

Demonstrative Evidence: The Opening Statement

The Trial Lawyer's Guide

January 1998

Vol. 42, No. 2 1998. Edited by James P. Chapman, Robert A. Chapman and Richard H. Chapman.

"The key to the opening is to tell a story that is a human story and squares with the jurors' common sense and their own experience with how and why people do things. Our goal is to provide the jurors with a story framework that makes sense. If we do that, and the other side does not, the jurors will filter the evidence accordingly. "

EDITORS' INTRODUCTION

Your editors are deeply pleased to present the truly outstanding opening statement to the jury by Philip S. Beck, one of our nation's outstanding trial lawyers, in a case that presented unusual difficulties for the client of Mr. Beck and his partner, Peter B. Bensinger, Jr., the defendant Dresser Industries. That is, in an earlier trial, where Dresser had been represented by other counsel, a jury had found Dresser guilty of multiple acts of fraud in the sale of one of its divisions to the plaintiffs and has assessed damages of \$4 million ordinary damages and \$50 million in punitive damages. In addition, in a separate earlier arbitration proceeds, Dresser had been ordered to pay plaintiffs \$1.3 million in connection with errors in its financial statements. Dresser engaged Messrs. Beck and Bensinger to represent it on the appeal that followed. On appeal, the court affirmed the finding of fraud, but reversed the damage awards because it found that the financial experts' testimony on the issue of damages suffered as a result of the fraud was speculative. It ordered a new trial on the issue of damages only. (The court's opinion is discussed later herein.). As a consequence, defense counsel at the second trial were faced with the damning burden that the jury would know that their client had already been found guilty of fraud at an earlier trial and that the issue of fraud was unchallengeable. The victory that Beck and Bensinger subsequently achieved takes on even greater moment in light of this unusual challenge.

We strongly recommend that our readers carefully review the Appellate Court's decision in this case, along with the remarks of Messrs. Beck and Bensinger about their approach to the concept of the opening statement. Your editors believe that this approach can and should be employed in bench as well as jury trials. There is every reason to believe that judges as the trier of facts are open to the same methods of persuasion as jurors. However, your editors offer the following preliminary observations to keep in mind in reviewing these materials and in considering your next opening statement:

1. More and more, experienced trial lawyers, based on their own observations and jury studies, believe that the opening statement (along with initial jury selection), may well be that portion of the trial where victory is achieved or lost. And that trial lawyers must give a greater degree of attention to preparation for opening statement, rather than treating it, as some of us do, as an after-thought to be considered just before the trial begins.

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2. In fact, early consideration of opening statement (along with preparation of jury instructions, particularly on the issues and burden of proof), will force the trial lawyer to appreciate at this early stage what the strengths and weakness of the case are, and where more work must be done on certain areas of proof. Stated differently, when we seek to verbalize "out loud" our initial presentation to the jury, a new reality sets in.
3. We consider techniques by which we can capture the jury's attention at this critical stage and capture their sympathy to our position, although we theoretically cannot "argue" the case in the same manner as in closing argument. In the opening statement of Mr. Beck for the defense, counsel considered the best ways a series of complex business transactions and events could be explained to the jury; how, in effect the jury could be educated, without putting them to sleep, at the very beginning of the trial about subject matter of which all or most of them had little knowledge.
4. In this respect Messrs. Beck and Bensinger carefully culled the thousands of documents received in discovery that in their opinion would best put the lie to plaintiffs' claim of substantial damages suffered because of defendant's fraud. They then created a sequence in which to display the exhibits that would be comparatively brief in nature and would reflect the oral statements that Mr. Beck presented to the jury. In this way, the documents, when compared with each other and with the testimony plaintiffs would provide, attacked the credibility of plaintiff's witnesses and, in reality, presented a closing argument of the defense, without on the surface appearing to be improper closing argument in the guise of an opening statement.
5. Through the use of computer technology, which was as economical as it was efficient, these exhibits were projected to the jury on a screen immediately in front of the jury box at the precise moment Mr. Beck was discussing them and in a manner that was clearly visible to the jury. The technology allowed Mr. Beck to enlarge or highlight in colored boxes critical portions of a document, and through split screens, to compare one document to another.
6. To explain a particularly difficult concept in simple terms, Mr. Beck actually drew a diagram on a large whiteboard as he explained each facet of the concept during his opening statement. As counsel explain below, this presentation was not done in a cavalier fashion. Rather, the creation of the drawing was carefully prepared and rehearsed, even to the color of the drawing implements.
7. Very early in his remarks, Mr. Beck dealt with the obvious weakness in his position--that his client had already been found guilty of fraud and he never sought to mitigate the nature of that fraud or excuse it. Rather, he concentrated on the key issue the jury was to decide--did that fraud cause plaintiffs' damages. Rather in understated tones, almost letting the documents do the talking, Mr. Beck clearly undermined the credibility of the plaintiffs, in effect, subtly charging them with fraud: yes, they had been wronged by defendant's misconduct, but they had been previously compensated for that wrong by defendant, they had made money out of the transaction despite the fraud, and were now just being greedy.
8. This is a strategy we all want to follow in most of our trials. Messrs. Beck and Bensinger succeeded admirably in this case.

BACKGROUND OF THE LITIGATION

The following statement of facts is taken from the Illinois Appellate Court decision of *SK Hand Tool Corp. and Corcoran Partners, Ltd. v. Dresser Industries, 284 Ill.App.3d 417, 672 N.E.2d 341* (1st Dist. 1996):

In 1983, the defendant Dresser Industries ("Dresser") agreed to sell its hand tool division to the plaintiff Corcoran Partners Ltd. ("Partners") which consisted of Daniel Czuba and Thomas Corcoran. The purchase price had been discounted by about \$10 Million because of the division's prior poor performance and certain liabilities. Partners assigned its interest under the sales agreement to the co-plaintiff, SK Hand Tool Corp. ("SK"), a division of Partners. In the agreement Dresser warranted an "Effective Date Balance Sheet." The agreement provided that if the parties could not agree on the balance sheet, their differences would be submitted to binding arbitration. Such a dispute did arise. An arbitrator reduced the purchase price by \$1.386 million. Dresser paid that sum to Dresser.

