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TRIAL TACTICS

Product Litigation in the Face of Negative Publicity: Getting the Jury to Focus

By Alan D. Kaplan

In the world of practical litigation, product liability attorneys would ordinarily and justifiably avoid exposing a client to a potential jury verdict during a period of negative and distracting national publicity. In the real world, however, the option of avoiding "bad timing" is not always available, and capitulation is not an option at all. With this in mind, Bridgestone/ Firestone Inc. recently went to trial before a jury in Tioga County, N.Y. in a product liability case—and won.

In *Brady v. Dunlop Tire, Bridgestone/Firestone Inc. and Armstrong Rim and Wheel,* No. 24622 (Oct. 26, 2001), the plaintiff sustained devastating personal injuries as a result of a pressurized release of air while attempting to mount a truck tire, with a tube, onto an agricultural rim. The case was tried before a jury in front of Justice Robert C. Mulvey on the issue of failure to warn. In essence, plaintiff's counsel sought to indict the entire tire and rim industry for what was alleged to be a failure to provide warnings where large truck-sized tires and tubes were to be mounted on single-piece rims designed for agricultural applications. The failure of each manufacturer to provide adequate on-product warnings was also argued by plaintiff's counsel.

While the case presented an assortment of product-related issues to all the defendants, Bridgestone/ Firestone Inc., the manufacturer of the 10.00 x 20 tube, faced the additional uncertainty of jury sentiments in light of the recent recall of Firestone tires and the attendant media coverage. Nevertheless, the decision to try the case, in spite of potential ill will, was never in doubt where an unreasonable settlement demand was coupled with what defense counsel considered defensible issues, as well as a bifurcation of the liability issues from the highly charged damages portion of the case (which was achieved by pretrial motion).

Plaintiff's Strategy

Even though he was allowed to make a liability presentation only as a result of the pretrial bifurcation motion, plaintiff's counsel, as expected, made every effort to introduce the maximum amount of prejudicial information to the jury. Undaunted by the court's ruling, it was argued that medical testimony as to the plaintiff's condition was necessary to provide the jury with a "complete picture" and explain why plaintiff's pretrial deposition testimony (which went into significant detail about his prior experience and general knowledge of tire repair and mounting procedures) should not be accepted by the jury. By doing so, plaintiff's counsel sought to obtain the joint benefit of introducing prejudicial damages testimony while also rebutting those portions of his client's testimony that were detrimental to their trial strategies and liability presentation.

The curious strategy of seeking to disclaim certain portions of the plaintiff's deposition testimony was, in hindsight, pursued because of counsel's desire to not produce the plaintiff for live testimony. Seeing through this ploy, the court denied the application for a limited medical presentation and allowed usage of the plaintiff's prior testimony by the defendants. However, this set the stage for the plaintiff's ultimate sympathy ploy: the presentation of a severely injured individual, mentally incapable of testifying, and taken advantage of at a pretrial deposition by the attorneys representing an uncaring industry, led by Bridgestone/Firestone.

Factually, the injured plaintiff, while clearly appearing as a sympathetic individual, possessed some knowledge of the product he was using, as well as a disinclination to read or follow warnings. The defense argued that at the time of the accident, the plaintiff disregarded well-known and accepted

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safety procedures. In other words, the plaintiff himself was at fault for the occurrence of the accident; a potentially hard sell under normal circumstances, let alone under the circumstances affected by recent media portrayals.

Bridgestone/Firestone's Response

The key to obtaining maximum jury focus was to approach the case in a typically aggressive, noncrisis mode—i.e., the product was a good and safe one for which Bridgestone/Firestone owed no apologies. Obviously, juror sentiment had to be gauged and tested during the voir dire stage of the trial. In this regard, jurors were asked direct questions regarding their attitudes, knowledge and sympathies toward the recall issues and Firestone in general. However, care was taken to avoid allowing the recall issue to predominate. A strategy for dealing with seemingly innocuous references to the recall made by plaintiff's counsel and/or his witnesses was developed. Barring any patently excessive forays by the plaintiff, the focus of the case was to be a spirited defense of the product and not a reaction to recall references. To be sure, further efforts by defense counsel to remind the jury to focus on the "real" issues of the case in opening statements and summation reinforced this strategy. As a result, recall issues were simply relegated to a similar status as those other "tangential" issues commonly used by plaintiff's counsel to misdirect a jury from the key facts and real legal issues.

After references to recall issues and tire tread separations (not involved in this case) were made by plaintiff's expert, it became apparent that Bridgestone/Firestone was being targeted as the industry's "de facto" warnings overseer. Even though the Bridgestone/Firestone product involved certainly had no greater role in the final assembly than the other components, the company had historically taken a more proactive role in establishing and disseminating industry warnings and standards in general. Since nobility has its obligations, it was argued that, as an industry leader, Bridgestone/Firestone had somehow "dropped the ball" when developing warnings for the particular combination of components involved. This approach conveniently dovetailed with plaintiff's implicit reminders to the jury that Bridgestone/Firestone was also blameworthy because of what transpired during the recall.

It is defense counsel's job to determine when achieving this focus is attainable, to not assume it is unattainable, and to effectively develop strategies to attain it even when faced with potentially overwhelming distractions.

Again, the proper response to these tactics called for great restraint yet a firm, directed counter-approach. Even in the face of recent events, there was never a thought to retreat from Bridgestone/Firestone's industry stature. The proper response stressed the company's long-standing concern and prominent role in the education, training and dissemination of information. It was made clear that rather than having warning gaps, the industry, with Bridgestone/ Firestone as one of its leaders, carefully and responsibly considered the best method of "getting the message" out to the population of tire mechanics. Once the merits of the previous decisions and actions were stressed with clarity and in an assertive and unapologetic manner, the jury focused on them and acted accordingly.

Ultimately, the plaintiff in *Brady* could not overcome the general perception that the products involved were properly manufactured and designed. The only real danger was posed when the products were misused or due care was not taken by the user himself. The jury concluded that regardless of the myriad issues presented by experts and the attempted assault on the industry as a whole by plaintiff's counsel, the plaintiff was not someone who would have benefited or acted differently if the defendants' efforts to warn had been different.

Subsequent questioning of the alternate and deliberating jurors revealed that considerations of the Firestone recall or the Firestone name, in general, were nonexistent during approximately eight hours of deliberations. Indeed, it was learned that any indecision exhibited by the jurors during deliberations was occasioned by their desire to determine whether any fault could be attributed to the plaintiff's employers while leaving the manufacturing defendants unscathed. As far as the jury was concerned, the products separately, or in combination, were not unreasonably dangerous. There were no negative feelings toward the manufacturers and no juror had been swayed by any recall references.

Conclusion

The lesson to be learned is a simple one: A focused jury will resolve the real issues of a case and avoid being distracted by sympathies that have no direct relation to the issues. It is defense counsel's job to determine when achieving this focus is attainable, to not assume it is unattainable, and to effectively develop strategies to attain it even when faced with potentially overwhelming distractions.

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