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The 'Biggest' Defense Wins Of The Year

At the end of each calendar year, Lawyers Weekly ranks the top plaintiffs' verdicts and settlements based on the millions of dollars the plaintiffs took home.

But defense lawyers win "big" cases as well.

In this issue, Lawyers Weekly spotlights a handful of notable defense wins from the last 12 months — the fiscal year for many corporations — out of the Verdict & Settlement Reports submitted to us.

Of course, there is no empirical way to rank the "biggest" defense verdicts since the "raw score" for every such verdict is \$0.

However, relying on a number of factors such as the amount of money at stake, the significance of the case within an industry and the underlying principle being defended, we selected cases from various areas of the law that showcase a variety of ways to defeat a lawsuit.

Whether the win was obtained before a judge, a jury or even through a voluntary dismissal, zero is truly a magic number for defense lawyers.



Multi-Level Marketing Co. Not Hurt By 'Zone' Doctor's Exit

Although it's unconventional, one of the "biggest" defense wins of the year was awarded, technically, to a plaintiff.

But it was a plaintiff who nearly had his fortunes turned around when he was hit with a whopping \$210 million counterclaim from the company he was trying to sever ties with.

Dr. Barry Sears — the Marblehead doctor famous for his "Zone" diet books and nutritional products — had sought to end his two-and-a-half year arrangement with a multi-level

marketing company called Envion International, which was selling and distributing his "BioZone" nutritional bars.

Sears apparently felt that Envion was heading in a different direction than he had signed on for. The company, upon the suggestion of a high-priced business consultant, had started to focus more on the "opportunity"



Photo by Jason Scally

The 1,000,000-Copy Bestseller
Avoid the Dangers of Bad Carbohydrates
Balance Your Hormone and Insulin Levels

ENTER THE ZONE

A DIETARY ROAD MAP TO

- ✓ LOSE WEIGHT PERMANENTLY
- ✓ REVERSE YOUR GENETIC CODE
- ✓ PREVENT DISEASE
- ✓ ACHIEVE MAXIMUM PHYSICAL PERFORMANCE
- ✓ ENHANCE MENTAL PRODUCTIVITY

BARRY SEARS, PH.D.
WITH BILL LAWREN

David H. Rich and Lisa G. Arrowwood successfully defended Dr. Barry Sears, architect of the famed "Zone" diet, in a dispute over his relationship with a marketing company.

of selling millions, than on selling Sears' "science."

But there would be no clean break from this arrangement.

Envion counter-sued and claimed that the loss of its now-famous figurehead would lead, and did lead, to financial ruin.

But due in no small part to the sleuthing and perseverance of Sears' three Boston lawyers, a federal jury saw it differently and awarded Envion nothing.

It was a challenging task, according to Lisa G. Arrowood, one of Sears' attorneys, because there had already been one long, drawn-out case (before she and her colleagues got involved) to determine whether there had been a contract between Sears and Envion.

As James E. Higgins of Manchester, N.H., who with Elizabeth A. Bailey represented Envion, explains, that first jury found that there had been a contract, that Sears had not been induced to sign the contract due to misrepresentation and that the agreement was not premised on a material mistake of fact.

This hurdle for Sears was compounded by the fact that when Arrowood and her partners were brought in on the case, there appeared to be very few documents made available to the prior attorneys.

But the case was about the financial performance of a company, and David H. Rich, one of the other attorneys for Sears, says they knew there were some key records out there that just hadn't been discovered yet.

He was right.

After a number of discovery battles, Rich and his colleagues eventually found themselves in Guilford, N.H. — a place he describes as being "two miles beyond the sticks" — staring at 350 boxes of the company's financial records that were stacked to the rafters.

What was in those boxes was "dynamite," according to Sears' attorneys.

Edward Foye, another member of Sears' defense team, explains that as part of their discovery of the boxes, they found the "top secret" records of Envion's chief financial officer — a "meticulous" person who apparently documented everything, including his memos about the company's financial woes.

"[His reports] showed problems before Sears leaves and after," recalls Foye. "But he's writing the same memos after Sears left [that he had written before] and he doesn't mention Sears leaving as one of the reasons why their profit is going down."

Arrowood chimes in: "But he does mention the money being paid to [a] consultant and the new products that were just terribly unsuccessful."