In the meantime in 1985, Partners sold SK to FACOM of France at a profit of \$4,000,000.

In January, 1988, Partners and SK sued Dresser in the Circuit Court of Cook County, Illinois. In their complaint, plaintiffs charged that Dresser committed several acts of fraud in connection with the 1983 sale of its hand tool division. These alleged fraudulent acts included among others, the nature of the division's accounting practices, the value of obsolete inventory, the amount of accrued liabilities, and most importantly for purposes of this article, the amount of the division's liability to its purchasers under a sales promotion known as "lifts."

Plaintiffs contended that after learning of the falsity of Dresser's representations, SK was forced to curtail certain marketing expenditures, particularly an alleged planned renewal of the lift program, resulting in lost sales and a lower resale price to FACOM.

At the first trial (in which Messrs. Beck and Bensinger did not represent Dresser), the jury returned a verdict for plaintiffs in the amount of \$4 million in compensatory damages and \$50 million in punitive damages. The trial court denied Dresser's post-trial motion, but granted a remittitur totaling \$42 million from the punitive damages verdict. Plaintiffs consented to the remittitur. Dresser on appeal was represented by Beck and Bensinger.

The Appellate Court affirmed the verdicts of guilty on the fraud charges, finding there was substantial evidence on each of them to justify the jury's verdicts. With regard to the "lift" program obligations which played a significant role in the subsequent retrial and Mr. Beck's opening statement for Dresser in that trial, the Appellate Court stated:

Dresser maintains that it is entitled to relief because its officials and employees made no false statements. Dresser first claims there was no false statement as to the amount of lifts in transit, arguing that there was merely a semantic misunderstanding the 'lifts in transit' were the same as 'outstanding lifts.' Czuba's [a principal of Partners] testimony, however, supports the conclusion that he asked Downey [of Dresser] about the outstanding lifts.

However, the Appellate Court took a much different view of plaintiffs' proof of harm they suffered as a result of Dresser's fraudulent acts. The court analyzed the testimony of plaintiffs' two damage experts, finding their conclusions too speculative to sustain the large ordinary damage verdict. The court stated in part:

James Moran, a CPA, [plaintiffs' financial expert] presented his calculation of the incremental sales and profits SK would have made if it had spent more money on the lift program in fiscal year 1984. Moran began with the plaintiffs' projected marketing capacity expense, then subtracted the amount actually spent on marketing (after adjusting for various expenses), resulting in a shortfall of lift removal expenses totaling \$1,622,000. Moran further adjusted the number to account for commissions and other miscellaneous expenses, resulting in a total shortfall of \$1,938,482. Moran then assumed that the lift program would have begun in March 1984 [and after a series of computer and other calculations, concluded that SK would have made a net incremental profit for fiscal year 1985 of \$1,196,000 had there been funds to pursue the lift program.] Another expert, using Moran's computations and the performance of an allegedly similar company, concluded that plaintiff could have made from four to 6.4 million dollars more from the sale of SK than what they were paid by FACOM. (emphasis added)

The reviewing court initially considered whether a business that had not been profitable could recover lost profits because of a defendant's tortious conduct. In reviewing several Illinois cases on lost profits (none of which involved a business that had not been profitable prior to defendant's tortious conduct), the court stated:

The logic of these cases persuades this court that a business which has not been profitable generally will be unable to provide competent proof by which the profits can be estimated with reasonable certainty. However, as in *Milex Products, Inc. v. Alra Laboratories, Inc.*, 237 Ill.3d 137, 606 N.E.2d 1226 (1st Dist. 1992), there may be cases in which such proof is adduced at trial. Thus, the question remains whether this case falls within the scope of the general rule or whether it is an exception.

In *Milex* the plaintiff had never manufactured the product which was the subject of defendant's wrongful conduct. However, the court found (237 Ill.App.3d at 177):

Milex's expert, Price, was very credible and that his opinion about Milex's lost profits was based upon fact, not speculation. Price's testimony concerning lost profits was based upon actual products in the marketplace as well as authoritative sources for the data he used.

In determining that plaintiffs' proof in the instant case had not met the Milex standards for proof of lost profits, the reviewing court found that plaintiffs had failed to establish that they would have in fact would have undertaken a lift program in 1984. That in fact, the documentary proof was to the contrary. As a consequence there was not a reasonable factual basis for expert Moran to base his profit estimates on the assumption that plaintiffs intended a lift merchandising program for the year in question.

The court concluded that the verdicts must be set aside (punitive damages also, since there was no basis for compensatory damages), and the case retried on the issue of damages only.

The case was retried in October, 1998 before Judge Kenneth L. Gillis and a jury in the Circuit Court of Cook County, Illinois. The trial revolved primarily around the issue that had concerned the Appellate Court-did Dresser's fraud cause a cash short fall that forced plaintiffs to reduce their lift merchandising program and suffer

the damages they claim. The jury returned a verdict of \$1.00 for the plaintiffs, liability being directed for plaintiffs pursuant to the Appellate Court's opinion. The trial judge awarded \$650,000 in punitive damages. Dresser paid plaintiffs \$650,001 to satisfy the judgment and the case concluded on a basis satisfactory to the defendant.

Messrs. Beck and Bensinger have graciously provided the following comments on their approach to opening statements generally and to the SK Hand Tool case in particular:

AN APPROACH TO THE OPENING STATEMENT

We place a great deal of emphasis on the opening. In our view, the outcome of many cases is influenced greatly by the opening. The key to the opening is to tell a story that is a human story and squares with the jurors' common sense and their own experience with how and why people do things. Our goal is to provide the jurors with a story framework that makes sense. If we do that, and the other side does not, the jurors will filter the evidence accordingly.

For the opening statement, we tell our story using many visuals. We believe that people absorb a lot more information visually than they do otherwise.

Moreover, using a variety of visuals keeps the jurors' attention. For this reason, we spend a huge amount of time choosing the visuals for the opening. In those cases, we might use a trial presentation technology, like Trial MaxII, which we used for the SK Hand Tool case. We literally choreograph moment to moment what the jury sees, much the way a screen writer scripts a screen play.

