CARLTON FIELDS

Q&A With Carlton Fields' Gregory Cesarano

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Law360, New York (April 09, 2013, 1:56 PM ET) -- At Carlton Fields, Greg Cesarano focuses his practice on defense of corporations and manufacturers in products liability and commercial claims. He also leads Carlton Fields' products and toxic tort liability practice group, which has experience in food law, aviation and manufacturing, including automotive, pharmaceutical, tobacco products and sports equipment.

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

A: On a Saturday night, deep in the Everglades, a young man with several of his friends were camping and fishing on a weekend boys' night out. The young man was driving his three-wheel Honda ATC down a dirt road, struck a large rock and went flying over the handlebars, landing on his head. He was not wearing a helmet and suffered a serious head injury.

He sued Honda Motor Company, alleging the ATC was inherently unstable, was negligently designed and tested and had inadequate warnings. The Consumer Product Safety Commission had been investigating three-wheel all-terrain cycles, and although they found no defect, nor required a recall, production of this type of vehicle was halted five years before the accident.

We strongly suspected the group of friends had been drinking alcohol and using marijuana, but they all denied this activity. We continued to press the investigation and interviewed each of the friends several times. Eventually, our investigator was told by one of the friends that the plaintiff had been smoking marijuana that evening just before his accident. It became clear that the plaintiff's attorney knew about his client's drug use because the friend also revealed that he had received a telephone call from the attorney suggesting that he not disclose that fact.

Unbeknownst to the plaintiff's attorney, the friend had left his answering machine running to record the conversation, during which he told the plaintiff's attorney in unmistakable terms that the plaintiff was smoking a joint. The friend then said "If I'm asked, I'm not going to lie." The plaintiff's attorney never actually asked the friend to testify falsely but, carefully choosing his words, said, "Just hang in there with me if you would, we really need your help."

We subpoenaed the friend to testify at trial. He was a large man with a shaved bald head. He entered the courtroom wearing a black t-shirt that had “No Fear!” on the front. On direct examination, he testified he had seen the plaintiff smoking marijuana before the accident. On cross-examination, the plaintiff’s attorney attempted to impeach him on another subject with a prior sworn statement. When the attorney asked whether he remembered making the prior inconsistent statement, he said he did remember making that statement, but he also remembered the attorney telling him not to mention that the plaintiff smoked marijuana.

The plaintiff’s attorney called him a liar, and the witness, for the first time, revealed he had a recording of the conversation. The witness continued, “That’s exactly what you said, may God strike me dead. I am a minister.” The attorney jumped backwards to avoid the lightning bolt. When the attorney again called him a liar, the witness said, “I hope God strikes your big dumb ass dead because he won’t strike me!” The jury returned a defense verdict.

Cases that involve serious injuries from products are always challenging because it is human nature to feel sympathy for a badly injured plaintiff, and juries often will make an award because they feel sorry for the plaintiff even where the product is not defective. This case was even more challenging because the CPSC did not allow the product in question to continue being manufactured and because the plaintiff’s friends were reluctant to disclose illegal drug use prior to the accident.

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

A: Class actions have a legitimate place in the legal system to benefit a large number of consumers affected by a particular event or situation, with similar facts or claims, but who have minimal individual damages. However, there have recently been a number of class actions where the class members have suffered no injury from use of the product that only enrich the attorneys with large fee awards. Corporations negotiate early settlements to avoid costly litigation, and class members customarily receive meager individual awards, often a coupon worth only a few dollars. Studies have shown that attorney fees and administrative costs account for nearly half of settlements or awards, and the true beneficiaries are the plaintiff’s attorneys.

For example, a suit seeking class action status asserts a reasonable consumer might be confused by a label on “Fruit Roll-Ups” stating that the product is “made with real fruit.” The list of ingredients includes “pears from concentrate,” which is in fact “fruit,” but the judge refused to dismiss the case, finding that a reasonable consumer might believe the product is made with strawberries, not pears from concentrate. Although a company that deliberately misleads consumers should be called to task, it seems there is no injury or misrepresentation to justify this action.

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

A: The burgeoning area of food litigation has taken center stage. There are at least five class actions throughout the country over whether honey can properly be labeled "honey" if the pollen has been removed. These mislabeling claims involve the Federal Food Drug & Cosmetic Act, so they raise issues of preemption where state labeling requirements conflict with federal law.

Some state laws prohibit the sale of honey as honey if the pollen is removed, while federal law only requires the label to bear the common or usual name of the food. Four out of five courts which considered these labeling requirements have found the federal law preempts state laws that are not "identical" to the federal requirement. Whereas these cases clarify express preemption law, they also establish the FDCA creates no private right of action.

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

A: Fred Fresard with Dykema in Detroit personifies the qualities necessary for an excellent product liability trial lawyer. I have co-counseled with Fred in two complex automobile product liability trials and watched him cross-examine highly credentialed, very experienced accident reconstructionists, mechanical engineers and biomechanical experts. It was essential for Fred to understand the scientific concepts each of these witnesses utilized.

As a cross-examiner, an attorney must be able to challenge an expert in the expert's own field of expertise. It was clear to everyone in the courtroom that because of his extensive study, research and preparation, Fred was not only able to talk the talk but also to walk the walk. His understanding of the issues and his courage to directly confront the experts exposed the weaknesses and vulnerabilities of the expert's opinions.

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

A: When I first started trying cases, I believed that juries were motivated by only the facts and the law, and I concentrated my final argument on those issues. As I became more experienced, I realized that jurors appreciated being reminded of the importance of what they were doing and how their service was an integral part of our country's self-government. I now use the first five or 10 minutes of final argument to talk about justice, our constitutional right to a jury trial and performing their duty to our society and system of justice. *The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

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