

**BUILDING, STRUCTURING & FINANCING
TOMORROW'S PRODUCTS LIABILITY PRACTICE**

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I. INTRODUCTION

Today, law practices devoted to representing plaintiffs in personal injury cases are under attack. Some level of “tort reform” exists in almost all jurisdictions. Texas, in particular, has been assaulted by the legislative special interests who have seen enormous recent success in limiting victim’s rights. While practicing law should be viewed as a profession and a calling; not as a business plan or a financial statement, smart business decisions today are necessary to ensure plaintiff’s attorneys can be here for tomorrow’s victims. This is even more true for a plaintiff’s products liability practice—where the risks are extraordinarily high and a single case loss can mean financial devastation for a law practice.

This paper is divided into three sections. The first section—building a products liability practice—answers the question of why the products liability niche exists and some general thoughts regarding marketing for this niche business. Next, the paper discusses structuring a products liability practice. What kinds of cases do you want to take? What cases should you eliminate? How should you target and measure profitability? These are all questions that will be discussed in the second section. Finally, a products liability practice is one of the most expensive plaintiff practices to maintain. The last section of the paper outlines different financial strategies to fund this type of practice.

II. BUILDING THE PRODUCTS LIABILITY PRACTICE

There are certainly several formulas for building a thriving plaintiff’s personal injury practice. Some practices are built primarily by direct marketing to consumers. Other personal injury practices are built primarily on the reputation and results of the founders. While no formula is perfect nor necessarily exclusive to the others, development of a niche practice can provide at least one cornerstone in building an overall successful plaintiff’s personal injury practice.

This section of the paper first offers observations on why products liability cases provide a viable niche practice area. The second half of this section offers some general thoughts on marketing strategy.

A. The Niche Practice: Why it Works

In simple terms, a niche in any business is successful because the general market place does not want to handle that particular type of business for one reason or another. Those reasons may include the availability of other more profitable business, the risk required to handle the niche business, the expertise required to handle the niche business or other “barriers-of-entry,” among other things. Even stronger niches exist, when those operating within the niche began to handle a larger volume of the niche business more efficiently and profitably than outsiders. This natural occurrence gives those within the niche an advantage over outsiders called “economies-of-scale.” These same business principles apply to development of a niche within the legal field.

Developing a niche for very easy, very profitable cases simply will not work. For instance, most competent PI practitioners are well equipped to handle a serious injury vehicular case, with outstanding liability and limitless insurance. While I would love to develop a niche in this type of case, trying to do so is ridiculous. Why? No one will ever refer those cases out. Indeed, many defense firms now keep these types of cases themselves. A niche practice area requires that most lawyers say: "I don't want to screw with those types of cases." The reasons for this response are several, but at its basics, they boil down to two things—the case is too hard or the case is too expensive. Thus, successful niches develop for handling cases that are generally too hard or too expensive. Examples of cases where niches exist or may develop include: medical malpractice, employment cases, bad faith cases, ERISA plan non-subscriber cases, aviation cases and products liability cases, among others. As discussed below, products liability cases create a strong niche opportunity because they are both extremely expensive and hard in terms of the technical expertise required to properly and profitably handle them. Products liability cases also enjoy a strong natural niche because those with a consistent level of products liability business began to enjoy "economies-of-scales."

1. High Barriers of Entry

Creating a products liability docket is a daunting task. The costs associated with marketing for the cases, screening the cases and ultimately litigating the cases are most often extraordinary. Moreover, handling products cases—particularly complex

automotive/aviation cases—requires significant levels of technical expertise. Finally, products liability cases are expert intensive. It is not uncommon for there to be only a few qualified experts who will testify for the plaintiffs. The costs, the technical expertise required and the limited pool of experts all erect high barriers-of-entry in the creation of a products liability docket. High barriers-of-entry are a double edged sword. The distinct advantage is that there are natural market forces to drive away competitors. Obviously, the flip side of the advantage is the distinct disadvantage faced when trying to enter this practice area.

a. Costs

Costs in products liability cases are driven, in large part, by the need for experts. The basic legal elements necessary to prove products liability cases always requires expert testimony. As the complexity of the product increases (i.e. airplanes & automobiles), the availability of qualified experts decreases and the costs of retaining those experts increases. Likewise, with unique products that have relatively small markets, it can be extremely difficult to hire good experts.

Liability experts are needed to opine regarding the defective designs, the effects of the defective designs, and safer alternative designs. With *Daubert/Robinson*, educated guesses based on experience simply do not pass muster in many courts. As a result, products lawyers often become financial underwriters of research projects conducted by the experts. Testing design defects or design changes is always extremely expensive.