In the SK Hand Tool case, we used a rear screen projection system. The screen was a portable 7' x 7' "DaLite" screen with an aluminum frame that we set up about six feet in front of the jury box. We arrived at this setup in consultation with the judge, who advised us as to his preference during a scheduled pretrial rehearsal. Our LCD projector was an Epson Powerlight 7300, which sat on a stand against the wall opposite the jury box. This projector is very quiet and very bright. There is no need to dim the lights. The projector was attached either to Phil Beck's or Peter Bensinger's laptop by a high quality VGA cable. The laptop sat on a podium placed near the jury box at the end opposite the witness.

To call up documents, we used a trial presentation product from FTI Consulting called "TrialMaxII. Using keyboard commands we could call up a document, zoom in on it, highlight key language or call out key phrases. For example, to call up the first page of defendant's Exhibit 1, we would type in "1.1" and hit enter. To call up the second page of Defendant's Exhibit 2, we would type "2.2 and enter. To zoom in, you hit "z" and select the area of the document you want to focus on. To highlight, you hit "h" and drag the cursor over the language to be highlighted. We also used the split screen function to compare two documents.

There are several advantages to the rear screen projection setup. First, you have no overhead projector near the jury box that has a loud fan or blocks someone's view or casts a shadow on the screen when the lawyer walks in front of the screen. Second, using TrialMaxII with its zoom and call out features, the jurors can actually read for themselves what the documents say. Before the trial, we tested this system in the actual courtroom.

We sat in every seat in the jury box to ensure that each juror would be able to read the selected text. After the trial, we debriefed the jury and they were uniform in their praise for this rear screen projection set up.

We experiment with different approaches to find what works best. We do this in our mock courtroom with one of us in the jury box and the other operating the laptop with a rear screen projection set up. Using this rehearsal process, we decide which sentences in trial documents to highlight, whether to zoom in or to call them out, and whether to use a split screen to juxtapose two documents.

We spend many hours rehearsing to find the right presentation and have found that this investment pays off at trial. After all, jurors are accustomed to lawyers hectoring them. Instead, we take the time to let them read for themselves what the key documents actually say. We in effect are giving the jurors "the straight dope." We tell the story showing plaintiffs' own words written at the time and this approach builds our credibility with the jury.

While a number of visuals for the opening will be documents, a number will be demonstratives that we create ourselves. For example, in the SK matter, plaintiffs' theory was that because of Dresser's fraud, plaintiffs were delayed in implementing a planned lift program. We spent a great deal of time figuring out how to teach the jurors about the fundamentals of "lifts", a marketing practice in the hand tool business used to get the retailer to switch from one brand of hand tools to another. We decided to use a huge blank whiteboard and to diagram the lift merchandising practice as we explained the concepts to the jurors. We spent many hours choosing the colors for the chart and working out how to present this information in layers, step by step, so that the jurors would not be overwhelmed but instead had time to absorb the information.

In the SK trial, the jurors were allowed to take notes. During our opening statement, many jurors reproduced this lift chart in their notepads. The finished board became known as "Mr. Beck's lift chart" and opposing counsel and all the experts used it when they were discussing lifts.

The story behind the lift chart illustrates our general approach to opening statements. When you are telling a story that squares with the jurors' experience and is one that they can believe in, you are usually teaching them about a subject they do not know anything about. If you can teach them new concepts without condescending, the jurors feel good about themselves and you. You have established credibility with them and this affects how they see you as the trial proceeds.

OPENING STATEMENT FOR THE DEFENDANT DRESSER INDUSTRIES

Introduction-Liability Is Not An Issue

MR. BECK: Good afternoon, ladies and gentlemen. This big screen here-I am going to be showing some documents, so that's why it is here. We have a projector behind there, so a little bit later in my remarks I'll be showing some documents there.

This case is not about whether Dresser did something wrong. That's already been decided by somebody else. They decided that Dresser said things that were not true when they sold the company to Mr. Czuba and Mr. Corcoran [principals of the co-plaintiff Partners]. And they determined that that was fraud. And I am not allowed to ask you to redecide that issue. That issue has been decided. And we accept that.

The Real Issue: Did Plaintiffs Suffer Harm As A Result Of Dresser's Fraud

What has not been decided is whether Mr. Corcoran and Mr. Czuba suffered any harm beyond the harm that they have already been paid for, and that's the issue that you are going to be deciding in this trial.

Mr. Czuba and Mr. Corcoran claim that we said things that weren't true during the negotiations before the sale and that because of that they paid more money for the company than it was really worth, and that's the issue that was decided by the arbitrator in terms of whether they paid more than it was really worth because of the misstatements or the fraud. And the arbitrator decided that they paid \$1.3 million more than the company was really worth, and so we paid them back. So that injury that they did suffer because of the overcharge, they have been paid back on.

Now, Mr. Brace [the attorney for plaintiffs] said, "Well, that's true, but if you buy a car from somebody and it ends up that it has faulty brakes and you get in a big car crash, it is no answer for the guy to come back and say, 'Well, gee whiz. I gave you the money to fix the brakes because you had this big crash and you suffered all of these horrible injuries as a consequence of that.' "

Well, Mr. Czuba and Mr. Corcoran did not get into a big car crash. Mr. Czuba and Mr. Corcoran bought a company. They did a nice job in most respects running it, but it was a big gamble when they bought it. And two years later this car didn't crash. This car was sold [to FACOM] for \$4 million profit. They got \$2 million apiece for this car with the faulty brakes.

And once more, as Mr. Brace told you, they took that \$2 million profit from the company that we sold them and then they turned around and sold two years later and they made 20 million more dollars since then off the money from that original investment.

So the car with the faulty brakes, we paid for the brake change and they made \$22 million off of it so far. And what this case is about is they want you to give them another \$40 million, and the evidence is going to show that they are not entitled to that, that they have been paid in full and they have done quite well because of the transaction that they are complaining about.

