

Current Crisis May Render Plaintiff 'Reptile' Tactics Ineffective

By **J. Chandler Bailey, Rachel Lary and Logan Matthews**

By now, all who try cases are familiar with the "reptile theory" — the idea that jurors are at their most persuadable and most likely to award large plaintiff verdicts when they feel that the defendants' actions directly endanger their own safety and that of their families.

In short, the idea is to turn off the part of the juror's brain that weighs risks and benefits and that understands that not all decisions are binary choices between a good and bad result, and turn on the "reptile brain," which seeks to protect life and safety to the exclusion of all other factors.

To combat reptile strategies, defense lawyers need tools to connect with modern-day jurors. Traditionally, that meant reminding jurors of their truth-seeking function, asking them to recognize that all decisions have certain trade-offs, and encouraging sound debate on the merits of a case.

But America's experience with combating the coronavirus — and the difficult decisions that have arisen as a result — may provide another useful tool for defense lawyers to combat this theory. Specifically, what our response to the coronavirus has shown is that decision-making, where professional judgment is involved, is not simply a binary choice between safety or danger. Rather, it is nuanced and multifaceted.

Initial Response to the Coronavirus

Over the last few weeks, every state in America has issued some form of a stay-at-home order to slow the spread of the virus. Without any treatment or cure, these measures are the best shot we have at preventing further spread of the disease and the carnage it is leaving behind.

But with these stay-at-home orders, we have also seen unprecedented challenges in other areas of our lives. Schools across the country have shut down. Churches, synagogues and other houses of worship are closed. The stock market has lost nearly a third of its value. More than 30 million Americans have filed first-time claims for unemployment benefits since mid-March. Leading economists estimate the unemployment rate could reach approximately 15% by June. And while the CARES Act was passed to help curb some of these effects, many still do not have enough money to put food on the table.

As these challenges continue to mount, Americans are discussing alternatives to staying home. People have strong feelings on both sides of this debate. While the health and safety of the American public will remain central to that response, one thing is clear: it's not a simple solution. We could all stay home indefinitely, and that may stop the virus, but at what cost? What other real dangers will that cause?

Relationship to Corporate Clients

Many of our corporate clients are asking us about the impact of the coronavirus. They want to know whether they will see an increase in litigation or how jurors will view them going



J. Chandler Bailey



Rachel Lary



Logan Matthews

forward. As we saw during the Great Recession, jurors' attitudes toward corporations soured, as many correlated the fallout to corporate greed. But the coronavirus is different. No one attributes the disease to corporate defendants.

And corporations, for their part, have stepped up and done a lot to help Americans during this time. We've heard stories of companies donating supplies to front-line workers; businesses paying their employees even though they're out of work; banks forgiving mortgage payments; and insurers covering co-pays for coronavirus-related tests and treatments. Automakers like General Motors and Ford have converted their plants to make ventilators and personal protective equipment, all in a matter of weeks.

And the list goes on and on. All of these things are likely to boost the public's perception of corporations.

But there's more. The coronavirus has the ability to give corporate clients license to try legal defenses in their cases that before the pandemic were simply off the table. Hospitals and front-line health care workers, for example, may be excused for potentially negligent acts because of the truly unforeseen consequences of the virus.

Companies providing professional services might invoke force majeure clauses to avoid liability for incomplete performance. Other businesses could possibly insist on strict compliance with their sales agreements where a past course of dealings was the measure of complete performance. But beyond these legal defenses, there may be new trial strategies as well, including those that correct the misperceptions of company decision-making, like the plaintiff reptile theory, and show why companies do not decide just between profits and people.

The Reptile Theory

The reptile theory has been widely used in personal injury, products liability, professional liability and commercial transportation cases. The common thread in these cases is that each defendant — health care, manufacturing and transportation workers — all have the potential to impact a juror or his or her family. The goal of the reptile theory is to evoke fear, replace the standard of reasonable care with something higher, and then coax the jury to impose that standard to ensure his or her own personal safety.

The problem, however, is in its simplicity — and that's what also makes it so appealing to jurors. The reptile theory attempts to create a world of binary corporate decision-making. That is, when faced with a choice, corporations only consider two polar opposites as alternatives (i.e., safe or unsafe products). We know, however, that all business decisions hinge on a variety of factors, including consumer health, safety, security, public relations, utility, profit and others.

