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HEADLINE: Ford Thinks It Has A Better Idea: Hardball

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HIGHLIGHT:
The automaker has thinned its outside counsel and adopted a tough pretrial settlement stance.

BODY:
WHEN JAMES A. BROWN, assistant general counsel of Ford Motor Co., was promoted to manage products liability litigation for the automaker two years ago, Ford considered its record in such litigation disappointing.Ford was winning about 80 percent of the products cases that reached juries, says Mr. Brown. But this was no cause for elation because Ford was litigating only 10 to 15 cases per year. "We only went to trial with the cases we felt we couldn't lose," Mr. Brown says.

Losing 20 percent of supposedly sure things was costly, as were the settlements of numerous cases each year in which the company believed the plaintiffs' action had no merit. Ford feared the whims of jurors and settled cases for "whatever was required to avoid trying the case," says Mr. Brown. "We'd give them the lowest amount they'd take."

Ford management, including its Vice President and General Counsel John Martin, decided that the company had to embark on a more aggressive course and that Mr. Brown would lead the charge. As part of its new approach, begun in 1994, the company got rid of most of its more than 200 law firms and put 40 firms on retainer to handle trials across the country. The company also brought all discovery work in-house.

The essence of Ford's strategy is that it's now ready and willing to try any case, no matter how small, no matter how great the risk of a mammoth jury verdict. A pretrial settlement is offered to plaintiffs on a take-it-or-leave-it basis.

Mr. Brown says, "I don't give a shit if they take it or not. If the plaintiff doesn't settle, it doesn't matter to us. We tell them, 'We're coming after you.'"

These policy changes have had an immediate effect. In 1994 and 1995, Ford tried more cases than it had in the previous 10 years, but it retained its 80 percent winning average. The company tried 145 cases and won 115, and many of the wins came in cases in which the company previously would never have risked facing juries, Mr. Brown notes.

And even though the automaker is involved in more trials, it says its litigation costs have been halved. Ford declines to specify the amount, but reportedly costs are down to $ 100 million annually from about $ 200 million per year.

In the cases that settled before trial, Ford's take-it-or-leave-it offer induced many plaintiffs to accept settlements far lower than the sums Ford had paid in the past. The hardball approach also forced a number of plaintiffs to back down completely. In 1995 alone, 300 products liability cases filed against it were dismissed. Ninety percent of these occurred when the plaintiff folded, Mr. Brown says. The rest were dismissed by judges.

A Prototype?

Ford does appear to have a better idea. Law firm management consultants say the automaker's approach may prove to be the prototype for other companies that want to cut costs stemming from products liability litigation.

Ford's integration of several reforms is "the key to the company's success in cutting litigation costs," says Daniel J. DiLucchio, principal and head of the corporate law department consulting group at Newtown Square. Pa.'s Altman Weil Pensa. "You can't do just one thing and be as successful as Ford. You have to have an integrated plan."

Mr. DiLucchio notes that Ford's new strategy was in line with a trend -- that of "evaluating litigation from a business perspective."

Joel F. Henning, senior vice president and general counsel in the Chicago office of Hildebrandt Inc., adds, "For companies with a large products liability docket, the Ford approach makes a great deal of sense."

He says that Ford's "systematic" strategy of putting top litigation firms on retainer, "conducting a hard-headed risk analysis, and being willing to go to the mat is extremely useful."

Not all the news has been good in the past two years. In 1995, for instance, Ford was hit with three substantial jury verdicts, including a $ 62.4 million verdict in Indiana in a Bronco II rollover case and a $ 39.34 million verdict in Texas in an accident involving a Ford Ranger pickup truck. Mr. Brown says, "These cases were very aberrational, and we feel all three will be overturned." In addition, he says, the great majority of verdicts against the company were small.

Overhauled

As part of its get-tough image, Ford has also dramatically changed its relationship with outside litigation counsel. Two years ago, Ford paid firms by the hour for litigation work. The company stopped using almost all those firms, and offered agreements to 40 firms that "we determined were the best at trial work," says Mr. Brown. The firms include Philadelphia's White and Williams: San Francisco's Pillsbury Madison & Sutro; and Birmingham, Ala's Lightfoot, Franklin, White & Lucas.

Some of the firms on retainer were new, and were picked because they had stellar trial records Under the terms of their agreement with the automaker, the firms on retainer handle all products liability lawsuits in their geographical area and must be available to try any case.

Ford has tinkered with the retainer list. "Some law firms turned out to be better at discovery work than trials," says Mr. Brown. He declines to name firms that were fired, but instead notes that Kansas City, Mo.'s Shook, Hardy & Bacon P.C. has been added to the list.

