

# LITIGATION 2009

A SUPPLEMENT TO THE AMERICAN LAWYER & CORPORATE COUNSEL

## PERSPECTIVE

### An Excess of Zeal

LESSONS FOR DEFENSE LAWYERS FROM THE W.R. GRACE TRIAL

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ON MAY 8, 2009, W.R. GRACE & Co. and three of the chemical company's former executives were acquitted of all charges in the largest, most aggressive environmental

capped a massive five-year effort to obtain "justice" for the town of Libby, Montana. According to the government, a rogue company intent on putting profits ahead of safety had

its executives had allegedly kept the dangers of "Libby asbestos" exposure a secret from everyone, including the government, for 30 years. The result, according to the Justice Department, was several hundred deaths and thousands of illnesses.

Prosecuting Grace and its executives was supposedly one more way to make amends for an apparent tragedy at Libby, even after years of civil litigation and tens of thousands of individual civil lawsuits against the company, and hundreds of millions of dollars paid in settlements with the EPA. But the problem—as the defendants argued at trial—was that there was no secret at all. Indeed, the EPA had stood on the sidelines in the 1970s and 1980s, taking no action after investigating Libby for a decade.

At its core, the Grace prosecution was a classic "cause" prosecution brought to right a public wrong. Undoubtedly, many practitioners defending clients caught up in the financial meltdown will face similar cause prosecutions attempting to gain a measure of retribution for the loss of shareholders' equity. Cause prosecutions involve unique risks and challenges. The defense's experience in the Grace case—fending off novel but flawed legal theories,



Anti-Grace protesters were a regular presence outside the courthouse during the criminal trial.

prosecution ever mounted by the U.S. Department of Justice and the Environmental Protection Agency. The two-and-a-half-month trial

for decades knowingly exposed the townspeople of Libby to asbestos from a vermiculite mining operation dating back to the 1920s. Grace and

oversimplification of facts, and prosecutorial overreaching, all in a setting dominated by hostile media coverage—is instructive for defending any cause prosecution.

The government begins with certain advantages in a cause prosecution. The defense in those cases will face many of the same obstacles as the Grace defense teams did:

**Motivated agencies seeking to deflect criticism.** Starting in 1999, the *Seattle Post-Intelligencer's* coverage of Libby emphasized the decades-long awareness of the Libby workers' health problems by various government agencies, including the EPA, the Occupational Safety and Health Administration (OSHA), the National Institute for Occupational Safety and Health (NIOSH), and the Mine Safety & Health Administration (MSHA). The EPA was investigated by its own inspector general regarding its historical actions to address asbestos contamination at Libby. Congress added its own criticism.

The end result was an agency, sitting at the prosecutor's table, that was highly motivated to prove that it was "in the dark" about key facts. That, in turn, opened the door to a simple defense—showing the full disclosure of those facts to the government. There is an equally long list of financial regulators coming under fire for ignoring, or facilitating, the economic meltdown, each of which will be motivated to prove itself in the right, and susceptible to overreaching in that quest.

**Saturated, critical media coverage.** Withering media criticism that blamed Grace for the Libby health crisis continued from 1999 through the end of the trial in 2009. This coverage included documentaries showing a cemetery and townspeople on respirators; articles about "victims" that suggested that the executives on trial should be hanged; and a

barrage of local articles in the week before jury selection on the "death in the air" at Libby. Defendants in meltdown prosecutions of mortgage companies or investment bankers with substantial bonuses can also expect relentless, critical media coverage. While change of venue motions rarely succeed, the Grace motion to transfer the case out of Montana permitted the defense to begin sensitizing the judge to the influence of the media on the jury pool.

**Us-versus-them mentality.** Grace was portrayed in the local media, and by

prosecutors, as the East Coast company that extracted natural resources from Montana and left destruction in its wake. The image is not far from that of "greedy" financial companies and their executives, getting rich at the expense of small investors. This presents a steep hill for a company to climb with a jury.

The Grace defense team told the counterstory—that of a company, and its executives, that cared deeply about its employees and worked tirelessly and at great expense to improve the work environment. Testimony connecting the company with the town, where several executives and their families lived, helped undercut the argument that those same executives had conspired to endanger the town and their own families.

