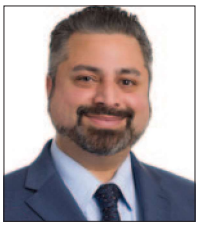
# Avoiding a Plan for Failure

## Lessons From Recent Products Liability E-discovery Decisions



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To be sure, the scope of issues, obstacles, and risks associated with electronic discovery in the products liability context can be daunting. Moreover, like technology's effect on our day-to-day lives, how New Jersey courts deal with ESI issues in products cases is evolving in real time as well. Several New Jersey courts have issued decisions in the past year that provide guidance regarding the handling of such issues in products cases.

**By Jonathan Donath**

In many ways, discovery in a products liability case presents a host of challenges that differentiate this type of litigation from many others. This notion is only amplified in the evolving context of electronic discovery. Products liability litigation often involves large-scale consolidation, such as multi-district litigation (MDL) on the federal level, and multi-county litigation in the Superior Court of New Jersey. The sheer breadth of discovery in litigation involving thousands of plaintiffs presents its own unique challenges, including how to best evaluate, manage and produce electronically stored information (ESI).

The volume of documentation and information that may be sought in discovery implicates a host of issues. Such cases can involve hundreds of thousands of emails and communications, historical documents, internal documents, and many other

types of ESI. Likewise, such cases involve documents relating to the development of the product, regulatory documents, governmental applications, and ESI that may implicate trade secrets and other issues of confidentiality. Defendants in product liability litigation are often institutional entities that have either corporate relationships with or outright locations in other countries or the product at issue may be distributed internationally, thus potentially implicating international issues as well.

To be sure, the scope of issues, obstacles, and risks associated with electronic discovery in the products liability context can be daunting. Moreover, like technology's effect on our day-to-day lives, how New Jersey courts deal with ESI issues in products cases is evolving in real time as well. Several New Jersey courts have issued decisions in the past year that provide guidance regarding the handling of such issues in products cases.

### Breadth of Information

The sheer breadth of material possibly subject to discovery in products litigation demands creativity and forethought in structuring how to preserve, collect, search, review, designate and produce such massive amounts of information. By way of example, just this past July, the Honorable Joel Schneider, acting as Special Master, was tasked with reviewing documents for confidentiality in the *Johnson & Johnson* talc MDL.[1] Judge Schneider reviewed emails by and between counsel, email attachments, patent communications, public relations documents, and several other categories of documents.[2] This case further illustrates the endless classifications of ESI that must be sifted through when responding to discovery in products liability litigation.

Indeed, an institutional defendant in a products liability action may be requested to produce millions of pages of documents. The task of identifying and producing this information becomes even more laborious when one considers that the subset of documents and information produced, voluminous as it may be, will likely be only a small percentage of the documents and information available from the company defendant overall. This means that processes must be in place to handle the scope of review, identification, and selection required to appropriately respond to discovery requests in such litigation.

Products attorneys have turned more and more to technology as a means to address these issues. One such method is technology-assisted review (TAR), which has been defined as "[a] process for prioritizing or coding a collection of documents using a computerized system that harnesses human judgments of one or more subject matter expert(s) on a smaller set of documents and then extrapolates those judgments to the remaining document collection."[3] The purpose of employing TAR is to permit counsel to review a large volume of documents and information while, hopefully, minimizing (as much as possible) the cost to the parties. The use of TAR has become so commonplace in products litigation that provisions for TAR are now routinely found in ESI protocols entered on dockets nationwide. Reference to another much-discussed matter presided over by Judge Schneider, this time serving as Magistrate Judge in the *In re Valsartan, Losartan, & Irbesartan* MDL, illustrates how TAR can be used in such litigation, as well as some of the potential risks involved.

