



**PRODUCT LIABILITY ADVISORY COUNCIL**

**COMMENT**

**to the**

**ADVISORY COMMITTEE ON CIVIL RULES**

**regarding**

**PROPOSED AMENDMENTS TO RULE  
30(B)(6)**

February 12, 2019

**I. INTRODUCTION**

The Product Liability Advisory Council, Inc. (PLAC) submits this Comment to the Advisory Committee on Civil Rules. PLAC opposes the current proposed amendment to Federal Rule of Civil Procedure 30(b)(6).

PLAC is a non-profit association with roughly eighty corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. A list of PLAC's corporate members is attached as Appendix A. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,075 briefs as amicus curiae in both state and federal courts, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability, regulation, and safety.

PLAC members attended the January 4, 2019 and February 8, 2019 hearings on the proposed amendments to Rule 30(b)(6). PLAC understands that attorneys for both plaintiffs and defendants have opposed the proposed amendment. We believe that a different, more common-sense and effective amendment would resolve the issues raised by the application of this Rule in product liability cases.

## II. COMMENT

Federal Rule of Civil Procedure 30(b)(6) is unique in that it is directed only to organizations. As a result, its treatment of defendants and plaintiffs in product liability litigation is not equal. A corporate defendant must prepare to respond to all questions a plaintiffs' attorney may ask, even if numerous broadly described topics venture well into irrelevant or previously discovered subject matter. If the corporate representative is unable to answer, even when the answer is not known to the corporation, under the current and proposed rules, the corporation and their counsel may be subject to sanctions. Plaintiffs do not face that risk because they will only be asked to respond to information within their own personal knowledge.

This disparate treatment fails to provide equal protection under the law and it is not needed to ensure discovery of unique, relevant facts. Neither is it proportional to the needs of the case. In our experience, under current practice, the plaintiffs' notices are too general to provide necessary guidance as to who to offer and areas of preparation, and they propose a scope well beyond a reasonable examination, making these deposition notices virtually impossible to comply with.

To ameliorate these concerns, PLAC supports the use of limits to guide courts and counsel in planning for, or executing, depositions of organizations. However, the proposed amendment does not accomplish this. For example, the proposed amendment does not include a presumptive limit on the number of topics. A presumptive limit would enable the corporation to focus on the real issues in dispute rather than being burdened with researching topics that are not relevant. A presumptive limit on topics would help ensure they are reasonable in scope and proportional to the needs of the case.

Another common-sense limitation would be a limit on deposition hours. Although Rule 30(d) sets forth a seven-hour limit absent leave of court, when multiple corporate representatives must be named to respond to the number and variety of topics, courts allow multiple seven hour 30(b)(6) depositions. This renders Rule 30(d)'s limit ineffective.

The proposed amendment misses the opportunity to lead to particularized and more reasonable notices, and it creates a new litigation issue – that of the selection of the witness. The proposed amendment would require a mandatory meet and confer between the requesting party and the organization promptly after service of the notice. One of the required topics for discussion in that meeting is the identity of the witness who will serve as the organization's corporate representative.

As numerous other comments have noted, the case law on selection of the witness is strong – the witness speaks for the corporation, and the corporation alone selects the person to testify on its behalf.<sup>1</sup> For purposes of the deposition, the witness is the corporation. Her or his identity is completely irrelevant. The proposed amendment would unearth this area of well-settled law.

In addition, the current and the proposed rules lack a procedure allowing effective objections to these notices. Unlike Rules 33, 34 or 45, current and proposed Rule 30(b)(6) are both silent on

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<sup>1</sup> See, e.g., pp. 3-4, September 12, 2018, "Comment to the Advisory Committee on Civil Rules, Fixing What's Broken: A Call for Straightforward Answers to the Questions that Regularly Confound Rule 30(b)(6) Practice," submitted by the Lawyers for Civil Justice ("LCJ").

any procedure for objecting to the notice or its topics. A much-needed improvement would be an opportunity for receiving organizations to formally and effectively object. The proposed amendment should, but does not, clarify that the filing of a motion for protective order precludes the deposition on contested issues until an order can be obtained. There is inconsistency among the district courts on the effect of filing a motion for protective order prior to the deposition. In some courts, the deposition must proceed even on the contested topics, and on a date unilaterally selected by the noticing party, even if a motion for protective order has been filed. A more effective amendment to the Rule would provide consistency and clarity on this issue – it should clarify that once an objection is made and the parties confer on contested issues, if they are not resolved, the deposition would proceed on uncontested issues, but the contested issues would remain for resolution after the deposition. Or, should the parties prefer resolution prior to the deposition, the filing of the motion would suspend the taking of the deposition until the Court resolves the issues.

