

Feature Article

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Vanquishing the Reptile and Using the Reverse Reptile Strategy

The scales of justice are in peril of being covered by the scales of the Reptile. Since 2009, the Reptile has slithered its way into courtrooms across the nation. David Ball & Don Keenan, *REPTILE, THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION* (2009). Its plan is simple: activate the jurors' "reptile" instincts by installing fear and danger cues so strong that the jury is compelled to decide the case on innate survival instincts and not logic. The hope is that the jury will be driven to protect the community from the danger presented by the defendant, typically a corporate entity, and award a large verdict. *Id.* at 17.

A key strategical concept employed to activate a reptilian response is counsel-designed safety rules. *Id.* at 51. Counsel will set out safety rules, that if deemed violated, must mean that the defendant is endangering the public, and must be stopped. Often, these rules are unrelated to the law and are, by design, vague, to maximize the potential for a perceived violation. *Id.* These safety rules will begin to surface in *voir dire* and will be a constant theme throughout the plaintiff's opening statement. Once established, a savvy attorney will cross-examine the defendant's experts and corporate witnesses to highlight a myriad of ways that the defendant violated these so-called safety rules. The sole purpose is to put the jury in survival mode. The hope is that the jury does not evaluate liability, but merely breaks out the calculators to ascribe a value to the verdict that will make an example of the defendant and all others. These tactics can be powerful. With planning, however, a defendant can turn the tables and "reverse Reptile" the plaintiff by showing that the corporate defendant is a diligent, safety conscious company, so the jurors feel justified in giving a fair and unbiased assessment.

Defending Against the Reptile

To combat the Reptile you must acknowledge its existence and act early. The judge must be alerted that the Reptile is lingering outside the door waiting to make its entrance. The first time it will show itself is during *voir dire*. While *voir dire* questions are not supposed to concern matters of law or instructions, often they do. *See* ILL. S. CT. R. 234. It is not uncommon for counsel or the judge to remind the prospective jurors that this is a civil case, which is different from a criminal case they may have watched on TV, and that the plaintiff does not need to prove her case beyond a reasonable doubt, but only by a preponderance of the evidence. After setting up the plaintiff's burden in various ways, counsel will move to establishing safety rules that have nothing to do with any legal standard that exists. The goal is to subtly convince the jury these are the rules they will need to listen for and weigh, regardless of the complex instructions they will later receive. These supposed rules may be as simple as "a company must go beyond the letter of safety regulations" or "companies can never use any substance that is a carcinogen." Such simple rules, if followed, present a company with an impossible standard to meet, and frankly offer the plaintiffs the potential for success outside of legal standards. A solid practitioner of the Reptile strategy will establish these rules in *voir dire*, discuss them in their opening statement, and then continue the theme throughout trial.



Defense counsel cannot wait until trial to stop the Reptile. Early efforts are required to stop it. A motion *in limine* may be the best avenue for at least slowing down its progression. Not a generic motion *in limine*, but a carefully worded motion that highlights the issue. Instead of a generic “Motion to Exclude the Reptile,” title the motion to frame the specific issue. For example, a “Motion to Exclude the Reference to or Use of Non-Regulatory Safety Rules.” The motion should contain specific examples of the rules you expect to be presented.

The specifics of the motion will be drawn out when you permit the Reptile to wrap its tail around itself by allowing related questioning of your experts during discovery depositions. An experienced expert will have endured such questioning in the past and will be able to respond accordingly. While the plaintiff’s counsel believes she is making strides, counsel is helping you draft your motion. Below are examples of Reptile questions your expert may field (here in a product liability case) that will be the foundation of a related motion *in limine* to enlighten the court as to what sort of safety rules Plaintiff’s counsel wants to use to indoctrinate the jury and misrepresent legal standards.

Question: Dr. Smith, don’t you agree it is a good rule of safety that if a manufacturer of a product can reasonably make the product without using dangerous ingredients it should? *In other words, your company can’t use any substances that could cause any ailment in any amount (even if allowed by regulation) or they violate a safety rule.*

Question: Dr. Smith, wouldn’t you agree that it’s a good rule of safety that before a company puts a product on the market, the company should test that product for potential hazards? *This would apply across the board even if the substance had been the subject of established study and regulation.*

Question: Dr. Smith, don’t you agree that it is a good safety rule for a company to over-warn than to do the bare minimum? *This is an attempt to get around compliance with regulations as being reasonable conduct.*

Question: Dr. Smith, don’t you agree that it’s a good rule of safety that before a company puts a product on the market, if it can substitute a less dangerous ingredient for a more dangerous ingredient, it should? *This is an unattainable goal for almost any product with almost any components or ingredients.*

Question: Dr. Smith, isn’t it a good rule of company safety that when a company puts a product on the market that could potentially increase a user’s risk for any sort of illness or injury, that the company should notify that potential user? *This is intended to supersede any permissible exposure levels for substances or regulated labeling requirements.*

These questions are not uncommon. Each is designed to build an argument that following industry and government regulation is immaterial. These are the types of concrete examples that are effective in the motion *in limine*. Even more importantly, these concrete examples are great for oral argument because they put the judge on notice of the tactics about to be employed. This may deter, or limit blatant Reptile use of these counsel-designed safety rules with the jury and leave the plaintiffs scrambling to re-design their case.

The Reverse Reptile



Sometimes the only way to defend against an attack is to meet it with equal force. If your adversary brings a Reptile to the fight, consider unleashing your own version. If your corporate defendant has a strong corporate story, use it. Using a “Reverse Reptile” allows you to show the jury that the defendant did all it could have been expected to do to in the given circumstances. Again, the Reverse Reptile requires advance planning. The ideal setting for use of the Reverse Reptile is with Plaintiff’s expert witnesses, preferably medical witnesses. While industrial hygienists or other safety professionals may be ready to give their particular slant to the responses based on the opinions they plan to offer at trial, a medical expert will often react much like a juror to Reverse Reptile questions. Assume that the defendant is a company with a good safety record and that the evidence will support the following statements.

Question: Dr. Jones, wouldn’t you agree that it is a good thing for a company to be actively involved in safety organizations?

Question: Dr. Jones, wouldn’t you agree that it is a good thing for a company to employ a medical director?

Question: Dr. Jones, wouldn’t you agree that it is a good thing for a company to comply with regulatory standards?

Question: Dr. Jones, wouldn’t you agree that it is a good thing for a company to comply with warning requirements?

Question: Dr. Jones, wouldn’t you agree that it is a good thing for a company to employ industrial hygienists to evaluate product safety?

As with the Reptile questions, the Reverse Reptile questions set out items to which the jury should be listening. The answers to the questions are less important than establishing that defendant has engaged in good corporate conduct. The remaining evidence will show that the defendant exemplifies these good safety practices.

Conclusion

It is always better to keep the Reptile out of the courtroom before the trial begins. If that fails, the Reverse Reptile is an effective defense tactic. The Reverse Reptile tactic will not work for every defendant in every case. Defense counsel must carefully evaluate the case and honestly evaluate the defendant’s history before implementing the Reverse Reptile. The goal is ensuring a fair trial, decided on the facts, the law, and the merits of the case. That cannot happen if jurors are making decisions on emotion and instinct, not logic.

About the Author

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