Betting the Company

By Michelle Davey

When everything you've worked for is on the line in a courtroom, you need a top business litigator. *C.E.O.* talked with seven of the best.

The financial risks in most business lawsuits amount to little more than rounding errors on a quarterly profit and loss statement. But every now and then, along comes a corporate CEO's worst nightmare—a high-stakes legal dispute in which the survival of the company may hang in the balance.

Did toxic waste from your factory somehow find its way into the water supply of the little village downstream? Does your biggest competitor claim to hold a patent on your best-selling product? Has a bottom-feeding hedge fund bought up 20 percent of your stock and launched a hostile takeover?

In legal circles, those are known as "bet-the-company" scenarios. Win and you stay in business. Lose and … well, the consequences of losing are unthinkable.

There's a small fraternity of lawyers in Central Ohio who specialize in high-stakes business litigation. They command top fees—often $500 an hour and up—but if they can save your company, they're worth every penny. *Columbus C.E.O.* talked with seven local litigators to discuss their experiences with high-stakes cases. All were named to *The Best Lawyers in America* in the specialty area of "Bet-the-Company Litigation" for both 2009 and 2010.

Risky Business

No two bet-the-company cases are alike. "Sometimes it's about a threat to the existence of the company, a tremendous amount of money, important reputation issues or a competitive advantage," says Buzz Trafford, managing partner for Porter Wright Morris & Arthur.

"It's not really clearly defined," agrees Thomas Ridgley, a partner with Vorys, Sater, Seymour and Pease. "It can cover all kinds of different subject matters of the law."

Today's legal backwater may be tomorrow's hot battleground. "I've been involved in many of the hostile takeover fights in Ohio, and we've represented those whose very existence has been threatened. … For years, they were a real rage," Ridgley says. "That morphed into class actions of environmental work, because that happened to be in vogue. And in the last six to seven years, it's been employment class action and wage and hour class action."

Sandra Anderson, also a Vorys partner, says she has "focused on labor and employment in class action work and on defending employers: everything from claims of discrimination to wrongful termination. But the subject matter of these cases evolves with what the clients need and what kind of litigation is being filed. As the law changes, the litigation changes."

Frank Ray, a partner with Chester Willcox & Saxbe, has dealt with issues of product liability, proprietary ideas, "key man" employee cases and insurance. "For example, cases brought up to invoke insurance coverage where an insurer disputes an obligation to defend or indemnify an insured," Ray says. "If the insured—the company—finds itself without coverage, it could mean the end of the company."

In 2005, Ray represented LeadScope, a developer of a chemoinformatics application—basically, a tool for computerized drug research—against National Union Fire Insurance Company, part of AIG. LeadScope had been sued in Franklin County Common Pleas Court by the American Chemical Society (parent of Chemical Abstracts Service), which contended that LeadScope's owners had developed a computer model while employed by Chemical Abstracts, then left to form their own company using that model.

National Union Fire claimed it had no obligation to pay LeadScope's legal defense costs. "My role was to represent LeadScope in securing coverage for the cost of defense of the claim brought against the company," Ray says. LeadScope won the lawsuit and a later appeal, forcing National Union Fire to cover LeadScope's defense to the limits of the policy—$5 million.

"That [Franklin County] Court of Appeals decision helped to establish a precedent as to coverage under circumstances where intellectual property is allegedly misappropriated by owners of the company who qualified as insured under the policy," Ray says.

"You have to think more clearly and be more creative," says **Thomas Ridgley**, a partner with Vorys, Sater, Seymour and Pease. "It's just litigation on steroids."

Unlike the LeadScope case, many business lawsuits are resolved before they go to trial. "I think statistically, well over 90 percent of all cases settle," says Thomas Hill, a partner with Kegler, Brown, Hill & Ritter. "I don't make that decision. I advise the company of the risk and cost of the litigation. … Because of the risk, the majority of the cases settle."

