad generic sense to cover both tort type personal injury actions as well as contract type actions arising out of defective products. Despite some courts' and practitioners' synonymous use of the terms "breach of warranty" and "products liability," important distinctions do exist between the various theories of liability that constitute the general field of law known as products liability. A products liability case may be brought under a number of different legal theories, the most important of which are negligence, strict liability, and breach of warranty. E.g., Sunvillas Homeowners Association, Inc. v. Square D Co., 301 S.C. 330, 391 S.E.2d 868 (Ct. App. 1990). Under each of these theories a plaintiff must establish that the product at issue was in a defective condition. 391 S.E.2d at 871. Under the theory of negligence, the plaintiff bears the additional burden of proving that the defendant failed to exercise due care. Id.

The theory of strict liability focuses upon the condition of the product and not upon the conduct of the defendant. E.g., Smith v. Home Light & Power Co., 734 P.2d 1051 (Colo. 1987) (focus of strict liability is upon nature of product and consumer's reasonable expectations with respect thereto rather than upon the conduct of the manufacturer); Rix v. General Motors Corp., 222 Mont. 318, 723 P.2d 195 (1986) (under § 402A of the Restatement (Second) of Torts (1965), a manufacturer is liable when it sells

user or consumer); Brown v. Superior Court (Abbott Laboratories), 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988) (strict liability differs from negligence in that it obviates necessity for plaintiff to prove that manufacturer of injury-causing product was negligent).

Like strict liability, a cause of action for breach of warranty is a condition-oriented rather than a conduct-oriented theory. A plaintiff suing for breach of the implied warranty of merchantability must prove that defects existed in the product at issue at the time it left the defendant's control. E.g., Hargett v. Midas International Corp., 508 So. 2d 663 (Miss. 1987); cf. Ragland Mills, Inc. v. General Motors Corp., 763 S.W.2d 357 (Mo. Ct. App. 1989) (to establish breach of warranty of merchantability, buyer is not required to show specific defect but may recover upon proof that manufacturer sold goods that were not merchantable). A "defect" in the context of an action for breach of the implied warranty of merchantability means a condition of goods that renders them unfit for the ordinary purposes for which they are used. See Plastex, Inc. v. United States Steel Corp., 772 S.W.2d 442 (Tex. 1989). The contractual remedy of breach of warranty may coexist with the theory of strict liability. Falcon Coal Co. v. Clark Equipment Co., 802 S.W.2d 947 (Ky. Ct. App. 1990). By virtue of §2-314 of the Uniform Commercial Code (U.C.C.), the implied warranty of merchantability arises automatically in every sale of goods by one who is a merchant with respect thereto. E.g., Abraham v. Volkswagen of America, Inc., 795 F.2d 238 (2d Cir. 1986).

One important effect of the nature of breach of warranty as a distinct products liability theory is that certain defenses are available in a warranty action that are unavailable under the other bases of products liability. Possible defenses to a negligence action include contributory negligence, comparative negligence, assumption of the risk, product misuse, and product alteration. The usual defenses to strict liability and breach of warranty claims are more limited, and include assumption of the risk, product misuse, and product alteration.

However, depending upon the jurisdiction, a defendant may have available to him special defenses that arise only in the context of a breach of warranty cause of action. For instance, under § 2-316 of the U.C.C., the implied warranty of merchantability can be excluded from a contract for the sale of goods. See Chemtrol Adhesives, Inc. v. American Manufacturers Mutual Insurance Co., 42 Ohio St. 2d 40, 537 N.E.2d 624 (1989); Dairyland Insurance Co. v. General Motors Corp., 549 So. 2d 44 (Ala. 1989). In addition, by virtue of § 2-719 a plaintiff's damages for breach of warranty can be limited in certain cases. For example, a manufacturer permissibly can limit the remedy for breach of warranty to repair and replacement of a defective product. See Chemtrol Adhesives, Inc. v. American Manufacturers Mutual Insurance Co., *supra*, 537 N.E.2d at 639. However, § 2-719 disallows an exclusion of consequential damages arising from personal injury with respect to consumer goods. See Waggoner v. Town & Country Mobile Homes, Inc., 808 P.2d 649 (Okla. 1990) (parties to sales contract may not limit

manufacturer's liability for personal injury caused by product defect). Moreover, a warranty disclaimer is not effective as against third persons that were not parties to the contract in which the disclaimer appeared. See Kawrczewski v. Ford Motor Co., 382 F. Supp. 1346 (N.D. Ind. 1974); 1A L. Frumer & M. Friedman, Products Liability § 3.02[7][b][v] at 3-263 (1993) (no cases exist in which a manufacturer has been able to stand on the disclaimer in a contract with its purchaser-reseller in avoiding liability to an ultimate buyer who had no knowledge of the disclaimer).

