

VI. PRESUIT CONSIDERATIONS

§ 45 In general

Thorough presuit preparation is often the key to a speedy resolution of a toxic exposure case. If counsel prepares the case properly at the start, he or she will be able to push for a quick trial and put pressure on the defense to settle. Counsel will also be able to control the pace of discovery and put the onus and expense of discovery on the defense. A thorough investigation is crucial for the plaintiff's attorney. For example, if counsel has been able to obtain comprehensive signed statements from potential witnesses, the time and expense of taking depositions from those individuals may be saved. That burden will then fall on the defendant, and plaintiff's counsel may be able to limit depositions to witnesses who are beyond control, such as employees and representatives of defendants.

If plaintiff's counsel has a strong case, and has completed most of the work during investigation, he or she should take advantage of that strength and press for an early trial, which, of course, will limit the defendant's time to conduct discovery.

§ 46 Depositions to perpetuate testimony

Some trial attorneys take the view that it is best to wait for the case to ripen before filing a lawsuit. One major difficulty with waiting, however, may be the condition of plaintiff's

⁶⁷On the attorney as investigator, see *Investigating the Civil Case*; *General Principles*, 1 Am. Jur. Trials 357 § 3.

health. If the client is suffering from a progressive and increasingly debilitating disease, trial counsel's ability to use him or her as a witness may be seriously impaired. However, this should not mean that counsel should rush the case into litigation before investigation has been completed. Instead, counsel should consider taking the client's deposition before suit to perpetuate his or her testimony. Most states have provisions for presuit depositions patterned on the federal rules.⁶⁸

The benefit of taking the client's deposition before suit, however, should be weighed against the loss of the element of surprise. Surprise has several advantages. First, there may be less time for the defendants to investigate the case and prepare the defense. Second, greater time may be available for plaintiff's counsel to contact and interview the client's coworkers and conduct other investigation into the liability of all possible defendants. These advantages may be lost when counsel takes client's presuit deposition. However, the risk of losing plaintiff as a witness may be too great to delay the client's deposition until after the action has been filed.

When conducting a presuit deposition to perpetuate testimony, the plaintiff's attorney must keep several things in mind. First, the attorney should schedule the deposition of the client in conformity with his or her treatment schedule. The periods when a person in chemotherapy, for example, can best be deposed should be carefully considered. Such a person may have difficulty remembering and relaying facts clearly at certain times during the course of treatment. Second, plaintiff's counsel should keep his or her direct examination short and to the point, although it should be thorough enough to cover all the material facts to which the client can testify. Then, if defense counsel's cross-examination becomes so intense as to jeopardize the health or stamina of the client, the attorney will be faced with the need to decide whether to halt the deposition. This he or she should not hesitate to do if indeed the client's health is at stake. However, counsel should also keep in mind that a tenacious cross-examination may aid the case by causing the jury to feel sympathy for the plaintiff. Counsel should also bear in mind that there is danger that, if the plaintiff's attorney halts the deposition, the court will strike the deposition at trial for the failure to permit cross-examination. Finally, if permissible, the attorney should attempt to videotape the de-

⁶⁸Am. Jur. 2d, Depositions and Discovery §§ 118-129.

position of the plaintiff.⁶⁹ The visual impact of a plaintiff wasting away from a debilitating disease attributable to a wrongful exposure to a toxic substance can have a devastating effect on defendant's case.

§ 47 Plaintiff's pleadings

The following illustrative complaint based on the model trial case⁷⁰ has been drafted for use in a notice pleading jurisdiction.⁷¹ Notice pleading requires only that sufficient information be given to put the opposing party on notice of a claim. Generally, this means that the drafter of the pleading may limit the factual allegations to statements of ultimate facts and use general charging allegations of liability. Where specific facts are required to be pleaded, they should be stated with particularity to bolster the claims of liability.⁷²

The illustrative complaint herein is based on the model trial factual pattern with the added assumption that the plaintiff died as a result of the condition he sustained by being exposed to the toxic substance after a prolonged period of illness. Thus, the "plaintiff" referred to in the complaint is the personal representative of the client's estate. The illustrative complaint further assumes that the jurisdiction permits the recovery by the decedent's estate of general and special damages incurred by the decedent prior to death as well as the recovery of wrongful death damages by the decedent's survivors, punitive damages, attorney's fees and prejudgment interest on the award.⁷³

§ 48 Illustrative Complaint

The complaint below is an illustration of pleading in a third-party liability action for negligence against the owner of the

⁶⁹Use of Videotape in Civil Trial Preparation and Discovery, 23 Am. Jur. Trials 95.

