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Defending Against A New Generation Of Toxic Torts

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The recent passage of Toxic Substance Control Act (TSCA) reform will incentivize the plaintiffs bar to bring more toxic tort suits against chemical manufacturers. TSCA's new testing mandates and relaxed protections for confidential business information will provide plaintiffs with government-generated ammunition to support "toxic soup" cases. Manufacturers must therefore ensure that they are operating in compliance with any new regulatory standards, show that past testing and confidentiality practices reflected a corporate commitment to safety and "playing by the rules," and then communicate all this to judges and juries in a compelling and comprehensible manner.

In a "toxic soup" case, an allegedly harmed plaintiff, who cannot precisely link their illness to any particular acute or chronic chemical exposure, alleges exposure to numerous chemicals that cumulatively or interactively caused an illness. The plaintiff then sues one or more manufacturers, claiming that the use of their products caused the plaintiff's malady.

Toxic soup cases seek to muddy the waters of specific causation, leaving jurors open to confusion and, thus, manipulation at the hands of the "Reptile Strategy."[1] The Reptile Strategy is a well-known plaintiffs' trial technique that plays on jurors' fears and desires to protect their communities from alleged harm. Given the new TSCA regulations, a reptilian strategy will portray corporate defendants as placing "profits over safety" by shirking proper evaluation of its products' risks. Plaintiffs counsel will also insinuate that assertion of confidentiality reflects an effort to cover up potential dangers. Failure to adjust to TSCA-mandated changes in confidentiality protections and testing protocols will be painted as an effort to evade reasonable and appropriate product evaluation procedures.

Managing the Defense in Light of the New TSCA Requirements

The new TSCA regime weakens protections for confidential business information (CBI). Previously, companies could protect most proprietary information, subject to U.S. Environmental Protection Agency review. Now, companies must seek the EPA's affirmative approval in order to keep information confidential. This risks exposing manufacturers to additional lawsuits, as more proprietary information could be publicly revealed and potentially used against the company by the plaintiffs bar.

Further, the EPA must now conduct aggressive testing of chemicals already on the market, as well as new chemicals, with a particular focus on how these chemicals may affect vulnerable populations. As this is a new law, it is not yet clear how the EPA will choose to implement these new tests. However, it

will be essential for chemical manufacturers to stay informed regarding new regulations. Indeed, manufacturers should engage with the EPA to ensure that the new testing standards are reasonable and appropriate, and then comply with the new testing standards.

Updating the Defense of the Company

Counsel for chemical manufacturers must take into account the new TSCA regime when structuring defenses to toxic soup cases.

Develop a Compelling Corporate Story

Nothing is more important than developing the company story. You must structure the story to emphasize the company's commitment to safety, testing and "playing by the rules." Preferably, the company's quality assurance practices will be scientifically equivalent to, or consistent with, any emerging EPA testing rules. The company's confidentiality policies must be explained as a necessary part of producing high-quality products in a competitive marketplace. The company must show that confidentiality and safety are entirely consistent. In this way, the company can present a powerful "play by the rules" theme that can undercut a reptilian attack. Investment of time and effort in developing this corporate story will drive down the value of plaintiff's case, promoting more favorable settlements and verdicts.

Develop a Strong Corporate Witness

A compelling corporate story must be combined with a strong corporate witness who is familiar with the company's culture of safety as well as relevant TSCA regulations. This person must be appealing and convincing on the stand, and the only way to ensure this is through a significant investment in practice and preparation. Obtain a commitment early on from management and the witness to spend enough time with your defense team. Finally, before this witness takes the stand, subject the witness to a practice cross-examination more difficult than anything that would be experienced at trial. The right company witness can keep the jury focused on the facts of the case rather than the plaintiff's efforts to demonize a corporate defendant.

Develop Strong, Memorable Themes

Themes are critical to driving home the corporate story and helping the jury keep track of where your evidence fits into the broader picture of the case. Themes will vary from case to case, but any successful theme should have four characteristics. It should be easily repeated, simplify the relevant facts, connect the complex evidence with jurors' own experiences, and serve as an anchor, helping jurors to understand how each piece of evidence fits into the overall case. Themes act as touchstones for your case strategy. You should consider how every piece of evidence and your cross-examinations help advance one or more of your themes.

Themes should be in the form of short phrases that you can return to in order to guide the jury through the case. Stress that your company "plays by the rules" by repeatedly referencing how it follows government standards and changes procedures as new rules emerge. Emphasize the company's willingness to work with the EPA and adapt to the new TSCA regime. Of course, if the evidence suggests that the manufacturer's product could not have caused the injury at all, use the theme "not our product," showing the jury that there is no causal link between your product and the injury. If the plaintiff chose not to wear mandated safety equipment while using your product, emphasize "personal

responsibility," reminding jurors that people who use complex chemicals must take appropriate responsibility for their own safety.

Effective use of themes is vital because a reptilian plaintiff has several compelling themes of their own, not the least of which is "profits over safety." A compelling corporate story is the best antidote to this theme. In a toxic soup case, one of the plaintiff's themes is likely to be "every little bit hurts." This theme suggests that there is no safe level of exposure to the chemicals in question. Thus, whatever trace amounts of this chemical exist within your product *must* have contributed to the plaintiff's injury. This approach ignores well-settled scientific principles and is largely unsupported by reliable science, but it is nevertheless an effective emotional hook.