Another defense peculiar to warranty cases is lack of privity of contract between the plaintiff and the defendant. Although a majority of states have abolished the privity requirement when the plaintiff alleges a personal injury, many jurisdictions have retained the requirement when the plaintiff's loss consists only of property damage or economic harm. E.g., Board of Education of City of Chicago v. A.C. & S. Inc., 131 Ill. 2d 428, 546 N.E.2d 580 (1989) (in order to state claim for breach of implied warranty, plaintiff must show that he was in privity with defendant, except when he is remote buyer who suffered personal injury). Other states have reaffirmed the requirement of privity generally on the basis that when a buyer not in privity is injured his remedy is under the theory of strict liability. Affiliates for Evaluation & Therapy, Inc. v. Viasyn Corp., 500 So. 2d 688 (Fla. 3d DCA 1987). Therefore, when a cause of action for breach of warranty is advanced, the plaintiff must demonstrate privity with the defendant. Id. at 693.

A plaintiff's failure to give notice of a breach of warranty also can serve as a defense to a breach of warranty claim. Section 2-607 of the U.C.C. requires a buyer within a reasonable time after he discovers a breach to notify the seller thereof or be barred from any remedy. Some courts have taken the position that a plaintiff's failure to give notice to a defendant manufacturer of a breach of an express or an implied warranty bars him from any warranty remedy for personal injuries. See Allen v. G.D. Searle & Co., 708 F. Supp. 1142 (D. Or. 1989). However, the majority rule is that a purchaser suing a remote manufacturer for breach of warranty is required to give notice of the breach only to his immediate seller. See Ragland Mills, Inc. v. General Motors Corp., supra, 763 S.W.2d at 361. Other courts have taken the position that a plaintiff need not give any notice at all, if he is not a buyer of the product at issue but merely a third-party beneficiary of the warranties. E.g., Morgan v. Sears, Roebuck & Co., 700 F. Supp. 1574 (N.D. Ga. 1988). Some courts have held that even if a plaintiff is required to give notice of a breach, the filing of a lawsuit against the defendant constitutes sufficient notice. Graham v. Wyeth Laboratories, a Division of American Home Products Corp., 666 F. Supp. 1483 (D. Kan. 1987); Chemtrol Adhesives, Inc. v. American Manufacturers Mutual Insurance Co., supra, 537 N.E.2d at 638. Other courts have taken an opposite viewpoint and have concluded that litigation filings are not sufficient notice of a breach. E.g., Quaker Alloy Casting Co. v. Gulfco Industries, Inc.,

686 F. Supp. 1319 (N.D. Ill.), reconsideration denied, 123 F.R.D. 282 (N.D. Ill. 1988).

It can be seen that although there is a great deal of overlap between the various legal theories within the products liability sphere, there are some important differences that can accord a lawyer additional defenses for a client.

II. Some Significant Cases in the Area of Products Liability and Products Warranty of the Past Year

1. Daubert v. Merrill-Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993). In Daubert, the United States Supreme Court held that general acceptance is not a necessary precondition to admissibility of scientific evidence under the Federal Rules of Evidence. The district court had granted summary judgment to the defendant manufacturers of the drug Bendectin in an action brought by the plaintiffs to recover for limb reduction birth defects that they allegedly suffered as a result of their mothers' use of the drug during their pregnancies. After ruling that the plaintiffs' evidence was not sufficiently established to have general acceptance in the field to which it belongs, the lower court concluded that there was no genuine issue of fact presented with respect to the question of whether Bendectin had caused the plaintiffs' injuries.

The Supreme Court vacated the district court's order, which had been affirmed by the court of appeals. In so doing, the Court repudiated the so-called "Frye Test," originally set forth in Frye v. United States, 293 F. 1013 (D.C. 1923). Although Frye concluded

that expert opinion based upon a scientific technique is not admissible unless the technique is generally accepted within the relevant scientific community, the Court decided that the requirement of general acceptance is no longer supportable. Rather, pertinent evidence based upon valid scientific principles will satisfy the demand that expert testimony on both sides rest on a reliable foundation and be relevant.

