

# The Hunter, the Ostrich, and the Spin Master



## Prologue

With a “hunter, an ostrich, and a spin master” in the title, you may think that an Aesop’s Fable is in store for you. You would be only partially correct. This story has all of the elements of those timeless fables: unforgettable characters, a good scare, and an important lesson. However, this tale takes place not in a quaint, wooded setting, but in

the present-day world of a corporate manufacturer striving to survive the onslaught of media attacks and product liability claims.

Corporate manufacturers have all too often become unwilling combatants over crisis events that have gathered media and social media attention. Administrative agency inquiries, scientific papers, or a catastrophic accident can all become catalysts for crisis events including media investigations, government investigations, and lawsuits seeking compensatory and punitive damages.

This article illustrates how corporations frequently fail to proactively address

crisis events with a long-term, crisis-management game plan. Given the high stakes and the increasingly hostile litigation environment, a corporation confronted with a crisis must quickly and accurately assess and control the potential damage to its long-term interests.

In assessing a potential unfolding crisis situation, the corporation needs to appreciate that silence or inaction often is viewed as tacit admissions to the charges. On the other hand, poorly planned, reactive comments also expose corporations to significant perils.

## Our Story’s Setting: A Treacherous Litigation Environment

In order to better know our main characters, the ostrich, hunter, and spin master, let’s look at the setting in which they are cast—the litigation environment. The litigation environment has dramatically changed in favor of plaintiffs over the last 10 years. The plaintiffs’ bar is now armed with unprecedented access to corporate information as a result of concerted, organized efforts to foil protective orders and confidentiality agreements. Manufacturers can no longer reasonably expect that their corporate documents will only be disclosed within the context of a single case, protected under confidentiality orders.

Document packages are now published and sold by plaintiffs’ counsel and other so-called “public-access” corporations, foundations, or organizations funded by the plaintiffs’ bar. Former corporate employees are becoming “turncoats” against their past employers, providing information in response to the request of an aggressive plaintiff. Corporations cannot assume that a seemingly increasingly unreceptive judiciary will enforce confidentiality agree-



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ments between former employees and their former employers.

A surplus of plaintiffs' lawyers has made a negative impact on the corporate environment. According to the United States Department of Labor Bureau of Labor Statistics, there is now roughly one lawyer to every 140 people employed in the United States. A growth in lawyers has not been matched by a growth in the demand for their legal services. As a result of this "overcapacity" and intense competition for scarce work, cases are sued that plaintiffs' attorneys would previously not have taken.

Judges in the new legal environment face heavy dockets. As a result, they may not engage in the sophisticated analysis called for by the complex legal issues raised by product liability cases, many of which seek punitive damages. What's more, defense lawyers must be cognizant of and surmount these growing obstacles in a strategic and cost effective manner at a time when corporations are cutting back on their legal expenses.

### **Our Supporting Players: Disaffected Jurors Play a Key Role in the New Treacherous Legal Environment**

Corporations must win over disaffected jurors and they must do it before the trial ever begins. In today's increasingly treacherous legal environment, there is one standout—the disaffected, displaced and/or hostile juror. This "new class" of potential jurors has been displaced by economic chaos suffered by our nation during the last decade. Unemployed and bitter jurors contribute significantly to the volatility of jury verdicts. Many disaffected jurors blame Corporate America for their plight. With time on their hands, they frequently access social media channels such as Facebook, LinkedIn, Twitter, YouTube, blogs and websites. Through these social media sites and through traditional media, they learn about and react to allegedly improper corporate conduct, large legal verdicts, punitive damages and settlements. Potential disaffected jurors form negative opinions based on blurbs and sound bites without considering the corporation's point of view. Most are unaware that enormous settlements are structured or the verdicts reduced on appeal. Due to all these factors

and more, disaffected jurors are ready to "stick it to" the corporation.

### **Our Cast of Characters**

#### **The Hunter—The Plaintiffs' Bar**

The first of the three title characters in our modern-day fable is the hunter. In the wild, the hunter often prevails by stalking, dis-

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tracting, confusing, or exhausting its prey. The hunter in the legal context previously was only an individual plaintiffs' lawyer hunting alone. As the hunter of prehistoric times learned that hunting in a group often was more successful, so too have the plaintiffs' lawyers of today joined groups to prosecute their clients' interests. Legal battles today are often fought by associations of hunters in groups such as the American Association for Justice.

Today's legal hunters engage in sophisticated and stealth techniques to bag their prey. It is widely believed that plaintiffs' attorneys now establish and jointly finance pro-plaintiff research. They may also lobby to place sympathetic representatives on quasi-public product-standards committees, sponsor quasi-scientific product studies and, in some instances, engage in disinformation campaigns. These efforts tend to lend an aura of credibility and prestige to their positions.

