

# The Art of Retrial

by **Thomas M. Goutman and Martin P. Zucker**

If it is true, as Hippocrates famously maintained, that “Life is short, art is long” (“*Ars longa, vita brevis*”), then the case of *Commonwealth v. Monsanto* is a masterpiece worthy of the Louvre. Now celebrating its seventeenth year, the litigation has seen the longest jury trial in Pennsylvania history (16 months), one of its largest verdicts (\$90 million), a lengthy appeal process (six years) that resulted in a landmark products liability decision by the Pennsylvania Supreme Court, and, just recently, a second trial that ended in a defense verdict.

For those involved in the long journey that resulted in a second verdict so different from the first, the concluding portion of Hippocrates’s aphorism also resonates: “. . . opportunity fleeting, experiment treacherous, judgment difficult.” For often it is only by making difficult, risk-laden decisions that trial, appellate, and in-house counsel can turn crushing defeat into redemptive victory. Here we discuss some necessary case background and then some lessons learned along the way. Among those lessons are these:

- Carefully balance the conflicting urges to retry the first trial again and to change everything the second time around.
- Use the direction given by the appellate court, by the first jury, and by mock juries to narrow the issues down to the simplest, clearest, and strongest ones you have.
- Ensure that both trial counsel and in-house counsel buy in to new strategies, foreclosing any fear of being second-guessed.

The story of a retrial is really three stories of three different cases: the case put together for the first trial, the case reimagined and reconfigured for the appellate court, and the case put together a third time, for a new jury and a new judge. It is a mis-

take to try the same case in each instance, a mistake unfortunately often made but one that is completely preventable. As with many things in life, much depends upon the personalities and skills of those involved. Is trial counsel an ego-driven species of lawyer too prideful to endorse a completely new trial strategy? Can in-house counsel, who may prefer the safety of the tried-and-true, get on board with a trial strategy her company had never tried before? In the end, success on retrial can occur only when all counsel harness that potent mixture of an open-minded willingness to change and an ego-free burning desire to win.

To summarize the case background: In the beginning, there was asbestos, about 1.2 million square feet of it sprayed into the underflooring of the Transportation and Safety Building in Harrisburg, Pennsylvania. The building, headquarters of the Pennsylvania Department of Transportation, was a 12-story concrete office tower completed in 1967 and located in the shadow of the state Capitol building. As was common then, the building was constructed using several building products that contained polychlorinated biphenyls (PCBs), used as a plasticizer in glues, mastics, and caulk because of its beneficial chemical properties (including stability and flame retardancy). By 1990, when the state sued the asbestos manufacturer, the deteriorating asbestos in the building was a long-acknowledged and growing problem. Coincidentally, the city of Harrisburg had passed a new fire safety code that required the installation of sprinklers in the building, a project that would have required gutting the building and removing all the asbestos.

On June 16, 1994, the still-unsprinklered building suffered a large fire that engulfed much of the sixth floor. In routine post-fire testing, PCBs were detected, for the first time, throughout the building. The state, however, waited until 1997 to sue Monsanto Co., the domestic manufacturer of PCBs. The state demolished the building in 1998 and built a state-of-the-art replacement.

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As trial approached in 1999 and the financial fortunes of the asbestos defendant worsened, the plaintiff state government agencies, now represented by an out-of-state mass tort specialist, retooled their case, making what was once an asbestos case into a PCB case. At trial the plaintiffs called witness after witness, all of whom testified that the asbestos problem had been easily brought under control and that it was PCBs, whose domestic manufacture and sale were banned by Congress in 1976, that were the real culprit and the deciding factor in their decision to demolish the building.

The plaintiffs also presented experts who claimed that the PCBs found in the building came not just from the incineration of PCB-containing building products during the fire but also from “off-gassing” of PCBs from those products, especially from glue used in miles of HVAC ductboard found above the suspended ceiling. Other experts claimed that PCBs cause various forms of cancer as well as developmental effects in children exposed in utero to PCBs, and that PCBs made the building unsafe for human occupancy. The plaintiffs’ damages claim totaled \$225 million, including replacement costs for the building and virtually all of its contents and lease costs incurred during the building’s demolition and construction of the new building.

