Product liability litigation developed during the last century in response to the perceived need to remedy injuries suffered by consumers who were not in privity of contract with the product manufacturer. A central element of product liability theory, as it developed, was to make every entity in the product’s distribution chain potentially liable to the end user. In return, those lower on the distribution chain could seek indemnity from the upstream parties. The innovators of product liability theory, Justice Cardozo of New York, Justice Roger Traynor of California, and others, expected that their theory would rescue individual consumers from the cost of debilitating injuries and spread the costs of compensating those injured to all consumers through loss spreading insurance policies.

As so often happens, theory and practice did not mesh. What was intended to be a relatively cost-free way to spread the loss of catastrophic injuries across the entire American economy has developed into an unwieldy system that costs billions of dollars. Economic theorists and sociologists can debate the social utility of product liability law for decades, but the practicing attorney must decide how best to defend his or her client in the current environment where some think that every injury is entitled to generous compensation and corporations are viewed as sources of unlimited funds.

The focus of this article is on one link in the chain of distribution—the distributor—and on a particular class of cases—mass tort litigation.

**Distributor Dos**

- Do: Determine your client’s real exposure to the plaintiffs’ claims
- Do: Identify your defense themes early on
- Do: Prepare a stand-alone defense
- Do: Create alliances
- Do: Stay involved in all aspects of the litigation from the start
- Do: Develop an indemnity plan

**Distributor Don’ts**

- Don’t: Aggravate the plaintiffs
- Don’t: Aggravate the manufacturers
- Don’t: Count on the manufacturers to provide your defense
- Don’t: Count on being ignored

**Determine Your Client’s Real Exposure**

As with any tort case, a defense attorney must first evaluate his or her client’s actual exposure to liability. This analysis goes beyond the hypothetical exposure outlined in the pleadings. But the attorney should bear in mind that every case goes through several permutations before verdict so the initial pleadings provide the boundaries of possible exposure and should not be ignored.

Most mass tort claims proceed under strict liability but they also can be based on negligence, breach of warranty, as well as various other legal theories. The defendant in such cases is often a distributor who is not the manufacturer of the product at issue. This article will follow and further develop this list of Dos and Don’ts.

Robert F. Redmond, Jr. is a partner in the Litigation Section of the Richmond, Virginia law firm of Williams Mullen. In his practice, he focuses on mass torts, products liability, insurance defense, and litigation management. Mr. Redmond has served as national counsel for a variety of distributors and insurers. He is a member of DRI.
state consumer protection statutes. In recent years, plaintiffs have also alleged the intentional torts of fraud, civil conspiracy, and battery, as well as certain arcane theories such as market share liability.

The strict liability claims are generally the most important and typically allege design defect, manufacturing defect, and failure to warn. Although the distributor's liability for these claims is derivative, some plaintiffs will argue that distributors have an independent duty to warn that is based on both negligence principles and strict liability.

Distributors have an advantage because the manufacturers design and make the product and are the most closely associated with its benefits and hazards. Distributors also have the subtle (if not legal) advantage of being in the position of the consumer. Often, distributors receive the product in the same packaging as the end user. The distributor often is merely a “pass-through” party that warehouses the product for a time and then delivers it down the chain of distribution.

It's not surprising then that, in the thick of mass tort litigation, everyone wants to be a distributor. The distributor's counsel must honestly assess what type of “distributor” his or her client is, and then identify the theories of liability that pose a risk to the client.

**Alteration by the Distributor**

One measure of the distributor's potential exposure is the amount it has altered the product, or the degree of control it exercises over the product. Some distributors receive a product in bulk form and then provide post-manufacture processing before the product reaches the end user. Others receive bulk product that they repack into smaller units for the end user. Some add their own private label to the product. Some (both manufacturers and private labels) will argue that private labeling makes a distributor responsible for warnings or the lack of warnings. Federal regulations may prohibit a distributor from providing or amending warning labels. See, e.g., 21 U.S.C. §352(a),(c),(f), which prohibits medical product distributors from adding or deleting warnings from the manufacturer's package.

The distributor often is merely a “pass-through” party that warehouses the product for a time and then delivers it down the chain of distribution.