Arrowood explains that the records showed that Matthew Freese, the president and founder of Envion, had bought himself a plane and had paid "something like \$450,000" to a business consultant who recommended that the company change its emphasis on selling "the science" of Sears'

SURFACTANT TECHNOLOGIES, INC. v. PURE DISTRIBUTORS, INC. d/b/a ENVION INTERNATIONAL, ET AL. v. SEARS

U.S. District Court, No. 96-1115-RGS

Date: Nov. 22, 2002

Defense attorneys: Lisa G. Arrowood, Edward Foye and David H. Rich, Boston

Demand: \$210 million

How disposed: Jury verdict

Zone diet, to selling "the opportunity" to make millions in a multi-level marketing business.

"People really react negatively when they see a corporate exec who seems to put his hand in the cookie jar," says Arrowood. "We were trying to paint this picture that in every way possible, this guy was hurting this company."

At trial, Envion also introduced some testimony about how some of the distributors were blaming Sears' departure for the company's downfall.

But another discovery battle, another warehouse and 250 additional boxes later, the defense-in-counterclaim team was able to prove through personnel files they also found that a majority of the distributors' letters actually blamed Freese for the problems, not Sears.

The letters, bolstered by the favorable testimony of six of Envion's top former distributors including Sears' brother, painted a much different picture than what Envion was claiming — and even cast the company's president in a poor light.

The turning point, according to Arrowood, was when one of the top distributors — a "body-builder type" — told a compelling story about how it was the company's policies, and not Sears, that had hurt the company.

"[He] came in and testified that when [Sears] left, they felt they still had the product, the science," recalls Arrowood. "But the later changes — jacking up prices, the increased competition — these were the things driving the company down."

The witness, a former close friend of Freese, also explained how he had told the company president that his new policies and products were hurting the business. But Freese apparently dismissed his concerned pleas and said that the distributor "didn't have enough passion" about the company, Arrowood recalls.

With that story, Sears' attorneys say, the "bear of a man" began sobbing on the witness stand, yelling "I don't have enough passion!" as he explained how he and his wife had taken a cross country trip to "fire up the troops," despite the fact that his father was on his death bed.

Arrowood adds that she presented five other witnesses who all "sang the same song ... that Barry was not what caused the demise of the company."

Envion had one former distributor testify on its behalf — a man who was "devastating" to Sears' case in the first trial, according to Arrowood — but by this time, they had enough information from the discovered records to prove that Envion's witness was a less-than-neutral witness who had received perks from the company that no other distributor had received.

Sears' team also hit a roadblock on their *Daubert* motion to preclude Envion's financial expert who was testifying as to how he came up with the \$210 million amount for projected lost profits. Although the judge called the expert's theories "fanciful," he allowed the expert to proceed at trial.

Arrowood admits it worried her because even if they could prove the expert was off on his calculations, \$210 million gave the jury a lot of wiggle room to find that there had been some damage caused by Sears' departure.

However, Foye was able to successfully discredit the expert on cross-examination by proving that he had based his calculations on a business plan for another company and that he hadn't taken into account the increased market competition for nutrition bars. Foye says that the so-called financial expert had never even seen the "top secret" notes from Envion's financial records.

Freese, himself, testified for Envion and even apparently "attempted" to cry, but that also may have backfired.

"Placed up against what [our expert] did two days earlier," Arrowood says, "[Freese] couldn't get a tear out and it came across as so contrived and so rehearsed."

In the end, the trial lasted two-and-a-half weeks, with the jury out for two-and-a-half days before it came back with a verdict.

Jurors had two questions to answer: Did Sears breach the contract with Envion, and if so, did his breach cause any damage?

When the jury came back with a "yes" on the first question, Arrowood says "my heart just sank." But when it answered "no" to the second question, she and the other attorneys were elated.

Arrowood says that it was a combination of the damaging evidence found in the warehouses and the "neutral" witnesses that won the case for Sears.

Higgins, Envion's attorney, has a slightly different take on the case, noting how the two sides won some and lost some when both trials and all the counterclaims are taken into consideration.

Of the jury's decision on the \$210 million counterclaim, he says: "I really think it was more 'a pox on both your houses' than any particular witnesses [that won the day for Sears]."

Higgins concedes, however, that the confusing nature of the case — a bifurcated trial with multiple counterclaims — also "might have worked against us." MLW

— JASON M. SCALLY