

Philip Harnett Corboy, Jr. Featured in "America's Top Plaintiffs' Lawyers Name Their Future Litigation Targets"

Steven T. Taylor

Of Counsel

September 2001

Now that much of the litigation against the tobacco industry, as well as the makers of the drug phen-fen, is dying down, attorneys on both sides of the courtroom are probably asking themselves what's next. What kinds of cases will plaintiffs' attorneys file and, conversely, for what kinds of client needs should defense attorneys prepared?

Clearly, one of the best ways for defense firms to devise strategies for their future litigation work, staffing needs, and marketing is to know what they are going to be litigating. There's no better way to plan than to take a close look at the areas in which opposing counsel expect to do the filing.

Of Counsel spoke with a half dozen of the nation's best plaintiffs' attorneys to get their opinions on what's coming down the road. What follows, it should be noted, is not an attempt to paint a portrait of the entire plaintiff arena in the United States. It is hoped, however, that readers will get a glimpse of what some plaintiffs' attorneys are thinking, including their thoughts on such mega-issues as that perennial hobbyhorse - tort reform - and the public's general perception about their fields of practice.

Most of the attorneys *Of Counsel* talked with immediately mentioned pharmaceuticals and medical devices as the products most vulnerable to class-action litigation. "I think the drug Baycol will be the next fen-phen," says Philadelphia's charismatic attorney Jimmy Binns, referring to the anticholesterol drug recalled in August because of 31 deaths and many more serious ailments. "Medicine is a necessary evil, and there will be constant efforts to bring to market new medications. There are so many things that go wrong with the

Attorneys

- Philip Harnett Corboy Jr.

product itself or the manner in which the product was administered, or misadministered. That includes these muscle-building supplements."

Of course, makers of medicines and supplements are vulnerable to risks for several reasons. For example, the market is so competitive - not to mention extremely remunerative - that drug companies rush their products to market without proper testing. Moreover, they do so knowing or suspecting that they have a faulty product, all the while crossing their fingers that it won't cause any actual harm.

Those law firms with pharmaceutical defense practices might start to boost attorney ranks because, according to several sources, the demand for new and better drugs is only going to grow. Consequently, the likelihood of defective products will increase.

"Baby boomers are going to be more and more concerned with how their bodies break down," says Phil Corboy, Jr., a plaintiffs' attorney with the Chicago-based firm Corboy & Demetrio. "Knowing that, pharmaceutical companies are doing their best to crank out all these drugs that are going to take care of all the baby boomers' concerns - medical or aesthetic. So I think you'll see a lot more phen-fen type cases. I think there will be a lot more pharmaceutical products that will turn out to be dangerous in the long run."

Unhip Implants

Anyone who has recently followed class-action products liability suits knows the name Sulzer Orthopedic, Inc., the subsidiary of Swiss parent Sulzer Medica. Last December, Sulzer was forced to recall its Inter-op hip implants. The medical device maker had used a manufacturing method that left an oily residue on the products, which interferes with necessary melding of the device and bone. As a result, many implant recipients have suffered severe pain. Some 17,500 patients are affected by the recall. At least 1,000 people have had the device surgically removed, but many more are too old and frail for the operation.

Currently, defense and plaintiffs' attorneys are negotiating possible settlements in several lawsuits filed against Sulzer. It seems the company is eager to settle, but for not nearly enough to satisfy many plaintiffs and their attorneys. "Sulzer is claiming it doesn't have enough money, and some plaintiff attorneys have driven a proposed deal with Sulzer in which each plaintiff gets a small amount, \$50,000, and stock, so the company won't go bankrupt," says David Rheingold of New York's Rheingold, Valet, Rheingold & Shkolnik, which represents several implant plaintiffs and advises "the corporate road kill of America," according to Rheingold.

"The deal is being sold on the idea that 'if you don't take this, the company is going to go bankrupt and then you'll have nothing," he says. "However, my experience is, the more a defendant pushes a case threatening bankruptcy, the more it actually has something to hide and is afraid of further discovery. For all we know, Sulzer is on the cusp of getting a great patent and is going to make millions of dollars. If that's the case - and I don't know that it necessarily is - the company wants to drive a cheap deal now and hoodwink everybody."

Many plaintiffs' attorneys are following the case and are incensed at the prospect of such a deal. "We think this short changes the plaintiffs in order to salvage the assets of Sulzer," says Mike Eidson of Miami's Colson, Hick & Eidson. "Plaintiffs are going to lose their rights to their own cases, and they'll get this very limited fund."

Eidson gained prominence in the mid-1970s for helping to win a \$3 million verdict from Ford Motor Company in the first suit against the automaker regarding its notorious exploding Pintos. At the time, the verdict was believed to have been the largest in Florida history. Eidson has his hands full these days, which is not unusual, as co-lead counsel for all personal injury and wrongful death cases in the much-publicized class-action suit against Ford and tire manufacturer Bridgestone/Firestone.

The general consensus among plaintiffs' attorneys is that there likely will be more debacles like the one in which Ford and Firestone are currently embroiled. So, they say, plaintiffs' attorneys, and by extension defense attorneys, are wise to pay close attention to the auto and auto parts industries. "The automobile seems to be a never-ending source of litigation," says Binns. "It seems to be the most prevalent agent of destruction."

Ponzi and Stucco

Binns cites securities fraud - and he's handled many such cases - as another growth area for plaintiffs' counsel. The perpetrators of fraud "don't learn their lessons, so there will always be work in this area," he says. "They think they can get away with it forever. Many of these guys aren't that sophisticated about the methods of investigation of the Securities and Exchange Commission, the plaintiffs' bar, and others."

