

*A Proactive Approach
to Narrowing the Scope
of Other Incident
Discovery Requests
to Get the Result You Want*



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December 5, 2016 - Every product manufacturer and seasoned litigator has been faced with the task of responding to overly broad and unduly burdensome “other incident” discovery requests in product liability matters. The production and admission of other incident evidence can adversely impact the value of a case if it is not carefully controlled. Therefore, the defense should implement a proactive strategy for limiting its responses from the moment a case is filed and prior to other incident requests being made.

Objections to the production of other incident discovery, and motions to exclude the admission of other incidents at trial are factually intensive. In West Virginia, evidence of “other incidents” is admissible only if it demonstrates that the other accidents occurred under substantially similar conditions and involved a substantially similar product. [*Gable v. The Kroger Co.*, 186 W.Va. 62, 65, 410 S.E.2d 701, 704 \(1991\)](#) (excluding evidence of prior, dissimilar accidents on the same premises).

To prevent the production or admission of other incident evidence under the above (or a similar) standard, the defense should narrowly define the conditions and the product at issue as early in the litigation process as possible. The narrowing process should begin long before the other incident discovery is served. The process should begin with the filing of the answer to the complaint and should continue throughout discovery.

An answer to a complaint should be more than mere admissions and denials of allegations. The answer is the defendant’s first opportunity to educate and influence the court’s impression of the case and to provide plaintiff with facts helpful for use during objections to other incident discovery at a later date. As such, product defendants should admit any relevant facts, if possible, and provide additional facts that are not likely to be in dispute. For example, a plaintiff may generally allege that the defendant’s product was defective without giving specific product details. As in many product cases, the defendant may have had an opportunity to inspect the product pre-suit. In such cases, the defendant should consider admitting, upon information and belief, specific information about the product at issue (e.g.,

make, model, serial number, manufacture date). By doing so, the defendant is narrowing the facts about the product for the purpose of distinguishing the incident at issue from other incidents in the future.

Contemporaneous with the filing of the answer, the defense should serve a focused set of discovery to narrow the product defect allegation and the incident conditions with specificity (e.g., “the bicycle was defective,” versus, “the bicycle’s brake pads were defective because they grab when applied on a slope and caused the plaintiff to be ejected over the handle bars and injured”). To be effective, the narrowing discovery must be done prior to plaintiff serving other incident discovery, because plaintiff’s responses will form the basis for your objections to the producing other incidents.

Rarely are requests for other incident discovery narrowly tailored to lead to the discovery of admissible evidence. In applying a proactive approach to object and respond to other incident discovery requests, you should incorporate plaintiff’s narrative of the case provided through the pleadings and discovery. This approach allows the defense to narrowly control the scope of the information to be produced.

For example, plaintiff serves a request for all documents relating to claims alleging that GoFast bicycles are defective. The objection and response should incorporate a detailed and narrow description of the incident and product at issue as described by plaintiff in pleadings and discovery responses (e.g., “This is a case about an alleged defect in the 2012 GoFast, STX mountain bike, serial # jg673jdkrf. Specifically, this is a case where plaintiff alleges that the subject 2012 GoFast, STX mountain bike’s brake pads were defective because they grab when applied on a slope and caused the plaintiff to be ejected over the handle bars and injured.”). Once the defense defines the incident and product in plaintiff’s words, the defense should agree to search for and produce a very narrowly described subset of documents of claims involving substantially similar conditions and a substantially similar product as described above (e.g., Gofast will produce all brake pad defect claims involving allegations of injuries sustained by riders operating 2012 GoFast, STX mountain bikes on a slope where the rider applied the brakes, the brake pads grabbed, and the rider was ejected over the handle bars). Always remember when framing the response—the narrower the scope, the narrower the search, and the narrower the production.

Most savvy plaintiff’s attorneys will not accept such a narrowly tailored response and will seek to broaden the production through a meet and confer, or a motion to compel. Either way, a proactive approach gives the defense the upper hand in limiting the scope of the response. In my experience, plaintiffs and courts usually agree to a modified version of what was proposed in the original response when response is framed in plaintiff’s own words.