**Identify Defense Themes Early On**

After you have learned about your distributor client's business and determined its real exposure, you must determine the issues that will be the core of the defense case. Like Goldilock's porridge, this task cannot be done too early (before the attorney learns about the client) or too late (after the initial discovery has been answered and the positions are set in the pleadings).

In identifying the distributor's defense themes, approach the facts from the perspective of a juror. Avoid “thinking like a lawyer.” Some questions to ask are:

- What is the real role of this distributor in the marketplace?
- Do end users/customers rely on this distributor to make recommendations about product use?
- Does this distributor try to influence product selection by the end user?
- How sophisticated are the end users in making their own product selections?
- Does the distributor have exclusive or “sweet-heart” contracts with the end users or their employers?
- Is the distributor part of a trade organization that promotes a particular product line?
- Are there “safer alternatives” that the distributor also distributes?
- Does the distributor have a financial incentive to push the product at issue over the “safer alternative”?
- Does the distributor have a medical or scientific department that could collect and review developing and scientific literature?
- Do the distributor's operations consist solely of warehouse and trucking the product in its bulk packaging?
- What training, if any, does the distributor provide to its sales representatives about the products to be distributed?
- Are the sales representatives distributor employees or are they “jobbers”—independent contractors representing several different distributors?
- These questions can help you decide what a real juror would expect your distributor client to do when faced with evidence of an alleged hazard in the product. Inevitably, there will be some medical or scientific literature that suggests that the product at issue harms end users. The strength of this scientific evidence may be debatable, but, for the purposes of defending a distributor, it is useful to assume that the jury will believe that the product can cause harm.

The next step is to determine whether actual jurors would think that: (1) your distributor client knew or should have known about the alleged hazard; and (2) your client could or should have done something about.

In analyzing whether the distributor knew about the alleged hazard, determine whether it tried to influence the selection of the product through sales representatives or promotional literature. If it did, then ask whether it...
conducted objective research to support its product recommendations.

If the distributor attempted to influence selection of the particular product at issue and did not have any research or analyses to support that recommendation, it is potentially at risk for independent negligence. If, on the other hand, the distributor simply presented the customer/end user with a menu of products and let the end user select from among them, jurors would be less likely to fault the distributor.

What are the distributor’s options if it knows or suspects that the product is defective? First, it could decide simply not to distribute the product. This may be impossible for products that are required by regulation or statute (e.g., latex gloves). The next option is to alter or amend the product. This, too, may be impossible if the distributor has no manufacturing or post-manufacture processing operations. Finally, the distributor should be prepared to explain the absence or “inadequacy” of the product’s warning.

As noted above, some federal regulations prohibit distributors from adding or deleting product warnings, as well as prohibiting alteration of a pre-packaged product. Most jurors would not expect a distributor to add warnings after the packaging process. They may, however, expect a private label distributor to request that a warning be placed on its private label products.

Once a distributor’s lawyer has determined what jurors would expect the distributor to know and do, he or she can then identify the defense themes and begin to develop them. The themes should be compelling and persuasive and, perhaps most importantly, not “defensive.” Statements such as “We didn’t do anything wrong” or “It’s not our fault” are neither compelling nor persuasive.

With imagination and reflection, most attorneys can prepare a two- or three-point theme that will resonate with the real people who sit on a jury.

- The distributor provided the end user with a menu of choices and let the user decide.
- The distributor dealt with trusted and highly respected manufacturers and relied on them to provide for the safety and adequacy of the product.
- The medical and scientific data was debatable; the distributor provided the best available products with the best available information.

When developing the distributor’s defense, keep in mind that the overarching themes will likely be addressed by the manufacturers. Thus, it is probably unnecessary for the distributor to address scientific causation. It is useful, however, to “salute” the respective roles of the distributor and the manufacturer in the defense themes. Jurors will not expect a distributor to know or do as much as the manufacturer.

The preparation of the defense must include in-depth discussions with corporate representatives. It makes little sense for an attorney to draft the defense themes if corporate witnesses will not support them in deposition and at trial. Also, as a matter of defense integrity, it is important that the themes be consistent with the company’s operating procedures.

As the themes develop, the lawyer should incorporate them into pleadings, correspondence, and strategy. They should seep into the entire body of work product that is the distributor’s mass tort defense. Counsel and staff should be on guard for evidence that is inconsistent with the themes. Counsel should carefully consider the language used in pleadings, correspondence, and discovery responses to ensure that the language supports rather than weakens the defense themes.