2. Dunn v. Hovic, 21 PSLR 845 (3d Cir. 1993). In Dunn, the Court of Appeals for the Third Circuit held that sequential assessments of punitive damages against a products liability defendant do not by themselves amount to a denial of due process. Nevertheless, the court did conclude that repeated awards of punitive damages are a factor to be considered in determining the size of a proper award. Noting that the United States Supreme Court had not condemned the award of punitive damages in the recent TXO Products Corp. case, the court of appeals was reluctant to impose a blanket policy against such damages.

3. Coffman v. Keene Corp., 21 PSLR 846 (N.J. 1993). Reviewing a verdict in favor of the plaintiff in a failure-to-warn case, the New Jersey Supreme Court, traditionally in the vanguard of the movement seeking to insure greater safety for product users, held that there should be a rebuttable "heeding presumption" in strict liability failure-to-warn cases. The application of the presumption results in a finding that if a warning had been issued with the subject product it would have been heeded. If the defendant fails to rebut the presumption, the conclusion arises

that the failure to warn was a proximate cause of the plaintiff's harm. The court went on to note that because persons in the workplace do not have any meaningful choice with respect to their use of potentially defective machinery, in order to rebut the presumption a defendant must prove either: (1) that if an adequate warning had been given, a plaintiff with a meaningful choice would have ignored it or (2) that if a warning had been given, the plaintiff's employer would not have taken reasonable precautions for the safety of its employees.

4. Jurado v. Western Gear Works, 21 PSLR 369 (N.J. 1993). In Jurado, the plaintiff brought a strict liability action against the manufacturer of a collating machine on which he injured his right hand allegedly as the result of the absence of a safety guard. In order to have placed his hand in a position of danger, the plaintiff had to squat and to reach into the nip point, which was only 28 inches from the ground. The defendant argued that the plaintiff's conduct constituted a misuse of the product. The court declared that in the context of the misuse defense in a design defect case, the jury must decide whether the plaintiff used the product for an objectively foreseeable purpose. The burden is on the plaintiff to prove that he used the product for such a purpose. If the plaintiff fails in this proof, then the defendant is not liable. However, if the plaintiff succeeds, then the jury must determine whether plaintiff used the product in a foreseeable manner. Again, the plaintiff bears the burden of establishing that he used the product in such a manner. If he fails to carry his

burden, then the defendant is relieved of liability. However, if the plaintiff does prove that the manner of his use was objectively foreseeable, then the jury is then charged with the task of determining--under the risk-utility test--whether the product was defectively designed.

5. Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc., 21 PSLR 771 (Fla. 1993). In Casa Clara, the Florida Supreme Court held that there is no exception to the economic loss rule in cases involving consumers as the aggrieved parties. The economic loss rule bars recovery in tort for harm other than personal injury or damage to property separate from an allegedly defective product. The plaintiffs argued that they should not be subject to the economic loss rule because they were mere consumers as opposed to commercial entities. The court declared that other provisions of the law provide homebuyers with adequate remedies, so that no exception to the economic loss rule is justified with respect to such a class of plaintiffs.

6. Euler v. American Isuzu Motors, Inc., 807 F. Supp. 1232 (W.D. Va. 1992). In a case interesting because of its combination of warranty law and the doctrine of crashworthiness, the court held that a cause of action exists under Virginia law for breach of warranty upon proof that a vehicle was not crashworthy. In so holding, the court noted that Virginia law pertaining to the implied warranty of merchantability requires a manufacturer to supply a product that--at the time it leaves the defendant's hands--

-is not unreasonably dangerous for the use to which it would ordinarily be put or for any other reasonably foreseeable purpose.

7. Fabre v. Marin, 18 Fla. L. Weekly S453 (1993). In Fabre, the Florida Supreme Court addressed the issue of whether a Florida statute dealing with the apportionment of damages should be applied so as to divide the plaintiff's noneconomic damages between her husband, a nonparty who was found to have been 50% at fault, and the defendants. The statute at issue provides that a court shall enter judgment against each "party" liable on the basis of that party's percentage of fault and not on the basis of joint and several liability. The trial court refused to reduce the judgment according to the plaintiff's husband's degree of fault, reasoning that the term "party" applied only to those tortfeasors who were named as defendants in the action. Noting that the state courts of appeals had reached conflicting results on the issue, the supreme court held that a "party" within the meaning of the statute is not limited to named defendants. Rather, the statute mandates that judgment should be entered against each party liable according to that party's percentage of fault. Because the defendants' percentage of fault was only 50%, the total judgment should have been reduced by half. According to the court, any other result would mean that a defendant could be required to pay a greater proportion of damages than his proportion of fault in causing an accident.

