Strategies for Successful Defense

The Idiosyncratic or Unusually Susceptible Plaintiff

By Krista Fowler Acuña

A well-positioned dispositive motion or other offense-oriented approach can more often than not achieve your client's desired resolution in a fast and cost-efficient manner.

Media coverage and consumer access to information about medical reactions to a variety of consumer, medical, and workplace products is now widespread and nonstop thanks to the advent of 24/7 streaming Internet and satellite television. As technological advances allow the design, manufacture, and sale of a greater variety of drugs, chemicals, cosmetics, and general personal care products, inevitably manufacturers and retailers will at some point in time face a claim that a product had a defect that caused a contact or exposure injury to a consumer. How can a manufacturer or a retailer most effectively defend against such a claim when the consumer initiating it appears to have experienced an idiosyncratic reaction or appears to have unusual susceptibility to the product associated with the claim?

The "idiosyncratic plaintiff" can appear in a wide variety of cases including cosmetic and personal care products, household cleaners, over-the-counter medications, prescription drugs, medical devices, and toxic torts. He or she can claim a wide variety of ailments, including allergic reactions, chemical or caustic reactions, or other reactive medical conditions. Notably, the rule of the "idiosyncratic plaintiff" is the antithesis of the rule of the "eggshell skull plaintiff" that we learned during our early law school education on torts, and we can regard the "idiosyncratic plaintiff" as an exception to the "eggshell skull plaintiff" norm in certain types of product liability cases. Whereas we understand and apply in nearly all tort cases the concept that we take a plaintiff as we find him or her, the "eggshell skull plaintiff" that is, we do not take the "idiosyncratic plaintiff" as we find him or her, as long as we develop the appropriate record facts.

A defense attorney can adapt the issues and strategies discussed in this article to any type of product liability case described here. As discussed in this article, these cases are ripe for summary disposition in favor of a manufacturer or a seller, whether by a motion for a judgment on the pleadings, a motion for a summary judgment, a motion for nonsuit, or a motion for a directed verdict.

This article will explain the "idiosyncratic plaintiff," key legal and factual defenses when confronted with an idiosyncratic plaintiff in a product case, ways to position a case for summary disposition and early settlement, and a framework that you can adapt to the nuances of a particular case to guide early investigation, evalu-

■ Krista Fowler Acuña is a member partner of Houck Anderson, PA, based in Miami, Florida. She defends and counsels consumer and recreational product manufacturers and retailers and construction companies in all aspects of products and general liability matters. She is a member of the DRI Product Liability, Trial Tactics, and Women in the Law Committees.

ation, and a discovery plan that would span 90 to 120 days to gather evidence to position a case for summary disposition, settlement, or, if necessary, a trial.

Evolution of the Idiosyncratic Plaintiff Defense—Restatement of Torts

Although sometimes referred to differently, for instance as the "idiosyncratic reaction" defense, the "idiosyncratic plaintiff" defense originates in comment j to the Restatement (Second) of Torts §402A. Comment j states:

> Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger.

Inversely, comment j dictates that if a consumer experiences an allergic reaction to an ingredient in a product that a substantial portion of the population does *not* experience, or if a manufacturer does *not* generally know of the danger of a potential allergic reaction, nor could the manufacturer know of it by applying reasonable, developed human skill and foresight, a court will *not* deem a product unreasonably dangerous and defective and the manufacturer will not be held liable under any theory of negligence, strict liability, or failure to warn.

The *Restatement (Third) of Torts* maintains the "idiosyncratic plaintiff" defense in comment k to section 2. That section recognizes the inevitability that "virtually any tangible product can contain an ingredient to which some persons may be allergic.…" Thus,

> The general rules in cases involving allergic reactions is that a warning is required when the harm causing ingredient is one to which a substantial number of persons are allergic. The degree of substantiality is not precisely quantifiable. Clearly the plaintiff in most cases must show that the allergic predisposition is *not unique* to the plaintiff. In determining whether the plaintiff has carried the burden in this regard, however, the court may properly consider the severity of the plaintiff's harm. The more severe the harm, the more justified is the conclusion that the number of persons at risk need not be large to be considered "substantial" so as to require a warning.