Corporate witnesses should all be thoroughly briefed on the themes during deposition preparation. If the witness has the themes in mind before reviewing documents, then he or she is better able to place the documents in context.

Likewise, expert witnesses should be briefed on the themes and should strive to incorporate them into their own testimony. Bear in mind, however, that some jurisdictions require disclosure of the expert’s documents to opposing counsel. Therefore, it is probably unwise to provide your experts with documents identifying or discussing the themes. Even direct conversations about the themes may be inadvisable. However, a prudent lawyer can develop these themes with a solid expert witness without disclosing them to the adversary.

The themes form the “skeleton” or structure of the main defense. Once they are identified, the defense can be built around them.

The Wisdom of a Defense Separate from the Manufacturer

It is very tempting for distributors to rely on manufacturers to prepare a general defense to the product liability claims. Manufacturers generally have more at stake in the litigation and commit more resources to the defense. They gather more information, line up renowned experts, and retain the largest and (most expensive) law firms. Furthermore, the manufacturing defendants will pressure distributors to allow the manufacturers to steer the defense.

This course is a mistake in the absence of a written indemnification agreement. Manufacturers and distributors have much in common, but, ultimately, they are separate defendants with divergent interests. While both seek, first, to defeat the plaintiff’s claims, both ultimately recognize that if the jury accepts the plaintiff’s allegations, the distributor will seek indemnification, and the manufacturer will seek to reduce its liability by identifying multiple, viable co-defendants.

Distributors’ counsel must also recognize that the manufacturing defendants may begin to point fingers among themselves. For a multi-line distributor, this strategy geometrically increases potential liability. If five manufacturing defendants begin pointing fingers and criticizing the manufacturing and design practices of each other, then the distributor could be caught in the proverbial crossfire.

Finally, distributors are potentially at risk for assuming the liability of the manufacturers who either go bankrupt or who are not amenable to service of process (e.g., off-shore manufacturers).

Apart from the apparent conflicts among co-defendants, there is a hidden danger in allowing others to manage and prepare the distributor’s defense. Manufacturers who gain control of expert witnesses ultimately gain control of the case. This may manifest itself in a benign fashion—allowing manufacturer themes to dominate the exclusion of distributors’ themes. It may manifest itself in other ways—manufacturers prohibiting distributors from filing cross-claims or pursuing distributor themes in exchange for manufacturer expert witness cooperation. In addition, the manufacturers’ control of expert witnesses may have disastrous consequences. For instance, the manufacturer, on the brink of trial, settles with the plaintiff and, as part of the settlement, agrees to make its experts unavailable to co-defendants: distributors will be faced with presenting a case at trial with no expert witnesses. Often, distributors are forced to settle at unfavorable terms in the face of this not infrequently used tactic.

The distributor must be prepared for unexpected rough treatment from the manufacturer co-defendants. It must also be prepared for surprises from the plaintiff. Generally, the plaintiff will focus discovery on the manufac-
A distributor without cross-claims against the manufacturers has little recourse other than to settle such a case because the doctrine of strict liability will place all liability on the distributor, notwithstanding its lack of involvement in the design or manufacture of the product. Even if a distributor has cross-claims (and third party claims) against the manufacturers, the plaintiff may successfully move to sever those claims. Here again, the unprepared distributor in such a position will have no defense.

Because tying its defense to that of the manufacturer can be a dangerous approach, the distributor should prepare a stand-alone defense—using its own experts and its own fact witnesses. The defense should be built around the distributor defense themes discussed above.

Selecting and Preparing Witnesses

In selecting experts, the distributor’s attorney should focus on reinforcement of the previously developed defense themes. He or she should not, however, neglect the broader themes that are typically addressed by the manufacturer’s lawyer. Identify one or two “generic” science witnesses with sufficient engineering or chemical expertise to offer testimony on a variety of issues that normally would be addressed by two or three manufacturer experts. The distributor’s “science and manufacturing” expert would be a “backup” and should have litigation experience, a general grasp of the issues, and a positive image and record in deposition and at trial. By contrast, the primary “distributor” experts will support the distributor’s main defense themes. All of the experts should be highly educated and deeply experienced in their respective fields.