Current securities fraud cases include litigations related to pyramid or Ponzi schemes. One such case involves the now-defunct Churchill Securities, Inc. New York's Kirby McInerney & Squire represents approximately 500 individual and institutional investors that got taken by Churchill to the tune of \$30 million.

"I think we've seen an upswing of Ponzi scheme type cases," says Dan Hume, a Kirby partner.

"Unfortunately, those cases are hard to recover because often the money is gone, but I think you'll see more because there's no abatement. Also, the bold market of the late 1990s created a lot of irrational exuberance on the part of the investors, as well as blindness to the risk of fraud. We see cases popping up all the time, and it's sad because so many people invested so much money and saw their money frittered away and their lives essentially destroyed."

There will also be more home-products cases, especially involving synthetic stucco, of all things. The so-called "stucco law" practice is seeing an eruption of cases in which plaintiffs suing stucco manufacturers because moisture has gotten trapped under the synthetic siding of their houses, the wood exterior walls have been covered in mold, and rot and decay have begun to slowly destroy the walls.

"Since late 1994, I have handled hundreds of these cases," says Dan Bryson, attorney at Raleigh, North Carolina's Lewis & Roberts, which has settled more than \$35 million worth of stucco-related claims. "It's been like the spread of killer bees," he says. "We've seen severe damage on homes first in North Carolina, then into Georgia, and up into Virginia."

The firm has a Web site, www.syntheticstucco.com, that offers homeowners information on the defective products. The response has been remarkable. "We have consistently had 100,000 to 150,000 hits a month on the Web site for the past two years," Bryson says, "including hits from several states and from the Russian Federation, Iceland, Canada, England, and other countries. It's a huge boom in chronic defense cases."

Perception Problems

Nearly all of the attorneys *Of Counsel* interviewed for this article discussed the image problem that seems to hound plaintiffs' counsel. Many of them don't think they get their message out to the press. "We often get a bad rap," Corboy says.

They mention all the negative publicity showered on plaintiffs' lawyers surrounding the infamous McDonald's hot-coffee litigation, in which a woman sued the fast-food giant for burns she suffered when the lid of her coffee cup came off and she spilled hot liquid all over herself. Initially, she was awarded a \$1 million jury verdict, and that set off a spree of plaintiffs' attorney bashing on editorial pages and around water coolers.

Several key facts, however, didn't emerge, Rheingold says. For example, the McDonald's management had heard some 100 reports from its own employees who had been burned. The home office essentially denied requests to lower the temperature because the poor quality of the coffee would be apparent if the beverage wasn't scalding hot.

"Also, the client wanted to mediate that case for her medical bills, but McDonald's refused," Rheingold says. "What the insurance industry says is that this lady burned herself and got all this money. They quote the amount of the jury verdict, but the judge reduced the verdict significantly."

Corboy says the law firm handling the case for the plaintiff missed a golden opportunity to deflect the criticism back to the Golden Arches. "Had our law firm gotten an identical verdict," he says, "we would have trumpeted it all over, but we also would have explained why the injury was as severe as it was, why the liability was as egregious as it was, and why the jury did the right thing in this case. We would have justified the award, and we would have explained that McDonald's had been aware of the problem but had done nothing about it."

Corboy says that even though he and his colleagues in the profession often are not looked at favorably, his firm and others try to educate the public. Talk to any PR specialists and they will tell you that plaintiffs' bar is way ahead of most defense firms in this regard. That begs the question: Should the defense bar be more proactive in adopting litigation public relations strategies?

Perhaps, but Rheingold and others think the insurance industry is effectively carrying the public-perception ball for the defense bar. "The insurance industry has the resources to spread the word that we are hurting America, crimping the economy, and clogging the courts," he says. "It's just not true. No study has ever shown that tort cases are clogging the courts. A larger percentage of litigation involves business-to-business contracts than torts."

Speaking of getting one's message out, plaintiffs' attorneys are quick to offer their opinions on tort reform, which, as readers may recall, became a rallying call for many conservatives in the late 1980s, led by none other than Dan Quayle.

"There will always be big push for tort reform because there's plenty of money available to the insurance carriers for their lobbying effort," Binns says. "Moreover, there will always be politicians available to accept the contributions and hoist the flag for the insurance carriers."

Eidson says tort reformers have "run into a wall in a lot of places the past couple of years as some judges have ruled the changes unconstitutional. We call it 'tort deform.'"

Here are a few final notes related to plaintiffs' litigation:

Look for toxic tort to surface in the near future. "Anything that adversely affects the water and air will result in litigation," Eidson says. "I think we'll soon see quite a few cases." At an American Bar Association environmental law conference last March, plaintiffs' attorneys predicted that the oil industry would be hit hard in litigation over the fuel additive methyl tertiary butyl ether, which has contaminated water supplies. They said there will be suits "all over the country."

The New York plaintiffs' bar, among others, is readying for a slew of litigation over a once-common additive to cold medicine, phenylpropanolamine, which has been linked to strokes. Some law firms, including New York's Early & Strauss, have established consortiums to handle the expected lawsuits, according to a report in the New York Law Journal.

As if Sulzer Medica didn't have enough trouble with its hip implants, it has received several complaints about defects in its knee implants.

Plaintiffs' attorneys warn that herbal supplements, or "nutraceuticals," will be the source of much future litigation, and they are not alone. At least some defense attorneys also are predicting that and are bracing the industry for just such an onslaught. In an article posted at the Web site of Minneapolis's Faegre & Benson, the supplement industry warned that "future plaintiffs, many of whom will have serious injury claims or even claims of death, will be pitted against defendants perceived to have deep pockets." The industry is told that it will "have to make sure the public hears the positive story about nutraceuticals."