Today's hunters have influenced governmental regulatory action and have built up public support for their causes. The fallout has had a chilling effect on expert and governmental witnesses' willingness to appear

for the defense. Trial judges, in turn, permit plaintiffs to secure broader discovery and corporations shoulder higher defense costs as a result. Most importantly, the hunters' tactics mold public opinion, including through the use of social media, against a corporate defendant long before the trial ever commences.

#### **The Ostrich—The Corporation**

Corporate America has traditionally defended itself only in the courtroom, not in the print and social media. "No comment" has been the rule rather than the exception. Corporations confronted by the media and social media do not fare well when they employ the ostrich-like response of burying their heads in the sand. Corporate silence is often viewed by potential jurors, especially disaffected jurors, as a silent admission that the charges against the corporation are true.

Timely, adept and strategic use of the media and social media can prove extremely helpful to Corporate America in protecting its interests. Rather than playing the ostrich, corporations may instead take swift proactive measures and reap the potential benefits of making their position known in the public forum, including social media channels, rather than solely in the courtroom.

Like the ostrich that erroneously perceives the hunter cannot see him when the ostrich's head is buried, a corporation's self-perceptions can be equally hazardous to its survival. A corporation's self-perception can be quite different and even more favorable than the perception that others have, such as outsiders and potential jurors. For a corporation, holding onto a self-image with little basis in reality can be dangerous, especially when members of the corporate hierarchy are pressed into a state of "high corporate stress," and thus are less objective regarding their corporate image.

An analysis of the tactics engaged in by the plaintiffs' counsel hunters reveals that they are intended to impose this high stress on corporations. These tactics may set in motion a domino effect of media inquiries, administrative agency investigations, and civil litigation.

A corporation that does not objectively assess its self-perception, which fails to recognize that its image is damaged by stress,

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and which does not have in hand an effective crisis-management plan, cannot present a favorable image to the public during a crisis.

Those who have counseled corporations through attacks on reputation and credibility recognize that the first stage of a crisis is rarely a media attack. Frequently, the conditions that lead to a media attack have festered in a company for an extended period of time. It is only when outsiders such as administrative agencies or the media learn of the situation that some corporations try, for the first time, to put their houses in order. Unfortunately, at that juncture, a corporation has lost the ability to put together a plan that permits it to respond in a timely, adept and strategic manner.

It is incumbent upon counsel for the corporate manufacturer at the early stages of a potential crisis to lead the corporation in a manner that fosters internal corporate soul-searching. A manufacturer must lift its ostrich-like head out of the sand and face up to the reality that it is in trouble.

#### **The Spin Master—Media Liaison**

The spin master is the person who, working with corporate counsel, helps navigate the corporate manufacturer through the treacherous areas of media and social media attention and product liability litigation. The spin master must be aware of, but detached from, the corporate self-perception and denial that often limits the objectivity of the typical corporate officer. He or she must also be fully informed of all aspects of product development and manufacture, have a talent for formulating long-term goals, and be extremely media and social media savvy.

One of the intangibles of defending a manufacturer's interests in a product liability case is the defendant's overall reputation for credibility and quality. A current lawsuit is not simply an isolated case in a vacuum. When a hunter attacks a corporation's image and reputation, spin masters must develop an appropriate game plan to preserve the good image, credibility, and reputation, and to counter the negativism that the plaintiffs' bar has attempted to assert against the corporation.

To preserve its good reputation and avoid disaster, a manufacturer should hire

someone highly experienced in dealing with the media and social media in crisis situations. Although this individual will undoubtedly be legally sophisticated and will be guided by counsel, the spin master is oftentimes not an attorney.

Rather, the spin master is an individual who, in addition to his or her degree of

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legal sophistication and sensitivity, is adept at handling the media and social media and is a master of corporate image, branding, and the sound bite. This individual, in concert with counsel and those responsible for protecting a corporation's interest in-house, can assist a manufacturer to project a favorable image to the public. The attack against negative misinformation should, in a concerted way, be consistent with the truth about a manufacturer's products, reputation, and credibility.

#### **Blueprint for Disaster**

A manufacturer faced with a product liability claim that reacts hastily and without a long-range strategy, is drafting a blueprint for disaster. For example, a corporate representative may issue a knee-jerk statement, post, or blog that proves later to be misleading or untrue. Like the ostrich, the representative may instead refuse to comment when a comment is appropriate and necessary. In either instance, the media and/or users of social media will seize upon the opportunity to spread unfavorable publicity and will not let go until the damage is done. A less obvious path to disaster is paved when a manufacturer gives the appearance of a proactive response to a cri-

sis but the response is short-term oriented, and the manufacturer has no control over the end result.