The costs associated with this first level of expert testimony varies greatly depending on a number of factors. First, what are the expert's fees. Second, does the expert's testimony plow new ground? Established defect cases are cheaper to litigate because a body of testing and research already exists. If your expert is the first to embark upon a new defect theory, the associated research and testing expenses can be substantial. Further, the existence of safer alternative designs can greatly affect costs. Many times patent searches, a review of the competitor's products or subsequent remedial measures can provide a basis for your expert's safer alternative design testimony. In the absence of a safer alternative design already in existence, your expert will have to create and test a safer alternative design. This process further increases costs.

With a product defect established, expert testimony may be necessary to establish causation. Some products cases will not require a medical/biomechanical causation expert. For instance, a defective garage that falls and kills a child will probably not require a causation expert. But most crashworthiness cases and many other product cases require numerous experts to establish that "but for" the defect the injury would not occur. For instance, I handled a case in which a child suffered brain injuries after being ejected from a child restraint during an SUV rollover. The case was defended on the primary premise that the child would have suffered the same injuries in the rollover even if properly restrained in her car seat. In that case, I hired an accident reconstruction expert to discuss the forces placed upon the vehicle, an occupant kinematics expert to discuss the movement

and forces experienced by the occupants within the vehicle, and a biomechanical engineer and child neurologist to discuss the injury causation. Proving causation in this, and many other types of complex products cases, can be one of the biggest expenses.

As with any personal injury case, there will be costs associated with proving up damages in a case. Because the victim must have sustained severe injuries to justify the pursuit of a products case, the costs to develop damages can be significant. Deposition of key treating physicians will always be a must. Moreover, hiring life care planners, vocational rehabilitation experts and economists are also common in a products liability case.

Generally, a simple case with only one liability expert and then damage experts can cost \$50,000 to \$75,000 to take through trial. A more complex case with the need for independent testing, such as the child restraint case discussed above, can easily have expenses in the \$300,000 to \$500,000 range. In my experience, an average case with fair complexity and no need for testing and research, costs between \$100,000 and \$200,000. These significant expenses multiplied over the total number of cases on your products liability docket can easily push your total case costs into the million dollar range. This investment requirement and the corresponding risk it creates are natural barriers-of-entry.

b. Expertise

Another barrier-of-entry is the technical expertise required to litigate complex products liability cases. Just as good medical malpractice lawyers have an in

depth understanding of the medicine involved in their case, products liability lawyers must have a working understanding of the engineering principles of the products involved in their cases. Moreover, most products dockets include automotive products liability cases. These cases also require a working knowledge of accident reconstruction, vehicle and occupant dynamics, biomechanics and injury causation. Understanding the engineering principles to handle these cases can be overwhelming. To be sure, attend an AIEG seminar. The first time I went to such a meeting, I first thought I took a wrong turn and ended up with a group of engineers. Quickly, I discovered the vast amount of technical information required to successfully litigate automotive products liability cases.

With a genuine desire, sufficient time and study, all lawyers can overcome the barrier-of-entry created by the requirement for technical expertise. But doing so does come with an opportunity cost. Spending time learning and understanding engineering principles may make sense if you have five other similar cases. If not, that time may be better invested working on other more profitable pursuits.

c. Limited Experts

While it may not be apparent at first, the limited availability of credible experts is a significant barrier-of-entry. Many times the most qualified experts are raised in the industry. Few of these experts are willing to later testify against that same industry. Those that are willing to do so, and who are credible and qualified, are in extremely high

demand. Some of the better experts simply will not take on cases with new lawyers with whom they have not worked in the past. Having a credible and qualified expert is important to the resolution of the case. If a defendant has taken that expert to the mat on other cases and not met with success, they will better respect—if not the expert’s opinions, at least the expert’s ability to communicate a defect to the jury. Conversely, when an expert is brand new to an area of testimony, the defendant’s will at least want to depose the expert. Naturally, this exploration comes at your expense.