Due to the substantial similarities between comment j and comment k, you may rely on the case law discussed here in all jurisdictions whether or not a jurisdiction has adopted the *Restatement (Third) of Torts*. More importantly, although both comments specifically mention *allergic* reactions, courts have interpreted and applied them more broadly in multiple jurisdictions to cases involving a wide range of physical reactions to products (caustic, allergic, and otherwise), *and* to legal theories beyond failure-to-warn, and implicitly, the rationale of comments j and k is that a product is not considered defective, as only defective products require warnings. Thus, a practitioner should not feel limited to using this defense only in allergic reaction, failure-to-warn cases. Thus, the rule generally is that a manufacturer cannot be held liable under any defect claim, whether couched in negligence, strict liability, or warranty, if an injury resulted solely from a unique plaintiff's idiosyncratic reaction or unusual susceptibility that a substantial portion of the population does not share.

Key Legal and Factual Defenses

The two defenses that you will want to apply when confronted with an idiosyncratic plaintiff are the "lack of causation" and the "no defect as a matter of law" defenses.

Lack of Causation

The threshold issue that a practitioner should explore in a product liability action alleging a contact or exposure-related injury is whether the product caused the alleged injury. Defense attorneys often overlook causation issues, but typically they become the first layer of a successful defense in a product liability case. The "idiosyncratic plaintiff" defense set forth in the *Restatement of Torts* presumes that a product caused the user's injury and is a pure legal defense. Although a product caused the alleged injury, as matter of law the manufacturer or seller cannot be held liable. But a defense practitioner should not make such a presumption and leapfrog to the pure legal defense. Not only would that overlook another available defense, but strategically a court may have more inclination to summarily dispose of a case because you argue that a product could not possibly have caused the injury, and the plaintiff has not proven otherwise, thus failing to demonstrate causation, rather than solely because you offer a legal defense of unusual susceptibility, under which the product caused the harm but the law does not regard the product as defective. Two defenses are often better than one, and offering a factual defense in addition to a legal defense is often better as well.

The rule generally is that a manufacturer cannot be held liable… if an injury resulted solely from a unique plaintiff's idiosyncratic reaction or unusual susceptibility that a substantial portion of the population does not share.

Because the scope and nature of undisputed evidence to support an "idiosyncratic plaintiff" defense will depend on the case, sometimes sufficient disputed material facts will not permit a court to resolve a case summarily, and the court will submit it to a jury, which, in turn, creates heightened risks. However, attacking both the general and the specific causation issues particular to a plaintiff's alleged injury draws into question the sufficiency of a plaintiff's evidence and a plaintiff's ability to establish a prima facie case and, in this practitioner's experience, increases the likelihood that a court will grant a summary disposition. Therefore, it is vitally

important that you investigate general and specific causation and develop appropriate responses to a plaintiff's theories in the early stages of a case so that you can assert them as the primary basis for a summary disposition, if appropriate.

It often turns out that a plaintiff has only alleged exposure to or use of a product. Exposure, the opportunity for causation, does not equal causation, the factual and legal cause of a plaintiff's injury. Depending on the specifics of a particular case, a case may offer both a general causation defense and a specific causation defense. Some recent court decisions have served as reminders about the frequent confusion about the critical distinction between general and specific causation. *See Myers v. Illinois Central Railroad Co.*, 629 F.3d 639 (7th Cir. 2010); *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665 (6th Cir. 2010); *Certainteed Corp. v. Nell*, 330 S.W.3d 64 (Ky. 2010). Pleadings that allege a general exposure to a product, or that allege use or application of a product, followed by alleged adverse reactions and medical conditions, should raise red flags to investigate further and separately the issues of general and specific causation to find out whether the sequence of events could have happened as alleged and whether the specific exposure or contact alleged by a plaintiff did, in fact, cause his or her condition.

Defense attorneys often overlook causation issues, but typically they become the first layer of a successful defense in a product liability case.

General causation focuses on whether a substance is capable of causing a particular disease or injury, while specific causation focuses on whether the substance did in fact cause the disease or injury in a specific individual. The federal courts generally have held that a plaintiff must prove both general causation and specific causation in toxic tort exposure cases. This same requirement has been applied by courts in product liability actions involving cosmetics and pharmaceuticals. *See Kilpatrick v. Breg, Inc.*, 613 F.3d 1329 (11th Cir. 2010) (applying Florida law in a product liability action alleging that a surgical patient suffered glenohumeral chrondrolysis in right shoulder joint due to use of pain pump); *Hood v. Matrixx Initiatives, Inc.*, 50 So. 3d 1166, n. 4 (Fla. Dist. Ct. App. 2011) (alleging an exposure-related injury due to an ingredient in Zicam nasal spray); *Vanderwerf v. SmithKline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010) (applying Kansas law in a product liability action alleging increased risk of suicide in patients taking the antidepressant Paxil); *Wells v. SmithKline Beecham Corp.*, 601 F.3d 375 (5th Cir. 2010) (applying Texas law in a product liability action for a $10 million gambling loss while taking a specific dopamine agonist to alleviate symptoms of Parkinson's disease); *Perry v. Novartis Pharmaceuticals Corp.*, 564 F. Supp. 2d 452 (E.D. Pa. 2008) (interpreting general causation as a necessary element of any finding of specific causation in a product liability action alleging prescription-cream treatment for atopic dermatitis caused lymphoblastic lymphoma).

