CPR PRODUCT LIABILITY COMMITTEE
Minutes of Meeting of January 15, 2008
CPR Institute
New York, New York

The CPR Product Liability Committee met in New York City on Tuesday, January 15, 2008. Chairman Matschullat welcomed the group and set ground rules that no comments will be attributed or repeated, so as to encourage candor and frankness. Those participating introduced themselves and described their practice and their interest in the work of the Committee:

Thomas Aldrich
Erin Gleason Alvarez
Sean Austin
Andrew Byers
James Deaver
Stefanie Fogel
Carrie Frank
James Golden
Richard Golumb
Philip Goldstein
Bud Holman
William Kinnery
Judith Korchin
Joseph J. Krasovec, III
David Martin
Deborah Masucci
Dale Matschullat
Larry McIntyre
Terry Miller
Robert Mongeluzzi
Lori Prokes
Deborah Russell
John Toriello
Don Trevathen
David Wallace
Lisbeth Warren

Also Attending:
F. Peter Phillips

Several themes were mentioned in the course of these introductions. One was that dispute resolution methods should be created that, through agreement and collaboration,

will remove wasted time, cost and distraction. Several participants noted their interest and experience in settlement and mediation processes. Some noted the involvement of insurance counsel in studying the underlying disputes, and their economic interest in seeking an early, and therefore least costly, resolution of claims. Some emphasized the uncertainty and high risk of product liability litigation. Some referred to the challenge of cutting through the traditional adversary system, with its belligerence and posturing, to develop the trust needed to resolve issues. Others have experienced resolving cases too late, resulting in waste to the principals, while professional mediators can get it done sooner. Others distinguished between cases that will settle and those that must be tried. The experiences of those attending included claims arising in auto, pharmaceutical, household goods, asbestos, building collapse, mass claims and other areas.

The group discussed what attributes distinguish claims that must be tried, and those that need not. A defendant often has an interest in defending a particular design, but seldom a manufacturing defect claim. Plaintiffs agreed that manufacturer defect cases are easier to settle, and reported that manufacturers are more willing to settle them. Yet the equation changes if multiple injuries arise from the same claimed defect, and in that instance defendants may have an incentive not to settle. Reasons to settle may also vary as a function of a difficult jurisdiction, whose result might be *res judicata* as to other claims. One manufacturer stated that it treats both claims the same way as far as a claimant is concerned; internally it considers recall in design cases, but not in manufacturing defects. Participants noted that design claims provoke an emotional from manufacturers, whose engineers defend their work. Settlement of fewer than all claims

also might be “blood in the water” and attract similar claims, arising from different facts and in different jurisdictions.

It would be ideal to resolve design allegations in a rational and fair way. Therefore, in light of the committee’s professed agreement that early resolution is good, the question was posed: Why is it not happening more often?

One concern is timing of the process. One participant suggested that, in fact, the number of product liability settlements is increasing. But from the manufacturers report that their transactional costs are increasing, and constitute a grossly disproportionate part of claims paid. Plaintiffs report that engaging in discussions with defendants early often is greeted with a demand for a discount unrelated to the merits. Manufacturers’ logic for this behavior is that early settlement avoids claimant costs and thus reduce the demand asserted at a later date. Plaintiffs agree with that analysis, but note that manufacturers “fall in love with their product” and resist conceding any flaw. Also, in the absence of a pending jury trial, there is often little sense of urgency and defendants can have incentives to postpone dealing with the issue until necessary.

Inconsistent economic incentives work to protract the process. On the plaintiff side, in a contingency relationship every hour spent reduces return; on the defense side, hours spent are profitable to outside counsel. These factors combine to create economic obstacles to rational outcomes. Even if logic suggests that resolving a claim prior to filing a formal lawsuit is more profitable than resolving it two years after filing, that is not in fact the experience of many plaintiffs counsel. Indeed, for defense bar, knowing the plaintiff’s lawyer and the pending jurisdiction is often more influential to decision making than economic rationales.

It may be necessary to change the very paradigm of assignment of risk and creation of liability. Reasonable claims based on actual economic loss should provoke reasonable settlements based on compensation, rather than the assignment of legal fault. Both sides related anecdotes in which outside counsel have made efficient and rational compensatory settlements more difficult than their respective clients would have wished. It was also noted that many settled cases require confidentiality and other terms designed to impede an overall resolution of a flawed product. And, again, many manufacturers may actually believe that the product is not flawed. All of these considerations combine to make settlement discussions unlikely in the early stages of a case.

How does one manipulate events so as to have the "magic moment" arise early on? Too often each side believes its own press releases, and therefore neutral information that is inconsistent with internal assumptions needs to be presented. An early evaluation based on shared facts allows an understanding of weaknesses and an authoritative assessment of business exposure. The early exchange of information would also assist the parties to evaluate their legal claims and defenses. Several members of the committee lamented that at present there is a lot of "hide the ball," posturing and gamesmanship. As a result, while most claims will settle, most will settle too late.

Ironically, this is a field in which fact discovery ought not to be difficult. Plaintiffs know their case well prior to filing it, and discovery from the manufacturer is often not critical. Manufacturers also know their product well. What is standing in the way to resolution is the mind-set that "top dollar" will be paid at the courthouse steps. The challenge is to create a no-fault environment to exchange the needed information and discuss a resolution.

Can early mediation -- bringing a neutral third party to manage the claim -- change these assumptions of the parties? It may be that one of the parties refuses to engage in settlement until prepared for trial. Experienced counsel with mutual respect can settle earlier and better than recalcitrant ones. A great deal of this process boils down to professional relationships, mutual professional respect. Even mandatory mediation works only if the counsel cooperate.

No single solution will be found, because it is a practice with a broad range of predispositions. Perhaps leadership – making a wave, creating a sense of a train leaving the station – is a distinct component of finding and implementing a "best practice" that would have a real impact.

Mr. Phillips commended the group on the level of discourse and suggested that a report be circulated among the group, and that it reconvene to continue the discussion before focusing on a specific set of recommendations. Participants are encouraged to add their own contributions as they read the report, and to recommend leaders whose participation on the committee would add to its work.

Respectfully Submitted,

F. Peter Phillips
Secretary