Spare no effort in identifying and developing fact witnesses. The distributor’s attorney may actually have better access to fact witnesses than the manufacturer’s because the distributor tends to be closer to the end user than the manufacturer, and thus can exploit the client’s contacts with the end user to uncover witnesses with insight into the factual scenario underlying the claim.

Follow the usual rules of fact investigation and witness preparation, including:

- one-on-one contact with fact witnesses;
- developing a rapport with fact witnesses;
- memorializing fact witness conversations off the record with sworn statements/written statements, diagrams, and maps;
- relentless follow-up of fact witness leads.

Neutral fact witnesses are often more memorable and more persuasive than paid expert witnesses. Moreover, plaintiffs’ attorneys are less comfortable confronting fact witnesses than expert witnesses. Also, fact witnesses can put a more human face on the defense, especially for the jury.

Invariably, plaintiffs and manufacturers will identify fact witnesses and depose them; the distributor’s lawyer should be sure to attend these depositions. Fact witness depositions often shed light on the distributor’s defense and may also identify weaknesses in the plaintiff’s case.

When developing the distributor’s defense, keep in mind that the overarching themes will likely be addressed by the manufacturers. Jurors will not expect a distributor to know or do as much as the manufacturer.

Develop an Indemnity Plan

Ultimately, distributors seek indemnification for liability and reimbursement of defense costs. While it is important to participate actively in a joint defense with the manufacturing defendants, it is equally important to weave an indemnity plan into the distributor’s defense. The best indemnity plan is one that eliminates the distributor from the litigation early.

This can be accomplished most easily by tendering the defense to the manufacturer, with the manufacturer accepting the defense. This may happen in single event products liability cases, but does not always happen in mass tort cases. Manufacturers may refuse to accept a tender of defense because of legitimate concerns about independent liability of the distributor, or they may reject tenders of defense because each case accepted is yet another case to be reported to the shareholders.

Multi-line product distributors face additional difficulty because there may be many manufacturers to whom they should tender their defense. Each of these manufacturers will be reluctant to undertake the defense of the distributor, which may include defending another manufacturer’s product. The mutual reluctance of manufacturers to defend other part of the distributors. A lawyer representing the distributor who has not participated in the litigation cannot “play catch up” after the experts have been identified, the fact witnesses deposed, and exhibits exchanged.

Although some distributors’ counsel believe that it makes economic sense to stay in the background early in the litigation, this cost-saving strategy will backfire if the distributor becomes a target or is suddenly forced to take on a higher profile. The cost of gathering, reading, and digesting depositions and relevant documents is much higher at the eleventh hour. These materials should be reviewed as they are produced. Equally important, if the distributor’s lawyer is not engaged early in the litigation, he or she will miss the opportunity to incorporate the distributor defense themes into the general defense.

The trajectory of the overall defense is set at the opening—during the assembly of the defense steering committees, the identification of experts, and the preparation of generic discovery of the plaintiffs. If the distributor’s attorney is not involved in these foundational events, then the distributor will not have developed its case to support the themes at trial.

Stay Involved in All Aspects of the Litigation from the Start

The lawyer representing the distributor must be engaged in the litigation from the start. He or she may want to stay in the background, particularly at the outset when it is not clear what role the distributors will play.

This passive role would be a tremendous mistake. Distributors are potentially liable for every product they distribute. Plaintiffs’ counsel are shrewd enough to target the distributors if they sense that they are weak and unprepared. Manufacturers have every reason to reduce their liability by suggesting fault on the
manufacturers’ products can lead to a pattern of refusals.

A realistic indemnity plan should foresee the manufacturers’ possible rejection of the distributor’s tender of defense. The plan should have several steps, each progressively more firm, that encourage the manufacturers to accept the tendered defense. Tender cases quickly, by letter, to manufacturers and to the manufacturers’ insurers. Follow up and respond to each request for “additional information necessary to evaluate the tender of defense.”

### Types of Indemnity

There are several sources of indemnity: common law indemnity; statutory indemnity; contractual indemnity; the implied covenant of good faith and fair dealing; and indemnity through insurance contracts or broad form vendors’ endorsements. The benefits and drawbacks of the forms of indemnity as they apply in the distributor situation are discussed below.