The relevant dispute in that matter centered on a defendant's use of "a continuous multi-modal learning (CMML)" in connection with its review.[4] The defendant described CMML as a "machine-learning technology that enables a computer to prioritize relevant documents based on limited human input."[5] Essentially, the defendant intended to use CMML to identify documents for review and, potentially, to identify groups of documents that, if identified by the CMML as "unlikely" to be responsive, would not be reviewed.[6] Plaintiffs objected on the basis that manual search terms had already been agreed upon and because plaintiffs had not been afforded the opportunity to weigh in on the layered review approach which, they contended, ran counter to the ESI protocol already in place.[7] Conversely, the defendant attempted to focus the court on the effectiveness of its methodology as opposed to its procedural compliance with the protocol.[8] Additionally, the defendant argued that forcing it to conduct a manual review at that point would be tremendously inefficient.[9]

The court agreed with the plaintiffs and determined that defendant failed to comply with the protocol.[10] The court largely disregarded the question of whether the defendant's methodology was effective.[11] Instead, the court chiefly focused on its view that the defendant had not fully complied with the meet and confer requirements in the protocol as to the review methodology.[12] As a result, the court attempted to fashion an equitable resolution that involved defendant conducting a TAR review of the potentially non-responsive documents (as opposed to a manual review) but foreclosed the defendant from utilizing the CMML platform as proposed by defendant.[13]

The obvious takeaway is that if a party seeks to utilize a layered approach to its review, the party should confirm that its approach is memorialized ahead of time in the protocol or other agreement with its adversary. More broadly, Magistrate Schneider's decision in *Valsartan* confirms that planning and working with your adversary are paramount. As noted by the court, "[e]lectronic discovery requires cooperation between

opposing counsel and transparency in all aspects of preservation and production of ESI…Technology-assisted review requires, an unprecedented degree of transparency and cooperation among counsel in the review and production of electronically stored information responsive to discovery requests."[14]

### Confidentiality and Privilege

In addition to responsiveness and relevance, another focus of ESI review in products liability cases is confidentiality. While disputes regarding confidentiality of ESI are certainly not unique to products liability litigation, the context of products cases can affect the scope of such disputes. For example, electronic communications between a range of personnel from multiple departments of an institutional entity about a product can implicate a variety of privilege issues once discovery commences in litigation surrounding that product. Indeed, the sheer breadth of documents and information in some products cases only compounds the potential confidentiality issues involved as compared to other cases, sometimes exponentially.

In the *Johnson & Johnson* MDL, plaintiffs challenged J&J's confidentiality designations as to approximately 1,300 documents.[15] In presiding over that dispute, the court reviewed a number of documents, many of them electronic communications to, from, or copied to inside or outside counsel. The court made it plain that such a confidentiality analysis cannot be limited to which personnel were copied on the communication or even the superficial nature of the communication itself. For example, simply because an electronic communication was copied to an attorney does not render the document privileged. On the other hand, simply because a communication is not copied to an attorney does not render it discoverable. Likewise, just because a document might be sent to or from an outside consultant does not automatically render the document discoverable. As noted by the court, "there is no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice."[16] In the present day, when legal advice is often interwoven with discussions of business issues, a court faced with such discovery disputes must analyze such electronic communications to determine whether the predominant reason for the communication was to seek or provide legal advice.[17] Likewise, the court will separately analyze both the email and any attachments, as "[m]erely attaching something to a privileged document will not, by itself, make the attachment privileged."[18]

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The lesson is that planning for confidentiality disputes in products liability litigation starts well before litigation is initiated. Company employees should be trained, with counsel involvement, on what types of communications may end up being privileged. Likewise, counsel should routinely be involved in higher-level communications in the event litigation becomes reasonably anticipated.

The onset of litigation presents a whole new set of issues. One of the most important for clients is the confidentiality designation. There is an inherent push and pull relationship when making these decisions. Attorneys must weigh the danger and harm to their clients should certain documents and information be disclosed in discovery without protection. Clients can suffer real commercial harm in a variety of ways if information that might otherwise be kept confidential as a trade secret is disclosed. On the other hand, over-designation of materials as confidential can result in litigation penalties and increased costs.

