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COMMENTARY

Corporations in the Cross-Hairs: A View from the Product-Liability Trenches

The United States finds itself in another political Olympiad—and a remarkable, unpredictable one at that. More than in past campaigns, the major parties' leading candidates have targeted American corporations, regularly railing against the supposedly outsized and pernicious power and influence of large companies. The anti-corporate campaign rhetoric from both sides of the proverbial aisle has been hot and heavy, with candidates taking turns outbidding one another in appealing to anti-corporate sentiments.

One can debate whether the candidates are tapping preexisting reservoirs of animosity or building new ones—or both. But that question is academic for American corporations trying to carry on with their work of serving customers. Either way, the flying mud hits them, and the dirt will make the coming years even more difficult. In representing American corporations in courtrooms around the country in a broad range of product-liability cases, we have seen first-hand how anti-corporate sentiment has burned hotter in recent years. Its growing heat will, as detailed below, present major challenges in court—and those legal challenges will raise costs and discourage risk-taking on a wide range of corporate actions that juries of hostile citizens may be invited to second-guess, such as issuing new products and introducing design innovations.

The Hostility Is Real

The anti-corporate agenda that pervades stump speeches, print, and social media is real and having real effects. For example, Gallup polls show the lowest rate of satisfaction with the size and influence of corporations in years—only 35 percent. This is well below the peak levels of 50 percent or more measured shortly after 9/11, when public trust in both government and big business was much higher. And 53 percent of Americans say they want corporations to have less influence in the country.

In questioning potential jurors in courtrooms around the country, we have seen attitudes that appear to largely track the views expressed by the major candidates and are consistent with these polls. There is clear evidence of increasing distrust of large corporations, hostility toward big business in general, and contempt for alleged corporate misconduct. Indeed, the increasing hostility toward corporations has already erupted in recent huge jury verdicts against a variety of corporate defendants, often (but not always) in traditional "tort belt" states (Texas, Louisiana, and Florida).

These immense verdicts, and others like them, suggest that corporate defendants face tougher jury pools than they did 10 or 20 years ago. That, in turn, will affect both the risk of adverse verdicts and the size of damage awards in the event of an adverse verdict.

The Plaintiffs' Bar Is Trying to Capitalize

The plaintiffs' bar has been attempting to leverage the anti-corporate mood across a broad front. This has already included changes in jury selection, trial strategy, and types of claims brought.

Jury Selection. In terms of jury selection, we have seen increasing sophistication from the plaintiffs' bar in their jury selection techniques and their use of jury consultants to identify and seat anti-corporate jurors. Some highly successful plaintiff's trial lawyers hire themselves out to pick juries for other trial lawyers, or brag about proprietary "algorithms" or other "scientific" methods of picking juries. Our experience confirms the need for, and advantages of, experienced and sophisticated jury consultants and jury research in high-stakes trials, and the change in plaintiffs' counsel's practices, together with the changing popular opinion, make that all the more important now.

"Reptile Theory." A popular plaintiffs' theory—the "reptile theory"—posits that the best way to get large verdicts from a jury is not by appealing to jurors' sympathy for the individual plaintiff who is in the courtroom but by appealing to the jury's anger, fear, and perceived need to protect society from the dangers posed by the defendant's misconduct. These tactics aim to trigger what the plaintiffs' bar terms "lizard brain" instincts of survival and the need to avoid and prevent danger, rather than altruism or a sense of justice.

Notwithstanding the catchy name and the biology analogy, this strategy has more to do with inflaming jurors' negative predispositions and attitudes toward large companies—mirrored in recent claims by the major candidates—and perceived corporate misconduct than it does with any biological or brain-related instincts. Particularly when permitted to introduce broad-ranging evidence of corporate misconduct, plaintiffs' attorneys who focus on the "bad acts" of the defendant and the dangers such conduct poses to society often are more successful than those who present the "traditional case" focusing on the sympathetic and injured plaintiff.

