EXPERT TESTIMONY is not mandatory in products liability cases. As a result, some litigators, whether handling the case for the plaintiff or the defendant, bow to the pressure to keep expenses in check and make a miscalculation: They don’t use an expert. For reasons discussed below, the nature of products liability actions can turn this miscalculation into a major mistake. But even if the parties decide to use an expert, another potentially fatal misstep often awaits: Failing to depose the expert effectively. In this article, we will review some of the factors that make expert testimony so important in products liability actions, and explore some of the finer points of deposing both plaintiffs’ and defendants’ products liability experts.

WHY EXPERT TESTIMONY IS SO IMPORTANT IN THE PRODUCTS LIABILITY CASE • Expert testimony is central, indeed crit-
ical, in products liability cases. A plaintiff cannot reasonably expect to prevail in a case, challenging a marketed product, without experts available and capable of showing causation and defectiveness. The manufacturer, too, would be wise to engage experts to support its defense. Expert witnesses for both sides are the center of attention in products liability cases.

What Kind of Expert Is Required?

Products liability cases often have a need for several experts in any given case: Human factors engineers, metallurgical engineers, biomechanical engineers, mechanical engineers, civil engineers, multiple medical experts, rehabilitation specialists and economists all have a role to play. Unlike the need for experts in other types of cases, the risk-utility test in design defects requires the testimony of expert witnesses. Alternative designs of the product, too, are an important aspect to be considered in defectiveness cases. Experts for the plaintiff may testify that an alternative design was known and accepted, whereas experts for the defendant may testify that such an alternate design was not feasible or was not known and accepted. The technical details of product designs and the thoroughness of the communications of warning statements generally are handled best through expert testimony. As a result, it serves each side well to seek expert testimony.

The point is that an expert’s testimony is traditionally used in products liability because the most important facts are beyond ordinary experience.

What Does the Expert Do?

A typical expert examines the product in question, if it has not been destroyed, or a similar class of products, if the product in question has been destroyed, and may perform various tests on the product or similar class of products from which the expert testimony can be prepared. The key is to remember that the purpose of discovery of the expert’s opinion testimony is to prepare for cross-examination and rebuttal of the expert’s assumptions, which may be presented at trial. Ultimately, counsel for both sides should be looking for opportunities for impeachment of the opposing party’s experts.

DEPOSING PLAINTIFFS’ EXPERT WITNESSES • Experts who will be testifying at trial may be subject to comprehensive depositions, which detail the basis for the expected testimony and the grounds for the presentation of the opinion evidence about defectiveness or causation.

The Basic Elements

In products liability cases, a plaintiff must show generally, by way of expert testimony, that:

• The product is defective or “unreasonably dangerous”;
• The product’s defective condition existed at the time that the product left the domain of the defendant; and
• That the defective condition of the product was a proximate cause of the plaintiff’s injuries or death.

To be successful in a products liability case, a plaintiff must show that a technologically and economically feasible alternative to the defendant’s design was, or could have been, available at the time that the subject product was manufactured or, at the latest, when the defendant could still have acted to have prevented the plaintiff’s injuries or death.

Feasible Alternative Design

The plaintiff’s expert, then, may be expected to testify that an alternative design was feasible; therefore, the pretrial deposition should include questions on the feasibility, cost, safety benefits
of the alternate design and use of that design in various models of the product.

It is imperative, then, that the plaintiff’s experts be well versed about the potential alternative designs. This may be as simple as obtaining product literature of the defendant’s competitors. When such literature is not available, however, the alternative design must be demonstrated, tested, and testified about by the plaintiff’s expert. It is clear, therefore, that the plaintiff’s expert must be prepared to respond at the time of his or her deposition to queries about available design alternatives.

Get To Know the Expert
Get to know the expert before taking the deposition. Carefully examine the expert’s curriculum vitae, paying special attention to the expert’s education, experience, qualifications, and opinions. Follow this up with an investigation of:

- The education courses the expert actually took;
- The courses the expert has taught;
- The authorities the expert regularly consults in his work;
- What the articles in the expert’s curriculum vitae covers;
- Any grants has the expert obtained for research projects and what work may have emanated from the projects; and
- Whether the expert was mentioned in any court opinions and how was the expert mentioned.

Publications
Oftentimes, inconsistencies and uncertainties are revealed in other work of the expert. Counsel should also obtain articles and publications written by the expert on the subject of the case and be familiar with the leading authorities on it as well.

Prior Depositions
Review the expert’s prior depositions to learn how the expert responds at depositions. If, by chance, the expert has been deposed on a similar topic, read the deposition to target areas on which your expert was impeached. One of the primary means by which counsel can effectively impeach an expert witness is by the use of the expert’s own words previously given under oath. Determine whether the expert has ever testified in a way that may appear to be diametrically opposed to testimony provided in the case at hand at the deposition. Because effective impeachment requires direct contradiction, subtle distinctions are generally of little value and require too much explanation and offer too much opportunity for the expert witness to distinguish the different context in which the prior testimony was given.

Speak to the Expert’s Colleagues
Additionally, get to know the expert by speaking to colleagues who have used your expert. Many times, the resumés of experts list case names and attorneys involved in the cases to demonstrate their expertise in testifying about products liability cases.

Learn About the Technical Issues
Counsel must also become very familiar with the pertinent technical background to know the decision points in the case. An expert who senses that a lawyer is really unfamiliar with the technical aspects of the case might deliberately give answers that are technically accurate, but unclear, incomplete, or misleading. A retained expert can help the examining attorney to gain this technical expertise. This expert can also provide instruction about the technical aspects of the case, including an analysis of its strengths and weaknesses. For very technically complex cases, it may be a good idea to take a course in the subject matter.