Monsanto offered detailed rebuttal on each of these points in testimony that was, of necessity, scientifically complex and lengthy. After 13 days of deliberation, and one hour after advising the court that it was hopelessly deadlocked, the Philadelphia jury returned a ten-to-two verdict of \$90 million.

The telephone call trial counsel made to in-house counsel to advise him of the verdict was difficult. Equally difficult was the strategic call Monsanto then had to make on who would handle the inevitable appeal (and retrial, if the appeal succeeded). Some companies might have reflexively changed horses, if only to find a convenient scapegoat and avoid being second-guessed, but Monsanto’s approach was to ask a lot of questions: What was trial counsel’s previous track record in PCB cases? Did we lose because of the way the case was tried? Does trial counsel have an appellate department with the resources and experience to handle the appeal? Is the trial record of such size and complexity as to make a change of counsel unwise and impractical?

Monsanto knew that trial counsel’s record was a good one, having won a previous jury trial in a complex case involving PCBs and handled the numerous appeals in that marathon case. But why was this result so different? With the trial court’s permission, jurors were interviewed at length, and valuable information was obtained about jurors’ perceptions of not only trial counsel, but also witnesses, exhibits, and arguments made by both sides.

We learned that approximately half the jurors agreed with our substantive positions but were “worn down” by pro-plaintiff jurors during the lengthy, emotionally charged deliberations. The \$90 million verdict was the best compromise the defense jurors could get. As for the pro-plaintiff jurors, it seemed there was nothing we could have done at trial that would have changed their deep-seated instincts to award damages against a large, out-of-state chemical company and in favor of the taxpayer-surrogate, the state government agency plaintiffs.

Of course, the record in the case was enormous, encompassing more than 1 million pages of documents, thousands of exhibits, and 16 months of trial testimony, and no one could

ever have known that record more intimately than trial counsel. Thus, although other firms were retained to gain additional perspectives on appellate issues, Monsanto decided to have trial counsel and his appellate department handle the appeal.

Losing a \$90 million verdict is a wrenching experience, particularly at the end of a draining, 16-month trial. But post-trial depression quickly dissipates with post-trial briefing schedules and the challenge to deconstruct the case, so meticulously put together before and during the trial, and reconstruct it for appellate purposes. Core themes and narratives designed for jury persuasion must be reexamined one by one and then abandoned or reconfigured to fit into a legal framework that an appellate court might find compelling. Although trial counsel’s thorough familiarity with the trial record is certainly an asset on appeal, the lawyer’s jury orientation, subjective attachment to certain evidence or arguments, instinct to retry the case before the appellate court, and a perhaps subconscious desire for personal vindication—all can be counterproductive.

Skilled appellate counsel, intellectually involved in the legal issues in the case but emotionally removed from the trial, must direct counsel’s efforts to reconstruct the case for appellate court consumption. While post-trial and appellate briefing were directed by appellate counsel, trial counsel remained deeply involved and, because of his knowledge of the extensive record, handled the arguments on post-trial motions and before the Pennsylvania Supreme Court. Because the issues on appeal were so fact-intensive and the record so voluminous, in-house counsel resisted the temptation to transfer argument responsibilities to one of the many distinguished appellate specialists that grace the Pennsylvania bar.

The Pennsylvania Supreme Court reversed, granting JNOV on more than \$100 million of plaintiffs’ damages claims (because of the absence of expert testimony on such issues as property value—as opposed to replacement cost—and causation) and remanded the case for a new trial on the remaining \$120 million in damage claims. Significantly, the court for the first time held that under the Restatement (Second) of Torts section 402A, the plaintiffs could not recover fire-related damages because, as a matter of law, the incineration of a product, even if foreseeable, cannot be an “intended use.”

Trial counsel learned of the state supreme court’s decision while en route to Boston for a Memorial Day vacation. The feeling of elation was immediate and lasted for months. It was as though an innocent man’s conviction for a heinous crime he did not commit had been overturned and expunged from his record. In-house counsel, relieved that the enormous judgment that had ominously hung over his company for years had finally been erased, savored the appellate win as well. But his focus quickly turned to the sober consideration of what lay ahead: What trial judge will be assigned to the case; what venue; when will the case be tried; can each side get new experts; do we want the same trial team; do we want to try the same case; what issues are left to try in light of the appellate decision? In short, the court’s decision was like a multimillion-dollar Mulligan, the ultimate do-over. It presented that rare opportunity to go back to square one, examine each foundation of the first trial’s defense strategies, question every assumption, probe every premise, wipe the slate clean, and start all over again.