Sometimes, however, the stakes are so high that settlement is out of the question. "None of my bet-the-company cases have

settled; they've all been tried," says Michael Carpenter, a partner with Carpenter, Lipps & Leland. "I guess that's why they've become bet-the-company cases. They've created a situation where even the possibility of settlement, either as a matter of principal or a matter of money, is too substantial. So, as a result, we must try the case."

Sometimes the potential for a disastrous outcome pushes both parties toward settlement, rather than trial. "We have had some cases where the consequences of going forward were risky on both sides. That's often the case, even though you call it a bet-the-company case," says John McDonald, a partner with Schottenstein Zox & Dunn. "Given the substantial risk and uncertainty with any litigation, a lot of times clients will sit down at the last minute and [settle]."

Big Money

Most bet-the-company cases involve big bucks—usually millions, occasionally billions. "In terms of large cases, I represented a client in the utility field that had $3 billion at risk—a case that lasted 10 years," Trafford says. He won't name the client, but says the case included testimony from Nobel Prize-winning economists and involved legal issues ranging from modern telecommunication statutes to century-old British laws.

"The all-consuming nature of some of these cases can displace your priorities in life," says **Sandra Anderson**, a partner with Vorys, Sater, Seymour & Pease. "It invades my dreams."

In 2008, Carpenter successfully defended Takata Corp. against a $250 million lawsuit and a statewide recall of 6 million to 7 million seat belt buckles. The case, tried over three weeks in Los Angeles, involved a consumer fraud claim under California's Unfair Competition Law. The plaintiffs contended that Takata had skipped a certification inspection and pull force test as part of the qualification process for a particular seat belt buckle.

"The claim was for unfair testing and unfair consumer practices. It was not really a products liability claim because there were no claims for damages in terms of personal injury," Carpenter says. "The recall would have resulted in enormous additional costs, interruption of business and would have created adverse implications for the quality and integrity of the seat belt buckle." Carpenter also successfully represented Takata in similar cases in Tennessee, Texas and Arizona.

"There were 500 families depending upon the livelihood of those employees," says **Frank Ray**, a partner with Chester Willcox & Saxbe. "That created significant pressure for me personally."

Ray represented Ebco Manufacturing Company in a case against Tecumseh Products Company that began after some of Ebco's Oasis bottled water coolers failed because of a defective compressor manufactured and supplied by Tecumseh.

"The failures were projected into multiples of hundreds of thousands of bottled water coolers," Ray says. "The cost of honoring warranties and providing replacements of water coolers had become an issue of tens of millions of dollars for Ebco, and Ebco didn't have the capability to manage that kind of loss without securing recompense from Tecumseh."

After two-and-a-half years of pre-trial preparation, a jury trial in Columbus in 1999 included testimony from chemistry and refrigeration experts on both sides. During a Thanksgiving recess, the case was "settled on a confidential basis," Ray says. "We had a happy ending for Ebco; that's about as much as I can say."

At the time of the trial, Ebco accounted for more than 50 percent of the domestic market for water coolers and employed 550 employees at its plant on Hamilton Road, Ray says. "There were 500 families depending upon the livelihood of those employees. That created significant pressure for me personally," he says. "When I would walk into the Oasis plant and everybody would stop work and turn around to look at me … it would usually take me a few moments to calm down after that."

The stress did have an upside for Ray's legal practice. "After that case, I started getting calls about similar scenarios where companies were at risk to lose their viability," he says.

Other Risks

Some bet-the-company suits aren't primarily about money. "It's not always that millions of dollars are at stake," McDonald says. "For example, a person is licensed as a real estate broker or securities dealer and his license is put at issue. If he doesn't have that license, he can't practice."

McDonald defended CHEP USA, a company that rents wooden pallets to companies such as Wal-Mart and Kroger, in a case filed by Buckeye Diamond Logistics, a recycler in South Charleston, Ohio.

CHEP painted its pallets a distinctive shade of blue and marked each with its logo and "Property of CHEP." Still, McDonald says, "Not all of CHEP's customers were careful about returning them, so a lot of pallets were dumped into recycling lots." Un-

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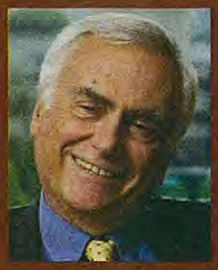

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fortunately for CHEP, Buckeye and others in the recycling industry took a "finders, keepers" position.