It's a simple exercise to decide whether, all things considered equal, it would be better to make a product safer. It's a different question altogether to decide whether to make a product safer in one way if it will (1) involve trade-offs of safety in other uses, (2) be less useful to a consumer, (3) limit the ability of a company to produce the product for more people, (4) make the product more expensive, and (5) increase the cost of production.

These decisions, which will ultimately inform questions of liability, are often made over the course of years. They involve a number of important stakeholders, including engineers, experts and investors, which (again) increases the complexity of these questions. While human health and safety are primary considerations, many factors play into a company's

decisions about how to conduct its business.

In the end, it's a risk-benefit analysis. If car manufacturers knew exactly how every accident was going to occur, they could design a vehicle to protect against them all. But they don't. So, their engineers design vehicles to reasonably account for the dangers customers might encounter.

The same thing is true with doctors and other professionals. While they may not know exactly which risk is posed to their clients, they make reasoned judgments based upon the data and modeling in the real world.

The Coronavirus and the Reptile Theory

So, what does the coronavirus have to do with the reptile theory? Our initial response to the virus was to protect human health and safety at all costs. This response led government and business leaders to implement strict social distancing measures. But now that we are more than a month into shelter-in-place orders, people are starting to consider other costs to staying home.

The economic impact of the virus has been severe. Businesses are making tough decisions about whether to cut their employees' pay or benefits or conduct layoffs. These are hard economic times for most Americans, even with a \$2 trillion stimulus package.

But there are also real social, health and welfare costs. Students across the country are staying home and many are unable to obtain online schooling due to the inability to access the internet or lack of in-home technologies. Food banks have been stretched to their breaking points, with many unable to meet the needs of their local communities. This has led to more people who are hungry and the nutrition-related health issues that follow. Doctors are reporting a decrease in the number of people seeking preventative treatments and vaccines, which may create negative health effects down the road.

All of this as the economic costs continue to pinch ordinary Americans. People have naturally begun considering variables other than COVID-19-related health and safety fears, even though they remain very important.

How Does This Help Corporate Defendants?

The complexity of these decisions has the unique potential to help defense lawyers tell their corporate clients' stories. Where in the past companies may not have felt comfortable discussing the financial ramifications of a decision for fear that it would play into the reptile theory catchphrase, "profits over people," now jurors might be more receptive to understanding a corporate defendant's decisions do not hinge on just one thing (profits), but on a multitude of factors (including safety).

Jurors will have lived through this transformative period understanding the difficulty of lifting social distancing measures, not only with respect to the impact it could make in their own lives, but in the lives of others, including individuals and businesses. Time will tell whether jurors' experiences with the complicated decisions arising from the coronavirus will positively affect their perception of what corporate decision-making entails.

The story of the coronavirus and our response is also useful for vetting jurors. Understanding a juror's willingness to consider factors other than human health and safety when responding to the coronavirus pandemic will give defense lawyers an idea of the lens

through which they see the world. Is it black-and-white, or rather somewhere in the gray, where so many hard decisions by corporate defendants are made?

Whether a juror is receptive to alternative considerations for responding to the coronavirus pandemic may be a good indicator of his or her willingness to listen to the company's story, particularly where the reptile theory is being used to paint the company as valuing profits over safety. For example, was the prospective juror in favor of shutdowns until a vaccine was developed, or did he or she support limited opening while trying to mitigate risk? The experiences and mindset of those jurors will be key for defense lawyers to know as they represent their corporate clients going forward.

Conclusion

Safety and health are among the most important things we should consider in responding to the coronavirus. The health and safety of the public has led to massive and unprecedented decisions. And it should have. But in the process, jobs have been lost, people are unable to put food on the table, our economy has taken a massive hit, and secondary health and safety issues are rising.

People are beginning to recognize that our response is not simple; it's not all or nothing. There is a risk-benefit analysis that is taking place before us, and the fact that jurors are experiencing this firsthand may forever change their perception of corporate decision-making in the trial setting.

J. Chandler Bailey and Rachel M. Lary are partners, and Logan T. Matthews is an associate, at Lightfoot Franklin & White LLC.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.