8. Dosdourian v. Carsten, 18 Fla. L. Weekly S459 (1993). In Dosdourian, the Florida Supreme Court abolished Mary-Carter

agreements, in which one co-defendant secretly contracts with the plaintiff to remain in the case and to defend in court in exchange for a reduction in his liability according to the increase in liability of the other co-defendants. In deciding that such agreements violate public policy, the court listed the potential abuses inherent in these arrangements. Most of the possible abuses stem from the appearance, cultivated through the use of a Mary-Carter agreement, that the settling defendant and the plaintiff are true adversaries. This false appearance allows the settling defendant to participate in jury selection, to present witnesses, to cross-examine the plaintiff's witnesses, and to argue points of influence before the jury. Because all such acts are founded upon an appearance of adverseness at odds with reality, Mary-Carter agreements undermine the adversarial process and promote unethical conduct on the part of attorneys, in the view of the court. Hence, the court ruled that such agreements would be barred prospectively.

III. HAGUE SERVICE CONVENTION¹ - Some Significant Cases During the Last Year

1. Diz v. Hellmann International Forwarders, Inc., 611 So. 2d 18 (Fla. 3d DCA 1992) (conditions for allowing entry of default judgment without receipt of certificate of service from foreign government under Hague Convention were not met by plaintiff, even though certificate of government of Spain concerning attempted service had not been filed in a timely manner; statement in motion

¹(Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters (the "Hague Service Convention"; codified at 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163.

for default that there had been no service was "certificate" within meaning of Convention requirement that to sustain entry of default no certificate of any kind be received).

2. Honda Motor Co., Ltd v. Superior Court, 10 Cal. App. 4th 1043, 12 Cal. Rptr. 2d 861 (1992) (service of process upon Japanese corporation by registered mail violated Hague Convention, even though actual delivery followed attempted service and California statutes authorized service by mail).

3. Stewart v. Volkswagen of America, Inc., 181 A.D.2d 4, 584 N.Y.S.2d 886 (2d Dep't 1992) (service provision of Hague Convention did not apply to negligence action against parent German corporation not authorized to do business in New York and wholly-owned subsidiary located in United States, where service upon subsidiary--parent's involuntary agent--was proper under New York statute governing service of process on unauthorized foreign corporations).

4. Gapanovich v. Komori Corp., 255 N.J. Super. 607, 605 A.2d 1120 (App. Div. 1992) (product liability plaintiff could serve process on Japanese manufacturer by mail directed to manufacturer at its place of business in Tokyo, even though Japanese internal law does not allow service of process by mail; as signatory of Hague Convention, Japan is bound by Convention's provision which allows service of process by mail).

IV. HAGUE EVIDENCE CONVENTION² - Some Significant Cases During the Last Year

In re Asbestos Litigation, 623 A.2d 546 (Del. Super. Ct. 1992). In Asbestos Litigation, multiple plaintiffs brought a personal injury action in which they alleged injuries due to asbestos exposure. In the course of discovery, a Finnish corporate defendant presented evidence that it would offend Finland's judicial sovereignty to require production of the documents located in Finland. The defendant, therefore, refused to comply with certain discovery requests on the basis that it should be required to produce documents only through discovery procedures pursuant to the Hague Convention. The Master ruled that document production was required to take place in Finland without resort to Hague Convention procedures in that the procedures were not mandatory. Under a clearly erroneous standard, the Superior Court of Delaware upheld the Master, rejecting the defendant's argument that the Societe Nationale Industrielle Aerospatiale v. U. S. Dist. Ct., S.D. Iowa, 482 U.S. 522, 107 S. Ct. 2542, 96 L.Ed.2d 461 (1987), factors are mandatory. The court reasoned that the factors enunciated by the United States Supreme Court in Societe Nationale "do not represent minimal requirements for an analysis of whether the parties must proceed under the Hague Convention." 623 A.2d at 549-50. Rather, the court reasoned, general principles of comity and the particular circumstances of each case should be a court's

²(Hague Convention on the Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention"), codified at 23 U.S.T. 2555, T.I.A.S. 7444, 847 U.N.T.S. 231)

guideline. Thus, the court ruled that the Master's decision to order discovery outside of the Hague Convention was not clearly erroneous under the factual circumstances of the case and was not contrary to law as set forth in Societe Nationale.