Earlier this year, again in the context of the *Valsartan* MDL, Judge Schneider reviewed several sets of ESI (mostly emails) that were designated as "confidential" by a defendant. As a preliminary matter, the court found that the defendant had failed to satisfy the process for confidentiality designation outlined in the protocol.[19] Specifically, although the defendant complied with the protocol's requirements to state the

bases for any objections to production and to meet and confer with plaintiffs thereafter, the court found the defendant failed to satisfy the protocol's requirement that the objecting party bring any such dispute regarding the designations to the court's attention.[20] As a result, the court found that the confidentiality designations were waived.[21] Moving forward, parties must be careful to adhere to procedural requirements of any agreed-upon or court-entered ESI protocol, especially as relates to confidentiality designations. If a party fails to do so, a procedural violation can result in very significant consequences, such as an outright waiver of the designation.

The court went on to review the documents from a substantive perspective as well. As is often the case, the defendant supported its confidentiality designations with client affidavits. However, the court was careful to note that it "…is not required to give credence to (defendant)'s conclusory self-serving affidavit that is inconsistent with the Court's independent review of (defendant)'s documents."[22] In other words, when designating ESI as "confidential," counsel should be able to support such designations with proofs beyond client affidavits and certifications alone. Instead, additional proofs showing that the communication/document in question contains, for example, "proprietary, trade secret and/or highly confidential information," and that the party would be "significantly harmed" by the release of the communications will very likely be required to uphold the designations.[23] In this matter, the court concluded that the communications at issue were "routine business communications" and were, therefore, discoverable without being designated as "confidential."[24]

## International Issues

Products liability litigation can involve institutional clients that do business overseas or have a parent or subsidiaries that are incorporated and/or have their principal place of business in foreign nations. This implicates a variety of issues relating to ESI. ESI sought in discovery might be housed in foreign nations. The product at issue may have been developed overseas, implicating foreign regulatory processes (and, by extension, discovery of the materials related to those regulatory processes). Likewise, when a United States court faces a discovery dispute in a products liability matter in which the material sought was created by or is owned or housed by a foreign entity, the dispute may implicate international laws.

Product liability claims are often borne out of product recalls, voluntary or otherwise. If the product at issue was distributed overseas, documents related to a foreign recall may be requested in discovery in a case venued in New Jersey. For example, in *Valsartan*, one aspect of the ESI dispute was over a series of emails relating to a recall in Finland.[25] Specifically, a customer instituted a recall of Valsartan in Finland.[26] While the defendant claimed that these emails should be shielded from discovery as trade secrets, the court ultimately concluded that these were "routine business communications" and should be produced.[27]

Recently, the District Court for the District of New Jersey was faced with a different issue: how to evaluate a claim that ESI should not be produced based on the laws of a foreign nation. In *In re Valsartan,* a defendant sought to withhold a selection of documents, including electronic communications, based on its contention that disclosure would violate the laws of the People's Republic of China.[28] In his Aug. 12, 2021, decision, the Honorable Thomas I. Vanaskie, (Ret.) serving as Special Master noted that, customarily, a party seeking to rely on foreign law to prevent production of discoverable information "has the burden of showing such law bars production" and put the defendant to its proofs.[29]

Judge Vanaskie noted the following factors that are to be considered in the analysis: (1) the importance of the documents requested; (2) the specificity of the request; (3) whether the information originated in the United States; (4) alternative means of securing the information; (5) the extent to which noncompliance/noncompliance would undermine important interests of the United States or the foreign state; (6) hardship that enforcement would impose upon the foreign entity; and (7) the good faith of the party opposing discovery.[30] Ultimately, after reviewing the electronic communications and other documents at issue through this lens, the court ordered production of all of the documents at issue, except three, which were created by a Chinese governmental agency.[31] In ordering production of some, but not all of the documents in dispute, the court noted that the defendant demonstrated good faith throughout the discovery process and had only sought to redact or withhold a very small percentage of documents as compared to the several hundred thousand it produced.[32] If nothing else, this suggests that it is advisable to proceed judiciously in seeking to redact or withhold documents in discovery, as doing so may establish some credibility with the court.