### Common Law Indemnity

Most states subscribe to some form of common law indemnity. Typically, this sort of indemnity allows a fault-free distributor to force a manufacturer to pay an adverse judgment based on strict liability. Common law indemnity, however, does not generally cover attorneys’ fees and other defense costs, which may be higher than an adverse judgment. Nor does it generally cover judgment for the distributor’s independent liability.

It is not unusual for a judge to submit only a general liability verdict form. If a distributor is simply held liable on a general verdict form, there may be no way to determine if the verdict was based on the derivative liability of distributing the manufacturer’s product or on the independent liability of the distributor. In the latter, a distributor may not even recover common law indemnity.

The other drawback of common law indemnity is that it is only available after an adverse judgment. Most states allow defendants to plead indemnification in a cross-claim before trial, but the right to indemnity does not accrue until an adverse judgment. Although this timing issue can be readily solved by filing indemnification cross-claims before trial and having the indemnification issue resolved by the jury at the same time as the liability issue, it still undercuts the distributor’s immediate objective, which is protection before an adverse judgment.

For that reason it is critical to include indemnification claims in any case where the manufacturer does not accept a tender of defense.

To support a common law indemnity claim, many states require that the distributor give the manufacturer “prompt notice” of the claim. See Section 2-607(c) of the Uniform Commercial Code. A tender of defense letter generally satisfies the notice requirement if it includes the “magic language” of Section 2-607(c):

You are advised that to the extent you fail to accept the tender of defense, you will be bound by any adverse factual findings made in the underlying action.

A cross-claim, by itself, is generally not considered adequate notice under the UCC and other state indemnity laws. Therefore, it is important for the distributor’s attorney to send a “Tender of Defense/Notice” letter, even in those cases where a distributor has already filed a cross-claim or a third-party claim.

Courts are generally lenient in determining what constitutes “prompt notice.” Typically, if a distributor is reasonably diligent in sending out tender letters when information becomes available, courts will find prompt notice. To be doubly sure of complying with this requirement, counsel should consider sending “Tender of Defense/Notice” letters to all manufacturing co-defendants with whom the distributor has a historical relationship when a lawsuit is initially filed. Although discovery may show that the distributor did not distribute products of some of these manufacturers, it is better to be prompt than sorry.

### Statutory Indemnity/Reimbursement of Defense Costs

In recent years, several states have enacted indemnity statutes (often as part of tort reform) that extend additional protections to distributors in strict liability lawsuits. Texas has the best protection for distributors. Section 82.002 of its Business and Civil Remedies Code provides:

(a) A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller’s negligence.

(b) “Loss” includes court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages.

(c) The duty to indemnify applies without regard to the manner in which the action is concluded; and is in addition to any duty to indemnify established by law, contract, or otherwise.

(d) A seller is entitled to recover from the manufacturer court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages incurred by the seller to enforce the seller’s right to indemnification under this section.

This statute has been construed favorably for distributors two times by the Texas Supreme Court. In Fitzgerald v. Advanced Spine Fixation Systems, Inc., 996 S.W.2d 864 (Tex. 1999), the Texas Supreme Court held that the statute provides for reimbursement of defense costs, including attorneys’ fees, even in situations where the distributor is not in the chain of distribution of the manufacturer.

In Meritor Automotive, Inc. v. Ruan Leasing Co., 44 S.W.3d 86 (Tex. 2001), the Texas Supreme Court narrowly interpreted the exemption under the statute for “negligence of the distributor.” It held that the “negligence exemption” to the distributor statute only applied in situations where the distributor was actually found negligent.

Thus, when read in conjunction with the Texas statute, other states have provisions that allow a distributor to “certify” the correct identity of the product manufacturer that allegedly caused the injury. Upon filing the sworn “certification,” the product seller is relieved of the strict liability claims. See, e.g., New Jersey Stats. 2A:58C-9 et seq.; Minnesota Stats. §544.41; 735 Illinois LCS 5/2-621; North Dakota Century Code §28-01.3-04, 28.01.3-05. See also, Maryland Code §5-405 (sealed container defense). These statutes do not absolve the distributor from liability if the distributor had actual knowledge of the defective condition. In New Jersey, the distributor is not entitled to statutory protection if it “knew or should have known” of the alleged product defect. New Jersey Stats. 2A: 58C-9(d). These statutes are also inapplicable to distributors that exercise “significant design control” over the product.

