

## Exploring Jurors' Perceptions

By J. Lee Gray  
and Kevin Bouilly

**J**urors will use their own experiences as the primary lens through which to evaluate a defendant manufacturer's conduct. Understanding how they think can help a manufacturer craft a more effective defense.

# Managing Recall Evidence in the World of Runaway Punitive Damages

People buy products—to wear, to drive, to ride, to make life easier, to take calculated risks, and generally to enjoy life. Inevitably, some of those products get recalled. They have defects, consumers misunderstand them or misuse

them, or enough incidents happen that a recall becomes necessary. Jurors who judge a product liability dispute are nearly as familiar with the idea of product recalls as they are with almost any other aspect of product liability litigation. Why? Because as consumers they have all received a product recall notice, learned of a recall in the news, or have otherwise been affected directly by a product recall issue. And it appears that evidence regarding manufacturers' knowledge and decisions related to product recalls may be playing a larger role in product liability verdicts, including the growing trend of astronomical punitive damage awards. In this article we explore jurors' perceptions of product risk, manufacturers' responsibilities to communicate about such risk, and product recalls more

generally. The purpose is to recommend strategies that defendant manufacturers can use to manage evidence that they failed to use knowledge or share information appropriately about product dangers that put the public at risk.

**Increasing Punitive Damage Verdicts**  
Eye-popping jury verdicts in product liability cases have grabbed headlines this past year, with runaway punitive damage awards pushing jury verdicts to near-record highs. For example, three St. Louis juries recently awarded three plaintiffs awards of over \$72 million, \$55 million, and \$70—including a combined \$180 million in punitive damages—for ovarian cancer allegedly caused by long-term talcum powder use. The plaintiffs' counsel relied



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on the defendant's knowledge of decades of reported epidemiological studies that showed a slightly increased risk of ovarian cancer associated with use of talcum powder. In seeking punitive damages, the plaintiffs successfully portrayed the manufacturer as a large, indifferent corporation that refused to warn consumers of the cancer risks that it had tried to conceal from the public. "The jury [in one case] voted 10-2 to find [the company] at fault after deliberating for about three hours. One of the jurors did not sign the verdict because she thought \$70 million in damages was not enough, [plaintiff's counsel] said." St. Louis Post-Dispatch, Oct. 28, 2016.

In December 2016, a Texas federal jury awarded more than \$1 billion (\$32 million compensatory) to six California plaintiffs for allegedly defective metal-on-metal hip implants. The plaintiffs alleged that the implants caused tissue death, bone erosion, and other injuries, which required revision surgery to remove the devices. The plaintiffs also alleged that the manufacturer turned a blind eye to studies showing risks of metal-on-metal devices to human tissue and bone. An earlier trial for another handful of plaintiffs with these metal-on-metal hip implants yielded a \$500 million jury verdict, including approximately \$450 million in punitive damages.

These product liability cases, and many others similar to them and involving all types of products, frequently include evidence that a manufacturer had knowledge or information regarding potential risks or injuries that it either did not share with customers in product warnings or did not act upon to timely recall the products. The perception that a manufacturer has delayed, ignored, or simply failed to act quickly and responsibly with the knowledge that it possessed motivates jurors to punish manufacturers with sometimes astonishing punitive damages. Acknowledging and addressing these perceptions related to product recalls is imperative.

### The Increasing Prominence of Product Recalls

The number and breadth of product recalls have remained steady during the past year over most industries. The Consumer Product Safety Commission (CPSC) reported approximately 700 different recalls of con-

sumer products in 2016, affecting some 320 million units. The U.S. Food and Drug Administration (FDA) reported over 1,400 separate recalls of pharmaceutical products and medical devices and nearly an additional 700 recalls of food and beverage products. The National Highway Traffic Safety Administration reported over 800 different automotive product recalls, affecting some 75 million different units, in 2016. With daily reports of product recalls affecting millions of products, the public's awareness of product recalls is higher than ever before, as is the likelihood of a product recall being an issue in product liability cases. Combined with the prevalence of punitive damage awards, manufacturers must realistically evaluate their approach to product recalls and the use of such evidence in product liability litigation.

### The Cost of Product Recalls

Manufacturers of any type of consumer product have strict reporting requirements to the CPSC when various problems arise with any of their products. And those reporting requirements are immediate. For example, a manufacturer must immediately notify the CPSC if it obtains information that "reasonably supports" the conclusion that a product creates an unreasonable risk of serious injury or death. As used here, the term "immediately" means within 24 hours of receiving the informa-

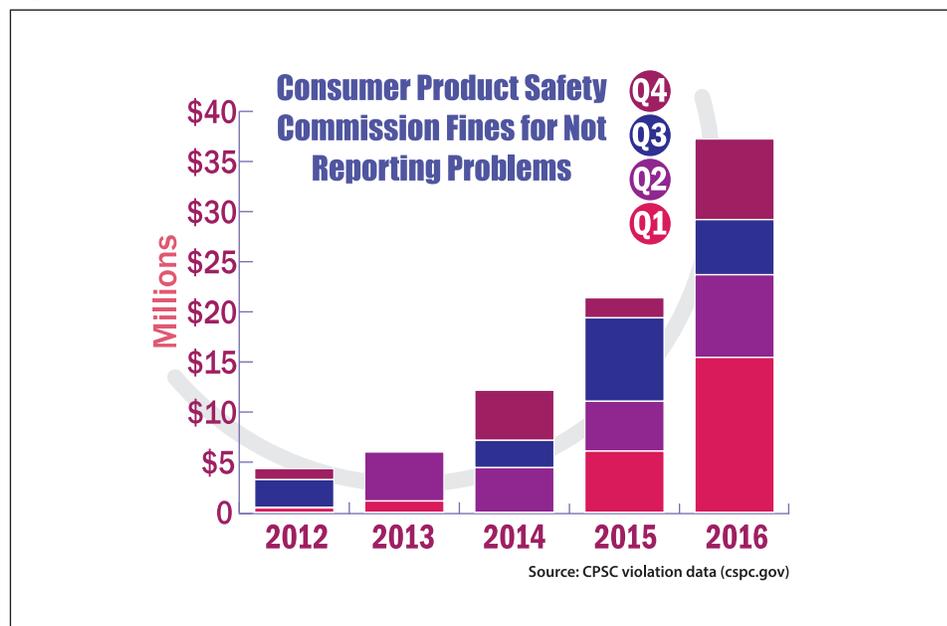
tion. Consequently, a manufacturer may be required to notify the CPSC immediately—as soon as it receives a single reported failure of a product—if one could reasonably conclude that the failure suggests that the product poses risk of serious injury. And it appears that the price for failing to do so may be going up. See Figure 1.