In the cases cited above, a challenge to general or specific causation typically involved a *Daubert* challenge to the admissibility of the plaintiff's medical expert's opinion. Common grounds for a *Daubert* challenge to general or specific causation include the availability and reliance on scientific data and literature and appropriate use of differential diagnosis. This article is not intended to address strategically using *Daubert* motions specifically, but it may help you to develop expert discovery and prepare to cross-examine a plaintiff's expert or experts. A detailed and useful review of such *Daubert* issues can be found in Scott J. Wilkov, *Exposure Does Not Equal Causation: Defeating Claims That a Given Product Contributed to a Plaintiff's Injury*, The Voice, Jan, 12, 2011.

No Defect as a Matter of Law

Even if a court finds that a plaintiff has presented prime facie evidence of general and specific causation and that disputed material facts exist to present to a jury, a defense practitioner can, in the alternative, also assert the "idiosyncratic plaintiff" defense—that as a matter of law a manufacturer or retailer cannot be held liable under any theory of product liability when a plaintiff's alleged injury is a result of an idiosyncratic reaction that a substantial portion of the population does not experience. This rule has been followed by state courts in Alabama, California, Florida, Illinois, Iowa, New York, North Carolina, Kansas, Louisiana, Pennsylvania, Rhode Island, and Utah, and by federal courts including the Third Circuit (applying Wisconsin law), the Fifth Circuit (applying Texas law), Tenth Circuit (applying Oklahoma law), and Eleventh Circuit (applying Alabama law).

Historically, the two most cited cases on this issue are *Bennett v. Pilot Products Co., Inc.*, 235 P.2d 525 (Utah 1951), and *Griggs v. Combe, Inc.*, 456 So. 2d 790 (Ala. 1984). In *Bennett*, the Utah Supreme Court affirmed the trial court's order granting the defendant's motion for nonsuit in a beautician's negligence action. There, the plaintiff alleged that a hair cold wave solution contained ammonium thioglycolate, which caused blisters and inflammation, diagnosed as dermatitis. In affirming the trial court order, the Utah Supreme Court stated that it

> cannot require the merchant to assume the role of absolute insurer against physiological idiosyncrasy. To do so also would invest the elusive ordinary prudent man with a quality of foreseeability that would take him out of character completely. Every substance, including food which is daily consumed by the public, occasionally becomes anathema to him peculiarly allergic to it. To require insurability against such an unforeseeable happenstance would weaken the structure of common sense, as well as present an unreasonable burden on the channels of trade.

Id. at 527–28.

Griggs v. Combe, Inc., 456 So. 2d 790 (Ala. 1984), discusses at length the various facts that support the rule of most jurisdictions, as annunciated in *Bennett*. *Griggs* involved the plaintiff's illness after using Vagisil, an over-the-counter topical analgesic. Her physician opined that the illness

was caused by an allergic reaction to benzocaine, the product's active ingredient. The plaintiff sued, asserting negligence, failure to warn, breach of warranty, and strict liability. The Eleventh Circuit certified to the Supreme Court of Alabama the following question:

> Does Alabama law impose liability *under any theory*—negligence, strict product liability, breach of implied warranty of merchantability, or duty to warn—on the manufacturer of an over-the-counter drug for injuries resulting from an uncommon allergic reaction of a hypersensitive user when the manufacturer was not aware nor, with the exercise of reasonable diligence, could have been aware that its product might cause such a reaction?

The certified facts revealed that Griggs, the plaintiff, suffered a systemic illness known as Stevens-Johnson syndrome after using Vagisil and having an allergic reaction to one of its ingredients, benzocaine. Other certified facts were "that benzocaine was not a "known allergen," and it had "been an effective external analgesic throughout the century." Neither the plaintiff's nor the defendant's experts knew of any literature that linked benzocaine to systemic reactions. The defendant had not received other complaints suggesting a causal link between Vagisil or benzocaine and systemic disorders. Relying on comment j to §402A of the Restatement (Second) of Torts, after which Alabama's statute was modeled, the Alabama court held that because the manufacturer "could not have known 'by the application of reasonable, developed human skill and foresight'" that its product could cause the type of injury suffered by the plaintiff, the court could not consider the product "defective" or "unreasonably dangerous." *Id.* at 792 (citation omitted).

