NOW WHAT?
PRESERVING AND DEFENDING LITHIUM-ION BATTERY CLAIMS
(The Best Defense Is a Good Offense)

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In recent years, the transportation and product markets have been flooded with claims involving the combustion of lithium-ion battery products or lithium-ion battery cells. While this technology is not new to the U.S. or foreign product markets, product lines are increasingly transitioning to rechargeable battery-powered technology. Even in the transportation industry, state and federal legislatures are incentivizing personal and commercial vehicle owners and operators to use battery-powered vehicles. The growth in this technology is exponential, with many manufacturers promising "greener" product alternatives within the next decade.

While this technology is rapidly growing, many claims related to the batteries can be catastrophic. For example, some lithium-ion battery products (including electric vehicles) can reach temperatures

above 4,900 degrees Fahrenheit. The extreme temperatures and rapid combustion potential make for a complex defense and preservation list.

With the inclusion of lithium-ion battery-powered products, which can lead to several different property and injury claims, counsel must be prepared to encounter unique preservation issues and overseas supplier difficulties and develop strategies to defend against these claims. This article hopes to identify a few key concepts to best defend claims involving lithium-ion battery combustion and poses key questions to manufacturers.

DETERMINING THE CAUSE OF FAILURE

Lithium-ion batteries have many potential methods of failure as a result of the materials, electrolytes, and gases associated with their core components. Common reasons for failure include, but are not limited to, the ignition of electrolyte liquid inside the device, thermal runaway events where a self-heating combustion leads to an explosion, auto reignition combustions of earlier events, physical damage to the component parts or cells, and temperature exposure. Each individual combustion event has a direct impact on how counsel and manufacturers can identify the cause of the event—what specifically triggered the combustion and which component part was involved. This determination also assists counsel with determining the scope of potential inspections, identities of parts suppliers, and the scope of eventual discovery (depending on the existing evidence on exam).

Identifying the failure method should be performed at the direction of an expert. After all, this technology is relatively new and requires a specific level of expertise to evaluate the potential combustion sources and failures. Investigating agencies may not have the capabilities to do certain testing or investigation, so if defense counsel has an expert able to assist and provide the relevant data, this could lead to a favorable position. Having a voice early in the process and providing evidence to support that the combustion event was not caused by your product may result in a preferable report or investigative outcome. Company knowledge and in-house specialists are also assets since they likely have experience investigating these types of events and can offer expertise and guidance.

WHAT SHOULD BE PRESERVED?

Early investigation is one of your best defenses against potential claims arising from lithium-ion products. During a post-incident investigation, it is imperative to preserve the lithium-ion battery for testing. If there is a combustion event, the battery may be stored in sand or a special container. Depending on the potential size of the claim, enlisting a third party to ensure preservation of the battery may be a good idea.

Lithium-ion batteries do not combust like alkaline batteries. For example, in a thermal runaway event, the cells within a particular lithium ion-based product can overheat and cause a chain reaction, causing the cells to explode and potentially cause fires. Counsel may not be able to dictate what is retained to assist with preservation and defense of a particular claim. However, manufacturers and vehicle owners should take reasonable steps to preserve the battery, scene evidence related to the combustion, last known charging station or outlet, packaging or product materials that accompanied the product, and any video evidence. These can assist the experts with identifying the source of the combustion.

Counsel or a business representative should be present for any post-incident inspections so that procedures are followed and evidence helpful to the defense is collected—something other parties may not consider. Being present for the inspections ensures a company's best interests are protected. Sending notices to all potential interested parties to participate in early testing and inspection may be a way to establish that a company or manufacturer's product was not involved in the incident and allows the opportunity to get ahead of any potential future claim or lawsuit. This is a time where offense can be the best defense.

WHICH SUPPLIERS SHOULD BE INVOLVED?

Many of the lithium-ion battery cell manufacturers are located outside the United States. Identifying and notifying an overseas manufacturer about a potential claim can present a litany of issues. However, other manufacturers may wish to be put on notice of the claim to join in the inspection efforts and potentially assist in defending the claim. Potentially interested and related parties may include: shipping, cargo, or storage companies, which may have stored the batteries before purchase; parts supplier for the cells; manufacturer for the charging station or battery charger; designers of any safety, cooling, or fire suppression features associated with the battery; and third-party testing companies, which may have performed tests on the product before distribution.

REVIEW YOUR INSURANCE POLICIES AND CONTRACTS

It is important to take the steps necessary to protect companies and their products. Businesses should review the insurance coverage in place as it is important to determine whether they will be protected if a lithium-ion battery fails. For example, a motor carrier that hauls lithium-ion batteries—or products containing them—should determine whether there is an exception for hauling this type of cargo or whether additional coverage is needed. Other considerations regarding potential claims should also be kept in mind. These include: Is there coverage if an electric vehicle's lithium-ion battery fails and causes property damage? What if there is a motor vehicle accident with an electric vehicle whose lithium-ion battery combusted?

Contracts should also be reviewed for burden-shifting provisions or indemnification requirements to see who holds responsibility for a lithium-ion battery failure—whether it is a claim for product liability, personal injuries from a motor vehicle accident, or property damage. This also goes for business relationships and determining when it makes sense to push back on liability or agreeing to accept the shifting of risk.

Lithium-ion battery claims present a challenging world of defense strategy and preservation. With the right preservation, expert retention, inspection, and review, defense counsel and manufacturers can ensure that they possess the information necessary to build a strong defense to both property and injury claims.

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