Putting firms on retainer enabled Ford to put controls on outside counsel costs and also enabled the company to back up its claims to plaintiffs that Ford would try any case, says Mr. Brown. In pretrial discussions with plaintiffs' counsel, Mr. Brown says, Ford attorneys point out the risk of financial loss to the plaintiff. "The trial will cost you $ 50,000, and eight out of 10 times we'll win."

In a recent trial in Philadelphia, for instance, Ford was defending a case in which the plaintiff was claiming $ 1 million in medical costs and seeking $ 10 million in damages. Ford's counsel, White and Williams, was scheduled to receive about $ 4,000 to $ 5,000 extra per trial day, but after the jury returned a defense verdict for Ford, the company doubled the sum, says Jay D. Logel, a Ford staff attorney. *Hancotte v. Ford Motor Co.,* 88-07272 (Ct. of Common Pleas, Montgomery Co., Pa.). In most cases, bonuses would not be as high as $ 5,000; the company gears the amount to the importance of the case.

Team Players

While the retainer arrangement is key to the automaker's new litigation strategy, much of the work before trial is handled in-house. As soon as a lawsuit is filed, a Ford team researches and evaluates the claim. The team determines the chances Ford would have at trial, weighing such considerations as the record of corporate defendants in that venue, the record of opposing counsel, the previous rulings of the trial judge in similar cases and the extent of the injury to the plaintiff.

The team then comes up with the maximum amount the company will offer in a pretrial settlement. The amount is often nominal, and in 25 percent of the cases, the company will offer nothing. Mr. Brown says, including all cases involving "insurance subrogation claims or allegations of injuries caused by air bags deploying."

Like many companies, Ford becomes "most concerned," says Mr. Brown, when a products liability action is filed in traditionally pro-plaintiff regions of Alabama and Texas. But, he notes, even in such hostile venues, the company will go to trial if the offer is rejected.

Staying the Course

In some cases, Mr. Brown concedes, playing hardball has caused him some "sleepless nights" One of the toughest trials occurred in Alabama in 1994. The case involved a devastating injury to a young woman who was a passenger in a 1989 Ford Probe when it crashed on Highway 1-59 near Trussville, Ala., in January 1990. The accident left Patricia Isbell a quadriplegic, says defense attorney Warren B. Lightfoot, of Lightfoot Franklin. *Isbell v. Ford Motor Co.,* CV 92 356 (Cir. Ct., Jefferson Co., Ala.).

Ms. Isbell and another injured passenger in the car sued Ford, charging that the Probe went out of control when a ball joint holding one of the wheel joints separated. Ford countered that there was no defect in the

car, though Mr. Lightfoot admits. "We didn't have an explanation of why it wobbled and shot off the road."

Ford offered to settle the case for $ 3 million because it was concerned about the venue, the severity of the injuries and the uncertain cause of the accident. The plaintiffs' lowest demand was $ 5.25 million. Plaintiffs' counsel claimed that anything less would not be enough to provide for Ms. Isbell's lifetime care.

During the trial, Mr. Lightfoot says, the Ford trial lawyers grew extremely worried. "Our courage would ebb and flow," he recalls.

When he phoned Mr. Brown in Detroit with reports on the trial's progress he says, "we would be screaming at each other. But to his credit, he never backed down" by agreeing to the plaintiffs' demands.

As the trial progressed, Ford did offer the plaintiffs a high-low agreement, under which the company agreed to pay at least $ 1.125 million, but no more than $ 7.125 million, no matter what the jury might award. The plaintiffs rejected this as well and asked the jury to award $ 40 million.

They got nothing. The jury returned a complete defense verdict in September 1994, and in February 1996 the Alabama Supreme Court rejected the plaintiffs' appeal.

At times, Ford's intransigence can backfire. In June 1995, for instance, the company was hit with a $ 25 million jury verdict in Houston involving the death of a 21-year-old woman who was killed in an accident involving a Ford Bronco II. The verdict was later reduced to about $ 7 million and is now on appeal.

Before trial, says plaintiffs' counsel Tab Turner, of Little Rock, Ark.'s Friday, Eldredge & Clark. "We would have settled it for $ 750,000. But Ford was never even close to that. "During trial, he adds, Ford upped the offer to $ 2 million, but the plaintiffs turned it down. *Cammack v. Ford Motor Co.,* 93-033-808 (Dist. Ct., Harris Co., Texas).

Bronco II

The automaker also handles all discovery in-house today. The discovery team comprises both lawyers and non-lawyers. Ford contends that its philosophy toward discovery is full disclosure: The company provides all material on a product to a plaintiff even before the opposing counsel asks for it, says Mr. Brown.