The sweeping changes found in the Consumer Product Safety Act of 2008 included a significant increase in the limits on fines for non-compliant companies. That limit was raised from \$1.8 million to \$15 million per company. Fines imposed on manufacturers that fail to timely make these reports has steadily increased over the past few years. Whereas total CPSC fines for failing to timely report problems remained under \$5 million per year as recently as 2013, those totals have quickly risen to over \$35 million in 2016, including a \$15 million fine against a single product manufacturer.

### The Challenges of Product Recalls

Correctly collecting and evaluating the appropriate information to make a recall decision is a complex and difficult task—made even more so by the fast timeline required. While regulatory agencies require manufacturers to accomplish certain tasks in compliance with pertinent regulations, neither the regulations nor the regulators dictate how a manufacturer should meet these requirements. To evaluate a product

Figure 1



recall scenario properly, manufacturers must adequately collect and document data regarding product performance well before a recall decision is made. This data must come from several different departments of the company, including sales and distribution figures to determine the number of product units and location in the marketplace, design changes and testing data, and customer complaints and reported adverse events, including the types and severity of injuries or problems. Timely collecting, maintaining, and analyzing this data will enable the manufacture to monitor product performance in the field constantly, evaluate the severity of potential risk, and determine the likelihood of occurrences.

Once any reported problems are detected, the manufacturer must act quickly to determine, as best as possible, the root cause of the problem and the severity of the potential risk of injury. When evaluating the severity of potential injury, manufacturers should consider who may be harmed by the product, also assessing whether users include unique or vulnerable individuals such as children or the elderly. The likelihood of occurrence is determined by comparing the number of reported occurrences with the number of potentially affected units. Manufacturers should evaluate all of these factors to determine whether and when to initiate a product recall.

Just as important as the recall decision is proper execution of the recall. Recalls are not easy. They require communication and close cooperation from virtually every department of a company. Research and Development must work to determine the cause of failure and potential repairs, if possible. The Sales and Distribution Departments must work to identify product volume and location and necessary reverse-distribution efforts for the recall. Marketing should work on fast, honest, and meaningful communications to warn of the potential dangers, publicize the recall, and assure the highest return rates. And equally important, a representative from senior management with action authority must be involved throughout the process and be ready to make game-time decisions. Even typical product launches require considerable time and effort to coordinate and execute the varying efforts from every company department. Successfully coordinat-

ing and executing atypical recall duties in all departments, in just a matter of hours or days, requires nearly a Herculean effort. Unfortunately, regardless of a manufacturer's Herculean effort to coordinate and execute an effective recall decision—which could include the decision not to recall a product—there is a group of people central to a product liability litigation poised to scrutinize and judge the manufacturer's actions and inactions throughout the process.

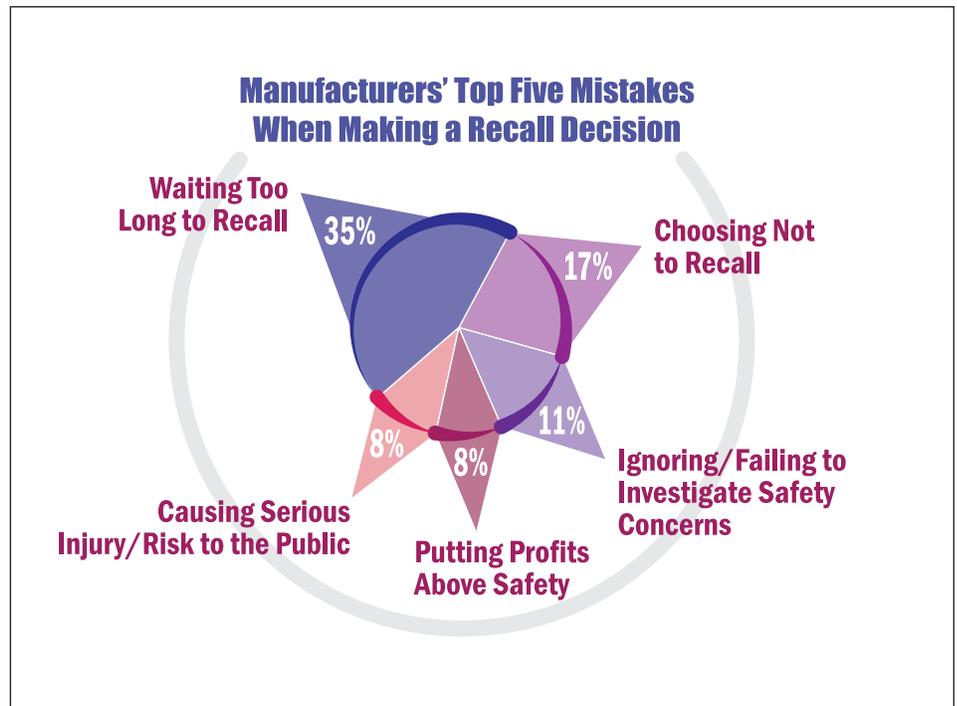
**Jurors' Complex Perceptions of Product Recall Evidence**

Due to the frequency and publicity of product recalls, most jurors are readily familiar with problematic or recalled products. Indeed, fully 83 percent of jury-eligible Americans recently surveyed said that they were familiar with the practice of recalling a product after the discovery of safety issues or product defects that might endanger the consumer or put the maker or the seller at risk of legal action. Persuasion Strategies, 2017 Product Recall Survey. In January of 2017, the national litigation consulting firm Persuasion Strategies conducted nationwide survey research of jury-eligible Americans to learn more about their familiarity with, and perceptions of, product recalls, and the manufacturers involved in them. Unless otherwise cited, all

statistics in this article are from the Persuasion Strategies 2017 Product Recall Survey. Of the 83 percent who are familiar with product recalls, only 9 percent thought that product recalls benefit product manufacturers more than they benefit consumers, demonstrating the public's perception that product recalls are helpful to protect consumers. Potential jurors recognize that recalls can be necessary, if not helpful, to manufacturers, with 34 percent reporting that recalls are somewhat helpful to product manufacturers and 20 percent reporting that product recalls are "extremely helpful."