The Nature of the Lift Program

You are going to hear a lot about lifts. Mr. Brace talked to you about lifts a little bit, and when I first got involved in this case, which actually was fairly recent--Mr. Brace has been involved in this dispute since back in 1984. I got involved more recently for this trial. So I haven't been around for the other trials, but I get all of the transcripts and I get to look at all of the exhibits that were used before and I have learned a lot about this, but when I first heard about lifts, it was helpful for me when somebody did kind of a diagram and showed me how

they worked. So I thought I would spend a few minutes on this question of what lifts are and how they work.

This is what the evidence is going to show. Mr. Czuba or Mr. Corcoran, one of them will explain this. Let's say here that Easco, which is a different tool company, they are a competitor of SK, let's say that Easco has sold tools to the warehouse distributor. Mr. Brace mentioned a warehouse distributor. Sometimes they are called WD's or warehouse distributor. Let's say they sold a set of these wrenches, I am going to say, for \$100. The wrenches cost more than that, but it is easier to think that way. So they sell these wrenches for \$100 to the warehouse distributors, and then the warehouse distributor sells them to the auto parts shop or the hardware store, kind of the retail store and, of course, they mark it up and then the retail store does a little more. So now the retail store has got the Easco wrenches in there.

I have been practicing this. Here we go. There is the green wrench, the Easco wrench that the auto parts shop has.

So SK, especially under Mr. Czuba and Corcoran, they'd like to get the warehouse distributor to stock their wrenches and the retailer to stock their wrenches, but the problem is that the auto parts shop, they have a lot of things in their shop. They have tires and batteries and cables and everything else, and they don't want to have those display boards from five different companies with five different types of wrenches. They want to handle usually one line of wrenches, and they don't have room to stock both of them at once.

So if SK can persuade these fellows that they ought to be using SK wrenches, then they--this guy has to figure out what he is going to do with his green wrenches to get rid of them. That's where lifts come in.

What happens is that SK says, "If you'll buy our wrenches, we will buy back from you the Easco wrenches." So here is how it goes. SK sells some wrenches to the warehouse distributor, and SK's wrenches are by and large more expensive than Easco's, so they might charge \$150 for their wrenches, same number of wrenches, just more expensive, good wrenches, and so then the warehouse distributor sells the SK wrenches to the auto parts shop.

So now [the retailer] has got too many wrenches taking up room, so what he does then, this is where the lift comes, he takes his green [Easco] wrenches and he ships them back up to the warehouse distributor and he gets a refund from the warehouse distributor for whatever it is he paid. So it is a wash for him.

Then the warehouse distributor instead of returning it to Easco, who wouldn't be wild about that idea, they end up selling it to SK, and SK pays \$100 for the Easco wrenches. So that means the warehouse distributor is not out any money, the auto repair shop is not out any money, but then the problem is that SK sold them \$150 worth of wrenches, but they had to buy back \$100 of wrenches, and they make some profit, but they don't make \$100 profit on every set of wrenches.

So what do they do with the wrenches they bought back. They sell them to a liquidator, somebody whose business it is to buy distressed goods or seconds or things like that and then, you know, you sell them out of a big barrel somewhere for pretty cheap. And they pay--these are just approximate numbers, but the truth is they are about right in terms of their relationship to one another. They pay maybe \$25 to SK to take these wrenches off their hands.

So, what SK has done is they lost \$75 on the lift part, because they paid \$100 for those wrenches, and sold them for \$25.

Then they sold \$150 worth of wrenches, but most of it is not profit. So they are actually losing money, or at best, breaking even on the first sale.

So why would anybody engage in a sale like this, where you are losing money, or breaking even? And that is where the lift theory comes in.

Let me get over here. Excuse my back.

The lift theory is No. 1; you lose money on the first sale. And if you don't lose, maybe you break even, but it's not worth your while.

But then No. 2 is, you make it, you make money on the follow-on sales, because the idea is that Mr. Auto Repair Shop is going to keep reordering your wrenches, instead of the other guy's.

When all the wrenches come off that board, he is going to call up SK and order more wrenches, so that they go back on the board. So you make money on the follow-on sales.

Now, that's how lifts work, in theory.

The Problems With The Lift Merchandising Approach

They don't always work out the right way. There can be problems with this. You are going to hear that from the witnesses in this case. One problem could be, there is not enough follow-on sales by this guy to make it worthwhile. You have lost money in the first sale.

And the truth is, is this guy doesn't sell very many wrenches. So he doesn't order enough wrenches from you in the future to make it worthwhile; so not enough follow-on sales.

And then the second problem is, what about old Easco over there? You know, if you are out there lifting all Easco's tools out and stealing their customers away, Easco isn't going to stand still for it.

Easco is going to retaliate. And then what Easco is going to do is, they are going to start lifting your customers. Then you all end up back at square one, except you lost 75 bucks every time you did one of these lifts. So retaliation by Easco is a big problem. You end up back at square 1. Okay.

That's basically how lifts work; the lift theory, on how they can make your money in the right circumstance, and then the kind of problems that come along once in a while where they don't work out as well as you had hoped.

This is important both to their fraud claim, and what the fraud was that they complained about, as well as to what they claim they would have done with the business in order to make a whole bunch of money. So that is why I took this amount of time....

The Nature of Dresser's Fraud Regarding the "Lift" Obligations

In fact, what the arbitrator's award [of \$1.3 million to plaintiffs] focused on was lifts. And what the claim was, was that we, being Dresser, had engaged in a whole bunch of lifts, and we hadn't told plaintiffs about it; and so after they bought the company, all these customers started saying, or basically the warehouse distributors started saying to them, where is my hundred dollars?

They already received the wrench, but they hadn't gotten credit yet for the hundred dollars. And this is called "unrecorded lifts", because we didn't carry them on our books the right way. And so what happened is: there basically was about \$800,000 worth of unrecorded lifts, where we had not told them that we had made these sales, and, but we owed the customers, all these lots of different customers, \$800,000 to take the wrenches off their hands.

So \$800,000 out of \$1.3 million was for lifts. And then there was about \$500,000 that was for a whole bunch of other claims. So lifts were the key thing here. Let me talk about what their core theory is in this case. Mr. Brace talked about it. And it comes down to lifts.