**Plaintiffs bar involvement in prosecution.** By the time the indictments were brought against Grace and its executives, Grace had been named in tens of thousands of civil lawsuits. The indictment read like a civil complaint, and media reports suggested that the government had obtained documents from the files of Montana plaintiffs attorneys who had sued Grace for decades. While a prosecution structured like civil litigation may risk placing too much reliance on the emotional story, the goal in a cause prosecution is just to get the case to

the jury, and then hope the human trauma controls the verdict.

**Committed activists.** Declining retirement accounts and underwater mortgages have produced a large, vocal community of activists pushing for "justice." Like the Libby community members who pushed for an indictment and conviction, and who packed the prosecution's side of the courtroom almost every day of trial, such committed activists are very public faces of a case who are not bound by gag orders.

IN ANY CAUSE PROSECUTION, the temptation exists to let the end justify the means. Lawyers defending these cases can expect to see untested legal theories relying on an amalgam of statutes, conspiracy charges supported by reams of possibly innocuous corporate documents, and aggressive prosecutorial tactics. They can also expect the government to oversimplify complicated concepts—whether financial or scientific—to gloss over problems with its theories. Defense counsel can take advantage of the government's tactics:

**Stretching the law to include untested, extreme legal theories.** In the Grace prosecution, the government faced the problem that Grace had shut down the Libby vermiculite mine in 1990—coincidentally, the

**The government charged that W.R. Grace had knowingly exposed the public to airborne asbestos.**





**Mayer Brown's  
David Krakoff  
(right) defended  
former W.R. Grace  
executive Henry  
Eschenbach.**

very same year that the government's main weapon, the knowing endangerment provision of the Clean Air Act, was enacted. To deal with the obvious statute of limitations problem arising from an indictment handed down nearly 15 years later, the government was forced to advance numerous novel and untested theories in order to prosecute several of the defendants for substantive violations under the Clean Air Act.

The passage of time similarly forced the government to stretch the bounds of general conspiracy law. Aggressive attacks by the defense on the government's theories through pretrial motion practice produced several rulings that changed the way the government had to present its case. For example, the government was restricted to proving endangerment only from releases occurring after November 1999—rather than endangerment from all releases back to the enactment date of the statute—which as a practical matter meant showing that the defendants harbored an intent for releases and endangerment to occur long after their association with Libby ended. At trial the difficulty in fitting the proof into these extreme legal theories undoubtedly worked to the government's detriment.

Another note on conspiracy counts: Cause prosecutions are likely to be built on a foundation of internal corporate documents. The Grace pros-

ecution claimed that documents showing meetings and conversations among, and decisions made by, various executives proved a conspiracy. As the presiding judge observed, though, when documents just show individuals sending and receiving memorandums in the course of business, the issue becomes: "Where's the conspiracy?"

The challenge for a defense faced with thousands of internal memorandums or e-mails is to counter the implication that corporate decision making combined with meetings or e-mails

discussing the decision equals a conspiracy. The Grace defense argued that what came out of the meetings was not at all illegal, and pointed to a corporate plan implemented during the alleged conspiracy period clearly calling for compliance with the law. Far from shying away from the idea that there was an agreement, then, the Grace defense embraced an agreement to stay in regulatory compliance.

**Prosecutorial overreach.** The biggest disadvantage for the government is its own natural tendency to push too

### The testimony of the government's star witness was the beginning of the end for the government's case.

hard in the name of a valiant cause, especially regarding discovery. Although the prosecution is required to turn over certain information to the defense under *Brady v. Maryland* and *Giglio v. United States*, that requirement is normally self-executing, and a judge is unlikely to look behind the government's representation of compliance. In light of recent high-profile examples of prosecutorial misconduct, though, judges may be more skeptical of a blanket statement by the Justice Department. The key is to find a chink in the department's armor and persevere until the full nature of the discovery efforts and its compliance or lack thereof is known.

Beginning well before the Grace trial, aggressive motions practice defined the scope of the government's discovery obligations to include information in the files of many different federal agencies. Access to these files allowed the defense to show just how much the government knew about the dangers of asbestos exposure, and when. Then, examples of nondisclosure began to seep out, exposing the government's failure to take its obligations seriously.