Potential jurors also report beliefs about the behavior of conscientious product manufacturers, including how common it is for responsible product makers to recall products. Specifically, just 52 percent report the belief that a manufacturer-initiated recall is the most common type of product recall, while fully 60 percent report that a voluntary, manufacturer-initiated recall is most likely *if a product manufacturer is acting responsibly*. These results immediately demonstrate that jurors' perceptions are based on both familiarity with recalls and a sense that responsible manufacturers *should* live up to certain standards when it comes to evaluating, monitoring, and ensuring the safety of their products.

**Figure 2**



Potential jurors have some strong and clear opinions about the primary mistakes that manufacturers make when deciding whether to issue a product recall or to continue selling the product. The key issues driving perceptions of whether a product manufacturer is behaving responsibly boil down to the timing of the recall, the perceived or known severity of risk to the public, the manufacturer's notice of reported injuries or known risks, as well as the interacting perceptions of manufacturers and the government regulatory agencies that regulate them. See Figure 2.

### Recall Timing

"They could recall a lot sooner."

"It's always after the horses are out trying to close the barn door, so to speak."  
—Product Liability Mock Jurors

Recall timing is the most critical issue to potential jurors who evaluate a product manufacturer's behavior pertaining to an actual or potential product recall. The sense that product recalls occur too late is the single most often-cited mistake that manufacturers make when making recall decisions. A strong majority of potential jurors (65 percent) believe that product recalls typically happen too late. A full 44 percent say that a product manufacturer's top priority regarding a product recall should be to "respond quickly when a recall is required," cited more than twice as often as the next highest priority of a manufacturer's need to "communicate openly and honestly with the public" (21 percent). See Figure 3.

### Risk Severity

A second central public concern about product recalls pertains specifically to the risk of harm that a product poses to the public and a manufacturer's responsibility to communicate openly with consumers about known risks. Jurors expect manufacturers to act early, when the risk of injury is low, and even when the extent of possible injury is minor. Most notably, 60 percent of potential jurors say that a product manufacturer should first warn consumers about potential health risks associated with a product when the *likelihood of injury is low*. The same proportion, 60 percent, say

that a manufacturer should first warn consumers about potential health risks associated with a product when the *extent of possible injury is minor*.

The expectation is that manufacturers should warn the public early, and a manufacturer should recall a product as soon as there is known risk—even when that risk is slight. Put a slightly different way, fully 78 percent believe that products are *rarely or almost never* recalled when there is no actual safety risk. So what constitutes "notice" of risk? How many reports of risk or actual injury translate to the perception that a man-

ufacturer knows of a possible health risk associated with its product? See Figure 4.

### Consumer Reports of Injury

"If they get one complaint, they should say something."

—Product Liability Mock Juror

Among the most interesting perceptions of manufacturers' decisions concerning recalls focuses on differing perceptions of the number of reports of consumer injury needed before a manufacturer should first

Figure 3



Figure 4



warn consumers about a possible health risk associated with a product or initiate a product recall. On the one hand, 34 percent of potential jurors surveyed say that a responsible company would warn of possible risks for the first time after a single consumer report of an injury associated with the product. Just one reported injury is enough for more than a third of people to feel a manufacturer should respond with a warning. Perhaps more importantly, 32 percent of potential jurors surveyed felt that a responsible company *should recall a product after a single report of a consumer injury*. For a meaningful proportion of people, a single reported injury associated with a product means that a company should issue a recall for the product, and this perception is truer for women than men, and truer for people with less than a college education.

These perceptions are even more interesting when considered in terms of the percentage of products rather than the raw numbers of consumer reports. Specifically, the need to recall immediately is perceived as somewhat lower when the question is framed in terms of a proportion of products related to reported injury or risk. Considering the percentage of units sold, fully 66 percent of respondents say that a responsible company need not recall a product until at least 5 percent of prod-

uct units sold have been associated with reports of consumer injury, and only 23 percent believe that a company should recall a product when 1 percent or fewer of units sold are associated with reports of a consumer injury. This is in direct conflict with the nearly one-third who say that a recall should occur after a single consumer report of injury when framed in terms of numbers of reports rather than proportion of sold units.