DOCUMENT PRODUCTION IN AMERICAN LITIGATION

Since the United States Supreme Court decided the case of Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa in 1987, American courts have fairly consistently applied the broad discovery rules of the Rules of Civil Procedure to foreign litigates in U. S. Courts. The Hague Evidence Convention is still normally applied by U. S. Courts to non party discovery. The courts even apply the Federal Rules to require production from foreign parents of U. S. subsidiaries who are parties to the action as well as to foreign subsidiaries of U. S. corporate parties. Courts give very little deference to blocking statutes and other prohibitions of American style litigation in the country where the foreign party is located. See In Re Asbestos Litigation, 623 A.2d 546 (Del. Super. 1992), Roberts v. Heim, 130 F.R.D. 430 (N.D. Cal 1990). American courts have an easy solution to the argument that production in the foreign country would violate the laws of the foreign country. The American judge simply says that you have a choice either to produce them in the foreign country or you bring them all to America. When faced with this choice, most foreign companies find a way to produce them in their company offices.

This broad based discovery is what is most disturbing to a foreign corporation which finds itself involved in American litigation. With the increased globalization of businesses and the ever increasing litigious nature of doing business in America, nearly all manufacturing companies of any size anywhere in the

world face the prospect of finding itself directly involved in an American lawsuit. It is not sufficient to say "I do not have an office in America and I do not even sell in America so why should I be concerned." If you manufacture a small switch in Germany and sell it to an Italian company who then incorporates it into their machine which they ship to America and there is a failure of their machine causing severe injury or damage, your company will likely find itself a defendant in the resulting American lawsuit.

Aside from the general reaction that it is an invasion of their right to privacy, the two most troubling aspects of broad American discovery to foreign companies is the prospects of allowing someone to plow through their voluminous company records and to grill their corporate officers and employees under oath in pretrial discovery depositions.

At this stage, I do not want to say much about the deposition aspects. There are a number of significant issues meriting discussion such as whether ordinary employees, as opposed to corporate officers and managers, can be deposed and whether the deponents should be deposed in English or through interpreters, but these are questions that can be addressed after litigation is already begun. I have found that the most troubling problem in representing foreign defendants in American litigation is the problem of production of documents. An effective defense requires that this problem be addressed years in advance of the American lawsuit. When you find yourself involved in an American lawsuit, the document body of evidence is frozen. To destroy documents

after the lawsuit is begun or even after you are aware that it is imminent can create enormous adverse consequences.

Traditionally, American lawyers of the past advised their clients to retain all records on the theory that you might need it to prove something in the future. Most American companies have long since abandoned this philosophy and have set up elaborate systems to routinely and systematically purge their files. These are normally referred to as Document Retention Programs but they are more accurately Document Destruction Programs. Most European companies are not as aware of the problems created by the failure to have established document retention programs. If these companies are in any way involved in American commerce, even indirectly, they must consider implementation of such a program. I would expand it beyond just a Document Retention Program. I would call it a Document Management Program and suggest that any effective corporate policy regarding documentation must have two facets. First is Document Creation and second is Document Retention.

The first aspect of this Document Management Program is the need to educate employers on what documents to prepare and the manner of preparing those documents. The best tool to fight "bad paper" is to educate company employees on what is bad, why it is bad and, therefore, why they should not generate "bad paper" to begin with. Care must be made not to write in a manner that casts company conduct in an improper manner. Write accurately. Do not create documents that contain false, inaccurate or misleading information. Do not exaggerate. Do not write hypotheses, theories

or opinions as though it were fact. Do not speculate about things that are not in your area of knowledge or expertise. Does the person really have the knowledge or training to express the "opinion"? Do not write matters as though they are facts when they are really based on assumptions. Write responses to product criticisms, dissenting opinions and reports of safety problems - do not leave an unanswered complaint. Employees must be taught to remember constantly that anything they write may be taken out of context and then can appear wholly different from what they intended. Perhaps the most basic item to teach is to think carefully as to whether any document should be created at all. Often times, it is better to handle sensitive matters verbally and maintain no written records. When there are staff meetings, why should everyone make and keep notes or minutes? If you have three people write notes, they will all be different. If minutes must be kept, have them made by one person who is trained and sensitive as to what to write. Is it necessary to make all these copies? Should I send copies to all these people?

Do not create any "personal files" regarding anything relating to company business. There is virtually no such thing as personal files under American Discovery rules if it contains anything remotely connected with the company's business. In the 1970s, there was a famous antitrust case against the paper manufacturers which was proved almost entirely by the files of a retired employee of one of the paper manufacturers when it was discovered that he had retained copies of company documents which showed years of private price fixing meetings. Many companies and individuals were

convicted of criminal violation of the U. S. Antitrust laws and millions of dollars were paid in criminal fines and settlement of civil suits. It is generally recognized that these cases could never have been successful without the documents from the former employee's garage. The company's files had been destroyed years before.