Several distributor statutes provide for indemnification and, in some cases, reimbursement of defense costs from manufacturers to the distributor. See North Dakota Century Code §28-01.3-05; Arizona Rev. Stat. 12-684; Mississippi Code §11-1-65(i). Others limit a

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distributor's liability for breach of express or implied warranty. See, e.g., Michigan Compiled Laws §600.2947(6).

Contractual Indemnity

The relationship between manufacturers and distributors varies from industry to industry. In many industries, manufacturers and distributors have standing distribution agreements that include provisions for indemnification and even reimbursement of defense costs. In others, manufacturers and distributors do business without a written agreement. A distributor's counsel should thoroughly review the client's files to identify any express contracts.

These contracts may be a fertile source of indemnification—or a fertile source of frustration. Often they are drafted by laypersons. Here are some questions about each contract that should be answered.

Is indemnification for a claim or for a judgment? Indemnification for "products liability claims" is much more valuable than indemnification for a judgment or, as it is often phrased, "indemnification for injuries caused by the product." In the latter situation, courts may insist on an adverse judgment before applying the indemnification clause. For the distributor who has settled or been dismissed from the lawsuit, this provides little relief. A settlement or a dismissal is not a judgment.

Is indemnification limited to the amount of an adverse judgment, or does it include attorneys' fees and costs? In many mass tort cases, a distributor's greatest exposure may be defense costs—not an adverse judgment. Most lawsuits do not go to verdict—and those that do go to verdict do not always result in large awards against distributors. However, a distributor may incur substantial defense costs in mass tort litigation. The best indemnification contract provides for reimbursement of all defense costs and adverse judgments.

What is the contract's term? Is it limited to a specific time period? Is it renewable by mutual agreement of the parties? Does the mutual agreement need to be in writing or can it be through course of dealing? In some industries, the manufacturer and distributor may have a continuing relationship, which would argue against a specific time limit for a distributor agreement. Moreover, even if an agreement is limited to a specific period of time, the parties may continue to operate under the terms of the agreement.

In addition to express contracts, many distributors include language on the accounts payable forms that will provide the basis for indemnification. This language, often appearing on the back of UCC-related forms, provides a basis for indemnification and the reimbursement of defense costs. All of these types of indemnities should be considered and pled.

Implied covenant of good faith and fair dealing

In addition to common law indemnification, some states have a unique cause of action called the breach of the implied covenant of good faith and fair dealing. This implied covenant requires commercial parties to treat one another fairly. Case law suggests that it requires parties to provide indemnification and a defense when the other party is sued for actions of the first party. See, e.g., Kittredge Sports Co. v. Superior Court (Marker, U.S.A.), 213 Cal.App.3d 1045, 261 Cal.Rptr. 857 (1989), and Lloyd v. State Farm Mutual Automobile Insurance Co., 187 Ariz. 369, 943 P.2d 729 (Ariz.App. 1997).

A brief review of case law indicates that New Jersey, Arizona, California, Hawaii, Minnesota, New Mexico, West Virginia, and Washington recognize an independent cause of action for the breach of the implied covenant of good faith and fair dealing in some form. Pennsylvania recognizes it, but holds that its breach amounts to a breach of contract claim. Indiana and New York recognize the cause of action, but only in limited circumstances such as insurance contracts or fiduciary relationships.

Indemnification based on insurance contracts

Distributors typically insist on broad form vendor endorsements from manufacturers for whom they distribute products. These vendor endorsements are intended to provide insurance coverage in the event the distributor is sued for a defect in the manufacturer's product. Manufacturers typically document compliance with this requirement by providing a "Certificate of Insurance," which is the manufacturer's good faith representation that it is insured and that it has obtained an endorsement protecting the distributor under its insurance policy.

A Certificate of Insurance, however, is not insurance coverage; it is only evidence of coverage. Absent a signed additional insured endorsement, the distributor cannot be certain that the manufacturer has, indeed, obtained additional insured coverage for the distributor. As a matter of business counseling, a distributor's attorney should urge the client to require a signed additional insured endorsement in addition to a Certificate of Insurance. The certificate and the endorsement should bear the same policy number and should clearly identify the distributor as a named insured.