Ironically, the testimony of the government's star witness also marked the beginning of the end for the government's case. An undisclosed offer of immunity came to light on direct examination. The floodgates opened, with the government admitting that it withheld notes of interviews with the witness that contained impeachment material, along with hundreds of e-mails between the star witness and one of the prosecution's special agents.

With the door open, the defense sought, and obtained, a midtrial evidentiary hearing to examine the special agent on his dealings with witnesses and his understanding of the government's disclosure obligations.

The e-mails showed a witness who actively sought to help the prosecution get a conviction. Combined with the agent's notes and the record of the

witness's immunity negotiations with the government, they demonstrated the witness's "animus toward the defendants and the extent of his relationship with the prosecution," the judge found. "They are evidence of the bias of the prosecution's star witness, which is clearly a fertile area for cross-examination."

While the judge concluded that the evidence did not support a finding of prosecutorial misconduct, he ultimately instructed the jury that the government had "violated its solemn obligation and duty . . . by suppressing or withholding material proof pertinent to the [witness's] credibility."

**Starting in the 1920s, vermiculite was mined and milled in Libby. Mixed with the vermiculite were naturally occurring asbestos fibers, which were released into the air during processing.**



Simple lessons can be drawn for cases brought in the wake of the financial crisis. Be persistent and aggressive in demanding discovery from the government, be creative as far as what is demanded, and be specific in demanding that the government search media such as e-mails with witnesses. Realize that information essential to the defense may be in the hands of an alphabet soup of federal agencies. Cooperating witnesses in cause prosecutions may be crusaders for justice against the defendants, and may be working closely with equally crusading prosecutors, both of which open additional avenues for attack on the witness stand.

Finally, defense teams invoking rule 615 to bar witnesses from hearing other testimony must realize that they now litigate in an era where trials may be covered, as the Grace trial was, both by conventional media and by bloggers and observers tweeting from the courtroom.

**Oversimplifying complicated concepts for the jury.** Cause prosecutions are rarely built around simple causation scenarios. Prosecutions arising in financial cases are likely to involve complex instruments like collateralized debt obligations and require untangling financial transactions unfamiliar to most jurors—who as a result are naturally skeptical.

So, too, the Grace prosecution was fundamentally about a concept most people think about in unscientific terms—risk, specifically, how much risk was known, contemplated, or accepted at the time. The prosecution tried to portray the inquiry as simple: Releasing asbestos into the air was

**The defense must tell a story as compelling as the government's—but more plausible.**

dangerous, and people ended up getting sick; therefore, the defendants knowingly exposed people to “imminent danger.”

Risk, whether of developing an illness or losing value in a financial market, needs to be explained to a jury to avoid conviction by hindsight. The easiest path to a conviction in a complicated case is to persuade a jury to believe that, because injury happened, it is irrelevant whether there was a known 50 percent chance of that injury occurring or a 0.0005 percent chance.

Early motions *in limine* argued the scientific shortcomings of the government's oversimplified and, frankly, distorted theory of risk. As the defense showed during trial, there is no consensus about what levels of asbestos exposure cause what level

of risk, and risk models embraced by the government's own witnesses showed that even after exposure, risk of developing an asbestos-related disease was far below the “imminent danger” standard.

ULTIMATELY, THE KEY TO success for the Grace defense was something that is not used enough in criminal trials, yet is essential for defending against cause prosecutions. The government's strength in such a case is the story it is telling—without a compelling story of loss, there would be no cause prosecution. The challenge for the defense is to tell an equally compelling, but more plausible, counter-story, instead of merely denying the government allegations.

The Grace defense embraced a simple counterstory supported by the company's own documents, and which could be presented through the government's own witnesses, instead of waiting for the prosecution to rest. As the evidence showed, Grace and its executives disclosed what they knew to the government, took steps to study a health problem well-known to the government, complied with applicable exposure regulations, and worked to improve their employees' working conditions.

At the end of the day, the verdict speaks for itself on which story the jury accepted. ■

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*Mayer Brown partners David S. Krakoff and Gary A. Winters and associate Lauren R. Randell are based in the firm's Washington, D.C., office. They successfully defended former W.R. Grace executive Henry Eschenbach in U.S. v. W.R. Grace, the biggest environmental criminal prosecution in U.S. history. Editor's Note: The U.S. Attorney's Office for the District of Montana declined to comment on this article's description of the W.R. Grace trial.*