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How to Help Clients Avoid the Responsible-Third-Party Label

by JIM THOMPSON

Most defense counsel in toxic tort suits are eager to extract their clients from litigation. But one of the most common exit strategies may not adequately protect their clients.

In many toxic torts suits, an initial period of discovery identifies the manufacturers who made the products to which the

plaintiffs were exposed. Other named defendants often exit such suits by obtaining nonsuits from plaintiffs' counsel.

But that's a mistake. Getting out of litigation on a nonsuit leaves the former defendant vulnerable to being named as a responsible third party (RTP). Although liability, in most cases, does not follow the ominous-sounding designation, it contains hidden pitfalls and is generally distasteful to clients.

Before exploring the solution, here's how the RTP designation usually operates in the toxic tort context.

First, some background. The Texas Legislature initially created the RTP designation in 1995 to lessen a defendant's potential joint-and-several liability. But lawmakers initially placed some restrictions on who plaintiffs and other defendants could add as an RTP, i.e. restricting the designation to those parties who the plaintiff had the ability to sue.

In 2003, however, the Legislature removed all of those restrictions, making it much easier to add RTPs. Now, parties can designate as potential RTPs parties outside the court's jurisdiction; parties that may not exist, such as bankrupt defendants; and parties the plaintiff is forbidden to sue, such as the state, which has immunity.

That's the history. Today plaintiffs who believe a product harmed them often sue every manufacturer that made products of the type they blame for their injuries. Initial discovery, in the form of work history, product identification sheets or interrogatory answers, then generates information about which brands the plaintiffs actually used or to which they were exposed.

Defendants whose products the plaintiffs did not use often seek to exit the litigation via motions for nonsuit without prejudice. When no facts show use of the defendants' product, plaintiffs often don't oppose the motions; they know they can bring the defendants back into suits at a later time, if they discover relevant evidence.

But the remaining defendants in toxic tort suits want to reduce their liability. If they're found more than 50 percent liable, they're responsible for the entire judgment, under the theory of joint-and-several liability. By listing more entities as potential RTPs, the defendants increase their chances of reducing their liability below that 50 percent threshold. Bottom line: The more names on a jury form, the more entities to whom jurors can assign blame.

So the remaining defendants file a motion for leave to designate RTPs, along with a list of entities they think are RTPs. Plaintiffs can file objections, arguing the remaining defendants have no evidence that those on the potential RTP list are responsible. Note the switch here: Now remaining defendants want to name RTPS, whereas plaintiffs are trying to whittle down the list.

Litigants should anticipate that remaining defendants may file a motion to designate RTPs, seeking to name as RTPs all defendants that had been named in the petition that have since been dismissed or have settled — it's simply an easy way to maximize the number of names on the jury form of other potential RTPs.

These defendant-versus-defendant skirmishes go against longstanding practice in the in toxic tort arena, and as a result, some defense counsel are unprepared when fellow defendants turn on their clients.

Jurors eventually receive a jury form that lists all the defendants and RTPS the court has approved.

Being designated by a jury as an RTP does not, by itself, impose liability on a defendant. Texas Civil Practice & Remedies Code §33.004(i) provides that a finding of responsibility against an RTP cannot "impose liability on the person" and "may not be used in any other proceeding, on the basis of *res judicata*, collateral estoppel or any other legal theory, to impose liability on the person."

Despite this protective language, most defendants prefer not to be named RTPs. Defendants do not want to be tagged on jury forms as being 10

percent or 20 percent liable in a case in which they are no longer parties.

Additionally, the designation poses real risks to a defendant. If a plaintiff nonsuits a defendant but a remaining defendant then designates that defendant as an RTP prior to trial, the plaintiff has a certain amount of time to bring the defendant back into the suit — even if the statute of limitations on the cause of action has run out.

Exit Strategy

Tactically, defense counsel must prepare to prevent a plaintiff or another defendant from naming his client as an RTP, and to block another defendant from walking away from court without being named an RTP.

The standard practice is for departing defendants to obtain a nonsuit rather than a motion for summary judgment. Given the choice, most plaintiffs' counsel are willing to execute a nonsuit without prejudice rather than go through the trouble of opposing a summary judgment motion. However, obtaining a nonsuit will not protect a defendant from being named as an RTP, so defendants should be wary of relying on nonsuits to make their exit.

Instead of filing a nonsuit, defense counsel should strongly consider filing a no-evidence motion for summary judgment. If a judge grants a party's summary judgment motion, that party has a strong argument that the plaintiff and co-defendants should not later be able to designate that party as a potential RTP

With a few exceptions, plaintiffs' firms are coming around to support the practice of using summary judgments rather than nonsuits to dismiss defendants for the simple reason that it may improve plaintiffs' recovery at trial by eliminating potential RTPs that dilute the damages available to prevailing plaintiffs.

However, toxic tort defendants should prepare for opposition to their motions for summary judgment to come from co-defendants in litigation. Traditionally, it has been almost unheard of for one defendant to oppose another defendant in this manner. That unspoken code will probably give way in light of the strong unwillingness of defendants to be branded in public as responsible third parties. TDL

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