Plaintiffs' Alleged Delay In Starting New "Lift" Campaign Because of Dresser's Fraud

Plaintiffs said that because they didn't know the true financial condition of the company when they bought it, that they had experienced a cash crunch in 1984, and this uncertainty, according to the plaintiffs, and because of that, they postponed a big program that they claim they had planned to start spending a couple million dollars on lifts beginning in January of 1984.

So that's what they claim in this case, is that beginning in January of 1984, they had a big plan to start spending a couple million dollars on lifts.

And they say that if they had done that, then they would have made money in 1985, and they wouldn't have had to sell the company, because of the follow-on sales; or they say that, we would have made money, and when we sold it in '85, we would have sold it for more money, because the company would be more attractive.

So, and you heard Mr. Brace there towards the end of his remarks say that what the plaintiffs claim happened is that they had a big program for millions of dollars of lifts in January of '84, right after they bought the company; and because of the cash crunch and the uncertainty, they postponed that until 1985.

Do you remember that exhibit he had up there, that had 300-some-thousand-dollars of the lifts in '84, and then \$1.3 million or something like that in '85? So their theory is we postponed our lift program, and that's, and that is what caused all of our problems.

Now, I'm going to spend most of my time this afternoon talking about whether in fact there is any evidence to back up their claim that they had a big lift program scheduled for January of 1984, because the evidence is going to show that that is not true....

The Evidence Will Show Plaintiffs Had No Plans For A Lift Program in 1984

And Mr. Brace has said that no one has questioned the integrity of Mr. Czuba and Mr. Corcoran, and I don't want to do that, but if they take the stand and they tell you that they had a lift program scheduled for January 1984, which is what they told their experts when they came up with these dollars, when I cross-examine them, I am going to show them the evidence that shows that that isn't true. I am going to show some of that to you today just to preview that.

First of all, Mr. Czuba and Mr. Corcoran when they were looking into buying this company wrote lots and lots of documents, memos to themselves, memos to the people that they wanted to lend them money. So they generated a whole bunch of documents when they were looking to buy this company. Once they bought the company and started running it, of course they had lots and lots more documents that they generated. Every month the reports would come in, the profit plans, all of the official records of the business. And the people who worked for them who were in charge of sales and production and finance, all of those guys, they wrote a lot of documents as well. And the people that lent them money wrote them documents. And the people who didn't lend them money wrote them documents.

So we have a whole bunch of people writing memos and documents about this company in late 1983 and '84 and '85, and there is not one document--out of all of the boxes that you'll see both sides stack up, there is not one document that anybody wrote that says that they had a multi-million dollar lift program scheduled for January of 1984. And there is not one document that says that they had any kind of lift program scheduled for 1984 that they had to cancel because of anything that Dresser did. So there is not one document that they are going to be able to show you that backs up their story.

The Heller Plan Projections For Marketing Expenditures

What is their basic claim. Let me move this out of the way here. Here is plaintiffs' basic claim about these lifts. What the Plaintiffs claim is that they had a plan back in 1983 when they bought the company on how much money they were going to spend on marketing. Mr. Brace showed you some of that--some of those numbers. So their marketing projections for how much they were going to spend in 1984 for all of marketing was \$5.6 million.

And that's in something called the Heller plan. This was a business document that Mr. Czuba and Mr. Corcoran wrote and they sent to Heller. The guys who lent them money. And they had all of these financial projections. Everybody calls it the Heller plan even though all Heller did was receive it in the mail and look at it, but it was the plan they sent to Heller.

Mr. Czuba and Mr. Corcoran say, and it was in this plan, that they were going to spend \$5.6 million on marketing for the entire year of 1984. And then the actual marketing expenditures--I am going to just put marketing under here so that we remember what we are talking about.

The actual 1984 marketing expenditures ended up being lower than that. It was \$4.1 million. So here we have a \$1.5 million difference from what they planned to spend on marketing and what they actually spent at the end of the year.

And what the Plaintiffs say is that all of this would have been spent on lifts, all of it for lifts, and this was their January 1984 lift program they claim they had, and then what they say is we cancelled it in January, cancelled the lift program that was supposed to start in January. That's what they say.

Now, what I'd like to do is look at some of the actual business documents that were written at the time that bear on whether this claim of theirs is true.

First of all, I am going to show you this Heller plan. You can see here at the top it is SK Hand Tool Corporation Financing Proposal. That's the cover sheet. I actually have it here. This is the actual document that was sent by them to Heller to persuade Heller they should lend them some money. And then along with it there were some financial projections that got updated now and then. So that's an exhibit as well.

The Heller plan, your Honor, for the record, is DRX 340 and the financial projections are DRX 21.

So what does the Heller plan say about marketing. Where do they get this \$5.6 million number. They have--first of all, the \$5.6 million is in one of the financial projections that went along with it, and we don't disagree with them that that's what this number says, so I am not going to take the time to show you the little column in this document here. So \$5.6 million for 1984 is what they planned in the Heller plan. But what did they say about how they were going to spend that money. And here is the beginning of their discussion on sales increase strategy, and I am going to make some of these paragraphs bigger so that we can focus in on them.

The Heller Plan Marketing Projections Do Not Contain A Lift Program

You'll have this document at the end of the case and you can read this section of the plan. It goes for about two pages, and they talk about how they are going to increase sales, and none of the things that Mr. Brace talked about are in the plan. They don't say in this plan that they were going to spend a lot of money on lifts.

They now claim they had a plan all along to spend a couple million dollars beginning in January on lifts, but that was the center piece of their turnaround plan. Well, in the plan that they sent to the guys that lent them \$7 million, they don't say that. They don't say anything about it.

What do they say. Let me see if I can focus in on--well, we'll just blow this one up here. This is the first paragraph of their strategy. So they are summarized, and they are saying that "the market share--SK's market share," that's under Dresser, "in its major market segment, serious amateurs, has declined from 30 percent to 10 percent in the last five years. This was the result of the aforementioned slow response to the changing retail

environment, severe price competition and poor promotion.

And incidentally, I am not claiming that Dresser did a good job running this company. If we had done such a swell job, we wouldn't have sold it.