Ford is faced with a multiplicity of lawsuits charging that its Bronco II has a propensity to roll over. "Every time the company is sued on a Bronco II matter, Ford provides plaintiffs' counsel with a CD-ROM including all the relevant information on the vehicle." Mr. Brown says.

Some plaintiffs' counsel don't think the company is all that forthcoming.

"Ford claims it's turning over a new leaf in discovery, but I haven't seen it," adds Eldredge Clark's Mr. Turner. "We see the same abuses over and over again." In another products case Mr. Turner tried against Ford in 1995, the judge even sanctioned the company for discovery abuse after the trial, he says. *Simon v. Ford Motor Co.,* 92-CV-465-H (N.D. Okla.).

Any sanctions for discovery have been minor, Mr. Brown says. "Ford wants to have the reputation that we're open and honest in the discovery process."

Ford Faces Its Fear

When Ford changed its litigation policies, company lawyers began talking to jurors after trials to determine why Ford was losing.

The company found that it was having problems convincing women jurors, Mr. Brown says. Women often were more likely to empathize with people who had been severely injured, and the company's experts were not "connecting" with female jurors, Mr. Brown notes.

Ford had always used male experts, generally tech-talking engineers, to reconstruct accidents and counter the plaintiffs' claims that Ford products were defective. After its initial jury research, Mr. Brown says, Ford began using women experts at trial, and it saw an immediate change in how women jurors viewed the company.

Nowhere was that more apparent than in *Isbell,* notes Mr. Brown. Michelle Vogler, an engineer at Detroit's Failure Analysis, testified as Ford's reconstruction expert and, Mr. Brown says. "I believe she won the case for us."

While Ford lost three major trials in 1995, the company won several other actions in which the damages claimed were massive. It won trials involving a $ 30 million claim in Detroit stemming from the deaths of three people, a $ 7.5 million claim of a quadriplegic in Los Angeles and a separate $ 14 million claim of another Los Angeles quadriplegic. *Larsen v. Ford Motor Co.,* 92-223387-NP (Cir. Ct., Wayne Co., Mich.); *Montoya v. Ford Motor Co.,* CV-F92-5664 (E.1). Calif.); and *Studer v. Ford Motor Co.,* BC 087029 (Super. Ct., Los Angeles). In *Studer,* Ford not only won a defense verdict but was awarded $230,260 in costs against the plaintiffs.

'Hardbailed'

Ford finds that a beneficial byproduct of its new strategy has been to discourage plaintiffs from pursuing what the company calls frivolous actions, says Mr. Brown. An increasing number of plaintiffs have dropped cases before reaching the trial stage, Mr. Brown notes, because Ford lawyers have convinced the plaintiffs that their chances of winning at trial are limited at best and that they risk spending more money on litigation than they could conceivably win.

In Florida, for instance, a couple is considering suing Ford because of an injury to their son. Philip Chandler was abducted and stuffed into the trunk of a 1986 Ford Mustang in July 1993. Five hours in the trunk in the sweltering heat left him with permanent brain damage.

Mr. Chandler sued the two abductors and won a $ 14 million jury verdict in 1995. The verdict was uncollectible because the defendants had no assets and were in jail. *Chandler v. Daymon,* CI 93 7204 (Cir. Ct., Orange Co., Fla.).

Mr. Chandler's attorney contacted Ford, complaining that the Mustang should have had a release inside the trunk that would have permitted his son to spring it open and get out of the car. A citizens group in Florida is campaigning for all automakers to install trunk releases. "We told Ford that if they installed a trunk release by the year 2000, we wouldn't sue," says plaintiffs' counsel Hussell Troutman, of Winter Park, Fla's Troutman, Williams, Irvin, Green & Helms.

In response, "Ford hardballed me," Mr. Troutman recalls.

"They said no thanks, they didn't have any liability." Ford had won a previous products liability action involving the lack of a trunk release several years ago, he says.

So far, Mr. Troutman has not filed the suit against Ford and has doubts that he ever will, because the risks outweigh the possible gains.

"Ford is liable to come back at me with sanctions or costs," Mr. Troutman says, "or the judge may say I've filed a spurious cause of action."

GRAPHIC: Picture 1, Lean, Mean Litigation Machine, James A. Brown, assistant general counsel at Ford Motor Co. and manager of products liability litigation there, says to plaintiffs' lawyers; If you don't take out first settlement offer, we'll be setting you in court. PETER YATES; Picture 2, Rathlned: Defense trial attorney Warren Lightfoot had monetary doubls about Ford's stance; Picture 3, Daunted: Plaintiffs' attorney Russell Troutman says he might not proceed against Ford.

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