I have found that the practice of creating personal notebooks and files by employees is much more common in Europe than in America and it is very difficult to convince Europeans that these records belong to the company or must be produced in American litigation. A program of educating your employees on creation of documents is not something that can be done overnight. It is a long term process and an expensive one but it is an aspect on which every company should concentrate. After all, the more you can prevent the creation of "bad documents", the less you have to be concerned when faced with a request for production of documents from an American court.

Focusing on the second aspect of a document management program which is the need to establish a document retention plan based on record keeping requirements and business needs. Today with high speed copiers, fax machines and computers, almost any company produces millions of written documents. There has been a literal explosion of documents. Is it necessary or desirable to keep all these papers? One large American company that I have represented conducted a detailed survey and found that 90% of the documents of that company were inactive after only 30 days.

The normal and easy course is simply to file all these documents away in warehouses, often with no organization whatsoever and forget them. Of course, it is expensive to provide the storage space but many companies have an abundance of old buildings and feel it is cheaper to simply store them than to organize them and select what should be kept and what should be discarded. One must ask, "what good is the document if you have no system to economically retrieve the document wanted?" After a short time, who even knows it even exists?

When faced with American style pretrial discovery, however, these documents can become an enormous liability. With literally millions of documents to plow through, almost any half bright lawyer can find many documents which can be taken out of context to help prove his case. This is particularly true in products liability litigation. Oftentimes in the beginning, the American lawyer will have little more than a severely injured client whose injury he believes was caused by or contributed to by your product. He has a very sympathetic client to put before a jury but he may have great difficulty carrying his burden of proof to show that the injury resulted from your product. He files suit and seeks discovery. Very often, the only way he can prove his case is through the manufacturer's documents. These document requests are very broad and typically in a products liability case will require production of all documents relating to the design of the product, testing of the product, manufacture of the product, cost studies of the manufacturing process and materials, quality control of the product; advertising of the product, marketing of the product, any

warning on use of product, any complaints received regarding the product, any settlement of any claims and any changes in any of the above over the years. Often this production will require records going back decades to when the product was developed. In the asbestos litigation, some companies have had to produce documents going back to the 1930s - sixty years ago. American pretrial discovery is very broad and allows for production of any document that is relevant to the issues or which may lead to relevant evidence. The principal provision of the Federal Rules of Civil Procedure governing production of documents are Rules 26, 34 and 37. Copies of these rules are set forth in the Appendix to this article. Once the plaintiff's lawyer gets your documents, he may discover even more serious problems. He may locate documents which indicate that some of the manufacturer's employees were aware of the risks yet the company went ahead with the marketing of the product without any warning. You are then faced with a punitive damage claim that can be many times the actual damages. He may discover that there have been a large group of persons that have sustained similar injuries or are exposed to similar injuries. The company is then faced with the prospect of many more lawsuits or a class action suit on behalf of all other persons in a similar situation. Most people point to these instances of "bad documents" as the principal reason for implementing a document retention program to routinely systematically and automatically purge company files of everything but essential business records.

Equally important in my mind is the cost of complying with the broad based American request to produce documents. Very few

American courts will grant protection against a discovery request simply because it is broad and calls for review of millions and millions of documents. In the Seminole Electric Cooperative, Inc. vs. Brown Boveri Corporation litigation, the fees and costs paid to my firm directly associated with the document production was over three million dollars. This does not include the internal costs to Brown Boveri in furnishing staff to locate, review copy and organize these documents for the lawyer's review. The internal costs were many times the attorney's costs. There were literally abandoned warehouses where no one except the pigeons had set foot for years. The records were totally disorganized. We cataloged and produced about one and one-half million documents but probably a hundred times that number had to be sorted to locate the documents required to respond to discovery. There was no system of indexing to locate specific types of documents. There were some very bad documents but most of the million and one-half documents were of no value to either side once produced but the cost was encountered in simply making the production. What was worse was they were of no value to the company whatsoever and should have been destroyed years before.