They go on to say, "Prices have firmed up after dropping 25 to 30 percent in an obvious marketing penetration strategy undertaken by SK's two major competitors, Easco," that's one I mentioned before, "and Stanley ". And then just focus in on this next sentence if you would. Here Mr. Corcoran and Mr. Czuba say that, "SK's promotional strategy has been erratic"--remember now this is SK under Dresser--"but with an overall negative direction, i.e., from largely consumer oriented pull marketing to largely trade oriented push marketing."

Now, let's stop for a minute. What they are saying in the letter they sent to Heller is that Dresser has done a bad job because they have moved away from the smart way of doing it, consumer oriented pull marketing, to the dumb way of doing it, push marketing. Big mistake by Dresser according to the document they wrote at the time. Pull marketing and push marketing are phrases that Mr. Brace used.

Pull marketing is when you say, the way I'm going to increase sales is, I'm going to persuade the fellow who is not even on the chart here, Ralph, who is fixing his car, or Francine, who needs a wrench to fix her plumbing, that SK wrenches are the best wrenches in the world.

So it's like a brand name, like Gatorade, somebody that works with Gatorade. It's kind of the consumer-driven advertising, to create demand among the consumers. That is called pull advertising, because if you can create it, then it just pulls those wrenches straight through the system.

Push advertising is where, or push marketing is where you try to push the wrenches through the system by making it worth the while for the warehouse distributor or the retail store to carry your wrenches.

So that is the phrases we use. And I'm not a marketing expert. But that is what they said.

And at the time that they wrote the plan that they submitted to the lender, they did not say, what we want to do is spend millions of dollars on lifts, which is push marketing.

They said, Dresser has made a mistake, spending too much of their money on push marketing, and getting away from pull marketing. So that is what they said.

Let's look at the next page. This continues on with the discussion of their strategy to increase sales.

And here I'm going to ask you to focus on these two paragraphs here. Here they are going on--this is, remember the push-pull thing? Now they are now going to testify that, gee, what we want to do is push marketing, millions of dollars on lifts--here they are--to their lender....

So what Mr. Brace told you, and what I think they are going to get up on the stand and testify to, is that they had a plan--that is what their claim is--that they were going to spend millions of dollars on lifts, push marketing, and they had that plan from day one, and only because of us did they abandon it.

But the document they sent to the guys who lent them \$7 million said that Dresser made a mistake in that direction. They were going to be more oriented toward the consumer, towards pull advertising, and they weren't going to do anything, they weren't going to finalize their plans at all until they had done their big research study.

So Heller gets the plan, and talks with Mr. Czuba and Mr. Corcoran. And they lend them the money. And Mr. Czuba and Mr. Corcoran buy the company.

Let me put up here--I'm going on--I started off a little timeline that is going to help us, I hope. We've got back here the Heller plan back in September of 1983.

And you remember that the Heller plan said they were going to spend \$5.6 million on marketing. So I'm going to put marketing down here. Whoops; put it in the wrong place.

Marketing; and the Heller plan says they are going to spend 5.6 million. We will come back, and we will compare that number to what happened later.

So they buy the company. Heller lends them the money. And then they go on and they run the company.

The 1984 Profit Plan--There Was No Cash Crunch

And Mr. Brace said that in these months after the purchase, the end of 1983, going into 1984, that is when the plaintiffs start learning these big problems. So what the plaintiffs say is that during this period in here, late '83, early '84, what did they have? They had a cash crunch, they had the uncertainty, according to them, and they say they canceled the big January lift program.

Okay. They won't show you any document, not one, that says that.

What do the documents actually show? Well, they wrote this Heller Plan before they were in there running the company. After they got in and started running the company, they learned more, as anybody would. And they got to understand the business better.

They got to meet the customers and understand the customers better. They got to meet their own employees and understand them better, and see what the company really could do.

And so one of the things they started working on right around in January, then continuing through February, was a new business plan, that was going to be the blueprint for how they were going to run the company for the rest of 1984; because there had been a bunch of projections before they had gotten in there and actually seen how the business operated.

So they had lots of meetings on the new business plan. And all the people who worked for them were at them; the head of the big departments, like sales, and production, and marketing and finance. They all had these meetings, and got together and developed a new business plan on what they thought they could accomplish with the company.

And it started to take shape in January, February, and then finally was written up and finally published in March of 1984.

Let me just show you this document.

This is the 1984 profit plan that they all worked on so hard from January and February into March. It's pretty thick. It has a lot of financial projections and discussions of what they planned to do with the business, now that Mr. Czuba and Mr. Corcoran had been in there for a few months.

I'll put over here the 1984 profit plan.

And this, of course, is after Mr. Czuba and Mr. Corcoran now claim that they had had this horrible cash crunch, horrible uncertainty, and had canceled a million and a half dollars in lifts. That is what they claim.

Let's see what the actual profit plan said. Here is the first page of the profit plan.

I'm going to highlight the top left-hand corner, and you can see it. We've got SK Hand Tool Corporation, 1984 profit plan. This was the thing that is published in March, after they know about all these problems that they are now claiming.

And here we have, this is "Total" that means total for the year. And over here, under "Selling," that is the same thing as marketing. All the witnesses are going to agree to that. There is not going to be a fight about that.

So what they are projecting as their marketing costs here in March of 1984, after all these problems supposedly caused them to cancel the supposed lift program, \$5.5 million. We'll call this the "March profit plan," so that we keep the months straight; \$5.5 million.

So they didn't miss out on a million and a half here by March. They didn't cancel the plan. The evidence is going to show, of a million and a half in lifts, their plan in March was to spend almost exactly the same as they had planned to spend way back in September.

The Plaintiffs Projected Large Sales Increases After Allegedly Suffering Cash Shortfall Because of Dresser Fraud

And those sales projections are interesting too, because sales that they were projecting way back here in September, they were projecting \$33 million. That was a huge increase over what Dresser had the year before.

Plaintiffs are going to take the stand. They are going to swear they canceled the big lift program in January, which meant that they were going to take it in the shorts on sales basically. What did they project in March in real life? \$36 million.

So, the real business documents show that after this period, where they are now claiming all the bad effects, they were going to spend the same amount on marketing; they actually thought sales were going to go up, not down.