⁷⁰See § 48.

⁷¹For another form of a complaint in an action by an employee of an independent contractor against another contractor for injuries received as a result of the negligence of the latter at the same worksite, see 18A Am. Jur. Pleading and Practice Forms, Negligence, Form 58.

Tactics and Strategy of Pleading, 3 Am. Jur. Trials 681.

⁷²Travis, "Allegations" in G. Nothstein, ed., Toxic Torts: Litigation of Hazardous Substance Cases §§ 13.01-13.09 (Shephard's/McGraw Hill 1984).

⁷³On the remedies generally available in toxic tort litigation, see Barnard, "Remedies" in G. Nothstein, ed., Toxic Torts: Litigation of Hazardous Substance Cases §§ 12.01-12.17 (Shephard's/McGraw Hill 1984).

premises where plaintiff was working, the general contractor or site manager of the worksite, the independent subcontractor (painting contractor) that was spraying the sealant which created the fumes which caused the decedent's injury, and, finally, the manufacturer and seller of the substance that contained the toxic chemicals.⁷⁴

COMPLAINT FOR DAMAGES

[Title of court and cause, introductory statements, and preliminary allegations respecting jurisdiction, venue, and fictitious defendants omitted.]

Count I

(Negligence of Painting Subcontractor)

1. At all times relevant defendant _____ *[painting contractor]* was a corporation licensed to conduct business in the state of _____ and was at all times relevant a contractor engaged in the application of certain chemicals at _____ *[construction site]*.

2. At all times relevant defendant _____ *[general contractor—site manager]* was a corporation licensed to conduct business in the state of _____ and at all times relevant was managing and supervising the work being done at said construction site.

3. At all times relevant defendant _____ *[chemical manufacturer]* was a corporation licensed to conduct business in the state of _____ and was at all times relevant the manufacturer and distributor of an industrial solvent known as _____ *[brand name of solvent]*, which contained the following chemicals: _____ *[identify ingredients or particular hazardous chemical or toxic substance]* used at the construction site for _____ *[describe use and application]*.

4. On or about _____ *[date of exposure]* defendant _____ *[painting contractor]* was applying _____ *[brand name of solvent]* at the construction site with knowledge of the existence of unprotected workers, including plaintiff, in the application area.

5. Defendant _____ *[painting contractor]* so negligently

⁷⁴Whom To Sue—Multiple Defendants, 5 Am. Jur. Trials 1; Hidden and Multiple Defendant Tort Litigation, 25 Am. Jur. Trials 1.

Comment, Unearthing Defendants in Toxic Waste Litigation: Problems of Liability and Identification, 19 S Diego L Rev 891 (1982).

and carelessly used and applied _____ [*trade name of industrial solvent*] as to cause toxic fumes to be distributed throughout the area where plaintiff was working with the further proximate result that plaintiff was exposed to the hazardous chemicals contained in those fumes.

6. Defendant _____ [*painting contractor*] further negligently allowed its officers, employees, and agents to expose plaintiff to certain hazardous chemicals.

7. As a proximate result of said exposure, plaintiff suffered great injury to his _____ [*injured areas*], which resulted in _____ [*condition caused by toxic exposure*] and which caused the plaintiff to suffer great pain and suffering; and as a further proximate result of defendant's negligence plaintiff incurred medical bills and lost wages, which damages will continue in the future.

Count II

(Negligence of General Contractor)

8. Plaintiff hereby realleges paragraphs one through seven herein as if fully rewritten.

9. On or about _____ [*date*] defendant _____ [*general contractor—site manager*] was supervising the application of certain chemicals by _____ [*painting contractor*] and knew or should have known of the existence of unprotected workers, including plaintiff, in the application area.

