

# Strategies for in-house counsel to maximize coordination of multidisciplinary products liability litigation

The days of standalone products liability litigation are gone

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The days of standalone [products liability](#) litigation are gone, at least when the claim is that a product has a design or warning flaw that led to death or serious injury. When such [claims arise](#), companies need a unified, multidisciplinary approach to address the array of adversaries and audiences they will face. Recent high profile product controversies have demonstrated the critical importance of communicating a consistent and accurate message to courts hearing civil litigation (products liability, consumer fraud) as well as others including: Regulatory agencies, both foreign and domestic, such as the U.S. Food and Drug Administration, National Transportation Safety Board, the National Highway Traffic Safety Administration (NHTSA) and the Securities and Exchange Commission (SEC); State Attorneys General; criminal prosecutors; Congressional committees; and shareholders. This article will discuss strategies for a multidisciplinary approach to products liability.

## Problems Caused by a Failure to Communicate – GM Ignition System Litigation

The General Motors [ignition system failure litigation](#) – involving alleged non-deployment of airbags when ignition systems in some GM model cars inadvertently moved from “run” to “accessory” – illustrates why interdisciplinary coordination is key even before mass litigation begins. According to GM’s internal investigation made public last May, potential safety issues were known to it for years before recalls were announced in early 2014. The report blamed systemic failures within the GM organization that prevented important information from getting the attention of senior management. No single individual or group took ownership of the emerging safety issues and those in possession of key information failed to connect the dots about the cause of the air bag failures.

The outcome: NHTSA levied a record fine against GM and required it to undertake wide-ranging internal changes. The U.S. Attorney for the Southern District of New York reportedly is considering criminal charges. The SEC opened an investigation. House and Senate committees held investigative hearings, bringing before them GM’s CEO and general counsel. Shareholders filed actions against the company and its officers and directors. Dozens of class action, wrongful death and personal injury lawsuits were filed in multiple jurisdictions. At least 15 employees, reportedly including senior in-house attorneys, were fired for what CEO Mary Barra called a “pattern of incompetence and neglect.” Plaintiffs in the class action litigation are even alleging that GM’s outside products liability defense counsel colluded with the company to conceal safety-related information from regulators and consumers, an accusation that both GM and its counsel are vigorously contesting. GM’s attempts to build a reputation as a brand that customers can trust, not to mention its bank accounts, have taken a significant hit.

## **Communicate and coordinate within the company to mitigate risk**

As the GM situation illustrates, the company must have a plan to facilitate communication about potential safety issues among product safety personnel, in-house counsel, and other employees. With communication across departmental boundaries, the company reduces the chance that warning signs will be missed, perhaps preventing the next product disaster. Every responsible company already should have in place SOPs for reporting injuries to the appropriate safety agency, be it NHTSA, FDA, CPSC, or other agency. Automakers like GM have those SOPs. But allegations against GM and other automakers suggest that following reporting rules might not always be enough, particularly if the product is widely distributed and the failures are relatively rare or difficult to uncover. Because accidents are an expected if unfortunate occurrence with every auto, connecting a pattern of airbag non-deployments in accidents under a variety of conditions would not necessarily catch anyone's attention absent rigorous review of the data. GM's alleged failure appears to be that it missed signals of a potential danger before the car was launched, failed to connect consumer complaints about "stalling" to a safety issue after launch (instead considering it a customer convenience issue), did not recognize the connection between the ignition system and airbag non-deployment, and then failed to urgently pursue a remedy. In the meantime, its product liability lawyers were allegedly settling cases in part because of concerns about punitive damages exposure resulting from company knowledge of a potential product design defect.

To prevent such communication failures, internal disciplines must not only coordinate with each other, but also be prepared to move the issue to higher levels. For example, if the pharmacovigilance department detects a potential safety signal in a medicine, a rigorous plan of study should be followed to understand the issue, and company protocols should make it clear that serious safety issues can and should be elevated to senior management regardless of normal reporting chains. As GM learned, product failures cannot be addressed by forming a committee and hiring an expert once the problem has emerged—it requires a corporate culture that overcomes bureaucratic roadblocks. Committees cannot be abandoned, of course. As a key part of GM's response to the findings of the investigation, it formed a "product integrity team" – a committee – whose mission is to identify, communicate, and address product problems early. Such cross-discipline teams may become an industry model.

## **Retain outside counsel with experience in managing communication with multiple audiences**

The goal is to prevent problems, but when prevention fails coordination and communication become even more important, and it is time to bring in more resources. Once design or warning defect litigation is in sight, outside counsel who understand the multidimensional nature of the potential problem should be brought on board to assist the in-house staff and management. Their job is to bring in the resources with specific expertise who can prepare on rapid, accurate communications to regulatory authorities and other relevant internal and external audiences. Ideally, outside counsel will have immediate access to expertise in dealing with the relevant federal agencies and state authorities, and will have experience in controlling company or outside experts handling communications with the press and investors. In high profile matters, such as the GM situation, having outside counsel who know how to communicate with Congressional staff and the Department of Justice (DOJ) also may be important. They must also have an ability to establish credibility and relationships with the key plaintiffs' counsel without compromising the company defense.

## **Conduct initial factual investigations with an eye toward potential future actions**

Company witness interviews, particularly at the outset of an investigation, need to be conducted and documented to balance potentially competing interests: speed in getting the facts, protection of potential privilege, and avoiding a conflict with a witness that may result in disqualification. As plans are formulated by counsel with expertise in investigations, criminal defense, agency procedures, and other disciplines, the defense leadership team needs to ensure that strategies mesh and do not put the company at odds with itself. For example, counsel should ensure that the strategy adopted in preparation for a Congressional hearing, which may call for a message that is simple and direct, does not undercut a more complex message necessary to defend against civil litigation or the detailed questions involved in responding to a DOJ investigation.

## **Coordinate information sharing**

As the company shares information with different audiences, it needs to have a system that avoids accusations that information is being shared selectively. In many cases, the most efficient way to do that is to provide to the relevant agency or committee the same documents that are produced in the civil litigation, where discovery is likely to be the broadest. Of course, this will not always be the case and there may be strong counter-arguments, particularly where sensitive information is involved. Unfortunately, the more broadly information is distributed, the less likely it will be kept confidential.

## **Conclusions**

GM's experience demonstrates the need for interdisciplinary coordination. With little notice, GM had to address multiple governmental and legal audiences and at the same time protect its brand in the minds of consumers. Whether GM succeeds will become clear as events unfold. Regardless of the outcome, this unfortunate situation will provide lessons of how--or how not--to tell the company story to all those audiences.

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