This "idiosyncratic plaintiff" rule has most recently been applied in *Mather v. L'Oreal USA, Inc.*, 695 S.E. 2d 693 (Ga. Ct. App. 2010), in which the plaintiff alleged that using L'Oreal's self-tanning lotion caused pus-filled abscesses. The undisputed facts were that the plaintiff used the lotion twice a day for three days without reaction; L'Oreal did not know that the product could cause such a reaction because it did not receive similar complaints during testing, and the active ingredient in the lotion, hydroxyacentone, was commonly used and generally accepted in dermatology as safe for use by most people. The Georgia court affirmed the summary judgment in favor of the manufacturer, L'Oreal, relying exclusively on comment j to the Restatement (Second) of Torts §402A.

Other jurisdictions have considered similar issues and reached the same result in the following cases:

- *Gilks v. Olay Co., Inc.*, 30 F. Supp. 2d 438 (S.D.N.Y. 1998) (in the Second Circuit).
- *Helene Curtis Indus., Inc. v. Pruitt*, 385 F.2d 841, 851 (5th Cir. 1967) (applying Texas law).
- *Tremblay v. Jewel Companies, Inc.*, 859 F.2d 517 (7th Cir. 1988) (applying Wisconsin law).
- *Tayar v. Roux Laboratories, Inc.*, 460 F.2d 494 (10th Cir. 1972) (applying Oklahoma law); *Merrill v. Beaute Vues Corp.*, 235 F.2d 893 (10th Cir. 1956) (also applying Oklahoma law).
- *Oakes v. E.I. Du Pont de Nemours & Co.*, 272 Cal. App. 2d 645, 651 (Cal. Ct. App. 1969).
- *Presbrey v. Gillette Co.*, 105 Ill. App. 3d 1082 (Ill. App. Ct. 1982).
- *Bonowski v. Revlon, Inc.*, 251 Iowa 141 (Iowa 1959).
- *Kaempfe v. Lehn & Fink Products Corp.*, 21 A.D. 2d 197 (N.Y. App. Div. 1964); *Beckford v. Pantresse, Inc.*, 51 A.D. 3d 958, 858 N.Y.S.2d 794 (N.Y. App. Div. 2008).
- *Hanrahan v. Walgreen Co., Inc.*, 243 N.C. 268 (N.C. 1955).
- *Robbins v. Alberto-Culver Co.*, 210 Kan. 147 (Kan. 1972)
- *Thomas v. Gillette Co.*, 230 So. 2d 870, 873 (La. Ct. App. 1970); *Booker v. Revlon Realistic Professional Prods., Inc.*, 433 So. 2d 407, 410 (La. Ct. App. 1983); *Blalock v. Westwood Pharmaceuticals, Inc.*, 1990 U.S. Dist. LEXIS 974 (E.D. La. 1990); *Rhodes v. Max Factor, Inc.*, 264 So. 2d 263, 267 (La. Ct. App. Cir. 1972).
- *Morris v. Pathmark Corp.*, 405 Pa. Super. 274 (Pa. Super. Ct. 1991).
- *Thomas v. Amway Corp.*, 488 A.2d 716, 722 (R.I. 1985).

Practitioner's Guide to Gathering Necessary Supporting Evidence

Summary disposition of "idiosyncratic plaintiff" cases typically necessitates record evidence from three sources: (1) your client; (2) the defense medical experts; and (3) the plaintiff. What follows is an outline of facts and information that you should investigate and consider in such cases. This guide is derived from a combination of facts weighed by various courts in the jurisdictions listed in this article that apply the majority rule discussed in *Bennett v. Pilot Products Co., Inc.*, 235 P.2d 525 (Utah 1951), *Griggs v. Combe, Inc.*, 456 So. 2d 790 (Ala. 1984), and most recently, *Mather v. L'Oreal USA, Inc.*, 695 S.E. 2d 693 (Ga. Ct. App. May 21, 2010).