What are the plaintiffs going to say? How are they going to explain the March, 1984 profit plan?

Plaintiffs Will Contradict Their Own Internal Financial Documents

Well, we got to take their depositions. With all the business going on now with President Clinton, you have probably all learned more about depositions than you ever wanted to know.

But both sides got to take the sworn testimony of the other side's witnesses in advance of trial, so we know what they are going to say, and they know what our people are going to say.

Well, here is what Mr. Czuba is going to say. Mr. Czuba is going to say, while it's true that the March profit plan says we are going to spend almost as much as we did, as we had originally planned, just inconsequential difference, while it's true that the sales that we projected after all these bad things that are supposed to have happened in March, they're higher, this plan was never a serious plan.

Mr. Czuba is going to testify that this 1984 profit plan, that at one point he actually admitted it was an arduous process to put it together, they worked long and hard on it, with all the key guys in the business, but now he is going to say, in light of these numbers, that it was not a serious plan; "I never ran the business according to this plan, this was actually more of a training exercise than it was a business plan."

He is going to say that the guys who worked for him, he just decided he would let them make up this business plan as a training exercise, but he never ran the business under this plan.

So then we say, well, where is the plan, the real plan?

And he said, well, I ran the business off of a computer model that I had, and I never showed it to any of the guys who worked for me, and I never printed it out. So I can't give you a copy of it. And I didn't save it on a disk, so we can't call it up on the computer and look at it. But I did have a secret computer model that I ran the business off of, and I never told anybody who worked for me about that. But this was not the real plan. We never ran the business according to this plan.

Plaintiffs Actually Followed the Written 1984 Business Plan They Now Say Was Not Used

That is what Mr. Czuba's story is going to be. But the evidence is going to show that that story is not true, because every month, all the folks who ran the company out there on the factory floor and in the sales field, they had to report to Mr. Czuba and Mr. Corcoran on how they were doing, and they wrote documents that are called

monthly operations letters.

And what happened is, all the key guys would get together, and they would write a summary of what had happened in the last month, and whether they met their goals.

And then each one of them would have to write his own report, two or three pages long, and then put them together into a monthly operations letter.

And they would explain in the monthly operations letter, here is what the plan was that we are running the company according to, and here is what we did in real life, and if we didn't accomplish our goals, here is why.

And these monthly operation letters are not just silly little letters. These things --this is the May operations letter. It is Defendant's Exhibit 104.

It's actually written in June, because you know, it takes a couple weeks before they can write the recap for the May operations letter.

And I think--I counted it up, I wrote it down--it's 52 pages long, is the one from May. And they are all pretty much like this.

Let's take a look at the couple pages from the May operations letter.

Just putting this up here, so you can see, that's the May operations letter. And again, just to save time, we will just use one example. We will go up to the top half here. Maybe I can make that bigger; let's see. Here we go.

Operations letter, it's for the month of May of 1984, written over here in June of 1984, sent to Mr. Czuba and Mr. Corcoran, copies to all these guys. They are basically the department heads, the guys who were running the business, who have to follow the plan.

So now we have a plan over here. We got net sales. We will just take this, because it's the first item that they talked about.

And you can see net sales. Here they say Actual. And all these are in thousands of dollars. All the documents that you see with numbers on them, if it says 2, that means 2,000. If it says, you know, 2505, that means \$2,505,000. So that was what they actually did. Here you can see the fore--the FC for plan, is what the next column says. FC means forecast. You know, it's what they are predicting, or plan. It's another way of saying the forecast.

Then they compare how they did in real life with what they had planned, for the blueprint of the company. Then they have the difference here.

So let's see how this compares with the numbers that we might find in the profit plan that Mr. Czuba is going to testify under oath was not the real plan that they were to run the business by.

Comparison of Two Operating Plans Through Use of Computerized Split Screen

This gets to be the tricky part. There we go. I'm going to try a set of two documents next to each other. I'll bring this thing back here in a second.

Here we go. Our old friend the 1984 profit plan. That's the first page, and I am going to turn to Page 25 of the profit plan now. Okay.

Now, you can't read anything on this, of course, so let me blow up some key items and then we'll put them together here. I am going to grab at the top the title as well as the little column headings. So there you see "1984 profit plan gross to net shipments" and here it has year to date and it has all of the months. And remember we looked up here. We were looking at May of 1984. So I am going to highlight May of 1984. Then we'll go down here and we'll grab the row called "net shipments" because that's the same as net sales which is what we looked at before, and we'll just put that underneath the heading there. We'll move these down so we can compare them. Okay.

Up on the top we have the operations letter that they write every month saying how we compared to plan and the plan that they ran the business by was \$3,024,000 on the plan for May. Let's see what the profit plan said for May, the plan that Mr. Czuba is going to tell you was never a serious plan. 3024. You can take every single monthly operations letter, 90 pages long, 50 pages long, every month of the year when they wrote these things and every page compares how they did in some item, sometimes real small items, to how they were planning to do, and every single number and every single one of these documents when it talks about the plan talks about this plan. It doesn't talk about any kind of a secret computer plan.

So the evidence is going to show that notwithstanding what Mr. Czuba now says when he is asking for \$40 million, back when the people were running the company month to month making business decisions, this is the plan they followed. And, of course, this is the plan that was written in March after all of these supposedly bad things caused them to cancel the big lift program, but it has the same marketing number and projecting even higher sales.

Implementation Of Another Marketing Approach--the "Board" Program and Decrease of Expenditures for the "Lift" Program

[Editors' note: Through a series of projected exhibits, Mr. Beck demonstrated that SK maintained its budgeting for the lift program even after the plaintiffs claimed they lost money because of the fraudulent representations regarding the company's lift obligations to purchasers. Then, through the use of subsequently projected exhibits, Mr. Beck demonstrated that monies were not spent on the 1984 lift program because marketing funds were diverted to a new merchandising program--the "board" program--and not because losses due to Dresser's fraud prevented them from doing so.]

I am going to get done with all of those blowups here, but we are on the same page and I am going to hone in on this page again, lift expense. We were looking at the numbers before, but now let's look at the explanation that they --Mr. Gustafson, the sales manager, head of marketing, he was the vice president of the company, let's see what Mr. Gustafson said for why they didn't meet the plan. He talks about the monthly variance. That's the difference that has been caused by the board program because the board program has decreased the amount of lifts. And then when he explains why the yearly numbers.

