

## The Trial Bar's Secret Playbook

Plaintiffs' lawyers have developed a set of drills for dragging good companies into pointless, expensive, damaging lawsuits. But corporations can learn the rules and beat the trial bar at its own game.

By Steven B. Hantler



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In a recent column for *The Wall Street Journal*, I posed this question: Why do so many large companies get pulverized in huge lawsuits that turn into media circuses and government agency investigations? It's not because of a lack of talent. These companies are led by very able CEOs and general counsel who retain the best defense law firms. Instead, it's because these companies do not fully understand the trial bar's playbook. Plaintiffs' attorneys are playing an elaborate game of three-dimensional chess; companies are playing a game of checkers.

Since more than just legal fees and verdicts are at stake—share value, brand equity and even a company's business model are also on the line—it's critical that we understand every page of the trial bar's playbook and develop strategies to beat them.

Page one involves research and development. Attorneys do not normally perform research and development, but as you read this there are several dozen plaintiff's firms poring over every successful company's press releases, public statements and filings

with government agencies, among other things, to find something that can be weaved into a billion-dollar mistake. Filing a lawsuit does not immediately follow finding the alleged mistake. Instead, page two is test marketing that mistake with mock juries and the media. If the story sells, lawyers and the alleged victims bring it to government regulators, including state attorneys general, on page three. Page four is filing the lawsuit, if possible, in a "magic jurisdiction," which the American Tort Reform Association less charitably calls a "Judicial Hellhole." Page five is staging media events and briefings about the lawsuit with analysts who follow the defendant company and its industry.

If done right, all of this creates a Perfect Storm of highly adverse media coverage, regulatory agency subpoenas, loss of share value and a decline in company and product reputation which overwhelms any company that did not see it coming. The trial bar knows, and takes advantage of the fact, that large companies tend to default to a bunker mentality when confronted

with this type of onslaught. That includes making “no comment” to media inquiries. This approach is not cost-free—according to a public opinion survey sponsored by Hill & Knowlton and *Opinion Research Corporation*, 62 percent of Americans believe that a company’s “no comment” about a lawsuit means that company is covering up wrongdoing and 51 percent of those surveyed are less likely to buy a company’s products when the company is *accused* of wrongdoing.

At some point, someone in the besieged company proposes settling the lawsuit for a couple hundred million dollars. This seems like the most expedient solution to what has become an all-consuming problem, even though the company may believe the lawsuit to be without merit. This is precisely what the trial bar’s playbook is designed to accomplish. After all, plaintiffs’ lawyers are sophisticated businesspeople who want to increase their inventory turns, and lawsuits are their inventory.

And, if this does not drive the besieged company to the settlement table, the trial bar turns to page six, which is “harassment by discovery” and manufactured discovery disputes. The trial bar is expert in punishing companies with withering and expensive discovery requests, often for information and documents they

already possess from other lawsuits. If this does not convince a company to settle, the trial bar is also expert in obtaining severe sanctions orders from judges in magic jurisdictions, even though the company made best faith efforts, and then some, to comply with oppressive orders.

### **Turn a Tsunami Into a Squall**

So, how can a company better position itself to withstand this assault?

First, build a litigation communications function. This will allow the company to respond in real time to the trial bar’s media campaign and, if appropriate, get its message out first. Otherwise the company is ceding every inch in print and every minute in electronic media to the trial bar’s message, which will be read and seen by the company’s key stakeholders without any counterbalance.

Second, manage the issue, not just the litigation. Align the legal, government affairs and public relations groups around the issue. Guide the company to respond in a consistent, effective and timely manner to each of its stakeholder groups. If done right, the tsunami intended by the trial bar will instead be only a manageable squall.

**Bite the bullet and litigate some meritless lawsuits rather than settle, even when it may be cheaper to settle.**

**Legal reform, when done right, works and fairly balances the needs of consumers and business.**

Third, bite the bullet and litigate some meritless lawsuits rather than settle, even when it may be cheaper to settle. For example, it is the conventional wisdom that once a lawsuit is certified by the court to proceed as a class action, the game is over and the defendant is forced to settle even cases with dubious merit. My company has taken two certified class actions with no underlying merit to trial and won both of them, either at trial or on appeal. Sure, we may have been able to settle these particular lawsuits for far less than our trial and appellate costs, but we wanted to convince the trial bar that their plays don’t always work. The trial bar needs to know that bringing a meritless case is a lousy investment.

In addition, we have also gone on the offensive and sued several trial lawyers for breaking the rules and the law.

Fourth, participate in a meaningful way to restore fairness and predictability to our tort system without restricting access to our courts for legitimate claims. Michigan’s tort reform efforts, led by National Association of Manufacturers’ President and CEO John Engler when he was our governor, have done just this. Legal reform, when done right, works and fairly balances the needs of consumers and business.

By revealing the trial bar’s playbook, companies can develop new strategies to beat the trial bar at its own game. Continuing to run the same defense that has repeatedly failed, hoping that the result will somehow change is, well, pointless.

*Steven B. Hantler is assistant general counsel for government and regulation at Daimler-Chrysler Corporation. E-mail him at sbh2@daimlerchrysler.com.*