But defense counsel on remand were not presented with a completely blank canvas. First, the supreme court’s lengthy

opinion, parsed and reparsed by the defense team, yielded a vastly different legal framework for the second trial. Issues that were once front and center now melted into the background. Other issues that were previously peripheral now stood in the spotlight. If defense counsel did nothing more than read the supreme court's decision, it was apparent that the second trial would be different from the first. Once the issues changed, so too would the evidence. Favorite witnesses became superfluous, marginal witnesses became crucial. Documents of little relevance at the first trial would now be removed from their boxes, dusted off, and marked as exhibits.

It is impossible to overstate the importance of using the appellate decision as the *starting* point, the first and guiding principle, the foundation of all retrial strategizing. As improbable as it sounds, there are many instances where trial counsel acts on retrial as though the appellate court had never spoken, and the results are uniformly disastrous. Obviously, on retrial the trial court will have closely studied the appellate opinion and be loath to wander far from its strictures. Trial counsel putting on no-longer-relevant evidence on retrial will make a particularly dissonant noise in the trial judge's ears.

In still other ways, the framework of the second trial was different from the first. There would be a different trial judge and a different venue. Both would have to be researched. We ascertained the trial judge's educational and professional background, read his opinions, interviewed lawyers who had appeared before him. From that, a coherent judicial philosophy emerged, as well as helpful information on courtroom practices and demeanor. The venue was changed from Philadelphia County to Northampton County, 90 miles to the north in the Lehigh Valley where Pennsylvania meets New Jersey. Because trial counsel had a Lehigh Valley office and its lawyers were familiar to the courts and with the local rules and procedures, there was no need to retain local counsel. Had the venue been moved elsewhere, a different decision might have been made.

And what about the new venue and the far different jury pool it offered? Did it, to some extent, render earlier jury research obsolete? We developed a profile of our probable jury and evaluated the need for new jury research. But before any research could be conducted, we first had to know what issues and arguments would be tested. And to determine that, we had to reinvent the case, now for a third time.

As discussed, the state supreme court had given us concrete guidance on the broader outlines of what the second trial would look like. But the details, the points of emphasis, the evidence and arguments that would comprise the defense in the second trial remained to be carefully and painstakingly fleshed out.

The real art of the retrial would lie in finding key elements between the extremes of changing everything and changing nothing that our new jury would understand and find credible and persuasive. It was important to guard against any outcome bias—because we lost the first trial, everything we did there must have been wrong; because we won on appeal, everything we did there must have been right. But we knew from juror interviews that we had done many things right during the first trial. And it was obvious that the case narrative developed for the appeal might well have little meaning to the second jury.

Thus, at an early post-appeal stage, both trial counsel and in-house counsel bought into the notion that for the second trial, everything was on the table for consideration. There would be no sacred cows, no pet theories, no favorite sons. A new case would be constructed, and both trial counsel and in-house

counsel would equally share ownership of it.

But to what extent were our hands tied by the record of the first trial, as well as the pretrial discovery disclosures? Could we call an all-new slate of witnesses, identify new experts, come forward with epidemiological studies and other relevant data that had surfaced in the six years since the first trial?

In Pennsylvania, there is an oft-quoted maxim, "A new trial wipes the slate clean," but there is little judicial guidance on the exact impact of the grant of a new trial on prior discovery, witness lists, objections, evidentiary rulings, and other trial matters. The limited appellate precedent on the issue suggests that new discovery and the introduction of new evidence is permitted only where it has been expressly ordered by the court. Otherwise, the case law holds that the new trial is unfettered by the prior judge's rulings on evidence, points for charge, and all other matters that arise in the course of a trial.