**Trust and Distrust in Manufacturers**

**“As consumers we put a certain amount of trust into companies that they are looking out for us.”**

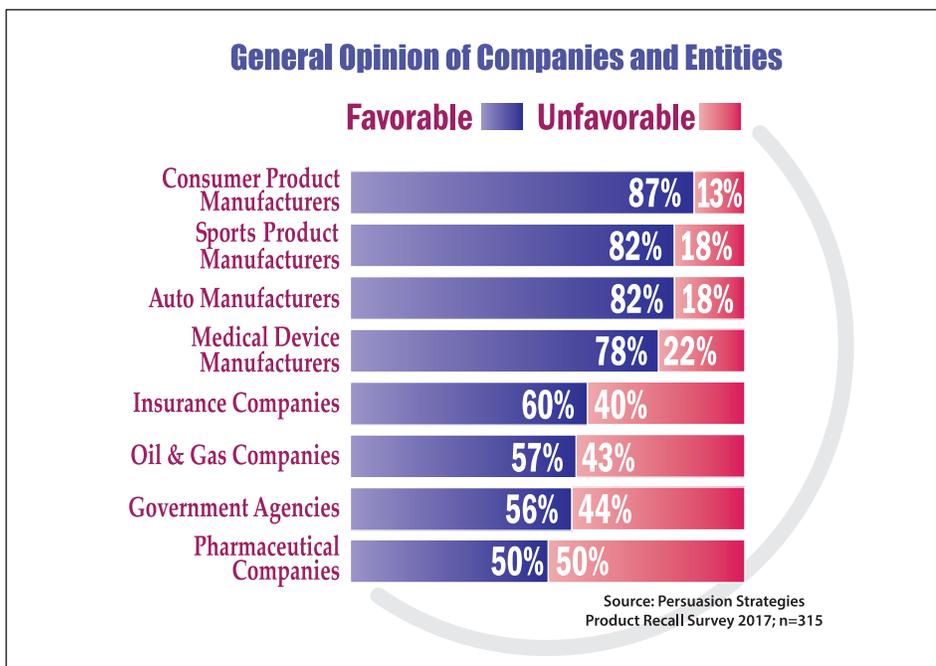
—Product Liability Mock Juror

Perceptions of different types of product manufacturers are as varied as the colors of product brands. Others have described perceptions central to medical device companies in particular. Ken Broda-Bahm, Lori G. Cohen, & Max Heerman, *Defending Medical Device Companies in an Era of Distrust*, For The Defense, Sept. 2013, at 70–77. The Persuasion Strategies 2017 survey demonstrates stability, and in some instances increases, in favorable perceptions of certain product manufacturers, including 87 percent favorable ratings of consumer prod-

uct makers, 82 percent favorable ratings of sports product manufacturers and auto makers, and 78 percent favorable ratings of medical device companies, up slightly from 72 percent in 2015. While general favorability ratings show that all product makers fare better than pharmaceutical companies (50 percent), it is important that a majority of potential jurors surveyed have favorable opinions of all other product manufacturers included. See Figure 5.

The news is not all good for manufacturers, however. It is also worth noting that while the survey results show that a majority (61 percent) report that a product manufacturer’s motivation when issuing a product recall is mostly or entirely to protect the public, a vocal 39 percent view manufacturers’ motivations as self-interested, perceiving a recall as a financial decision intended to protect the company from liability, loss of reputation, and most importantly, loss of revenue. Jury research in cases involving product manufacturers repeatedly puts on display the American public’s disdain and strong negative feelings toward corporations, including the gamut of negative perceptions of corporate conduct (deceptive, profiteering, and more), motives (evil, unilateral, profit-first), and postures in litigation (“CYA,” disingenuous, and more). The widespread distrust of manufacturers works in cahoots with perceptions of the government regulators entrusted to police them.

Figure 5



**Distrust in Regulators**

**“The corporations... are the information collection point. They have that information. It is their responsibility to have oversight.”**

—Product Liability Mock Juror

General trust in government has declined sharply since the early 2000s. Beyond Distrust: How Americans View Their Government (Nov. 23, 2015). The sentiment is also reflected in perceptions of the regulatory agencies that regulate product manufacturers and the myriad issues pertaining to product recalls. While favorable ratings of government agencies rests at 56 percent—the lowest among all the types of entities tested except for pharmaceutical companies—the more salient and important perceptions pertain to perceptions

of how specific agencies regulate product manufacturers that may be in a position to recall products.

Mock jurors and surveyed potential jurors continue to display cynicism about two key aspects pertaining to regulating product recalls: meeting and exceeding requirements. Potential jurors consistently scrutinize evidence of a manufacturer's actions as they relate to meeting government regulations, while also expecting responsible companies to go above and beyond the minimum regulatory requirements. Jury research consistently shows that people expect responsible companies to do more than the minimum that regulators require of them. This belief goes hand in hand with low expectations and low standards for the regulators themselves. For instance, 49 percent say that when a federal government agency requires a product recall, the agency typically takes action too late. At the same time, most people do not assume that the failure to take action sooner is related to regulators intentionally favoring manufacturers or designing to protect manufacturer interests. Indeed, 82 percent say that the FDA's primary priority is to protect the public interest, while only 18 percent say that the primary priority is to protect corporate interests. Ultimately,

jurors' general perceptions of regulatory agencies are less favorable than the specific agencies that monitor and manage product manufacturing issues. Manufacturers need to know that jurors' perceptions of agencies vary, and in most instances, jurors are skeptical of corporations that only meet the minimum standards of the regulating bodies. See Figure 6.

**Let Loose Your "Good" Recall Evidence**

While a product recall itself will not prevent tort liability, evidence of a timely and effective recall can persuasively inform jurors of a company's commitment to customer safety and can influence jurors' overall perceptions of a defendant manufacturer. This evidence may be useful to demonstrate that a defendant did not act negligently or breach any reasonable duty of care standard because it did all that it could to minimize or avoid the alleged injury. Perhaps more importantly, such "good" recall evidence helps improve jurors' general opinion of a company—which will combat the attitudes that often lead to punitive damages. Consider some of the critical ways that a manufacturer can leverage persuasive evidence of its policies and conduct pertaining to a product recall