Updating the Defense of the Product[2]

The defense of the product must rest upon good science.

Stress the Real Science of Causation

Much of the scientific information you will present to the jury will concern both general and specific causation. General causation is simply about whether or not the chemical can cause the symptoms at issue in general. Specific causation refers to whether or not this chemical caused the plaintiff's illness. It is very easy to confuse the jury here. Jurors are unlikely to have strong backgrounds in science. Thus, the more complex the scientific evidence becomes, the more likely jurors are to make decisions based on emotion rather than evidence.

The details of the causation analysis will vary, but the defense should always seek out alternative causes. Many of the plaintiff's symptoms may be explained by diet, lifestyle factors, genetics, addictions, or previous accidents or diseases. These issues can be used to show the jury that other factors outside of your client's control explained the plaintiff's symptoms. Where possible, force the plaintiff's experts to admit during depositions that the plaintiff's lifestyle choices or medical background could be responsible for the plaintiff's symptoms. Do not let the new TSCA regulations distract you from the issue of causation: the new rules don't matter if your product could not have caused the plaintiff's disease.

Fight off Attacks on the Science of Dose-Response

Plaintiffs counsel will, inevitably, find some expert to support their contention that any level of exposure to the chemicals in question is inherently unsafe. Courts are divided as to whether or not such "no-dose" testimony is admissible under Daubert and similar standards. In 2013, the District of Massachusetts excluded expert testimony that there is "no safe level" of benzene exposure, stating that such a claim is "inadmissibly unreliable."[3] Earlier this year, however, the California Court of Appeals upheld a ruling on a similar "every exposure" theory in an asbestos case, allowing an expert to testify that any exposure to asbestos, no matter how small, can cause cancer.[4] Thus, although you may be able to exclude similar expert testimony in a toxic soup case, you must also be prepared to combat the pernicious effects of such "junk science" on a jury through the use of supportable science and a strong expert presentation.

Consider an Exposure Assessment

You must work with your experts to perform a thorough exposure assessment in order to understand specific causation. If you lack reliable knowledge of the probable dose range for an individual plaintiff,

then the plaintiff's experts can focus on extremes and outliers, leading the jury to believe that such consequences of chemical exposure are ordinary, and that the chemicals in question are toxic in much smaller doses than they actually are.

An exposure assessment consists of four steps. First, characterize the exposure setting. Second, identify the exposure pathways. Third, quantify the exposure. Fourth, conduct quantitative uncertainty analysis. In other words, find out *where and how* the plaintiff was exposed, *how much* of the chemical the plaintiff was exposed to, and *how likely it is* that this level of exposure would cause the plaintiff's symptoms. It is important to work closely with experts during this process, and it is also important that this work begin early. It is better to go into depositions knowing a great deal about possible exposure scenarios so that experts can be questioned in detail. Precision will favor the defense.

Be conscious of whether or not any models you generate during your exposure assessment can be presented to the jury. Most states permit the admission of experimental tests and evidence, such as air modeling, if the testing occurred under circumstances substantially similar to the plaintiff's exposure.[5] However, is important to think carefully about how you will present this information at trial. Generous use of comprehensible and well-vetted graphics will be essential in communicating scientific information to the jury. You must consider how your experts will be cross-examined about these models and graphics during trial. You must ensure that your expert is capable of appealing to the jury while simultaneously teaching them about complex scientific principles. Finally, check to make sure there is nothing in the models you present to the jury which might whipsaw back and hurt your case.

Conclusion

A plaintiffs attorney has a powerful image at their disposal in toxic soup cases: the image of the profit-driven corporation exposing people to toxic harm. Plaintiffs want to draw the jury's attention away from the science and towards an instinctive desire to protect the community. The new TSCA provisions give the plaintiffs bar even more ammunition with which to attack chemical manufacturers.

You must therefore ensure that your client's testing protocols and business practices are in compliance with the evolving TSCA standards, and then be prepared to defend your clients with compelling themes and coherent science.

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Richard Morgan is a partner in Bowman and Brooke's Minneapolis office. *He wishes to thank Bowman and Brooke associate Rob Fafinski and summer clerk Bill Coberly for their assistance in preparing this article.*

[1] See David Ball and Don Keenan, Reptile: The Manual of the Plaintiff's Revolution (2009).

[2] Thanks to Brent Kerger, Principal Scientist at Exponent, for his assistance with this portion of the article.

[3] Milward v. Acuity Specialty Prods. Group, 969 F.Supp. 2d 101 (D. Mass. 2013), aff'd sub nom.

Milward v. Rust-Oleum Corp., 2016 U.S. App. LEXIS 7470 (1st Cir. Apr. 25, 2016).

[4] Davis v. Honeywell Internat. Inc., 245 Cal. App. 4th 477 (Cal. App. 2d Dist. 2016).

[5] See, e.g., Dunn v. Nexgrill Indus. Inc., 636 F.3d 1049, 1055 (3d Cir. 2011).