Another example to illustrate the costs associated with complying with requests for production of documents is found in the more than 500 products warranty cases presently pending in the United States against Du Pont arising out of the sale of Benlate 50 D.F. Du Pont has produced over three million documents over a very short period of time. They have over sixty-five people involved full time in handling this production. There are attorneys, legal

assistants, document reviewers, librarians, catalogers and copiers. For over a year, they have had ten very large, high speed copiers on 24 hour, 7 day a week shifts. In addition, to outside legal counsel to handle the litigation, they have hired outside law firms to do nothing but review these documents for attorney-client and work product privilege. Even then, the American judges have found that Du Pont was dilatory, had not proceeded in good faith discovery and had abused the process. One Federal judge in one case has imposed fines against Du Pont for one million dollars and has required them to pay plaintiffs' attorneys nearly one half million dollars in attorneys fees for their failure to timely respond to discovery requests. When the Judge found that the company was still not timely complying with his discovery orders, he ordered Du Pont's Chief Executive Officer and General Counsel to appear in person in his court in Georgia to show cause why they should not be held in contempt. He threatened to strike Du Pont's defenses and enter judgment for the plaintiffs. The Bush Ranch Inc. vs. E. I. Dupont de Nemours & Co., No. 93-33-COL (U. S. District Court, M.D.Ga. 1992)

The necessity to devote so much time and resources to the marshalling, review and production of so many documents also distracts both the lawyers and company management away from the more important task of creating and organizing the defense of the principle issues - which is where the focus is needed.

It is for these reasons that I come down strongly on the side of those who feel the risks associated with keeping records for too long is much greater than the benefits of not keeping them long

enough. In lawsuits, bad paper kills. It is much easier to counter almost any testimony than it is to convince a jury that they should disregard what was written prior to the event by some low level unqualified employee who really had no knowledge of the facts. Every company should have a detailed comprehensive policy to control and organize its documents and to systematically destroy those records that are no longer absolutely essential to the company's business operations. I think this is especially true with foreign companies doing business in America. In my experience, it is much more likely that they will be a defendant in the U. S. Court than it is that they will be a plaintiff. The plaintiff normally has the burden of coming forth with proof of the product defect. Often, he cannot carry this burden without the defendant manufacturer's documents. If these documents do not exist, he may no longer have a case.

Designing a fairly good system is not particularly difficult, especially for a professional records person. There are many professional consultants available to assist in the design and implementation of the program. The hard part is to make sure the system fits the company and its needs and that the system is designed in such a way that it actually works.

Once implemented, the policy must be communicated to all persons inputting into the system and they must be educated and convinced that the system is needed and know how to use the system. The system must be followed. The selective destruction of documents can lead to enormous consequences. Any system must have "stop buttons" designed into the program once the company learns

that suit has been filed - all destruction of documents related to that subject must be stopped immediately. Otherwise, severe penalties can result. First, there are federal and state statutes relating to the obstruction of justice that can be severe including criminal penalties. Civil trial judges can impose severe sanctions for destruction of documents once litigation has begun. In the well-known case of Callucci v. Piper Aircraft Co., 102 F.R.D. 472 (S.D. Fla. 1984), the judge struck the pleadings of the defendant and entered judgment for \$10 million dollars for the plaintiff after finding that Piper Aircraft had deliberately destroyed documents relating to the design and testing of the aircraft after suit had begun. These penalties for selective destruction of documents can be imposed even if there is not a document retention program but if documents are destroyed not in accordance with the document retention program, it is particularly incriminating. Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107 (S.D. Fla. 1987). On the other hand, adherence to an established document retention program will protect the company from adverse inference being drawn from destruction of documents which were destroyed in accordance with the plan. Normally, when it is shown that a company document has been destroyed and is not available, an adverse inference arises that the document was unfavorable to the company. However, this inference can be rebutted and a showing that the document was routinely destroyed in accordance with the company's document retention policy effectively rebuts any adverse inference. Vick v. Texas Employment Comm'n, 514 F 2d 734 (5th Cir. 1975).

There are couple of further points I want to make related generally to the overall issue of document production in American civil litigation.

Simply failing to proceed in good faith with production in response to a request for production can lead to severe penalties. Rule 37(b) of the Federal Rules of Civil Procedure provides the judge with wide discretion. It reads:

(b) Failure to Comply with Order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

In addition to the Du Pont Benlate cases discussed above, a couple of years ago, I was involved in a products liability case involving a tire manufacturer, who failed to provide adequate information as to other claims and other lawsuits which they had involving similar tires. This came to light just prior to the pretrial conference, and the information was furnished. The judge found the plaintiffs would be prejudiced by late production, that there was no excuse for the delay, and he refused to continue the trial date. Instead, he prohibited the tire manufacturer from offering any expert testimony at trial. How do you defend against a products liability claim without an expert?

