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Constitutional provisions; Greater profits;
Corporatedecisions

Sadly, in researching this article it was amazing to find the number of cases where such cooperate decisions were made. To discuss even a significant proportion of those cases would be more than a single treatise let alone an article so a selection process was necessary. Some cases not discussed here are more egregious than those selected; others less. Some discussed more famous; others less so. However, for virtually all there are three basic themes. First, corporate executives made decisions that put other human beings at risk. Second, when victims of these decisions sought redress, additional decisions were made to hide corporate malfeasance in order to avoid accountability. Third, in almost all cases, any eventual accountability was disproportionately lower than

in punitive damages. The court reduced the \$125 million award of punitive damages to \$3.5 million on the condition that Ford's motion for a new trial be denied. We can now turn to the facts that led the jury to so manifestly demonstrate its displeasure with Ford.

In 1968, led by Lee Iacocca, then Ford Vice President, Ford embarked on a rushed project to get a small, inexpensive car on the market. As the project was a rush, rather than starting with marketing and engineering studies before proceeding with the styling of a vehicle, this project went in reverse with styling coming first. Disregarding the practice of other subcompact car manufacturers to have the gas tank over the rear axle, Ford's styling option was to have the gas tank behind the rear axle "leaving only 9 or 10 inches of "crush space"—far less than in any other American automobile." Compounding this design flaw, the Pinto's differential housing had an exposed flange and a line of exposed bolt heads—protrusions sufficient to puncture a gas tank driven forward against the differential upon rear impact.

Ford conducted numerous crash tests of the Pinto. These tests revealed that the Pinto as designed could not withstand a 20 miles-per-hour rear end collision without fuel leakage, and in at least one test at 21 miles-per-hour test, the gas tank was punctured by the bolt heads on the differential. Other tests with a modified and reinforced version of the Pinto proved safe. Investigations by Ford engineers into fixing the Pinto's gas tank problem determined that there were multiple ways to attack the issue. This could be done at the low end of about \$2 per car to a high of just over \$15—the latter solution would enable the Pinto to withstand a 34 to 38 mile-per-hour rear end collision with no gas leakage. The crash test results and potential risk information was funneled up the line to Ford's top management. These Ford executives decided not to fix the Pinto's gas tank problem in order to save money. In short, these individuals decided they would rather take a chance on killing or maiming people than spending a few dollars to avoid that possibility. One can see how the jurors in Grimshaw, almost all of whom probably were car buyers, might not like that idea.

At least 27 people burned to death in Pinto rear end collisions and an unknown number were injured. The dead included three young women in Indiana who died in a rear end collision/gas tank explosion. Ford was charged with reckless homicide in that case and acquitted. Numerous lawsuits were filed against Ford arising out of the Pinto's obvious design defect and millions of dollars—which Ford could easily afford—were paid out in damages. However, none of the corporate executives who made the appalling decision to sell what they knew was a dangerous vehicle were individually held accountable.

The Bayer contaminated blood case is similar to the Ford Pinto case in that corporate executives decided to sell products that they knew or should have known would harm other people—a basic theme throughout these cases. The difference is that in Bayer's case the results were much more catastrophic, especially considering intended users of its products. As a result of Bayer's unconscionable conduct hemophiliacs around the world contracted the human immunodeficiency virus (AIDS); many died and those that survived had to live with an incurable disease.

Although spreading around the world since the 1960s, AIDS first came to the United States in 1970 and did not become publically known until the early 1980s. A division of Bayer, Cutter Biological, manufactured Factor VIII concentrate, a blood clotting agent used by hemophiliacs to help in clotting blood. In July of 1982, the CDC started to warn that blood concentrates were likely causing AIDS in

hemophiliacs. In January 1983, a manager at Cutter stated in a letter that there was strong evidence AIDS was being passed on through its plasma products. Recognizing the need to compete with other blood companies who were producing a heated AIDS free version of Factor VIII, on February 29, 1984, Cutter obtained authorization to make the heated alternative. The company's next move was really reprehensible.

Once Cutter started manufacturing the heat treated AIDS free Factor VIII, it was left with a large inventory of the older contaminated version. Also, the heated product was more expensive to produce. To protect its profits Cutter knowingly continued to sell its inventory of contaminated Factor VIII and even manufactured additional supply of the contaminated product in order to fulfill several fixed price contracts. However, rather than sell the older version in the United States which Bayer executives thought could turn out to be more problematic, it sold the product overseas to such countries as Argentina, Indonesia, Japan, Malaysia, and Singapore. As a result, tens of thousands of hemophiliacs around the world contracted AIDS and thousands died.

Eventually in 1997, Bayer agreed to a settlement of a class action brought by AIDS infected hemophiliacs pursuant to which it paid \$300 million into a compensation fund. Certainly, this amount was but a drop in the bucket considering Bayer's net worth and the extent of the damage it had knowingly caused. As criminal as this Bayer-Cutter behavior was, nobody was prosecuted. Thousands of people died and no corporate executives were held accountable.

The Dalkon Shield was an intrauterine device (IUD), a contraceptive device designed to prevent pregnancy. It was sold by A.H. Robbins from 1971 until pulled off the market in 1974. It was originally marketed by a small company, the Dalkon Corporation. One of the developers and owners of the device, Dr. Hugh J. Davis, conducted a very flawed study of the device indicating that the product had a pregnancy rate of 1.1%, lower than the pill and other IUDs on the market. Dr. Davis had an article published touting the lower pregnancy rate without disclosing his financial interest in the device. Later, more scientific studies found the actual rate to be between 5% and 10%. A.H. Robbins purchased the Dalkon Corporation, made some changes in the product, and even knowing the actual pregnancy rate was much higher than 1.1%, marketed the IUD without any additional testing emphasizing the bogus lower rate and claiming it was safer than other contraceptive methods. This false and deceptive marketing program was the least of A.H. Robbins transgressions.

IUDs are designed to be inserted into the uterus, which is generally sterile, with a tail hanging down into the vagina, which can be prone to containing bacteria. The tail of the Dalkon Shield consisted of several encased filaments with an open top and bottom. Six months before the Dalkon Shield was put on the market by A.H. Robbins, it knew that the design of the Dalkon Shield tail could allow bacteria to wick up from the vagina to the uterus and cause infections. The company executives designed

and gave birth to deformed children, and thousands of others suffered pelvic infections that left them infertile.

As the problems with the Dalkon Shield became known, thousands of suits were filed against A.H. Robbins including several individual cases where the plaintiff was awarded substantial damages. For example in *Palmer v. A.H. Robbins* the plaintiff was awarded \$600,000 in compensatory damages and \$6,200,000 in punitive damages. In order to avoid this deluge of lawsuits, A.H. Robbins declared Chapter 11 bankruptcy in 1985. Eventually, a compensatory trust fund was established which was woefully insufficient to compensate the victims of its reprehensible conduct. None of A.H. Robbins executives were held personally liable and nobody went to jail.

The PCA case is worth mention, not because of the number of casualties—9 deaths and 714 confirmed illnesses, most of those children—but because it is one of the few cases where the corporate executives responsible were subject to criminal liability. The PCA scandal stems from a salmonella outbreak that took place in 1979.

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