Products Liability Defense: At The Center Of The Storm

The Editor interviews ***Richard Fama*** *and* ***Michael J. Partos,*** *members of Cozen O'Connor.*

Editor: Would you tell our readers something about your professional experience?

Fama: I have been with Cozen O'Connor for 11 years, focusing on defending high profile products liability actions in state and federal courts nationwide. Most of my cases involve class action lawsuits and multidistrict litigation proceedings. For example, I am actively engaged in class action litigation arising from industry-wide pet food recalls that occurred earlier this spring – in addition to defending a major snack food manufacturer in cases stemming from salmonella poisoning claims. My practice also involves litigation over diacetyl, the chemical used in butter flavoring and often found in microwave popcorn. Another interesting area of my practice involves counseling clients on country of origin labeling issues.

One of the attractive things about Cozen O'Connor is that it provides a national network of attorneys, offices, etc., suitable for such major litigation.

Partos: I have been handling products cases since 1989. Prior to joining Cozen in 2001, I worked as associate general counsel for a major tractor manufacturer, overseeing their products liability matters throughout the United States. Within the last few years, much of my practice has been devoted to toxic tort litigation and food products litigation, with a geographic focus in California and Nevada.

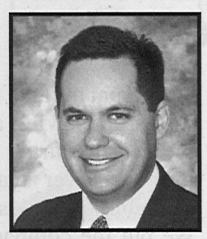
Editor: Product safety has improved over the years, yet we're still seeing diverse and increasing numbers of suits. What are some emerging areas for products liability?

Partos: Products have gotten safer, and I think that is a result not only of improvements in science and technology, but also pressure from products liability litigation. Manufacturers have been forced to make their products safer, and obviously that is a good thing. Nevertheless, fewer injuries does *not* mean there are fewer lawsuits. In California, and elsewhere, "personal injury" lawyers have become "trial" lawyers, which means they are bringing lawsuits even where no personal injury has occurred, or is even likely to occur.

Editor: Are there specific strategies that plaintiffs' attorneys are using to gain ground?

Fama: One troubling trend is the increase in so-called no-injury class action lawsuits. These are claims that do not allege personal injury, but rather economic loss. In its most basic form, the assertion is that the plaintiff would not have purchased the product had it been properly labeled or had the plaintiff known it had the potential to cause damage or injury. The measure of damages, in one instance, might be the cost of the product multiplied by the number of purchasers alleged to have been affected by the mislabeling. These claims blur the distinction between tort and contract.

Richard Fama



Michael J. Partos

Editor: Does the plaintiffs' bar have an unfair advantage here over those who are defending corporate America?

Fama: What I would say is that this area is so new that corporate America is just beginning to develop responses to these types of claims. In addition, I think the defense bar has been the victim of its own success to the extent that, when these no-injury claims were first brought, many motions to dismiss were granted. That served to educate the plaintiffs' bar on how to tailor their cases and survive motions to dismiss. In time, the pressure shifted to manufacturers who – because it was their brand and reputation on the line – were very reluctant to be in the public eye as a consequence of litigation.

Editor: Are there particularly vulnerable industries or industry sectors?

Fama: In my opinion, every industry is vulnerable. These actions are easy to commence. The plaintiffs' bar does not need to find an injured plaintiff, and they don't have the burden of causation. For example, in the cases against PepsiCo, the manufacturer of Aquafina, the plaintiffs claimed they would not have bought the product had they known it was simply tap water. *Every* purchaser is a potential class member.

Partos: In California, we have seen many no-injury actions, especially involving food products, building materials and toxic exposure claims. There has been an explosive growth in medical monitoring class actions. Groups of people that have taken a drug or been exposed to a chemical in the workplace have not become ill, but still sue, as a class, to receive medical monitoring to look for illness. In many cases, most class members are not even likely to become ill.

California has also developed the concept of the "private attorney general," where trial lawyers, claiming to act for the good of the public, bring lawsuits to force manufacturers to issue product warnings. Very often these are unnecessary warnings aimed at, or received by, people who don't consume the products. Typically, the only people who benefit are plaintiffs' lawyers.

Editor: I understand deceptive trade practices claims are on the increase?

Partos: To be sure. In the food area, the cases began with mislabeling claims. For example, the product label lists 11 grams of fat, but scientific analysis shows 12 grams. No injury to anyone, but a demonstrated, although slight, problem with labeling. Another issue arises with products holding themselves out as "healthy" or "low carb." There is a great deal of room for argument in this situation, and the plaintiffs' bar is quick to make every conceivable claim that the public is being misled.