10. Defendant _____ [*general contractor—site manager*] negligently supervised the work area and further negligently allowed its officers, employees, agents, or others under its supervision to expose plaintiff to certain toxic fumes containing hazardous chemicals.

11. As a direct and proximate result of said negligence, plaintiff suffered the injuries and damages alleged above.

Count III

(Statutory Duty of General Contractor)

12. Plaintiff hereby realleges paragraphs one through eleven herein as if fully rewritten.

13. On or about _____ [*date*], defendant _____ [*general contractor—site manager*] had a statutory duty under _____ [*frequenter statute*] to provide a workplace that was safe for its employees and others frequenting the work site.

14. Defendant _____ [*general contractor—site manager*] negligently failed to provide a workplace that was safe for its employees and others frequenting the work site.

15. As a direct and proximate result, plaintiff (or plaintiffs decedent) suffered the injuries and damages alleged.

Count IV

(Negligence of Chemical Manufacturer)

16. Plaintiff hereby realleges paragraphs one through fifteen as if fully rewritten herein.

17. Said product manufactured and distributed by defendant _____ [*chemical manufacturer*] was negligently designed, labeled, produced, manufactured, and distributed by defendant, and contained improper warnings.⁷⁵

18. As a direct and proximate result plaintiff was exposed to a defective, unreasonably dangerous and hazardous product.

19. As a direct and proximate result plaintiff suffered the injuries and damages alleged.

Count V

(Chemical Manufacturer's Failure to Warn)

20. Plaintiff hereby realleges paragraphs one through nineteen herein as fully rewritten.

21. Defendant _____ [*chemical manufacturer*] manufactured a chemical product known as _____ [*brand name of solvent*] which contained _____ [*identify ingredients or particular hazardous chemical or toxic substance*] to which plaintiff was exposed on _____ [*date*] as alleged above.

22. Said product was in a dangerous condition which, when used in its intended or reasonably foreseeable manner, exposed plaintiff to unreasonable danger beyond the expectations of an ordinary person.

23. Defendant _____ [*chemical manufacturer*] was aware of the dangerous propensities of its product but negligently

⁷⁵In most jurisdictions a count for strict liability in tort may be made against the chemical manufacturer. See Am. Jur. 2d, Products Liability §§ 528–577, 751.

failed to apprise users of the dangerous propensities of said product.⁷⁶

24. As a direct and proximate result, plaintiff suffered the injuries and damages alleged above.

Count VI

(Breach of Warranty)

25. Plaintiff hereby realleges paragraph one through twenty-four herein as if full rewritten.

26. Defendant _____ [*chemical manufacturer*] impliedly warranted that said product was safe and fit for its intended purposes.⁷⁷

27. Said product was not safe, nor fit for its ordinary purposes.

28. As a direct and proximate result, plaintiff was exposed to an unreasonably dangerous and hazardous product.

29. As a direct and proximate result of said exposure, plaintiff suffered the injuries and damages alleged above.⁷⁸

Count VII

(Punitive Damages)

30. Plaintiff hereby realleges paragraphs one through twenty-nine herein as if fully rewritten.

31. The above described actions of all defendants were in willful and wanton disregard of the rights of plaintiff in exposing him to dangerous and toxic chemicals.⁷⁹

32. As a direct and proximate result of said behavior plaintiff's decedent suffered the injuries and damages alleged above.

WHEREFORE, plaintiff requests judgment in the amount of \$_____, compensatory damages, plus \$_____, punitive damages, plus costs incurred herein.

⁷⁶In some jurisdictions, a manufacturer's failure to warn of a product's dangerous propensities may also be the basis of a cause of action for strict liability in tort. See Restatement (Second) of Torts § 402a (1965).

⁷⁷Breach of warranty liability may not be available to bystanders in some jurisdictions. See Am. Jur. 2d, Products Liability §§ 597-613.

⁷⁸In some jurisdictions a further allegation of notice of breach of warranty may be required. See Am. Jur. 2d, Products Liability §§ 521-525.

⁷⁹In some jurisdictions it is necessary to allege facts showing the requisite animus to support an award of exemplary or punitive damages. See Am. Jur. 2d, Damages § 293.