Without clarification on this issue, this area of practice will proceed with inconsistent treatment among the eleven districts, and responding organizations have no ability to effectively keep preparation and testimony focused on the genuine issues in the case. Amending the rule to allow the corporation to prepare its witness on agreed upon topics but not contested topics until those are resolved would provide the organization much needed relief. It would avoid burdensome and disproportional work currently done to ensure the organization and witness comply with the rule. It would bring more equitable treatment to organizations in this area of law. And this makes sense - the contested issues would be resolved by the court only when necessary. The practical effect would be that plaintiffs, after proceeding with the undisputed topics, would often realize that resolution of the contested topics is not necessary and the Courts' involvement would be limited.

An effective procedure for resolving contested issues also would ensure reasonable control over the number of hours required of the witness and counsel to comply. Such an amendment would enable a corporation to comply the rule without the need to obtain a protective order prior to the deposition to effectively forbid obviously objectionable questions without the threat of sanctions that now exists.

PLAC appreciates the Committee's efforts to maintain the benefits of Rule 30(b)(6) while tempering its inequities. We ask that the Committee not proceed with the amendment as currently drafted, and that it consider additional, different rule-making to bring a more common-sense approach to this area of practice.

# Appendix A: Corporate Members of the Product Liability Advisory Council

*as of 2/12/2019*

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3M	Great Dane LLC
Altec, Inc.	Hankook Tire America Corp.
Altria Client Services LLC	Harley-Davidson Motor Company
American Suzuki Motor Corporation	The Home Depot
Aptiv Plc	Honda North America, Inc.
Bayer Corporation	Hyundai Motor America
Becton Dickinson	Illinois Tool Works Inc.
BIC Corporation	Isuzu North America Corporation
Biro Manufacturing Company, Inc.	Jaguar Land Rover North America, LLC
BMW of North America, LLC	James Hardie Building Products Inc.
The Boeing Company	Johnson & Johnson
Bombardier Recreational Products, Inc.	Kawasaki Motors Corp., U.S.A.
Bridgestone Americas, Inc.	Kia Motors America, Inc.
Bristol-Myers Squibb Company	Kubota Tractor Corporation
Caterpillar Inc.	Magna International Inc.
CC Industries, Inc.	Mazak Corporation
Celgene Corporation	Mazda Motor of America, Inc.
Chevron Corporation	Medtronic, Inc.
Continental AG	Merck & Co., Inc.
Cooper Tire & Rubber Company	Meritor WABCO
Crown Equipment Corporation	Michelin North America, Inc.
Daimler Trucks North America LLC	Microsoft Corporation
Deere & Company	Mitsubishi Motors North America, Inc.
DISH Network L.L.C.	Mueller Water Products
The Dow Chemical Company	Newell Brands Inc.
Easton-Bell Sports	Novartis Pharmaceuticals Corporation
Emerson Electric Co.	Novo Nordisk, Inc.
Facebook	Pfizer Inc.
Ford Motor Company	Polaris Industries, Inc.
Fresenius Kabi USA, LLC	Porsche Cars North America, Inc.
General Motors LLC	RJ Reynolds Tobacco Company
GlaxoSmithKline	Robert Bosch LLC
Glock, Inc	The Sherwin-Williams Company
The Goodyear Tire & Rubber Company	Stihl, Inc.

# **Appendix A: Corporate Members of the Product Liability Advisory Council**

*as of 2/12/2019*

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Subaru of America, Inc.

TAMKO Building Products, Inc.

Teleflex Incorporated

Textron Inc.

Toyota Motor Sales, USA, Inc.

Tristar Innovative Products, Inc.

The Viking Corporation

Volkswagen Group of America, Inc.

Volvo Cars of North America, Inc.

Wal-Mart Stores, Inc.

Waymo (Google)

Whirlpool Corporation

Yamaha Motor Corporation, U.S.A.

Yokohama Tire Corporation

ZF TRW