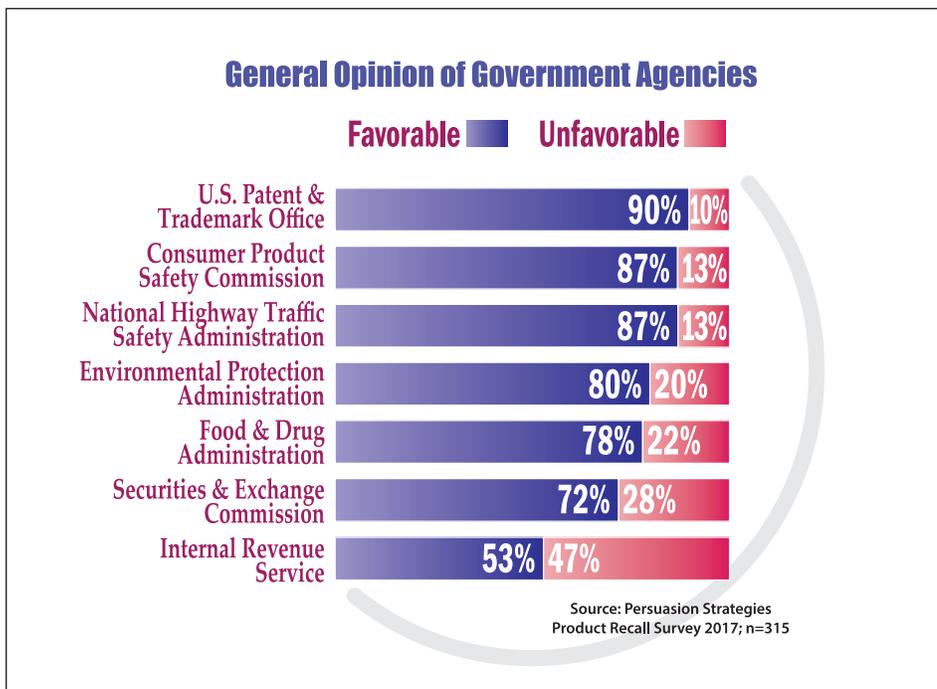
in the following ways, applied to a medical device manufacturer.

**Demonstrate When a Recall Is Performed Timely**

Medical device manufacturers typically have comprehensive corrective and preventative action procedures in place that require stringent post-market monitoring of product performance and adverse events. Such procedures come from the companies' robust quality control systems, which are part of FDA-required current Good Manufacturing Practices (cGMP), and typically they begin in the design phase of new medical devices. In following these procedures, beginning at the design phase and continuing throughout the product life, device makers identify and evaluate potential risks of use, including various types and severity of potential injuries and corresponding levels of reported issues that trigger appropriate corrective actions. The more severe the risk or injury, the faster the trigger for more comprehensive corrective action, such as a full product recall. It is not uncommon for more severe risks involving medical devices to trigger a recall based on as low as a 0.1 percent occurrence rate.

Importantly, while FDA regulations instruct medical device companies on *what* they need to do, these regulations do not regulate *how* to do it. As discussed above, simply meeting minimum regulatory requirements or guidelines in this regard is likely not enough. As juror attitudes about government regulators and the efficacy of federal regulations declines, medical device manufacturers should demonstrate their efforts and desire to exceed those requirements. Manufacturers of other types of products, such as consumer products, should also strive to exceed industry norms when there are no specific regulatory requirements. Companies must not only establish, maintain, and follow appropriate procedures and standards, but they must also document all activities along the way. Setting and following aggressive, but realistic, triggers for initiating a product recall will go a long way to demonstrate a manufacturer's strong commitment to customer safety.

Figure 6



### Understand the Perception of Injury Risk

As discussed above, a significant factor for jurors related to recall efforts is how quickly a manufacturer acts on the data that it has to initiate a product recall. Interestingly, survey data conflicts when jurors consider a specific number of injuries instead of a percentage of sold products. That is, when no amount of total units sold was provided, a large majority (66 percent) of survey responders believed that a recall should be initiated when 5 percent of units sold were associated with reports of consumer injury. (23 percent required a recall of a product at 1 percent reported injuries.) But when an actual number of units were used instead of percentages, and more context that was provided, such as identifying the product as a medical device rather than as a consumer product, and a total of 5,000 units sold, the same survey responders indicated that a recall should occur much sooner: 86 percent believed that a recall should be initiated with 25 or fewer reported injuries (which is only 0.005 percent of sold products), while 50 percent wanted a recall at 5 or fewer injuries (0.001 percent of sold devices). See Figure 7.

These numbers are well below the stringent 0.1 percent recall triggers mentioned above, and if followed, they could likely lead to unnecessary recalls of products that are, in fact, not defective. Thus, the real challenge in this scenario is sufficiently educating a jury regarding what an appropriate level of risk is, compared to the benefits of the device, as well as the difficult task of properly evaluating the root causes of adverse events when there are multiple potential causes that are not device related.

### Acknowledge that Jurors Expect a Response to Consumer Reports

Although manufacturing defendants can, and should, spend sufficient time at trial educating jurors on the complexities of determining the root cause of an adverse event and making a recall decision, survey results demonstrate that this will require moving jurors away from their preexisting views coming into trial. For example, survey respondents were provided with the scenario that a patient who had a medical device implanted by a doctor experienced a severe injury, which was also experienced

by hundreds of other patients, representing about 1 percent of those receiving the device, and the device maker was aware of the hundreds of reported adverse events but chose not to recall the device. Knowing nothing else, a full 83 percent of respondents indicated that they would lean in favor of the patient in a lawsuit regarding that injury, while 12 percent would not lean either way. Only 5 percent of respondents indicated that they would lean in favor of the device maker.