2. *Economies-of-Scale*

While high barriers of entry exist for the development of a products liability docket, once developed, the practitioner enjoys some economies-of-scale. These economies-of-scale are another reason that a products docket can be a successful niche practice. Stated simply, the economies-of-scale means the more products cases you handle the easier handling them becomes. The following sections explain why.

a. Cheaply Eliminate Bad Cases

Perhaps one of the most significant economies-of-scale created by handling a consistent number of products liability cases is the ability to eliminate bad cases without significant expense. A one time products practitioner may be forced to spend significant time and money developing a products case only to learn that another component of the proof cannot be established. Frequently too, a one time practitioner may need to spend several

thousands of dollars to retain experts to simply figure out if there is a viable case. While everyone loses money on case evaluations, maintaining a consistent number of products cases helps to reduce these losses. Through the experience of a large number of cases, the products practitioner learns to eliminate cases without exhausting unnecessary time and resources.

b. Redundancy
with Experts

Handling a consistent number of cases with the same expert allows a more efficient and cost effective relationship to evolve with that expert. Indeed, if you have a number of cases involving the same defect, the testing and research costs can be spread among the cases. This reduces each of the client's separate expenses and spreads the lawyer's risk among a number of different cases.

c. Relationship
with
Defendants
and Defense
Counsel

After handling a number of cases against a single defendant, hopefully a relationship of trust and mutual respect develops. A defendant learns that you are willing and motivated to spend the time and money to develop fully a case. A defendant also learns that you understand both the strengths and weaknesses of a particular case. I have found that with the development of this relationship, it is easier to resolve cases earlier in the litigation. Generally, fact witness and damages discovery can be conducted and settlement

options explored early in the litigation process. Early resolution means more net settlement for your client, less required case cost investment/risk by you, and increased profitability.

A niche in products liability cases can be successful, in part because of the existence of the high-barriers-to-entry and the economies-of-scale discussed above. The next section of the paper offers some suggestions for the development of a docket of these cases.

B. Marketing for Products
Liability Case

Most products liability cases come through other attorneys. The majority of those cases are referred by other plaintiff's attorneys. To develop a products niche, it is important to understand the target audience of your marketing efforts. With the target audience identified, one should develop and implement a marketing plan to reach that target audience.

Marketing to the intended target audience is most effective when accomplished on several levels. With a continued and collective effort, the hope is that your fellow lawyers will think of you when given the opportunity to refer a products liability case. While sharing an entire marketing plan is beyond the scope of this paper, I will offer some general suggestions.

First, budget both dollars and hours for marketing pursuits. A six-figure marketing budget is not uncommon for most products liability shops. With an idea of the time and money you are willing to spend,

you can then decide how to best allocate your marketing resources. Some marketing efforts require little money, but lots of time (i.e..speeches). Other marketing efforts require significant funds, but relatively little time (i.e...mailouts of firm brochures). Conscious development of a marketing resource budget and then a marketing plan will ensure that you best communicate your message given your budget. I would even recommend retaining a marketing firm to help develop and implement a marketing plan.

Some methods of marketing that are successful include: (1) simply networking with other lawyers—tell them what you do and ask for their business; (2) participate in TTLA, Bar Association, AIEG; (3) speak to other lawyers when given the opportunity; (4) letter and brochure campaigns to other lawyers; (4) tastefully publicize results on other products cases in the trial reports and other periodicals; and best of all (5) try cases. Trying similar cases makes you an expert and will bring business perhaps more so than any other method. Certainly this list is not exhaustive. Nor is one avenue of marketing in and of itself sufficient. Rather, you should try to market on as many levels as possible within your market resource budget.

III. STRUCTURING THE PRODUCTS LIABILITY PRACTICE

You've decided to embark upon a products liability practice. You've marketed for the cases. Now the phone rings. The decisions you make next are perhaps the most critical in determining the success your products liability practice will enjoy. The

following are some thoughts on how to approach screening of these cases.

A. Case Intake

Approach the screening of a products liability case by way of a process of elimination. Review the case and try to eliminate it. If you can not eliminate the case on your own review, then engage investigators to try and uncover an eliminating factor. Finally, try to analyze the weakest issues with the experts in the final attempt to eliminate the case. If after this thorough screening process you can not eliminate the case, then consider taking on a new matter.

1. *Causation*

A good number of cases can be eliminated because of a lack of causation. Perhaps the airbag did not fire in the potential client's car. No doubt it should have considering that he hit a tractor-trailer head on at highway speeds. But this individual would have been killed with or without an airbag. No causation. Eliminate this case. Try to think of causation first in deciding whether to eliminate a products liability case. Many times your screening can stop right here.

2. *Economic Feasibility*

To make this determination, you need some understanding of the damages, the likely settlement, and the budget/profit analysis discussed in detail below. Given that products liability cases are extremely expensive and time consuming, the damages and settlement potential must reach a certain threshold. How to arrive at a well thought

out threshold is outlined below, in the attached Appendices and will consume a major portion of the presentation.

Seventy-five percent of the cases reviewed will be eliminated on either causation or economic feasibility grounds. Examining causation and economic feasibility first will greatly decrease the time and money a products liability lawyer spends on case evaluation.