Because the grant of a new trial in this case followed an appeal (as opposed to just a post-trial motion), the additional issue arose as to the effect of Monsanto's decision not to appeal certain prior unfavorable trial court rulings. Would Monsanto be precluded from revisiting these rulings on the basis of waiver? As a practical matter, the Pennsylvania Rules of Appellate Procedure limit an appellant to a mere 15-line statement of issues on appeal. Following a 16-month long trial, it would have been a practical impossibility for Monsanto to have appealed all of the rulings believed to be erroneous. Fortunately, Pennsylvania appellate precedent fills in the gap by establishing that the failure to appeal an adverse trial ruling, while resulting in waiver on appeal, does not result in a waiver of the issue on remand. To the contrary, even the failure to object to the admission of evidence at the first trial does not result in a waiver of the objection on retrial under Pennsylvania law.

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## Despite prohibitions against it, counsel should be prepared for new evidence to be introduced at a second trial.

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After remand, the court issued a case management order essentially reopening expert discovery, permitting plaintiffs to file updated expert reports and Monsanto an opportunity to file responsive updated reports as well. The court reasoned that the extraordinary lapse of six years since the first trial warranted this departure from Pennsylvania practice. The plaintiffs, however, filed no updated expert reports, nor did Monsanto. Nonetheless, at trial, the court gave the plaintiffs' experts wide latitude in discussing scientific studies and governmental pronouncements on PCBs that postdated the first trial, finding that Monsanto could not credibly claim "surprise" about such matters. Through this loophole, the plaintiffs' experts joyfully pranced, using more recent epidemiological studies as their rationale for withdrawing concessions painstakingly won during cross-examination at the first trial.

Thus we found that, although practice might prohibit the

introduction of new evidence at a second trial, counsel should be prepared for the court's discretionary and often justified expansion of those parameters at trial, and should prepare his own experts to respond in kind. Both parties had the renewed opportunity to present any additional evidence previously developed in discovery that was not presented at the first trial. Both sides also had the renewed opportunity to move to preclude any evidence regardless of the prior judge's ruling on the issue. As it turned out, the second trial judge departed substantially from the first in his evidentiary rulings, more often than not allowing the introduction of previously prohibited evidence. Thus, in two important respects—the unanticipated expansion of expert opinions and the reversal of significant evidentiary rulings—the second trial turned out to be very different from the first.

Of course, in the months of pretrial preparation and lacking Nostradamus-like powers to predict the future, we assumed that we would construct the second trial with the same universe of evidence as the first trial. We turned our attention to which items of that evidence we should use and what kind of picture to paint for the jury. Now, as every artist will tell you, came the hard part: staring at the blank canvas and making the first brush stroke.

In analyzing the trial record, we identified a dozen strong defense issues on liability and damages. They all had their intrinsic appeal and ample evidence to support them. Should we try a 12-issue case in hope that the jury might latch onto one or two of them and find in our favor? If we were to simplify our case and limit the issues we would litigate or contest, how would we choose? Realizing that many of our strongest points were scientifically complex and required precious trial days for intricate and nuanced explanation, we pondered whether there was a way to simplify our case without disemboweling it.

We were guided by these key factors. First, what were our strongest arguments, those (if any) for which the evidence was so clear that a reasonable juror would have difficulty finding against us? Were they narrow factual issues or broad legal issues or both? And was the legal framework given to us by the Pennsylvania Supreme Court such that we could make those issues case-defining? The starting place, as always, was the supreme court's opinion. The court had ruled unequivocally that the plaintiffs were barred from recovering for fire-related PCB contamination. Thus, while the plaintiffs at the first trial were free to commingle their alleged off-gassing PCBs with those spread by the fire throughout the building, arguing that both sources were perfectly foreseeable by Monsanto and, thus, a legitimate basis for liability, they were now faced at the second trial with the daunting task of proving that the PCBs found throughout the building in extensive post-fire testing resulted from something other than the fire.

The plaintiffs, of course, had experts ready to minimize the extent of the fire and the spread of products of combustion (including PCBs) during and after the fire, while Monsanto's experts were prepared to maximize the role of the fire. We knew, however, that we had the most powerful and persuasive evidence on our side: photographs, videotapes taken by the Harrisburg police, and the eyewitness testimony of the Harrisburg fire chief and two key government employees—all of which demonstrated the spread of PCB-laden smoke and soot throughout the building during and after the fire.