Of course, the defense can and should defend corporate conduct where good evidence is available and, in general, focus on countering a plaintiff's counsel's arguments. But simply defending each particular challenged act by the defendant or spending too much time attempting to humanize the company can play into the hands of a plaintiff's attorney using "reptile" strategies. As the defense spends more and more time responding to the plaintiff's attacks, the jury spends more and more time thinking about the defendant. Instead, and because jurors tend to think about what the plaintiff could have done (if anything) to avoid the injury, an "asymmetric" defense strategy can be more effective—focusing on the individual plaintiff's conduct, knowledge, and awareness of danger.

This "reptile theory" exacerbates what we have seen for years in various courtrooms; namely, that the plaintiff and defense approaches to a case often are proverbial "ships passing in the night." Each side seeks to make the other one the central focus of the trial, with the plaintiff focusing on supposed corporate "bad acts" and the defense focusing on the decisions the plaintiff made and the risks he or she knowingly encountered. In the current anti-corporate environment, plaintiffs' counsel's efforts to shift the focus away from their clients' decisions, actions, and inactions, and onto the defendant corporations are to be expected, and creative ways to counter this shift are all the more important.

Economic Loss Lawsuits. Plaintiffs' counsel not only have adapted in their jury selection and trial presentation methods but also have modified their long-standing efforts to combine plaintiffs into a single case—a situation where, for plaintiffs' counsel, bigger often really is better. Class and multiplaintiff actions, of course, are not new. But some avenues have, over time, been foreclosed in that, for example, it now is more difficult to bring securities class actions in many jurisdictions, and courts almost everywhere have rejected efforts to aggregate personal injury claims.

As these other avenues increasingly have been foreclosed, plaintiffs have begun bringing product-related lawsuits based—not on alleged personal injuries—but on claimed economic losses. These cases typically are based on state consumer protection or deceptive trade practice statutes, breach of warranty, or state disclosure statutes like California's Proposition 65. They assert that one or more advertising or labeling claims for a product were somehow false or misleading, sometimes relying on federal regulatory labeling requirements. The multiple "natural/no-additive" class actions filed against a number of manufacturers are a recent example of this phenomenon.

The alleged economic losses often are presented as a "loss of benefit" or "loss of value" where the product supposedly does not perform as advertised, or involve claims that the purchase price was an inflated "premium price" that would not have been paid but for violations of the consumer fraud statute or breach of warranty. Successful claims of this type can present astronomical damage claims as plaintiffs simply multiply a per-unit "loss" or "premium" across the relevant sales for a product.

State consumer protection and deceptive trade practice statutes—or breach of warranty claims—are in many respects tailor-made for this purpose. These statutes may have no "individual reliance" or actual injury requirement, and thus these claims present fewer individual issues that would prevent aggregated treatment through class actions or other efforts to consolidate claims. Using these plaintiff-friendly statutes, plaintiffs' counsel scour manufacturers' claims for their products so as to identify anything that is even arguably misleading, often using federal or state regulatory actions as a guide or, according to plaintiffs' counsel, "proof" that the claims are false or misleading. Moreover, the state statutes often permit trebling and recovery of attorneys' fees for successful plaintiffs. This is consistent with plaintiffs' "reptile strategy," which places all the focus on the corporation's conduct and the harm to society while diminishing any attention to an individual plaintiff.

Once cases get to trial, plaintiffs' counsel have been pushing the limits of the evidence rules so as to allow "storyteller" experts, in the guise of expert testimony, to become their advocates from the witness stand. Yet these efforts have had mixed success, as more states are adopting stricter scrutiny of the reliability of expert testimony by moving to the federal *Daubert* "gatekeeper" standards (e.g., Florida, Wisconsin) or simply applying existing state law more exactingly. Regardless, the rise of economic-loss litigation is likely to continue.

Criminalizing Corporate Product Liability

But the plaintiffs' bar is not alone in seeking to exploit public disaffection with American corporations. Federal and state prosecutors—the latter often elected, and the former also not always immune to political ambition and public sentiment—have opened what amounts to a second front in defending product-related claims. Today, prosecutors increasingly turn product issues that previously were resolved through administrative and civil proceedings into criminal investigations and prosecutions. These criminalization efforts were first seen outside the United States where, for example, an airline was convicted of manslaughter in France in 2010 in connection with a crash resulting from debris from one of its planes causing another jet to crash in 2000 (a conviction later overturned on appeal).

