

Five of the Most Common Defense Case Vulnerabilities: Medical Products Liability Litigation and Beyond

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During our many years of consulting, we have observed first-hand the variety of challenges facing corporate defendants. Economic conditions, compositions of jury panels and, more specifically, corporate attitudes and FDA perceptions, vary from venue to venue and case to case. Yet our research has revealed consistent trends in the frameworks both plaintiff and defense-leaning jurors create and rely on. In this edition of Insights, we explore five of the most common defense case vulnerabilities, or challenges, facing corporate clients within the realm of medical products liability litigation. Although these vulnerabilities have been observed across dozens of medical products liability cases (with jurors' framings tending to be similar, regardless of the type of medication or medical product involved), it should be noted that some of these same vulnerabilities also transcend this specific genre of litigation – from patents to property disputes.

Armed with the knowledge of the common plaintiff perspectives described below, there is much defense counsel can do in an effort to mitigate their effectiveness. As early as discovery, and prior to being deposed by plaintiff counsel, both expert and fact witnesses can be given tools (e.g., thematic responses) to deal with tough questions that will perpetuate these vulnerabilities and designed to appeal to plaintiff jurors at trial. Knowledge of these common plaintiff framings can inform and shape the deposition process. They can also uncover counter-themes that directly contradict plaintiff juror predispositions while arming defense jurors with schemas of their own to take into the jury room. Further, an awareness of these common vulnerabilities points toward important voir dire topics.

While we have identified a number of common vulnerabilities over our years of experience, we will limit this presentation to five of the most common and consistent trends in medical products liability cases.

1. **Profits Over Safety/Profits Over People.** Perhaps not surprisingly, this is one of the most common and far-reaching beliefs plaintiff jurors have regarding corporations in general and medical products manufacturers specifically. The “profits over people” theme serves as a filter such that plaintiff jurors evaluate several aspects of any case through this lens (e.g., companies limit testing because they do not want to spend “extra money” on anything beyond the “bare minimum”). For plaintiff jurors, this is an overarching umbrella phrase that explains why a medical product manufacturer did not do something that it could have or, from their idealistic perspective, should have to prevent the situation at hand.
2. **Inadequate Warnings as a Denial of Choice.** Warnings are an easy target for plaintiff jurors who are typically idealistic and expect defendants, particularly medical products manufacturers, to educate and protect consumers directly (with little regard for the role of the physician vis a vis the Learned Intermediary Doctrine). The reality is that no matter how

thorough and precise the warning, it is always possible to second guess its content and the motives of those who created it. More often than not, plaintiff jurors contend that defendants should provide more inclusive warnings with little thought for the length of an expanded warning and/or of the practicality of including so much information. Importantly, plaintiff-oriented jurors also view inadequate warnings as creating a denial of choice for the user of the product. If a manufacturer fails to share all critical information, how are consumers to locate this information and/or to make educated decisions about the risks and benefits of the applicable medication, device, etc.? Again, plaintiff jurors often put aside the role of the physician and instead argue that warnings' content directly affects consumers' actions. This is particularly true in cases involving over-the-counter medications where the defense has less opportunity to discuss what a physician did or did not share with his/her patient.

3. **Product Development, Testing as Incomplete.** Stemming from jurors' misconceptions of testing protocols, industry norms and FDA regulations, plaintiff proponents typically argue that companies should/could have performed additional "testing" prior to bringing their products to market. The term "testing," as used by plaintiff jurors, is often ill-defined and ambiguous, based on perceptions of what they idealistically and erroneously believe can be accomplished by pharmaceutical companies (e.g., that "all possible" side effects can be identified and reduced via the testing and product development process). Further, plaintiff jurors typically conclude that companies' "insufficient" testing is the result of: 1) not wanting to spend the extra money (i.e., companies are motivated by "profits over people"); and/or 2) fear regarding what the results might show (i.e., companies want to conceal adverse outcomes).
4. **FDA Standards as the "Bare Minimum."** Plaintiff-oriented jurors often come to the courtroom with the belief that the FDA is more "lap dog" than "watch dog" and, similarly, they believe the agency can be persuaded – by "Big Pharma" (e.g., to ignore less-than-favorable testing data). Less cynically, plaintiff jurors view the FDA's standards as the "bare minimum" and as insufficient when it comes to determining a product's true effects and/or what the "complete" content of a warning should be. Universally, plaintiff jurors typically contend that pharmaceutical companies should go "above and beyond" the FDA's protocols or requirements in an effort to ensure that products are both safe and effective, with thorough warnings and with years of testing *prior to* entering the market.
5. **"Possibility" as the Standard for Causation.** Shifting the burden of proof, plaintiff supporters often expect a defendant corporation to establish that its product in no way caused, or contributed to cause, harm. Whether the burden of proof is appropriately or inappropriately placed, jurors in the pro-plaintiff camp often invoke "possibility" (instead of probability) as the standard for causation. That is, they argue that if there is any possibility that the product caused or contributed to cause illness or injury, then the defendant corporation should be held responsible. While alternative causation is often proffered by the defense, plaintiff jurors find their way around this evidence, arguing that the product at issue worked in conjunction with the other factors to serve as the proverbial "straw that broke the camel's back." Even more simplistically, plaintiff jurors often focus on the product's use as adequate proof of causation. For example, if a medication was in a plaintiff's system when an injury or behavior occurred then the medication must have caused said injury, behavior, etc.

While our research has found that these vulnerabilities often transcend venue and product, each case's unique facts and evidence will inevitably create case-specific vulnerabilities or variations within the findings provided here. Having identified the particular vulnerabilities of a case, Litigation Insights can then assist the defense team in developing themes and strategies that ideally counter the beliefs held by those with a pro-plaintiff orientation. Moreover, Litigation Insights can recommend voir dire topics and/or a pre-trial questionnaire that will help identify these types of attitudes and opinions among prospective jurors.