However, even this may not provide full protection to a distributor. Often, a broad form vendor endorsement provides that the vendor's coverage is "excess to other insurance." Assuming the distributor carries its own primary insurance, this "other insurance" clause will be asserted by the manufacturer's insurer to avoid providing a defense. The distributor's insurer may also include an "other insurance" clause in the primary policy that would make the vendor's policy primary.

An additional insured on a manufacturer's policy must constantly monitor the manufacturer to confirm that coverage is maintained and that it is maintained with the same insurer. Often, manufacturers will shop for insurance coverage; the new policy may fail to name the distributor as an additional insured.

Enforcing coverage under broad form vendor's endorsement or as an additional insured will require a separate action distinct from the underlying action between the plaintiff, the distributor, and the manufacturer. This separate action will likely be filed in a separate court with separate counsel. It is often easier for a distributor to pursue indemnification and reimbursement of defense costs in the underlying action through a statutory or contractual indemnity cross-claim rather than an insurance-based cross-claim or third-party action.

In sum, distributor's counsel should search for and locate all potential sources of indemnification and reimbursement of defense costs. He or she should not count on these documents surfacing during a "document sweep" conducted to respond to plaintiff's discovery. Plaintiffs do not always ask for documents related to indemnity. Moreover, insurance contracts between a distributor and a supplier are often maintained in files separate from files.
typically searched to respond to plaintiff’s discovery (e.g., complaint files, sales and distribution files, etc.). The best practice is to conduct a search for documents supporting indemnity and reimbursement of defense costs at the same time as a search for documents responsive to plaintiff’s discovery.

Cross-Claims and Third-Party Claims

Because it is easier to pursue indemnification and reimbursement of defense costs in the underlying action, it is appropriate to file cross-claims or third-party claims in the main action. The Federal Rules of Civil Procedure and most state rules require that cross-claims and third-party claims be brought within 10 or 20 days of filing an answer. Frequently, a distributor will not know which manufacturer’s products it distributed to the plaintiff’s exposure sites within 10 days of filing an answer.

However, courts are often lenient in allowing cross-claims and third-party complaints, if there is no prejudice to the manufacturer and the distributor has worked diligently to identify valid cross-claims and third-party claims. The alternative (which courts generally recognize) is the filing of superfluous third-party claims and cross-claims that may not be supported by evidence.

Manufacturers don’t like cross-claims or third-party claims. While it is wise to maintain the joint defense with the manufacturer to the extent possible, sometimes it is not the best course of action. If negotiations for indemnification and reimbursement of defense costs fail, it is only reasonable for a distributor to file cross-claims and third-party complaints.

With cross-claims and third-party complaints in place, the distributor can bring all the manufacturers for whom it distributed product before the same forum. Ideally, with all manufacturers in the same forum, they will agree amongst themselves to provide a defense and proportional reimbursement of defense costs to the distributor. If that does not happen, it is useful to have the jury decide indemnity at the same time as liability. This prevents a distributor from being held liable in an underlying action and then having to pursue a separate action to obtain indemnification and reimbursement of defense costs.

A related point: it is very important that distributors resist severance of cross-claims and third-party complaints. In certain types of lawsuits (e.g., asbestos litigation) judges routinely sever cross-claims and third-party complaints. Resist this judicial habit because severing a third-party or cross-claim will simply multiply the litigation. First, there is the underlying action: plaintiff versus the distributor. Second, there is the indemnity action of distributor against manufacturer. Courts can avoid this multiplication of lawsuits by having all claims heard together. Furthermore, indemnity issues are fairly simple, particularly if the distributor is a pass-through distributor whose only liability is derivative of the manufacturer’s liability.

The problem with severing cross-claims is that the manufacturers, who are generally in the best position to defend their products, may not remain in the case. They may settle or even be dismissed by plaintiffs as a strategic matter.

Without the manufacturer’s technical support and testimony, the distributor will have a difficult time defending the manufacturer’s products. Additionally, an adverse verdict in the underlying action will require an appeal and the posting of an appeal bond while the indemnification action is tried separately.