Assume a major corporate manufacturer with a good reputation is suddenly confronted with a multiplicity of actions based on the alleged long-term effects of its product. The plaintiffs' bar endeavors to have a class certified. Spokespersons purporting to act as "consumer advocates" begin to appear in the press, television and social media, asserting that red flags warning about the dangers posed by the product have been raised for years. Broad pretrial discovery has been allowed by the trial judge, and the materials have been disseminated from one plaintiffs' law firm to another and perhaps even posted in the social media. The first jury verdict against the corporation is a large one.

In the face of such notoriety, the manufacturer quickly develops a short-term plan. It retains the services of a prestigious attorney; his or her retention is announced with great fanfare. The attorney announces that he or she is in the process of evaluating the situation on behalf of the corporation and that he or she will issue a detailed and comprehensive report of his or her investigation.

After some months, the reputable attorney announces that he or she has finalized his or her report and has sent it to the manufacturer. Because of the potentially damaging content in the report, the manufacturer feels that it cannot release it in total. Instead, it releases a summary of the report, or perhaps only its closing recommendations. The refusal to release the body of the report, based upon the attorney-client privilege, is met with vicious attack by the plaintiffs' bar. It charges—in the press and in the social media—that failing to release the report is characteristic of the manufacturer's disregard for the well-being of the public in general and users of its product in particular.

The manufacturer now finds itself in the middle of a full-scale disaster. It has not only failed to preserve its integrity and credibility, but it has also affirmatively damaged itself. The public now sees a corporation with a dangerous product that is hindering the flow of information about that product. The manufacturer has played right into the hands of plaintiffs' counsel,



who will ask juries for punitive awards to deter and punish.

### Developing a Positive Game Plan Assisted by Counsel and the Spin Master

The fundamental goal of a manufacturer faced with managing a crisis and/or defending a product liability action ought to be developing a strategy that projects the corporate image in a positive way and that has the effect of influencing the very people that will sit in judgment of it.

It is clear that the image and perception that lay people have of a manufacturer, its credibility, and its integrity, are its “franchises.” Thus, in developing a strategy to counter a negative public relations and/or social media campaign, a corporation should proceed as follows:

#### A Corporation Must Be Prepared for a Crisis

1. Well before the crisis hits, a corporation should have in effect a formal *crisis-management plan*.
2. A *crisis-management plan* should address a corporation’s *long-term interests*, rather than focus on instantly satisfying knee-jerk reactions to unpleasant events, which may have negative long-term implications.
3. A *crisis-management plan* should be able to rapidly produce the *technical information* necessary to understand the problem with a manufacturer’s product, and to distill that information to simple components. A well-structured document retention and retrieval program is an integral part of this process.
4. A *crisis-management plan* should identify a core crisis management team, the individuals in charge and their responsibilities.
5. A *crisis management plan* should identify key crisis scenarios and the proposed responses to the scenarios.
6. The corporation should engage in a mock crisis response to each one of the key crisis scenarios.
7. A group of individuals, corporate counsel, spin master, and their team, should develop in advance a *positive position paper* for a manufacturer as part of the manufacturer’s *crisis-management plan*.

8. Prior to a crisis, the corporation must engage in online monitoring of the corporation’s image and brand. The corporation should seek to use the media and social media to create a favorable image of the corporation and its products or services. Prior to any crisis, the corporation should engage journalists in its

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industry in a favorable way.

#### Executing the Crisis Management Plan

1. In executing the *crisis management plan*, the corporation should seek to control the crisis.
2. Armed with the *crisis management plan*, the corporation should collect and analyze facts and proactively communicate its findings as warranted through media and social media channels both internally and externally.
3. The corporation should express concern as deemed appropriate by counsel and the crisis management team.

#### After Resolving the Crisis

1. The corporation will learn from its mistakes.
2. The corporation will make changes as warranted and communicate those changes to the public through media and social media channels.
3. The corporation will revise, as necessary, the *crisis management plan*.

Corporate crises and lawsuits have a beginning and an end. Protecting a manufacturer’s long-term interests must be a top priority. The press has a natural disposition to attempt to “close the loop” on stories. When a corporation vacillates, or acts inconsistently, the press tends to “fill

in the blanks” and present its own conclusions. Nothing is worse for a manufacturer than failing to demonstrate consistency and candor.

