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3 Litigation Strategies To Combat 'Safetyism'

By **Ann Marie Duffy** (March 18, 2024, 12:52 PM EDT)


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The belief that every person should be free from the risk of harm or discomfort, referred to as "safetyism," is on the rise in our society for a variety of reasons, as discussed in detail in the 2018 book, "The Coddling of the American Mind: How Good Intentions and Bad Ideas Are Setting Up a Generation for Failure," written by Greg Lukianoff and Jonathan Haidt.

The rise of safetyism can be felt in courtrooms across the country, affecting jury verdicts and contributing to jackpot damages awards that have stunned corporate America and seasoned trial lawyers alike.

Eric Rudich, managing partner and senior litigation consultant at Blueprint Trial Consulting, reports that from the hundreds of mock jurors his company has empaneled and interviewed, 91% believe the products they buy should be 100% safe for all consumers, 84% believe that if a product is not 100% safe it should not be on the market, and 72% believe that work environments should be 100% safe for all employees.[1]

It is no surprise then that plaintiffs lawyers are leaning heavily into safetyism and successfully combining the current level of risk aversion among jurors with the growing sentiment that corporations only care about the bottom line. Indeed, a recent Pew Research Center survey found that the majority of Americans have negative views of large corporations.[2]

The combination of these two forces creates a powerful tool for plaintiffs lawyers in the courtroom.

But there are ways defense attorneys can combat safetyism, and the fight should start long before stepping into the courtroom. When defending against personal injury claims, either due to product liability or environmental torts, knowing the company's full history and identifying the witnesses who will tell that story should be among the first steps you taken when starting to build your defense.

Understanding that no one is immune from safetyism — not even judges — you should also be telling the company's account of the facts every chance you get.

1. Know the facts.

For corporate defendants facing large, complex litigation, generally the focus of pretrial preparation, including witness interviews and document collection, is almost exclusively defensive: Produce documents that were requested, answer interrogatory that were propounded, sit for depositions and only answer opposing counsel's questions.

Too often, all the facts of what happened and who was involved are not fully known until pretrial dispositive motions practice. By this time, it could be too late.

Of course, in the face of broad discovery rules and potentially harsh sanctions for compliance failures, it makes sense to collect all relevant documents and materials that are potentially responsive to the opposing party's discovery requests.

In personal injury cases where discovery is largely one-sided, plaintiffs lawyers often attempt to expand the scope of discovery, driving up related costs for corporate defendants. This may turn up a few poorly worded memos or emails that will speak loudly to the safetyist juror about the company's neglect and greed.

To combat this, look at discovery, even responsive discovery, as an offensive exercise. Collecting and reviewing documents without a clear strategy could leave you without a full understanding of what happened at the company, who was involved and why decisions were made.

Knowing your documents as well as your key company witnesses and subject matter experts is essential to understanding what happened and how you will tell these facts to the jury.

To accomplish the goal of building your affirmative story early, the more senior lawyers on your litigation team must spend time getting to know who the key players are and what their documents say.

While this approach requires more time and effort in the early stages of the litigation, there are new tools that can help counsel identify, organize and rank document custodians and witnesses to the claims and defenses of a matter, arming counsel with the knowledge of which witnesses have relevant information and should be the focus of counsel's attention.

These tools can also help counsel to oppose impermissibly broad discovery requests and motions to compel by arming them with data on the relative time and cost burdens of pursuing discovery from custodians with less responsive and nonrelevant material.

Not only should counsel know the company's history and key players early, but document production should never be limited to producing only what the other side has asked you to produce. Companies should think carefully and strategically about the history and facts of what happened and how they will present this at trial. They should look for and produce documents to support this effort, even if not sought by opposing counsel.

Thinking of discovery in offensive terms early in the case can pay dividends later in the avoidance of large jury verdicts and punitive damages.

2. Identify your witnesses.

Once you know the facts, witnesses will be key to conveying those facts to the jury. Who presents the company history and the facts of what happened at trial is important, so ensuring you get to know all the individuals who were involved in the issue, and who can speak to what the company knew and what steps the company took, is critical.

Again, attorneys should meet with and extensively interview employees and subject matter experts early in the litigation and, if needed, take the time to educate a trustworthy witness who may have less corporate knowledge than others.

3. Tell the facts every chance you get.

Trial counsel should not wait until dispositive motions briefing to tell the court the facts of what happened in the case. Judges are people, too, and may have safetyist viewpoints that could affect the way they see the case.

While it's important to tell the company's viewpoint regarding key issues in its pleadings and motions practice, trial counsel should also take every opportunity — be it a status conference or an argument on a discovery or procedural motion — to educate the judge about the facts from the start of the litigation.

Doing so early and often can pay dividends later when the court has to rule on dispositive motions, motions in limine and other evidentiary issues.

Conclusion

In the face of this rise in safetyism among potential jurors and even judges, it is critical that corporate defendants know the facts of what actually happened and tell those facts early and often.

While this may not guarantee a defense verdict, it can help blunt potential jackpot damages awards and punitive damages.

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[1] Report from Ad Idem's Live Webcast,"Safety-ism" and Its Impact on Jury Trials, held November 14, 2023.

[2] https://www.pewresearch.org/short-reads/2022/11/17/anti-corporate-sentiment-in-u-s-is-now-widespread-in-both-parties/#:~:text=Majorities%20of%20Americans%20express%20negative,the%20same%20about%20large%20corporations.