3. *Drugs*

If there are drugs or alcohol used by the plaintiff at the time of the injury causing event, eliminate the case. Resist every temptation to overlook the drug use in favor of the great liability and damage facts. Eliminate the case.

4. *Prior Injuries*

As with any personal injury case, carefully examine any prior similar injuries.

5. *Plaintiff Likeability*

There has never been a truer statement: "The Plaintiff is the Case." In order to invest the time and resources required, you should insist that the plaintiff be likeable and credible. If you have doubts about the potential plaintiff; there is no question that the defense and the jury will share those same reservations. If you are not comfortable with the plaintiff, you should not be comfortable taking the case.

6. *Availability of a Credible Expert*

Remember an expert is necessary to

prove the elements of your case. Before signing on, be sure you can find an expert who is qualified, credible and likes your case. Without it, you may spend money and time, but ultimately be unable to prove up the elements of your case.

7. *Safer Alternative Designs*

In a design defect case, there must be proof of a safer alternative design that was economically and technologically feasible at the time of manufacture. After ensuring that an expert can testify on causation, direct your experts to the safer alternative design issue. It is one thing for an expert to be critical of a design; it is quite another for that expert to come up with an alternative design that works, that is feasible and that would have prevented the harm. If the experts do not have a good answer to the alternative design question, eliminate the case.

B. Budgeting

An early logical step in deciding whether to take a case is to develop a case budget. Attached as Appendix A, is a form case budget and profitability analysis I use to evaluate potential cases. Appendix A is a work up for an automotive products case with a well-defined defect history and a safer alternative design that is already in existence. In other words, this case budget did not require the experts to do extensive design or testing work, but rather simply to apply established principles to the facts of the individual case. Appendix B is a case budget and profitability analysis for a typical \$50,000.00 car wreck case. A comparison of these two budgets provides interesting insight into the respective profitability of a

complex case and a relatively simple case. I use this analysis to help establish case value thresholds for both types of cases.

C. Setting Case Value Thresholds Based on the Case Budget/Profitability Analysis

Complex products liability cases can generate large fees. However, those large fees almost always come with the expenditure of significant time and resources. Some lawyers make the mistake of only looking at the total potential fee without a corresponding analysis of the time and resources which must be spent to earn that fee. One must look at both together to get a true measure of profitability. With this perspective, you can then appropriately set thresholds for the value of cases you are willing to take.

Appendix A, for instance, is a products liability case with a ½ million dollar settlement/verdict value on a 40% contingency fee. This case generates a gross fee of \$200,000. Not bad. But remember the referral fee? Paying a 1/3 referral reduces the fee to \$133,333. Still, this seems to be a decent fee? After all, five or six of these cases a year would make for a good living. But when viewed together with the time and resource required, you realize this fee is wholly insufficient. First, this fee required an investment by you of over \$150,000. There is lost opportunity cost for otherwise investing that money as well as the risk that you lose all of your investment if things don't go as planned at the courthouse. Perhaps even more shocking, when you calculate your hourly rate for the

privilege of taking the case to trial, you realize your hourly rate is just under \$75 per hour.

It's not as bad as it may seem. This example is of a case that goes all the way through a trial. If this same case settles after expert depositions, but before trial preparation, the hour rate increases to \$167 per hour. If you can get the case settled after expert reports, but before expert depositions; the hourly rate increases to a respectable \$275 per hour. Accordingly, an important part of your analysis requires an educated guess about the timing of settlement. If you have a history with the defendant on similar cases you may be able to resolve the case early in the process thereby allowing you to reduce your case value threshold. If you are litigating a new defect theory or are litigating against a defendant who is new to you, you should count on the case going up to, if not through a full trial. Accordingly, you must set your case value threshold higher.

The point is that being blinded by the fee amount without a look at the realistic prospect of early settlement and a harder look at the budgeted time and resources, can result in a poor financial decision. With an ideal of early settlement prospects and the budget/profit analysis in hand, you can make smart decisions about the case value thresholds. If the thresholds are not satisfied eliminate the case.

IV. FINANCING PRODUCTS LIABILITY CASES

Even a modest number of products liability cases demands a significant capital investment. This final section of the paper

discusses the likely capital requirements and various financial options to satisfy those requirements.