The totality of cases cited throughout this article applying this rule reveals that courts rely heavily on a very discrete set of factors in an "idiosyncratic plaintiff" case: (1) whether the product or ingredient that allegedly harmed a plaintiff was known as triggering sensitivities or as a primary irritant, (2) whether medical or scientific literature existing when a product was manufactured linked an ingredient to an adverse reaction, (3) what has been the ratio of consumer complaints to the total units sold, and (4) whether a plaintiff has presented evidence establishing himself or herself as belonging to a substantial number of the population who experience a reaction.

Obviously, a client and the defense medical experts will supply most of this key evidence. Therefore, you will want to gather the documentation and information listed below from a client as soon as possible. Involving medical defense experts and providing manufacturing data to them early is also advisable. Fully analyzing data from a client and from medical defense experts will assist you in conducting a plaintiff's deposition and in requesting written discovery, as well as in responding to requests for it. If you do this, you can gather ample evidence in the early stages of litigation to position a matter for summary disposition.

A Client's Evidence

Your client will become the primary source of relevant data and documentation. At the inception of a case, you should work with a client not only to obtain, analyze, and understand the data and documentation listed below, but also address confidentiality and trade secret privileges and protections. Understandably, manufacturers hesitate to produce company data openly—specifi-

cally, product formulas and designs, testing data, and postmarketing consumer information on other complaints and claims. However, not only may you be required to produce this data and documentation in response to discovery requests, you may need to "put it out there" offensively to defend a client. Before filing any motions, collecting supporting affidavits, and gathering evidence—and before providing any data to your medical defense experts—execute required confidentiality agreements. At the motion filing stage, you must consider filing documents under seal, redacting trade secret information, or both. In some jurisdictions you may need to file an advance motion when you want to file other items under seal, which could mean that you will need additional time to file a dispositive motion on the issue. Do not forget to address these issues early with a client to avoid delay later in the case or potentially inadvertent disclosure of sensitive information.

Fully analyzing data from a client and from medical defense experts will assist you in conducting a plaintiff's deposition and in requesting written discovery, as well as in responding to requests for it.

These vital procedural issues aside, you should discuss with a client substantive data and documentation about the following topics, at a minimum, to establish an "idiosyncratic plaintiff" defense and a lack of causation defense.

- Premarket Testing and Development: This category includes all testing data, peer review procedures, approval processes, and market-review data specific to a product, and more general policies and procedures for product development.
- Design, Formulas and Revisions: Obtain the full spectrum of designs or formulas for a product and discuss all changes from the original with a client to understand not only the nature of the changes, but the reasons for them. For example, was an ingredient or component removed or changed due to unrelated product improvement such as appearance or fragrance, or was it because consumers complained or industry standards changed? This category of documents will primarily establish whether a substantial number of the population has experienced adverse reactions to an ingredient or component of a product as it includes all testing data. You must analyze details of positive testing data and compare them to a plaintiff's alleged reaction to determine similarities, which in turn will relate to the causation issues.
- Literature and Standards: Discuss with a client nonregulatory industry standards or guidelines that may exist for the product, whether your client follows them, and if not, why not. For example, a cosmetic or personal care product manufacturer may voluntarily follow fragrance standards promulgated by the International Fragrance Association. This information can further support whether an ingredient or component is a known primary irritant or allergen at the time of manufacture, as will recognized medical literature existing at the time of manufacture. A client is the primary and often the best source to identify known scientific studies and recognized medical literature.
- Manufacturing Processes: This category includes policies and procedures on manufacturing and quality assurance. If a plaintiff has not specified whether the defect theory is a design defect or a manufacturing defect theory, you may need to rule out adulteration, contamination, or a manufacturing error.
- Postmarket Monitoring: This category includes all internal complaints, claims, and lawsuits known by your client for a product, as well as other similar products or products using the same ingredients or combination of ingredients alleged to have caused a plaintiff's injury. This also includes external information and data, safety bulletins, alerts, and other marketing data from the Consumer Product Safety Commission, FDA, or industry or medical groups or associations.
- Units Sold: This data concerns the ratio of consumer complaints or claims to the units sold. It is an extremely influential factor cited in the cases. *See Blalock*, 1990 U.S. Dist. Lexis 974 (one million units sold without a complaint); *Lemoine* (insecticide caused one allergic reaction in over 30,000 allergic patients); *Booker*, 433 So. 2d 407 (four complaints received out of seven million potential users); *Rhodes*, 264 So. 2d 263 (65 complaints out of one million units sold); *Thomas*, 488 A.2d 716 (two complaints out of one million units sold); *Robbins*, 210 Kan. 147 (only two complaints per million sales).