There are a couple of final points I wanted to make because of the audience I have here. I have repeatedly found that when a claim is made, or even after a complaint is filed, most companies and their insurance companies do not want to invest the money and effort to marshal and review the documents until required to by discovery requests. If you are faced with a serious claim that is likely to go to litigation, the documents should be marshalled and reviewed by American trial counsel almost immediately. The documents are probably one of the most important considerations in

evaluating the case for settlement, especially if the company does not have a comprehensive document management program that encompasses both quality control of the documents being created and a document retention program to purge files. The sheer costs of complying with the discovery that is sure to follow may affect the settlement posture. If there are documents which are likely to lead to punitive damages or multiply the lawsuits, it should be known. In addition, it is extremely important for the attorney to know what the documents say and whether they are good or bad so that he can plan the strategy of the defense early. Trial documents must be dealt with and the lawyer needs to know what he is dealing with early. It is often disastrous when an attorney outlines a line of defense and proceeds with preparation, only to subsequently have one of his client's own documents come forth in discovery that completely destroys the defense strategy. It may be very costly and difficult to restructure the defensive strategy.

The second point is to stop the creation of bad documents after litigation occurs. There is a tremendous inclination to point the finger at someone else when tragedy occurs. In the products liability/products warranty area, upper management must be forceful to prevent employees being pitted against each other. Marketing cannot start blaming manufacturing which cannot start blaming the design department. If management is not careful and forceful, each will try to find someone else in the company instead of trying to concentrate on the plaintiff's misuse of the equipment or some other good defense. When this occurs, each starts creating disastrous documents that are extremely difficult to overcome.

Finally, be very alert as to what documents are being prepared and sent to your insurance carrier. Usually, documents prepared in your investigation of a claim for your insurance carrier are protected by the attorney work product privilege and do not have to be produced. However, this is not an absolute privilege, and the court can order the documents produced if the other side makes a showing of compelling need. Rule 26(b)(3), Federal Rule of Civil Procedure, provides:

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

I have been involved in at least two cases where it was clear that the company was admitting complete fault to their insurance carrier and submitting backup proof so that they could obtain immediate coverage to pay to their customer in settlement. The DuPont Benlate cases are very illustrative on this point. After widespread claims from farmers that their plants had been killed by the fungicide, DuPont undertook a massive settlement program and paid out over \$500 million at the same time voluminous investigative reports were going to the insurance carrier stating that tests and investigations of the fields established that the cause of plant damage was the Benlate and all other causes were eliminated. DuPont stopped making settlement. Hundreds of suits have been filed, and a number of judges have found that the investigations and tests made soon after the plant damage cannot be duplicated two years later and have required production of these investigative reports.

There is one significant development in regards to document production which has occurred this year which I feel indicates the future course which will be followed in cases involving large numbers of documents. In re Silicone Gel Breast Implant Products Liability Litigation MDL 926 is a multi-district proceeding where the discovery in the thousands of breast implant cases have been consolidated for discovery purposes before United States District Judge Sam Pointer of Alabama. He has entered orders requiring that all documents produced in discovery by the implant manufacturers be copied word for word and signature for signature on CD-ROM computer discs. Each disc contains roughly 15,000 pages and he requires

that anyone can purchase the discs for \$25 per disc. A company was designated by the court to electronically scan the documents which are then sent to SONY to create the discs. The costs of the scanning is being split equally by the manufacturers and the lead plaintiff firms. The discs can be purchased with minimal indexes on floppy discs. The discs and the indexes work on several different data bases and litigation support programs. This procedure can be a great benefit to defendants when faced with a large number of suits because they will not be barraged with repetitive document requests in each case. However, it has disadvantages to defendants. It assures the proliferation of the distribution of the company's documents everywhere. It makes it much less expensive for many cases to be brought which might not have previously been brought because of costs of obtaining discovery. Further, it puts the documents in the hands of plaintiff's counsel in a form which can be easily and quickly used. I am sure this procedure will be widely followed in future cases involving a large number of documents. Thus any plaintiff or potential plaintiff can purchase the 3 million documents much cheaper than going to the central depository and copying those needed.

In closing, I want to say that I am not an expert on document retention policies. There are plenty of experts in the field. I simply want to share some of the problems that I have experienced as a trial lawyer when there is no comprehensive document management policy in effect or if it is not properly maintained and adhered to. In my experience, this problem is particularly

troublesome when representing foreign defendants who have not had years of experience in dealing with the problems created by broad American pretrial discovery. American companies, through experience, have at least developed an appreciation for the problems and have attempted to formulate policies to better protect themselves. European companies by and large are not even aware the problem exists until they are involved in an American lawsuit.

FIRM\SEMINAR.PAP