CHEP "has operations all over the world," McDonald says. "So, you had a case here in Ohio in which the monetary amount wasn't that great in terms of revenue, but it was a matter of principal. If you ship out those pallets and can't expect to get them back, the whole business model could fail."

The case was tried in U.S. District Court for the Southern District of Ohio, and CHEP was granted a summary judgment on the issue of ownership in 2003. Eventually, CHEP modified its pallet recovery program, and the case ended with a settlement over the cost of the pallets.

In another case, Hill represented Columbus car rental companies in a dispute over citizens' petition rights. In June 2002, Columbus City Council approved a $4-a-day rental-car tax intended to make visitors pay a share of the cost of city services.

Rental-car agency executives filed a petition to repeal the tax, but failed to notarize it. After realizing their mistake, the group notarized and refiled the petition, only to be told that it would not be passed on to council because city law says a petition cannot be altered after filing.

Had the tax remained in force, Hill says, it would have been "very, very difficult for the rental-car companies to continue to succeed. It would have been a significant competitive disadvantage for those companies whose operations were in the municipal boundaries of Columbus."

The case went all the way to the Ohio Supreme Court. "We prevailed," Hill says. The Supremes "concluded that the petition was validly submitted. The ordinance went on the ballot and it was overturned."

Building a Reputation

You don't just graduate from law school, hang out a shingle and expect CEOs to start begging you to save their companies. Even for veteran business litigators, bet-the-company cases—and the big fees attached—don't come along that often.

"I think in Columbus, Ohio, if you wait around for bet-the-company litigation to happen as your sole source of remuneration, you'll have plenty of time to play golf," Ray says. "The opportunity to become involved in these kinds of cases is not commonplace."

"It takes a significant amount of time to get a reputation," says **Thomas Hill**, a partner with Kegler, Brown, Hill & Ritter. "It is developed by doing really good work resulting in very good outcomes for clients."

Business litigators must learn to crawl, walk and jog before they're ready to run a bet-the-company marathon. "It takes a significant amount of time to get a reputation," Hill says. "It is developed by doing really good work resulting in very good outcomes for clients. It takes 15 to 20 years before you develop that reputation."

"None of my bet-the-company cases have settled; they've all been tried," says **Michael Carpenter**, a partner with Carpenter, Lipps & Leland.

"Over a period of time, you get more and more involved in complex matters, so you become more familiar with how you go about putting together a case," McDonald says.

The worst outcome for a bet-the-company lawyer is a lawsuit defeat that results in the client going out of business. All seven of the lawyers interviewed for this story say that hasn't happened to them so far, though they've had close calls.

Carpenter recalls a federal case in Cincinnati in which his client's first lawyer was convinced the company would lose eight figures at trial. "I was called in to try the case," he says, "and we did lose it, but we lost $125,000, which was a far cry from either the adverse possibility or the settlement demand being made at the time."

"Going back to the [hostile] takeover days," Ridgley says, "I was involved in a couple of cases where we helped the client avoid takeover, but ultimately their options ran out and they sold out to a third party. If they were happy with that, I guess I was, but I always felt a loss there."

Bet-the-company attorneys find personal enjoyment in high-risk cases. "Obviously, the stakes are high. The higher the stakes, the more pulse-quickening the endeavor," Hill says. "It requires every skill you have. If you're in a bet-the-company case, you will almost always have a highly skilled litigator on the other side."

"It does give you the opportunity to work with the really talented people here and in other law firms," Ridgley says. "Everything about it is heightened. You have to think more clearly and be more creative. It's just litigation on steroids."

The hard work and effort can be exhilarating, but also exhausting. "The all-consuming nature of some of these cases can displace your priorities in life," Anderson says. "It invades my dreams. When I'm under pressure about something I dream about it, so even when I'm asleep I can't escape it." ◊

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