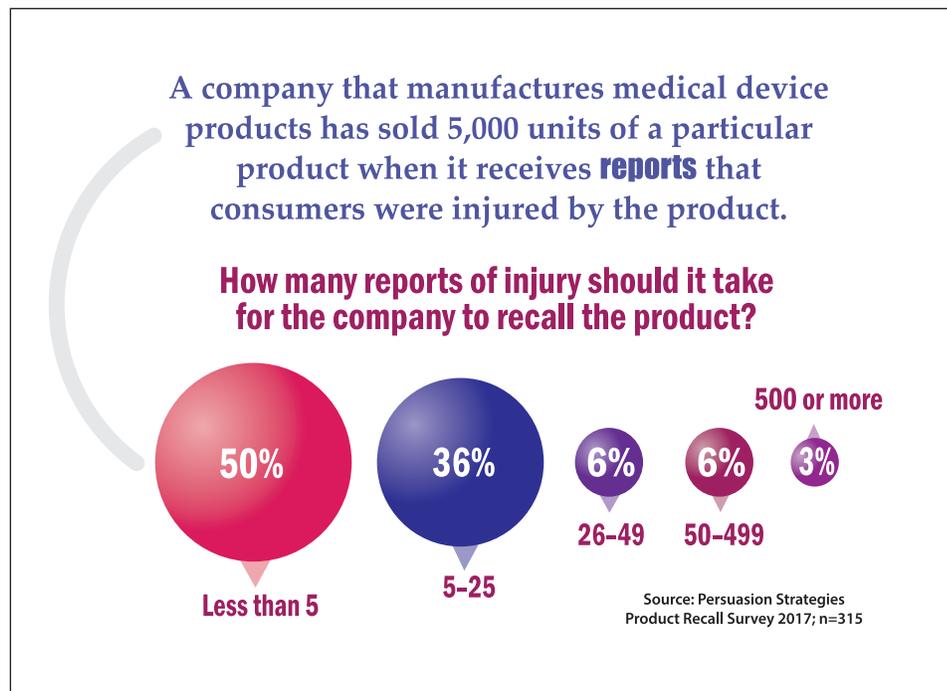
Additional responses did suggest that juror attitudes can change when the number of injuries remains the same but the perceived rate of injury is reduced. In follow-up questions using the same scenario but changing the percentage of the hundreds of injuries to only 0.1 percent of the total implanted devices, the percentage of respondents leaning in favor of the patient dropped to 63 percent, while 25 percent said that they would not lean either way, and 12 percent would favor the manufacturer. These results indicate that potential jurors are open to changing their views based on additional information. But a real danger of punitive damages remains in any plaintiff's verdict because the vast majority of those who favored the plaintiff in such a hypothetical lawsuit also leaned

in favor of awarding punitive damages. Of those favoring the patient plaintiff, 43 percent believed that the device maker should probably be punished, and 41 percent said that the device maker should definitely be punished. These beliefs regarding punishing the manufacturer likely derive from its decision not to recall the product in the face of hundreds of reported injuries—regardless of how small a percentage of implanted devices they made up. See Figure 8.

### Trust Employees to Tell the Investigation Story

One important tool in properly educating a jury is to have key employees testify live at trial regarding the manufacturer's good recall evidence. This testimony should describe fully the efforts taken beginning in the design phase to determine, address, and eliminate or reduce anticipated risks, wherever possible. These witnesses should also testify about the manufacturer's continuing post-sale efforts to track and evaluate product performance in the field, as well as the enormous efforts required and taken to make the recall decision and properly execute the recall. This testimony will not only humanize the manufacturer, but also provide much-needed context to the recall actions that were, or were not, taken.

Figure 7



In addition, these key employee witnesses should demonstrate the company's efforts to keep its communications to customers honest, clear, and as effective as possible. When combined with the detailed story of how vigorously the manufacturer worked to determine the root cause of reported adverse events and the potential

non-device-related causes, this testimony should include the reasons why public communications made too early can potentially be harmful to consumers by unnecessarily depriving the vast majority of users, who will not experience any adverse effects, from the benefit of the device. When placed in the correct context, the story of the man-

ufacturer's well-timed efforts to communicate accurate information responsibly will address jurors' main concerns, discussed above, concerning mistakes that manufacturers make after determining that a product should be recalled.

**Go Above and Beyond the Regulators**

Along these lines, a manufacturer should tell its own story regarding a product recall and not simply rely on explaining how it met the regulatory requirements for recalls. In keeping with the growing distrust of government regulators described above, the vast majority of jurors come into the courtroom believing that regulators are too lenient toward product manufacturers. For example, 62 percent of respondents surveyed indicated that the FDA was somewhat too lenient toward manufacturers in approving, monitoring, and recalling food and drug products. An *additional* 20 percent believed that the FDA was far too lenient toward manufacturers. Thus, manufacturers who solely rely on evidence that they met regulatory requirements in their recall decisions and actions do very little to change juror perceptions that the manufacturers acted properly in the face of reported problems. See Figure 9.