But those efforts now are being seen in the United States. Indeed, follow-on criminal investigations and charges now are a fairly standard feature of any highly publicized corporate product issue where government regulations allegedly were violated.

Likewise, claims by the federal government (or individuals claiming to act on its behalf) under the False Claims Act, often in conjunction with criminal charges, have become a common feature in any product-related problem that directly or indirectly relates to sales to or payments by governmental entities or to alleged violations of federal regulations. Such claims have been bolstered in recent years with aggressive theories of both liability and damages. Pharmaceutical manufacturers have paid very substantial amounts to settle False Claims Act cases and related criminal charges relating to their prescription drug marketing and promotion practices. In any industry where products are directly or indirectly sold to the federal government or are subject to a federal regulatory scheme, False Claims Act claims now are standard fare when product-related problems arise.

Dividing and Conquering Corporate Management

Further, prosecutors increasingly have focused on bringing criminal charges against individual corporate employees, particularly high-ranking executives and attorneys. Some of these efforts have been unsuccessful, but prosecutors have had many successes, including the convictions of senior executives of major corporations for violating mine safety regulations, food safety regulations, and FDA drug labeling requirements.

This broader government effort to pursue criminal charges against individual employees is reflected in and encouraged by a September 2015 memorandum by U.S. Deputy Attorney General Sally Quillian Yates. There, the Department of Justice announced the following steps: (i) corporations must provide all relevant facts relating to individuals to qualify for cooperation credit; (ii) investigations will focus on individuals from the outset; (iii) government criminal and civil attorneys are to routinely communicate with each other; (iv) the DOJ generally will not release individuals when resolving a corporation's liability; and (v) before resolving claims against a corporation, government attorneys should have a "clear plan to resolve related individual issues." These steps expressly are designed to pressure prosecutors into charging individual employees, as well as to pressure corporations to turn on their own employees by developing and presenting evidence of individual wrongdoing in exchange for more lenient treatment for the corporation. The steps outlined in the Yates Memo very well may hinder efforts to resolve claims against corporations and make defending against supposed corporation criminal wrongdoing even more difficult.

Lawsuits of the Future

Looking down the product-liability road, we anticipate increasing use of a tactic plaintiffs' attorneys have used to avoid limits on aggregating personal injury claims—the "no safe level of exposure" claim coupled with a request for medical monitoring as a remedy. By asserting that there is "no safe level of exposure" to a substance known to be dangerous at higher levels of exposure, plaintiffs build a class from large numbers of persons exhibiting no symptoms or injury and, as a remedy, seek to have the defendant pay for medical monitoring of the uninjured class to find and treat their injuries when they occur.

Medical monitoring claims have received a mixed reaction in state courts, as some states have permitted them to go forward (e.g., Arizona, California, Florida, Maryland, Massachusetts, Missouri, Pennsylvania, Utah, and West Virginia), while the United States Supreme Court in a Federal Employers Liability Act case and other states have not (e.g., Alabama, Kentucky, Michigan, Mississippi, Nevada, New York, and Oregon). Medical monitoring claims, however, are potentially powerful tools that provide plaintiffs' counsel with a ready ability to place substantial sums at risk because they allow aggregating claims, are subject to few limits on the number of claimants, and provide little opportunity for the defendant to shift the focus to the plaintiffs and their choices.

Another approach that may be on the horizon is further use of "addiction" claims to counter and offset consumers' responsibility for their choices to use or consume products with well-known risks. For example, food companies have been threatened with actions—ones roughly modeled on actions filed against cigarette manufacturers—where plaintiffs assert that they are "addicted" to food ingredients—primarily sugar—and thus, the plaintiffs are not responsible for the health consequences of consuming them in excess, such as obesity and diabetes. These actions, which have been threatened for a number of years and have yet to catch on, purportedly will focus on compulsive eaters' "addiction" to highly caloric foods as seen in their inability to stop eating them and changes seen in their brain scans. In any such actions, food companies' efforts to make their products more appealing to consumers, particularly if those efforts involve adding sugar, will, no doubt, be used as evidence of the companies' furthering the plaintiffs' "addictions."

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