All of this duplication of effort can be avoided if the distributor prevents severance.

Don’t Aggravate the Plaintiffs

The plaintiffs have innumerable methods of inflicting litigation pressure on defendants. These include: serving voluminous discovery targeted at privileged and confidential information; challenging privilege logs; deposing senior executives; and, using the media to criticize the defendant. Furthermore, because mass tort inevitably involves multiple venues, plaintiffs have many forums from which to select a friendly court to bring these disputes.

In most mass tort litigation, the plaintiffs’ attorneys bring these weapons to bear on the “target” defendants. Almost inevitably, the plaintiff can raise the costs against the target to the point where it is cheaper to settle than to fight. This is the core dynamic of mass tort litigation.

Plaintiffs’ counsel can bring these weapons to bear against aggravating peripheral defendants. While this response may not be particularly strategic, it is understandable. It is also avoidable for most peripheral defendants. By and large, the plaintiffs’ lawyers are focused on accomplishing their objectives. They expect defense counsel to vigorously and legitimately defend their clients but they do not expect, and strongly react to, defense counsel needlessly complicating their cases. It is far better, as a distributor’s counsel, to identify those areas where one can cooperate with plaintiffs’ counsel. Often, there are many areas of mutual cooperation.

For example, one of the primary assets maintained by the distributor is sales and distribution records. These records will certainly be produced in any case involving the distributor. Moreover, these records must be produced if subpoenaed. Thus, there is no reason to delay production of these records. Because the records do not generally harm the distributor (and in fact, identify manufacturers that should be protecting the distributor), it makes sense for the distributor to assist plaintiffs’ counsel in interpreting the records when necessary.

The alternative to cooperative production of sales and distribution records is contentious litigation that the distributor will almost always lose. Because the records may not be intelligible to a lay person, failing to provide an explanation for sales and distribution records may result in depositions of company employees.

Don’t Aggravate the Manufacturers

The manufacturers are co-defendants in litigation and are typically targets. They are better funded, have more resources, and have more at stake.

Like any good defense lawyer, the lawyers representing the manufacturer seek to maintain as much control as possible over the defense. Manufacturers’ counsel will be inclined to cooperate with distributors’ counsel, to a point. Distributors’ counsel should identify as many areas of cooperation as possible, keeping in mind the ultimate need to prepare a separate defense and to pursue indemnification and reimbursement of defense costs.

Achieving these goals is probably more difficult than working directly with the plaintiffs. The best practice is to enthusiastically pursue areas of mutual cooperation, such as joint experts, joint fact witness investigation, and joint examination of plaintiffs. In areas of contention, however, it is important to be firm.

Don’t Count on the Manufacturers for Your Defense

As noted above, distributors will be tempted to simply react to the plaintiffs’ pleadings and discovery and rely on the manufacturers to prepare the overall case defense. This will certainly be encouraged by the manufacturers (and perhaps even by the distributors’ insurers). However, as discussed above, this is a recipe for disaster because: manufacturers...
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settle out and in settling out withdraw their experts; plaintiffs’ counsel can look to a distributor for modest settlements initially and, receiving them, can add the distributor to later-filed claims; and the vagaries of trial may lead the distributor to the center of a case where it becomes the target defendant.

Most importantly, the distributors’ lawyers have an obligation to put on the best defense for their client. This necessarily involves a stand-alone, distributor-oriented defense with witnesses, experts, trial exhibits, and jury instructions. Anything less is not full representation.

Don’t Count on Being Ignored

Products liability has developed to the point where there are innumerable theories a plaintiff can assert against a distributor defendant. Under various factual circumstances, some of those theories will fail on summary judgment but some will not. In many states, summary judgment is difficult to obtain.

If the plaintiffs’ attorney believes that the distributor has money to contribute to an overall settlement, he or she will develop a strategy to bring the distributor to trial. Once in trial, the plaintiffs’ counsel will exert pressure to obtain a settlement. Failing that, he will seek to obtain a judgment. It would be foolhardy for a distributors’ counsel to ignore these possibilities.

Conclusion

The days when distributor defendants were simply collateral and could hide on the periphery are gone. Asbestos litigation is continuing proof that distributors may someday be target defendants. Distributors’ counsel must develop an overall defense plan that accounts for this modern reality.