Q&A With Adams and Reese's Lee Butler

Law360, New York (March 18, 2013, 2:38 PM ET) -- Lee Butler served as the partner-in-charge of Adams & Reese LLP's Houston office for eight years and currently serves as one the firm's litigation practice group leaders. He represents businesses and corporate entities litigation matters and disputes, such as products liability and toxic exposures, insurance coverage and bad faith, breach of contract, deceptive trade practices, oil and gas disputes and catastrophic injury cases arising from refinery and oil field accidents.

Q: What is the most challenging case you have worked on and what made it challenging?

A: We defended an industrial product manufacturer in a lawsuit arising from a catastrophic incident that occurred at a power plant that was undergoing a turnaround. A 30-year-old welder was working near a high-pressure air jack when the device exploded and struck him in the head and neck, instantly rendering him a quadriplegic. The case was challenging to begin with, given the catastrophic injury, huge damages exposure and the difficult jurisdiction.

The case became all the more challenging when during the course of discovery, it was learned most of the documents needed to prove the integrity of the product development and design safety had been lost or destroyed, and the only documents located indicated design flaws that were being addressed. Our witnesses were firm in their convictions that the product design was appropriate and safe, but the absence of supporting documentation was a challenge.

Q: What aspects of your practice area are in need of reform and why?

A: Difficult, and sometimes what seem to be impossible to answer, questions arise in cases which implicate a product seller's statutory right of indemnification from a product manufacturer. In particular, the Texas Products Liability Act (Chapter 82, Texas Civil Practice and Remedies Code) requires a product manufacturer to indemnify an innocent product seller for certain damages and litigation expenses arising out of a product liability action. The intent of this statutory indemnity scheme is to provide protection for product sellers for aspects of products they do not control by placing primary liability on product manufacturers, who are presumably in a better position to identify and remedy product defects.

Statutory indemnity is not available, however, if the loss at issue is caused by the product seller's negligence, intentional misconduct or other acts or omission for which the seller is independently liable (i.e., a product seller must bear the damages and expenses for the

losses it causes). A plaintiff's joinder of and claims of negligence against a product seller do not relieve the product manufacturer of its statutory duty to indemnify the seller.

The exception to the product manufacturer's duty to indemnify the seller may only be established by finding that the seller's independent conduct caused the plaintiff's loss. Until a finding against the product seller is made, any allegation of negligence in the plaintiff's pleadings is sufficient to invoke the product manufacturer's duty to indemnify the seller for all theories alleged in the plaintiff's products liability action.

Easy enough, right? The difficulties with this scheme arise during attempts to settle a products liability case before trial. For example, plaintiff sues a product manufacturer (strict liability and negligence) and the seller (negligence) in a products liability action. According to Texas law, by virtue of the plaintiff's pleadings, the product manufacturer owes a statutory duty to indemnify the seller. The exception to this duty owed by the manufacturer can only be invoked by a finding of negligence on the part of the product seller. This may lead [to] a situation where the product manufacturer and the product seller take positions that can stymie settlement negotiations.

Product manufactures will argue that a finding of even 1 percent of responsibility on the part of the seller bars the seller's statutory indemnity claim. Is that the law? Texas Civil Practice and Remedies Code § 82.002(a) states:
A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.

In the event a jury finds independent negligence on the part of the product seller caused the loss, it is unclear if that finding would be dispositive of the seller's indemnity claim. The seller will argue that a finding of, for example, 1-percent responsibility would not be fatal to the seller's claim that it is still entitled to partial indemnity for the percentage of the loss not caused by its independent negligence.

Texas Civil Practice and Remedies Code § 82.002(a) entitles a product seller to indemnity except for the loss caused by the seller's conduct. In that regard, it may be argued that the indemnity obligation still exists with respect to any percentage of the loss not caused by the seller's independent conduct.

Q: What is an important issue or case relevant to your practice area and why?

A: The partial indemnity conundrum referenced above arises at least in part from Gen. Motors Corp. v. Hudiburg Chevrolet, 199 S.W.3d 249 (Tex. 2006), a case where multiple parties were allegedly responsible for the loss. In that case, the Supreme Court of Texas noted that the evidence raised fact issues on the issue of partial statutory indemnity. The court stated: "Without further development of the record, we decline to consider whether or under what circumstances a seller may obtain partial indemnity under §82.002." Id. at 199 S.W.3d at 260.

The Supreme Court at least hinted that partial indemnity exists but failed to give any further guidance as to its application.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Several years ago, I tried a product liability case against a legendary plaintiff's attorney, Ernest Cannon [at the Law Offices of Ernest H. Cannon], and the trial was held in his hometown of Madisonville, Texas. I remember being most impressed with his uncanny ability to relate to the jury. The jury panel had 70 people, and within a half hour, he knew every juror's name and personal background. Without any notes, he conversed with each juror, asked detailed questions and built credibility for himself and his client. I truly was impressed by his craft as a trial lawyer.

Q: What is a mistake you made early in your career and what did you learn from it?

A: I learned early on never to underestimate the ability of my opponent in a case because of a perceived lack of experience or reputation. I now always assume my opponent will be the best I will have ever faced and prepare accordingly.

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