We knew the plaintiffs' experts would dutifully opine that smoke and soot reached only the floors surrounding the sixth-

floor fire, and provide the jury with graphs and calculations of floor-by-floor PCB concentrations that they said supported their conclusions. But we also knew that the live videotape would show smoke and soot methodically blackening the building's windows on one floor, and then another, then another, until there were 12 floors of blackened windows. We anticipated that the plaintiffs' experts' testimony on limited spread of smoke might sound to the jury like the old Groucho Marx line, "What are you going to believe, me or your own two eyes?" Further, on the key factual issue of the extent of the smoke spread, whom would the jury more likely believe—litigation experts who did not visit the building until weeks after the fire (and after extensive smoke and soot clean-up) or lay eyewitnesses? The conclusion was obvious: If we could make the case about smoke and soot, we would win.

Second, what were our necessary arguments, those that we could not lose and still ask a jury to find in our favor? The plaintiffs' experts would testify that PCBs, used as intended as plasticizers in glue to construct the building's HVAC ductboard, routinely off-gassed during the winter heating season when temperatures in the ductboard allegedly exceeded 100 degrees Fahrenheit. Could we reasonably ask the jury to find PCBs nondefective when used as intended if it was demonstrated that they routinely off-gassed into the air breathed by the building's occupants? To support their off-gassing theory, one of plaintiffs' experts conducted small chamber tests on ductboard taken from the building, which purported to show off-gassing at temperatures found in the HVAC system. Another expert used test data from Commonwealth laboratories that analyzed asbestos samples taken from the building before the fire and tested for PCB concentrations after the fire, claiming that these tests showed PCB levels before and after the fire as being roughly equivalent. Thus, he testified, PCBs found in the building must have come from off-gassing.

Superficially, at least, the plaintiffs' evidence on this issue appeared to be strong. How could we win this "necessary" issue? We concluded that only by rolling up our sleeves and going toe-to-toe with the plaintiffs' experts on complex but fundamental scientific issues could we undercut the plaintiffs' off-gassing theory. In fact, PCBs were a "miracle chemical" (as conceded by one of the plaintiffs' experts) precisely because they did not readily volatilize but rather tended to "stay put" (according to another of the plaintiffs' experts). The chamber tests were technically flawed and substantially diverged from conditions found in the building (according to the very expert who performed the tests). As for the 100-degree temperatures found in the HVAC system during the winter heating season, it turned out that it was merely an auxiliary system that was never actually turned on (according to the building's HVAC supervisor). And those Commonwealth lab pre-fire asbestos-test results? The expert who used those results to buttress his off-gassing theory conceded on cross-examination that the laboratory's data were essentially unreliable. Each leg of the plaintiffs' off-gassing theory could be and was systematically cut off.

Third, we identified arguments for which we had been able to assemble evidence, by way of expert testimony, evidentiary and judicial admissions from the plaintiffs' own witnesses, documents, or discovery responses and pleadings, that the plaintiffs could contradict only at the price of their own credibility. Under the law, the plaintiffs had to prove "factual causation": that "but for" the presence of PCBs, the plaintiffs' claimed damages would not have been sustained. The plaintiffs

claimed that it was PCBs that required the gutting and eventual replacement of the building, as well as the forced relocation of building occupants for five years. From the records of plaintiff government agencies, however, emerged a far different picture. The records showed that because of delayed maintenance, the building required tens of millions of dollars of building-system replacements and upgrades. In order to install the sprinkler system required by the newly enacted Harrisburg Fire Code, all of the asbestos would have to be removed. And even if no sprinkler system were to be installed, the government had already promised the building's beleaguered employees that it would remove the progressively deteriorating asbestos. According to government engineers, sprinkler installation and asbestos removal would require the gutting of the building and long-term employee relocation.

The clincher for Monsanto's factual causation case was, once again, a government document. One month before a single molecule of PCBs was detected in the building, the governor and the chief of the state agency that owned and maintained the building published to all the building's occupants an announcement that the building would be vacated and employees relocated for sprinkler installation and asbestos removal. Thus, we knew that the plaintiffs' litigation strategy, blaming everything on PCBs, would encounter a major obstacle—a mountain of the plaintiffs' own documents, created by their own employees long before litigation against Monsanto was ever considered. The issue of factual causation would be a "keeper" for us at trial.