A. Capital Required

A docket of five trial-ready products cases would require a capital investment of at least \$800,000 (assuming the budget outlined in Appendix A.) This analysis somewhat overstates the capital requirements because all five cases will surely not be in the end-stages of litigation at one time. However, if three cases were at the expert report stage, two cases were beyond expert depositions and one case was trial-ready, those capital requirements are still significant at just below \$600,000. If one adds another three to four case evaluations and investigations at a range of \$25,000 each, the capital requirement climbs to \$700,000. In general, I have found that capital availability of \$1,000,000 - \$1,250,000 is generally sufficient to operate a products liability docket with 8-10 complex cases in various stages of litigation. Certainly, a more ambitious docket size will have correspondingly larger capital requirements. As part of the case intake process, a review of the capital requirements of each additional case should be addressed and a plan for funding developed. What follows is a discussion of various avenues to obtain this funding.

B. Financing Options

Save loans from family and friends, the following are some more traditional avenues to obtain capital for funding your products liability docket. Your financing

plan will generally draw on a combination of these options.

1. *Internal Funds*

A conservative approach to a products liability practice dictates that the majority of capital needs be met with funds provided by the attorney without obligation to repay those funds in the event of a loss. As we all know, any case can take a wrong turn. Eventually one or more cases will do so on every lawyer's docket. By funding cases with cash on hand, a case gone bad will not mean financial devastation. A case loss is much easier to swallow if it does not come with an immediate requirement to pay a large expense check back to a lending institution or a bank. Building a products liability practice with primarily borrowed funds can be a potentially devastating financial decision. A good general approach is to only use borrowed funds for small short-term capital needs when there is a certain ability to repay those funds within a few months.

2. *Joint Venture Agreements*

Most often joint venture arrangements are thought of as a mechanism to share expertise and work load. However, with a solid case, joint venture arrangements are almost always available to not only share the workload, but also to share the capital needs of a particular case. Favor joint venture arrangements over borrowed money if additional significant capital is required.

3. *Non-Traditional Lines-of-Credit*

There are private banking companies dedicated solely to providing lines-of-credits to plaintiff's personal injury lawyers. While the specifics vary from company to company, the general lending model is consistent. Most of these companies extend a plaintiff's attorney a line-of-credit based on a historical ability to generate revenues. The company charges a 3% annual commitment fee for the extension of this line-of-credit. This 3% fee is charged against the entire available line-of-credit extended by the lending institution. For example, a \$1,000,000 line-of-credit would result in a \$30,000 annual commitment fee, whether or not you even use the line-of-credit. These lines-of-credit can only be used to finance reimbursable case costs. Most companies contractually prohibit use of the line-of-credit for working capital or overhead (this varies from company to company). There is no obligation to repay the line-of-credit or interest until a case settles. When the case settles, some attorneys pass interest charges through to the client. The annual interest rate charged on monies loaned is approximately 14.35%. However, these companies typically extend only a percentage of the total amount of the loan. For instance, if you incur a \$10,000 expert bill, the capital company will pay 80% or \$8,000 of this bill and maintain 20% of the money in an account to create a reserve on your behalf. While you only have access to 80% of the funds, you are charged 14.35% on the entire \$10,000. This increases the effective interest rate to over 20%. While this reserve system creates exorbitant interest rates, there is some benefit. If you lose a case and do not have the cash to repay the loan, the capital company can tap the reserves on all of your cases to pay the outstanding loss.

These non-traditional lines-of-credit, for most lawyers, will be an option of last resort. The interest rates are over three times that which can be obtained through a traditional lending institution. However, these non-traditional lending institutions are willing to extend lines-of-credit without hard collateral assets and in larger amounts than most traditional banks. If you are interested in further information, some of the non-traditional lending institutions are Themis Capital Corporation, www.themiscapital.com; Advocate Capital, www.advocatecapital.com; and Counsel Financial, www.counselfin.com.

4. *Traditional-Lines-of-Credit*

The most common source of third-party capital is a bank line-of-credit. Generally, in exchange for a lien against your firm's accounts receivables and a personal guaranty, most banks will extend a significant line-of-credit. Once established, the line-of-credit can then be accessed in any amount up to the limit. Interest is charged on only the portion of funds accessed. The funds can be used for any business purpose. Interest is due monthly. Principal must be repaid according to the terms of the loan documents, but generally, the loan is renewable on an annual basis. In simple terms, a line-of-credit works in a very similar way to a credit card with a lower interest rate and higher credit limit. As stated above, the line-of-credit should be used primarily to meet short term capital requirements with the ability to repay the funds within a short period of time.

V. CONCLUSION

While entering the products liability arena may seem daunting at times, armed with a motivation to succeed and sound business principals, the practice will be both financially and professionally rewarding. A solid marketing plan, sound budget and profitable analysis, and a strict case threshold screening process will go a long way toward ensuring your success. I hope that this paper and the presentation have provided you with some thoughts and suggestions which will be helpful in the management of your own products liability practice.

Appendix A

Appendix B