Figure 8

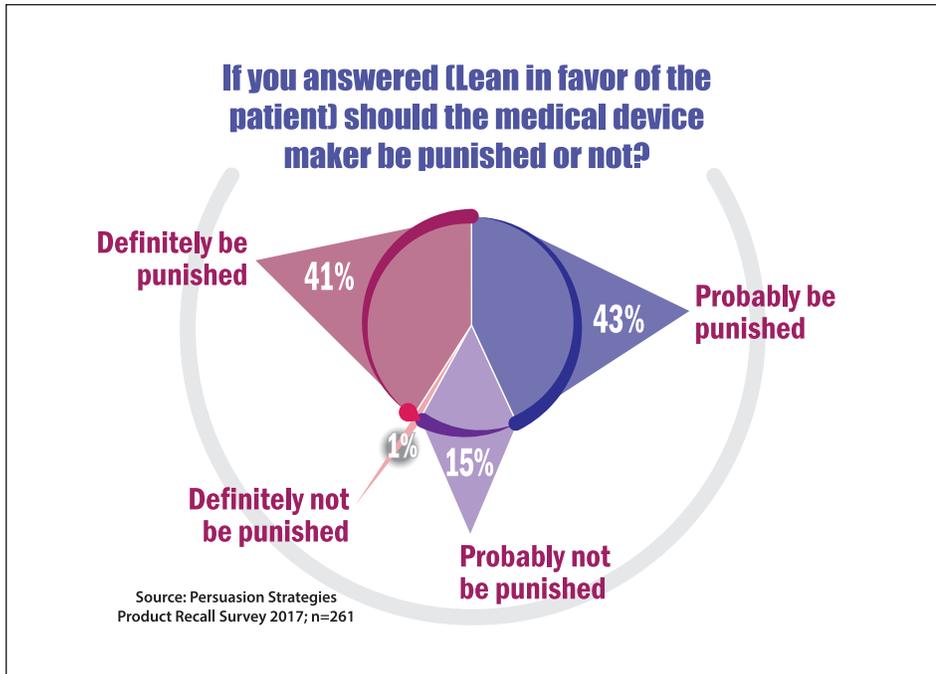
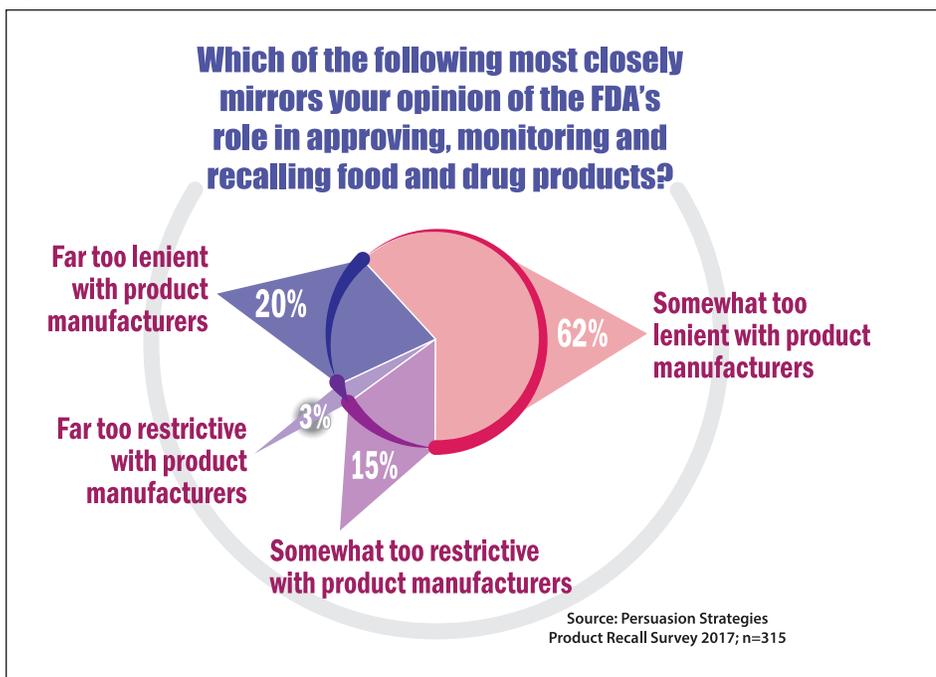


Figure 9



**Embrace Your "Bad" Product Recall Evidence**

Experience tells us that manufacturers can face challenges either when they have recalled a product or when they have chosen not to issue a recall. There are some fairly consistent challenges when jurors hear evidence pertaining to product recall issues that is less than ideal.

**Accept Profit Motive and Use It to Your Advantage**

*"The manufacturer had an unwillingness to be forthright when information became available that the product had serious issues because of it being a detriment to sales."*

—Product Liability Mock Juror

When corporations become defendants there is rarely a way around some portion of the jury pool assuming the worst, including that a company is nothing more than profit motivated. Too often, corporations attempt to fight that perception by trying to mini-

mize their size, reach, revenue, resources, and more, or by asking a jury to treat the corporation as jurors would treat an individual, either by citing a statute or jury instruction that requires it, or by attempting to make the case about the people employed by the corporation. While these strategies can help improve perceptions of the corporation, a better strategy is often to surprise the jurors by embracing their preconceptions about corporations, including the corporate profit motive. Defendants should find a way to align their trial message with a jury's preexisting belief that the defendants want money, only money, and always money. For example, when the accusation is that a manufacturer waited too long to recall a product to save costs, a defendant manufacturer should consider all the ways to develop evidence that the loss of reputation due to handling a recall improperly is much more financially damaging than the costs of implementing one. The message will ultimately be that profit was exactly the motive, and that's why a timely recall decision is always a high priority: to avoid costly loss of reputation and stay ahead of the public relations curve. This may seem counterintuitive, and that's precisely the point. Jurors will think twice about the simplistic view that a recall is a deterrent rather than an opportunity. (Remember that 54 percent of potential jurors surveyed felt a product recall is helpful to a manufacturer.)

### Accept Responsibility Where You Can

The credibility battle in trial often boils down to a few relevant ways that jurors ultimately evaluate the parties' credibility and make the informal determination of which party is the most believable. Accepting responsibility for imperfect conduct is well-established as a key way to increase credibility, particularly when the act of doing so betrays expectations. In a product recall scenario, this act can be genuine and helpful in a variety of incarnations.

We could have communicated more completely with the public early in this process, but based on known information, we took action and we were able to recall the product in a timely manner and protect the people who owned the product in just the way we had hoped.

We learned of an issue with the product that was concerning, there is no

doubt about that. Thankfully, we were monitoring well enough to pick up on it early in the process and take appropriate action to protect the public.

Once a defendant takes responsibility for some of its conduct in a case, jurors often begin to perceive their job as allocating responsibility for what happened in the case to all of the individuals' actions that led to the result. The outcome is often an increased scrutiny on consumers or plaintiffs who may have played a role in the injuries that they claimed that the product caused. Indeed, survey results show that fully 63 percent of jury-eligible Americans say that a consumer "very much" or "mostly" has an obligation to monitor the safety of a product that he or she owns. In comparison, that is just 15 percent fewer than the proportion that say a manufacturer "very much" or "mostly" has an obligation to monitor the safety of its products once they are sold.

### Use Perceptions of Regulators to Your Advantage

"There is only so much the FDA can do."  
—Product Liability Mock Juror

If perceptions of the relevant regulator are low, a manufacturer should compare its conduct with that low standard and

demonstrate how its internal standards were more stringent, exceeded the requirements, or established a pattern of internal concern that was superior to the regulator requirements.

If perceptions of the relevant regulator are high, a manufacturer should emphasize how it complied with regulations or agency requirements and continue to highlight how and when it exceeded those requirements based on any unique internal processes or benchmarks that pertained specifically to the manufacturer's product design, manufacture, or sales processes.