Defense Medical Experts' Evidence

You will need one or more medical experts to refute causation allegations and allegations that the product, or a product ingredient or product component, creates an adverse reaction in a substantial portion of the population. The underlying support necessary for either defense is largely the same. Issues that you will want to develop with medical defense experts include (1) whether alternative medical causes could account for a plaintiff's condition, and whether, if applicable, the treating physician or plaintiff expert performed a proper differential diagnosis; (2) whether a plaintiff's means and mode of product application, usage, or exposure and the timing of each comports with the plaintiff's objective medical symptoms; (3) whether the placement, shape, and size of a plaintiff's scars, wounds, illness, or injury comport with injury caused by an allergic or other adverse reaction; and (4) whether recognized medical literature existing at the time of manufacture recognized a client's product as causing adverse reactions complained of by a plaintiff.

You should review and discuss the following with the defense medical experts both to support the experts' opinions and conclusions and to find support to challenge or to refute the opposing expert or the treating physician relied on by a plaintiff.

- Authoritative Medical Literature Existing Contemporaneous with Manufac-

ture: Your expert, possibly in conjunction with your client, will identify all authoritative medical literature applicable to a plaintiff's claimed injury and whether the client's product caused it. The literature must be considered *both* authoritative, meaning a learned treatise, *and* must have existed when the product was manufactured. Authoritative medical literature can deal with both expert medical issues and legal issues, depending on a product at issue in a case, so do not overlook the potential case law discussing authoritative medical literature.

- A Plaintiff's Medical Records: You will need to examine, first, a plaintiff's subjectively reported symptoms and complaints and subjectively reported history of product use. Second, you will need to examine a treating physician's basis for a causation diagnosis, testing of a plaintiff, review of the product formula, qualifications to treat the specific condition or injury, and inquiry into or research of authoritative data and literature.
- Product Use History: This includes the history of a plaintiff's use of the specific product and use of other products that could have caused the same or a similar condition, including, at minimum, details on all actions and activities by the plaintiff from the time of exposure, contact, or application to when the plaintiff experienced an adverse condition.
- General Information About a Plaintiff: This includes predispositions, genetics, lifestyle, habits, prior medical history, and preexisting conditions.

Discovery from a Plaintiff

The scope of discovery that you will want from a plaintiff is listed here last, because you cannot typically obtain complete and detailed discovery to support a dispositive motion in these types of cases without first obtaining the above information and analysis from a manufacturer and defense medical experts. At minimum, interrogatories, requests for admissions, and deposition questions should focus on the following issues:

- The manner of application, use, or exposure.
- The timeline of application, use, or exposure, including the number of times and obtaining specific dates when possible.
- The timing of reaction and all symptoms following usage, including details concerning each separate symptom experienced.
- The nature and scope of reaction and symptoms.
- The progression of symptoms.
- The cessation of symptoms, if any, and any activities leading up to cessation.
- The course of treatment from all treating physicians if a plaintiff saw more than one, self-administered treatments, information and data provided to treating physicians by the plaintiff, and disclosure of prior medical treatments and conditions.
- The use of all other similar products or other products that could potentially cause the same or similar reactions, broadly exploring all possible sources, whether seemingly similar or not.
- The history of a plaintiff, including family background, medical history, lifestyle and habits, and work history.
- The chain of custody of the product, such as storage and handling of the product, and whether product remains so that you can have it tested.

Conclusion

As discussed, the "idiosyncratic plaintiff" can appear in a wide range of cases involving adverse reactions linked to alleged exposures, contacts, ingestions, or applied products. You can apply the reasoning, rationale, and guidance of the cases cited in this article equally in toxic tort cases, pharmaceutical and medical device cases, cosmetic and personal care product cases, and even food-related cases. Such cases are often expensive to develop and to try, however, in the early stages of litigation you can develop the necessary evidentiary base to pursue a dispositive motion, which, in turn, could promote earlier settlement resolution, if you take the appropriate steps immediately when you receive a case.

An initial pleading, even with a nominal amount of information, will likely offer enough to identify an "idiosyncratic plaintiff." The guidelines presented here, adapted to the nuances of a particular case, provide a framework for an early investigation, evaluation, and discovery plan that would span 90 to 120 days. If pursued diligently and hand-in-hand with your client and experts, you can more often than not well position a dispositive motion or take other offense-oriented approaches to a case to achieve your client's desired resolution in a fast and cost-efficient manner. This will simultaneously allow you to evaluate the strengths and weaknesses of your case effectively, as well as the likelihood of success of a dispositive motion, *Daubert* motions, or trial. FD