Another area where deceptive trade practices litigation has been invoked by the plaintiffs' bar has to do with warnings. The argument is that the presence of saturated fats, trans fats, trace amounts of environmental mercury, or benzene, and so on, requires the manufacturer to provide specific warnings regarding the existence and nature of these components or characteristics to all potential purchasers. Taken to its extreme, each can of soda or frosted donut would require a 10-page warning manual. Much of the warnings litigation is simply ridiculous, but the number of cases based upon this kind of reasoning is definitely on the increase.

Fama: Plaintiffs' attorneys are also using these statutes – state consumer protection and deceptive trade practices laws – to try to create a private cause of action where none existed in the past. I am defending an action on behalf of a client who labeled their product "Made in the USA," and the claim is one of improper labeling. This type of claim is usually governed by Federal Trade Commission (FTC) regulations, which do not authorize a private cause of action. The plaintiffs' bar is attempting to utilize various state statutes which do permit such a cause of action to get around the FTC restrictions.

Editor: What steps can companies take to anticipate these litigation trends?

Fama: The best way to anticipate litigation trends is to be proactive. That means monitoring the media, reading trade publications, attending seminars, speaking with industry colleagues, and, of course, seeking the advice of counsel. Additionally, it is essential for the company to have open lines of communication between and among its various departments and units. One fairly frequent recipe for disaster is when the company's research and development people change a formula for a particular product – say, the fat level in a milk product – but neglect to communicate that fact to the marketing group, which continues to label it a low-fat product.

Partos: In addition, manufacturers need to keep a close eye on what is underway in Washington and in their local statehouse. They should work with their industry groups to stay abreast of current legislation. In California, for example, Proposition 65, which started out as a California initiative to promote clean drinking water, has now evolved into a major area of liability requiring manufactures to warn consumers of even minute quantities of various substances in consumer products, from traces of lead in chocolate to minuscule quantities of formaldehyde in kitchen cabinets. This legislation has penetrated virtually every area of California's commerce, from gas stations, to hotel rooms, to hospitals, to hardware stores. Manufacturers elsewhere should be on high alert to resist the enactment of similar undertakings in their states.

Editor: The food industry has been particularly hard hit this year.

Fama: One area in the food industry that I have been monitoring pretty closely is the potential for consumer-driven diacetyl litigation. As I indicated earlier, diacetyl is the chemical compound often found in artificial butter flavoring and linked to serious lung disease in microwave popcorn factory workers. Needless to say, the plaintiffs' bar has considerable interest in this subject. The worst-case scenario would be no-injury class action litigation, where every purchaser of microwave popcorn, whether injured or not, is a potential member of the class.

Partos: The food industry has been hit hard, but it will be fine. A few years ago in California, there was an explosion of mold claims, and many construction industry manufacturers thought their businesses would be crippled. The defense bar learned the science at issue and began to educate judges and juries, reminding them of the inherent quality and irreplaceable nature of the construction industry and its participants. Within two or three years, these cases began to run dry, both in terms of numbers of filings and the size of verdicts. If the food industry takes a proactive approach and defends their products aggressively, I believe the same thing will occur.

Editor: What new regulations are we seeing that could impact the food industry?

Fama: A bill has been introduced in the California legislature that, if enacted, will ban diacetyl use after January 1, 2009. This product is ubiquitous, and such a step would have a profound impact on the entire baking industry. To say nothing of the fact that many other states would follow California's lead with similar legislation.

At the global level, given all the recalls relating to Chinese consumer products, I anticipate greater governmental regulation over the importation of all goods. This is not necessarily a bad thing, if it results in an increase in the resources channeled to the FDA and the USDA, which have been underfunded for a very long time.

Editor: Where is products liability litigation headed?

Partos: In an earlier era, a plaintiff would take a product to a lawyer, and the lawyer would look at the product itself in attempting to determine whether it had caused injury. Today, we are dealing with additives, flavorings, and the like. The plaintiffs' bar is breaking products down into their basic components and analyzing underlying chemicals. That creates many new areas of liability – a candy bar, a can of hair spray, or a tube of rubber cement might contain 50 distinct chemicals – and the plaintiffs' lawyer is going to attempt to show the ill effects of an exposure to 50 pounds of each of these components over a 10-year period. A phony case, to be sure, but a case nevertheless, which may well survive to trial. The defense bar will rise to meet this challenge, but success is not going to be achieved overnight. Rather, the defense bar and a group of informed clients, acting together in proactive mode, will prevail over time.

Please email the interviewees at rfama@cozen.com or mpartos@cozen.com with questions about this interview.