Fourth, what arguments could we identify that the plaintiffs' own case responded to most weakly? The law limited the plaintiffs' recovery for building repair costs to the lesser of the cost of repair or the building's fair market value. The plaintiffs never identified a real estate expert to rebut the property evaluation testimony of our certified building appraiser. Thus, although it was anticipated that the building appraisal testimony might be tedious, and even though we believed we would prevail on the liability issue, we decided to keep this damages-limiting issue as part of our trial defense.

Last, and certainly not least, we identified arguments that we could present in the most economical and comprehensible way, knowing that shorter trumps longer. We knew from the first lengthy trial that jurors, asked to make significant sacrifices even during trials of more modest duration, would become increasingly impatient as each trial day (and week and month) passed. On this point, the plaintiffs would be given virtually a free ride and could put on their case at a more leisurely pace. But by the time it was the defense's turn, the jurors' attention spans would shorten, and boredom, restlessness, and resentment might prevail. We examined whether there were issues whose strength was outweighed by the inherent prolixity of their presentation.

We carefully analyzed the issue of alleged PCB health effects. We were confident that we could demonstrate with well-credentialed expert testimony of our own, and extensive cross-examination of the plaintiffs' experts, the scientific consensus that has emerged in the decades since PCBs were banned: that far from being the dire health threat they were once thought to be, PCBs were now thought to cause only a transitory skin condition known as chloracne, and only at very high exposure levels.

We faced, however, a structural problem inherent to property damage cases. Unlike personal injury claims, where health-

effect evidence is usually limited to a single condition (the disease the plaintiff is alleged to suffer as a result of chemical exposure), property claims encompass the universe of all potential health effects of every organ, body part, and system. The toxicological and epidemiological literature on PCBs could fill a warehouse. Explanations of the strengths and weaknesses of each study would take weeks (it did in the first trial). In the end, did we want this case to be about statistical significance and confounders or about smoke and soot?

Fortunately, we did not have to jettison the health-effect issue entirely. Once again, the documents and testimony of the state's own agencies and employees came to the rescue. After PCBs were detected in the building, and for the two and one-half years it remained occupied, in newsletters, meeting minutes, sworn testimony before government oversight committees, and press releases, the government agency plaintiffs certified that the building was "safe," the PCB levels were "negligible," and "no health threat exists." Moreover, we would present the testimony of the Department of Health's PCB point person, who had testified at deposition that PCBs in the building were simply not a problem.

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## **We proceeded to trial with a pared-down defense case, to the astonishment of our adversary.**

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We anticipated that the health-effect testimony of the plaintiffs' litigation experts contradicting the plaintiff agencies' own pronouncements about PCBs would seriously undercut the credibility of the plaintiffs' case. Further, it would reinforce our theme of plaintiffs' opportunistically taking one position before they sued Monsanto and the exact opposite position after. Perhaps best of all, by relying on plaintiffs' pre-suit evidence on PCBs instead of our own, we could save precious days, indeed weeks or months, of trial time.

Using these principles, we constructed a new case and successfully tested it before mock juries of citizens from a demographically similar county. We proceeded to trial with a significantly pared-down defense case, often to the astonishment of our adversary. Cross-examination of certain key plaintiffs' experts, which had taken days during the first trial, was concluded in less than an hour during the second trial. We did not even call several defense expert witnesses (including all of our health-effect experts), whose direct and cross-examinations during the first trial lasted for weeks. We derived much of the defense case from the government's own copious files, from which emerged a veritable cornucopia of documents, authored by government employees, that flatly contradicted the very assertions made by the plaintiffs' litigation witnesses.

After listening to the evidence for five weeks, and after six hours of deliberation, the jury returned a defense verdict, answering no to the first jury interrogatory, whether PCBs were defective. Post-trial motions were denied, and the plaintiffs have filed a notice of appeal to the Pennsylvania Supreme Court. Now, to reconstruct the case a fourth time . . . . □