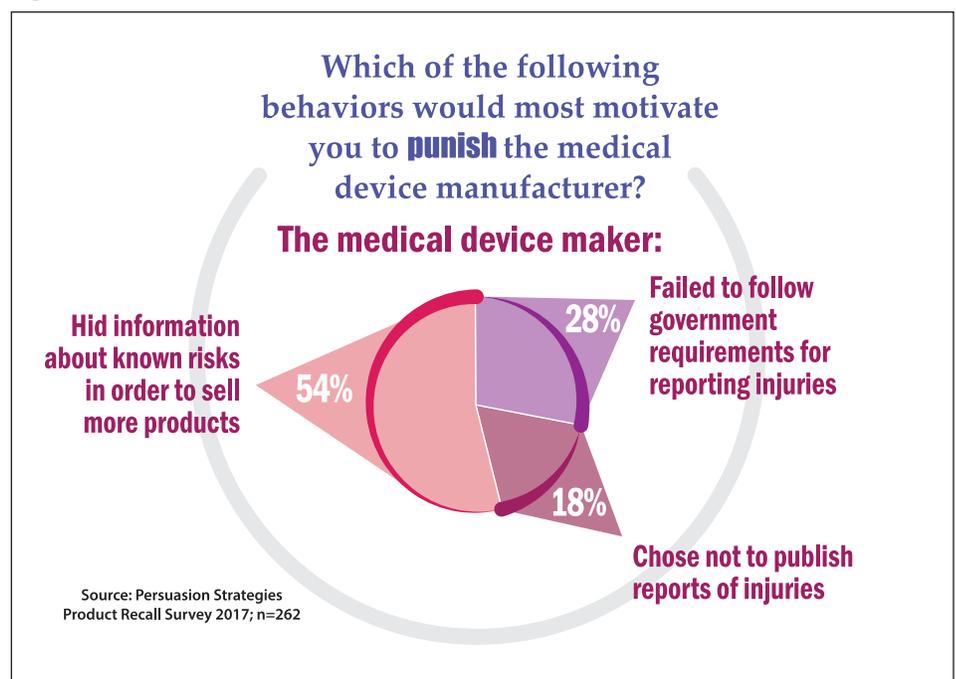
### Demonstrate Transparency

"These guys didn't disclose it, they sat on it, and that's what angered me about it."

—Product Liability Mock Juror

Persuasive trial lawyers know that they can motivate jurors by highlighting conduct that feels deceptive, dishonest, or concealing. Research confirms that jurors are most motivated against product manufacturers by the perception that they have hidden information or concealed evidence from the public, especially if the behavior is perceived as increasing profits. See Figure 10.

Figure 10



In the well-known, metal-on-metal hip implant trial cited in the introduction to this article, the plaintiff’s attorney argued in closing argument a variety of appeals intended to trigger juror anger based on perceptions of dishonesty:

- The defendant knew but did not tell.
- The defendant knew but said something else.
- The defendant failed to test properly or did not tell people that it was testing on them.
- The defendant used regulatory loopholes to gain approvals.

At the same time, jurors expect product manufacturers to steward their products honestly and thoroughly through a product’s life. They expect that a company will keep tabs on a product and communicate openly when there is an issue. Fully 86 percent of jury-eligible Americans surveyed say that a product manufacturer “very much” or “mostly” has an obligation to investigate the safety of its products once it receives reports of health concerns.

Manufacturers can demonstrate transparency by presenting a unified and coherent story that allows jurors access to as many sides and aspects of the relevant operations and personnel as is feasible. Present a continuum of witnesses who can directly address any implications of

deception or concealment. The goal should be to have a unified message that also includes naturally occurring differences that occur with different people’s perspectives. (These slight differences can actually increase credibility.)

**Bring “Hands-On” Employees**

One of the biggest mistakes that product manufacturers make is failing to employ, trust, or identify and bring as witnesses the employees who have the type of knowledge and experience that jurors will care about the most deeply. More often than not, jurors want to hear from personnel who have direct knowledge of the relevant product issues, whether they are involved in manufacturing, design, monitoring, investigating, or otherwise. They want to hear from the horse’s mouth. That does not always (and many times does not at all mean) that jurors want to hear from executives higher up on the food chain than anyone on the jury. When asked who they would trust more when the two people told different stories of the same events, an executive or a lower level employee of the company, 78 percent said that they would trust the lower level employee more. Employ, train, identify, and prepare the witnesses with hands-on experience so that you can bring them to trial.

**Frame Appropriately**

The results of the Persuasion Strategies 2017 Product Recall Survey illustrate clearly the power of how an option, such as whether consumer reports of injury associated with a product are represented in raw numbers, or as a percentage of units sold, can influence perceptions of the information. The effect is similar to the psychological phenomenon known as “the framing effect,” a cognitive bias often considered in terms of a positive frame (99 percent of products have no connection to consumer injury), or a negative frame (1 percent of products sold have been associated with consumer injury). In the survey, the results showed that people had a higher tolerance for consumer injury reports when framed as a proportion of the product units sold rather than as a raw number. While more than a third of jury-eligible respondents say that a product should be recalled after just one report of a consumer injury, 94 percent say that a medical device company is being extremely or somewhat responsible if it issues a recall after 1 percent of its products are reportedly associated with injury. See Figure 11.

**Conclusion**

Product manufacturers face a difficult set of challenges when jurors in product liability cases see evidence and hear arguments that a defendant manufacturer had knowledge about product risks or consumer injuries, which it did not use efficiently and clearly to protect consumers effectively. There is almost nothing that motivates a jury to punish a defendant more than the perception of dishonest or deceptive corporate conduct. Particularly when the evidence is framed in terms of a manufacturer’s decision-making process about whether to share information about risk, warn the public of potential dangers, or recall a product, jurors can—and will—use their own experiences with products and product recalls as the most important lens through which to view and evaluate a defendant manufacturer’s conduct and render a decision. In today’s climate of runaway punitive damages risk, defendant manufacturers must manage risk information and the product recall process with a jury in mind.

Figure 11