Those numbers up there are the yearly numbers, the year variance is caused by the board program in lieu of lifts. So what happened is that instead of doing lifts, they decided to do something called a board program, and that's where they spent their money instead of spending their money on lifts.

What's a board program. Well, the board program was not Dresser's idea. This was basically Mr. Czuba's baby. Mr. Czuba thought that he had figured out a better way to do this push marketing where you persuade people to carry your tools. And essentially what--the board program is a little more complicated than this, but here is the general idea. Those display boards that you have been looking at for the last two days with all of the wrenches, that's a board and then it has a lot of wrenches on it. The idea is if you want a new customer to start carrying your wrenches instead of Easco's, what you do is you sell them a nice fancy board and all of the wrenches on it real cheap, and that way it is kind of like an introductory offer and they get these real nice boards and real nice wrenches and they don't have to pay very much money for it. Now, of course you don't make any money by giving away your boards and giving away your wrenches. Why would you want to do that? The same reason you would want to do lifts.

Because you hope the follow-on sales, once the customers come by and buy all of the wrenches, then the retailer will reorder the wrenches and restock the board. So it is kind of a--from a manufacturers point of view, almost like a loss leader. To use one of Mr. Brace's analogies, you are sowing the seeds and hoping that you are going to reap the benefit later on. You are planting the seeds by losing money on the board, hoping that you get to harvest the crops later on when they start ordering more boards--more tools, rather. So that's the theory behind the board program. This was a bright idea that Mr. Czuba had.

The Failure of the Board Merchandising Program

The problem is that the board program that Mr. Czuba came up with was a colossal flop, and we are not faulting him. Dresser has certainly made its share of mistakes in this business. This idea that Mr. Czuba decided to implement didn't work. Why not? Because the existing customers said, "I'd like some of those cheap boards and those cheap wrenches," and so what they did, even though they ordered through the wholesalers--we looked at this distribution system before. So what would happen is Frank's Auto Shop would call up the warehouse distributor, even though he is already carrying SK wrenches, and he'd say, "Give me some of those cheap boards, that way I can make more money on my wrenches," and some of the warehousemen would do it. It ended up that the introductory offer for new customers, a lot of it was being bought by the old customers. What Mr. Czuba and the fellows who worked for them called that was rip-offs, and Mr. Czuba had estimated when he implemented his board program that rip-offs would account for about two percent of the orders here, but, in fact, they accounted for about 20 percent of the orders. So the board program was a major fiasco and yet that's

where they decided to spend their money according to the business documents instead of the lift program.

SK's Failure To Meet Sales Expectations Had Nothing To Do With Dresser's Fraud

We talked about what Mr. Czuba and Mr. Corcoran had projected for sales. Remember here, this is the Heller plan. They said back in September we are going to sell \$33 million worth of wrenches. In March after all of this supposed stuff happened to them, they upped the estimate to \$36 million in wrenches.

What were the actual sales? Again, with time running short, I am not going to show you the numbers in the documents. It was \$30 million, just under 30 million. So that was a big advance, incidentally, compared to where Dresser had been. Dresser had been down closer to 20 million. So they made some real progress. They did a nice job in many respects, and I don't want you to think that we are saying they did a lousy job or they didn't try hard or anything like that. So they increased the sales a lot, all of the way to \$30 million, but they didn't get to \$36 million, which was the profit plan, and they didn't get to \$33 million which was their original estimate.

Why not. Now, one of Mr. Brace's favorite charts, the ones that the paid experts did that show those bars where one of them is higher than the other, he said that the difference there between the projected sales and the actual sales, why that was because of Dresser's fraud and because all of the bad things Dresser did, they had to cancel the lift program and, therefore, they didn't get all of the sales that would have come from the lift program. That's why there is the big difference.

Let's see what the people who were running the business said back at the time when nobody was asking for \$40 million.

Here we go. We are going to go back to the same document, the September, 1984 operations letter, the year-end recap, DX Exhibit 1. Here we are. This is the one we looked at before.

And they have an explanation for what went wrong during 1984, the key negatives during 1984.

Now, before I get there, when we asked Mr. Czuba the questions under oath, we asked him, you know, recently, what was the key negative for 1984?

And he said, the key negative, the key negative was Dresser's fraud, which caused us a cash crunch, which caused great uncertainty in the business, which caused us to cancel the January lift program, and if we only hadn't done that, we would be in clover today.

That was his testimony; key negative was our fraud and canceling of the January lift program he claims to have had.

Let's see what the people who ran the business said at the time.

Key negatives for 1984. I have to color some things some different colors here as we go; see if there's some recurring negatives that they talked about back at the time.

First key negative, Eastern Tool took on Easco. Remember, we talked about Easco? \$100,000, and the four distribution centers. Why did they take on Easco? Because of, well, because they took on, because of the strength of Easco. That is why the distributor did it, the strength of Easco out east.

The next point, C&S, another distributor, took on Easco, and has attacked our jobber base with a changeover program.

Changeover program, that is the same thing as a lift. So remember, I said one of the problems with lifts is you get retaliation? Well, here Easco is retaliating. So they are taking some of SK's customers away.

Then the next one is W.E. Supply, another one of their customers, has taken on Thorson--that is another competitor--and stated it was because of SK's price.

Remember, we talked about the SK wrenches cost 150 bucks, and the other ones cost 100? Some people are willing to pay; some are not. They didn't like the price....

Plaintiffs Suffered No Damages Because of Dresser's Fraud

What the evidence is going to show here is that Mr. Czuba and Mr. Corcoran overpaid for our company, that the arbitrator said the amount of the overpayment is \$1.3 million. And we paid them for that.

And they took this car of theirs with the bad brakes and made \$4 million two years later, and turned that 4 million into another \$20 million since then.

And they have not suffered one penny of additional harm. And we are going to ask you to award a verdict that says zero, because they were paid, and they don't have anything more coming to them.

Thank you, ladies and gentlemen.