## Conclusion

These are only a few of the myriad of electronic discovery issues that have been reviewed in recent New Jersey products cases. New Jersey counsel in products liability actions must be cognizant of the dangers inherent in navigating the sea of electronic discovery. The lesson New Jersey practitioners can learn from these decisions is that the earlier the preparation begins for electronic discovery, the better. Before litigation is even anticipated, counsel should be involved in training company employees early and often regarding their use of electronically stored infor-

mation and electronic communications. Once litigation is anticipated, counsel should begin weighing decisions related to confidentiality, as well as the best means for reviewing potentially hundreds of thousands (in some cases, millions) of documents and other ESI in terms of both cost and substance. Once litigation commences, counsel must take great care in crafting and agreeing to an ESI protocol that they and their clients can live with on multiple levels. Once the protocol is agreed to and/or entered by the court, counsel must follow the protocol as even a procedural misstep can have substantive impact in the litigation and on their clients. Finally, the extent to which ESI (or the custodian of such ESI) is located in a foreign nation or implicates foreign laws should be considered. Many New Jersey attorneys have long been taking these issues into account earlier and earlier. Nevertheless, the overarching lesson to be gleaned from these cases is that it is never too early to consider such issues in products litigation. ⚖

**Endnotes**

1. *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices, & Prods. Liab. Litig.,* No. 2738 (FLW) (LHG), 2021 U.S. Dist. LEXIS 138589 (D.N.J. July 26, 2021).
2. *Ibid.*
3. Maura R. Grossman and Gordon V. Cormack, *"The Grossman-Cormack Glossary of Technology Assisted Review,"* 7 Fed. Courts L. Rev. 1 (2013); https://www.americanbar.org/groups/litigation/committees/professional-liability/practice/2020/ethical-obligations-in-technology-assisted-review/
4. *In re Valsartan*, 337 F.R.D.610, 614 (D.N.J. 2020).
5. *Id.*
6. *Ibid.*
7. *Id.* at 616-617.
8. *Id.*
9. *Id.*
10. *Id.* at 617-618.
11. *Id.* at 620.
12. *Id* .at 621.
13. *Id.* at 624-625.
14. *Id.* at 618, 612.
15. *In re Johnson & Johnson* 2021 U.S. Dist. LEXIS 138589 at *1160.
16. *In re Johnson & Johnson*, 2021 U.S. Dist. LEXIS 138589, at *1160-61; *quoting In re Copper Market Antitrust Litig.,* 200 F.R.D. 213, 219 (S.D.N.Y. 2001).
17. *In re Johnson & Johnson,* U.S. Dist. LEXIS 138589 at *1145, 1150.
18. *Id.* at *1163; *quoting Leonen v. Johns-Manville,* 135 F.R.D. 94, 98, 99 (D.N.J. 1990).
19. *In re Valsartan N-Nitrosodimethylamine (NDMA),* 512 F. Supp. 3d 546, 553 (D.N.J. 2021).
20. *Id.* at 551-552.
21. *Id.* at 552.
22. *Id.* at 553-554.
23. *Id.* at 554.
24. *Id.*
25. *Id.* at 553.
26. *Id.*
27. *Id.* at 554.
28. *In re Valsartan,* No. MDL No. 19-2875(RBK/KW), 2021 U.S. Dist. LEXIS 159783, at *114 (D.N.J. Aug. 12, 2021).
29. *Id.; quoting Schindler Elevator Corp. v. Otis Elevator Co.,* 657 F. Supp. 2d 525, 532 (D.N.J. 2009) (*quoting United States v. Vetco, Inc.,* 691 F.2d 1281, 1288 (9th Cir.)).
30. *In re Valsartan,* 2021 U.S. Dist. LEXIS 159783, at 123-124; *citing Richmark Corp. v. Timber Falling Consultants,* 959 F.2d 1468, 1475 (9th Cir. 1992).
31. *In re Valsartan,* 2021 U.S. Dist. LEXIS 159783 at 130-131.
32. *Id.*