Crises do not just occur. A manufacturer is usually well aware of a “problem product” long before the press reveals it to the public. As soon as problems come to a manufacturer’s attention, a team of specialists must deal with them aggressively and proactively. Today a corporation’s response or lack thereof will be blogged about, tweeted, or posted on YouTube and remain “forever” on the social web to be searched, retrieved and rebroadcasted. By not playing crisis situations too close to the vest, and by developing a public relations and social media program that is proactive and long-range focused, these manufacturers avoid becoming the fodder for hostile media campaigns.

A corporation can develop a long-term game plan by combining a mastery of the technical issues associated with a product, accumulated from the corporation’s document base, with an analysis of these issues. The resulting information, with “a proper spin,” can then be disseminated to the public including through a well thought out and comprehensive use of social media. A prerequisite to developing that information is to understand fully the difficulties and technical problems associated with a product. Every corporation should have an appropriate document retention program so that it can organize its documents for evaluation and assessment in a timely and expeditious manner.

Corporate counsel, and the spin master ultimately bring all of these elements together. Their long-term plan should be able to resolve any crisis quickly and completely, while maintaining the morale of the corporation, preserving the confidence and reputation for credibility and reliability that it enjoys in the community, and quashing negative media attention. A corporation that follows such a plan will never be labeled by a fact finder or appellate court as “really mean.”

#### Applying the Game Plan

The preceding discussion sets forth general guidelines for drawing up a game plan  
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for corporations facing potential crises. What follows are the steps that corporations should consider in implementing the guidelines using a hypothetical scenario.

Suppose the following situation. A disgruntled employee of a regional manufacturer of a popular beverage has been linked to the deaths of three consumers who drank a bottle of the beverage that was intentionally tainted. The cause of the deaths and the name of the employee have been identified, and a major media and social media onslaught is underway. The crisis-management team, guided by counsel and fronted by the spin master, is prepared to proceed with a well-planned and finely tuned course. Here is what the team will do:

- Counter all negative media reports, social media attacks and potential legal claims aggressively while preserving the established, trusted reputation of the company.
- Utilize social media proactively including appropriate posts to the company's website, blogs, YouTube, and its Twitter followers and Facebook.
- Present the company as fully responsive, forthright, and communicative with respect to the crisis.
- Demonstrate genuine concern and compassion for those impacted by the crime.
- Emphasize that the event arose out of unanticipated criminal behavior.
- Specify the immediate steps that the company has taken to ensure absolute safety to consumers of the product.
- Address issues in a straightforward

manner, demonstrating that the company has nothing to hide.

- Prepare public statements and social media responses carefully that not only pass legal muster but that demonstrate warmth, involvement, and concern.
- Anticipate future developments and prepare additional public statements in advance.
- Schedule one or two well-planned, public appearances by the company's president or chief executive officer to issue a statement in the place of the spin master or other spokesperson, to demonstrate concern and involvement at the highest levels. Post this appearance through all appropriate social media channels.
- Cultivate existing media and social media relations and forums and develop new contacts.
- Limit responsibility for answering questions from the press or in the social media to the spin master or designated spokesperson.
- Answer questions frankly to the extent reasonably appropriate: an answer of "I don't know" is preferable to an inaccurate, off-the-cuff response, which is certain to be revisited in the future.
- Take every opportunity to reinforce the company's pride in the product and its confidence in recommending the product to the public upon the prompt resolution of the current crisis.
- Educate employees fully with respect to the relevant facts so that they are accurately informed in the event that they are presented with questions from the outside.
- Educate the employees regarding what

they may and may not say in social media channels.

- Step back and reexamine the progress of the crisis management at established intervals to ensure that long-range goals are being met.
- Document all stages of the crisis management fully and designate a particular officer or employee as custodian of relevant records, and social media posts.
- Learn from the crisis so that even more effective crisis control policies and procedures are in place for the future.
- Make appropriate changes as a result of the crisis, and if warranted make the changes known through the media and social media.

These specific steps are based on fundamental guiding principles and may be adapted to any variety of product liability situations. The key is to establish an effective crisis-management team and plan *before* a crisis develops. A corporation should have its counsel study and understand the particular qualities of the product at an early stage. Counsel should anticipate a range of potential liability situations, assist in the selection and grooming of a spin master, and put into place a comprehensive crisis-management program.

It is only with such foresight that a manufacturer can be assured of a competitive place in an increasingly hostile world of media and social media attacks, product liability litigation, and runaway punitive damage awards. The hunter is here to stay and is growing hungrier and cagier. With good counseling, the corporate ostrich will become a thing of the past. 