

MANAGER'S JOURNAL / By Steven B. Hantler

How to Beat the Trial Bar

WHY DO SO MANY financially strong, well-managed American companies get creamed by huge lawsuits that turn into media circuses, government-agency investigations and multimillion (or billion) dollar settlements? Because when it comes to litigation strategy, Corporate America is playing checkers while the trial lawyers play chess.

When the impact of litigation was confined to paying legal fees and the occasional adverse verdict, companies could survive their competitive disadvantage against the trial bar. No longer. Today, share value, brand equity, corporate reputation and even a company's business model are at stake. That's why successful companies must take time to study the trial bar's playbook—and develop opposition strategies. The good news is, the bar can be beaten.

Page One from the playbook is research and development. Right now there are several dozen trial-lawyer firms poring over every successful company's government filings, press releases and all their public documents. The purpose: To find the next billion-dollar "mistake."

Page Two is testing this alleged mistake on mock juries and the media. If the story sells, they move to Page Three and bring the issue to government regulators, including state attorneys general, and try to involve them.

Page Four is filing the lawsuit, if possible in one of those magic jurisdic-

tions that the American Tort Reform Association calls "Judicial Hellholes." Page Five is staging a press conference or working with their allies at the network news magazines to generate incendiary coverage about their lawsuits. In Old West parlance, some of these events could be called "necktie parties"—that is, public hangings. Trial lawyers have even been known to brief financial analysts who cover a company's stock in an effort to drive down share price.

Many companies unwittingly cooperate by defaulting to a bunker mentality, which includes making "no comment" to media inquiries. Every time an executive says "no comment," the trial bar cheers. No wonder. Some 62% of Americans believe that a company's "no comment" about a lawsuit means that company is covering up wrongdoing and 48% of those surveyed are less likely to buy a company's products when the company is *accused* of wrongdoing.

The idea of this coordinated campaign is to create a perfect storm of highly adverse media coverage, regulatory agency subpoenas, share-value loss, and decline in company and product reputation that overwhelms any company that did not see

it coming. The trial bar knows that if they can turn up the heat, someone in the besieged company will propose settling the lawsuit "for a couple hundred million dollars" as the most expedient solution, even though the lawsuit is without merit.

The good news is that the playbook is not infallible. Companies can position themselves to withstand these assaults, and prevail in court.

The first step is to build an effective, proactive 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.

Second, companies must manage the issue rather than just the litigation by coordinating the legal, government-affairs

and public-relations response. This allows the company to respond in a consistent, effective and timely manner to each of its stakeholder groups.

Third, companies must bite the bullet and litigate some meritless lawsuits, even though it may be cheaper to settle. It is conventional wisdom that once a class-action lawsuit is certified by the

court, the game is over. Yet my company has taken two certified class-actions to trial and won both of them, either at trial or on appeal. True, we might—might—have been able to settle these lawsuits for less than our trial and appellate costs, but we didn't want to play by the trial bar's playbook. By winning, we sent a message: Bringing a meritless case is a lousy investment.

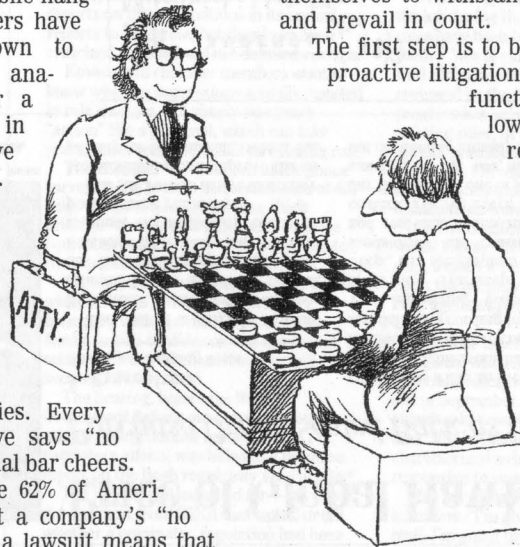
The final imperative is to participate in a meaningful way to restore fairness and predictability to our tort system. Michigan's tort reform efforts led by then-Gov. John Engler (now president of the National Association of Manufacturers) have done just that. The future of legal reform looks bright with Mr. Engler of NAM, Tom Donohue of the U.S. Chamber of Commerce, and Sherman "Tiger" Joyce of the American Tort Reform Association all pushing for reform.

By studying the trial bar's playbook, companies can develop strategies to beat the trial bar at its own game. Two can play this game, and if we play smart we can win.

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