

# The case that made their careers

HOW A GROUP OF YOUNG WOMEN LITIGATORS made their names defending Baxter Pharmaceuticals against a breast implant mass tort

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THE PLAINTIFF WAS visibly uncomfortable. She wouldn't look at the defense lawyer as he ran through his deposition questions: "How large were your breasts before the surgery?" "What size did you want them to be?" "Why did you want them to be that size?" The plaintiff shifted in her seat and avoided eye contact as she responded, her replies pierced with defensiveness. "It was awkward," says Marla Persky, the chief of litigation at Baxter Healthcare Corp. at the time, who was sitting at the defense counsel's table.

It was 1991, and Baxter was in the early stages of defending against what would become a monsoon of lawsuits filed by women claiming that their leaky silicone breast implants had caused a slew of illnesses, such as chronic fatigue, headaches, arthritis and skin diseases. The suits accused Baxter and other defendants of defective design and negligence.

The storm clouds had started gathering in December 1990, when CBS News aired a program hosted by Connie Chung which chronicled the stories of five women who claimed that their breast implants had made them sick. A few days later, Representative Ted Weiss of New York led a congressional hearing to examine the dangers of silicone breast implants. Although implant-related product liability suits had been on Baxter's docket since 1985, when the company bought American Hospital Supply Corp., whose subsidiary Heyer-Schulte made the devices, the program and the hearing put the issue on a national stage for the first time.

In the pre-1990 suits, "women would want Baxter to pay for their deflated implant," says Persky, who is now general counsel at Boehringer Ingelheim USA Corp. "Suddenly it went from cosmetic complaints to complaints of death, destruction and illness on the part of unsatisfied patients. My recollection is that almost from the week after

the Connie Chung show, we started to see lawsuits come in by the handful, then by the dozen, then several dozen, then by several hundreds."

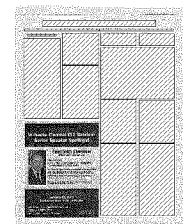
It was the same situation for other manufacturers, such as Dow Corning (the nation's largest manufacturer of the devices), 3M and Bristol-Myers Squibb Co. Seven-figure wins for early plaintiffs—a \$7 million jury verdict against Dow Corning and a \$25 million jury verdict against Bristol-Myers—encouraged more litigation, as did media coverage of the cases, which often highlighted the tribulations of sick women who blamed their illnesses on implants they'd received for cosmetic or reconstructive reasons.

Almost overnight, the mass tort had become bet-the-company litigation for Baxter, which would ultimately face 15,000 lawsuits globally. The invasive questions about breast size and augmentation in the company's early depositions had the potential to make a bad situation even worse. It made the male attorneys appear heartless.

"At trial, I didn't want jurors made uncomfortable by the questions," Persky says. "I was concerned about the sympathy factor for plaintiffs. I wanted jurors to step back and listen to evidence from a more dispassionate, more clinical view."

To Persky, the solution was simple but, for the time, unorthodox: She'd have female attorneys ask the questions. Persky decreed that every trial team had to include at least one woman who would have a meaningful role. This was no time for window dressing. "I'd seen the way the questions and answers flowed between female attorneys and female plaintiffs," Persky says, and it was much more academic: "There was no awkwardness or sexual innuendo."

Over the better part of the next decade, Baxter assembled a half-female trial team. The women who ended up joining and often leading Baxter's trial teams were



instrumental in implementing the company's strategy, which was to fight the suits in court. Baxter went to trial 25 times, which resulted in 18 defense verdicts; 11 of which were won by teams led by women lawyers.

Although female attorneys appeared on other defendants' trial teams, Baxter's emphasis on assigning women lawyers to highly visible roles stood out and likely contributed to the company's overall success at trial, says Zoe Littlepage, whose firm, then known as Ravkind & Littlepage, represented 750 plaintiffs in the litigation. "I thought it was a very clever and progressive move," Littlepage says. "It was very smart of Baxter to have women on every trial team. It was a clearly recognized strategy that we would talk about how to counter at meetings."

But Baxter's strategy did more than just help save the company. The female attorneys on Baxter's defense team were thrust onto the national stage in a decadelong litigation, igniting their career development. Along the way, they demonstrated that women could successfully handle high-profile defense-side litigation.

"I think it was a turning point for women lawyers," says Littlepage, who was two years out of law school when the litigation heated up. "It showed that they didn't have to be relegated to minor duties, that they could carry prominent roles."

Today, two decades after Baxter's first breast implant case went to trial, Baxter's female lead trial attorneys, Debra Pole, Mary Wells and Christy Jones, are household names in the product liability bar, as are some of the women lawyers who were at their sides, such as Diane Sullivan. "I like to think that the litigation helped alter the face of law firms," says Sullivan, who is now a partner at Weil, Gotshal & Manges. "They changed because clients demanded it."

Although Persky conceived of Baxter's female-focused defense strategy, Debra Pole played a big role in implementing it. Now a partner at Sidley Austin, Debra Pole had started representing Baxter in 1984, a few years after moving to Los Angeles from West Palm Beach, Fla., where she'd spent four years as a prosecutor. In Los Angeles, she eventually became a partner at a small firm, Dickson, Carlson & Campillo, and became

one of Baxter's regular outside counsel in California. Leading up to the breast implant litigation, Pole had worked on several product liability cases for the company.

In fact, one of the few breast implant cases that was filed before 1990 had landed on Pole's desk. The case, *Deborah Phillips v. Baxter*, had been filed in state court in Norwalk, Calif., and became the first-ever breast implant suit that Baxter took to trial. It resulted in a defense verdict in June 1991, just as Baxter was discovering the full scope of its exposure. Pole's performance in that trial was impeccable, Persky says. "I saw her on her feet—the way she related to the jury and plaintiffs and opposing counsel," Persky recalls. "She's as fierce a warrior as there is. She was a trial lawyer I wanted Baxter associated with."

Later that year, as Pole prepared for another breast implant trial in Colorado Springs, Persky called Pole to say that she was naming her national trial counsel for the breast implant litigation, giving Pole oversight of the trial teams that would end up handling breast implant cases across the country. A few weeks later, Persky consolidated the national trial counsel and national coordinating roles, putting Pole in charge

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of the entire litigation.

"I screamed into the phone," Pole says. "If it happened now, I would have been much more mature—'Oh, thank you. That's fabulous.' But at that moment, I could do nothing but scream."

Looking back, Pole sees the appointment as the defining moment in her career. "To have a black woman in the role—at that time—was just extraordinary," she says. "It helped propel me onto the national products litigation stage."

In addition to compiling Baxter's team of outside counsel, which she did by building on the company's existing network of lawyers through referrals and recommendations, Pole served as lead in eight of Baxter's breast implant trials. The size of the litigation—and the opportunity it gave to Pole—ended up surpassing her own expectations. "I initially thought the lawsuits would peak at around 300," she says. But the number

quickly grew beyond that, she says, and “on a few occasions, plaintiffs lawyers tried to personally serve me with 80 cases in one day. I would end up with a whole pile of complaints on my desk. Getting our arms around the litigation was the first step.”

Baxter met with its entire legal team for the first time in 1992, in an auditorium at the company’s headquarters in Deerfield, Ill. The collection of the company’s defense attorneys—about 40 percent of whom were women—left a lasting impression on one of Baxter’s youngest outside lawyers, who was sitting near the rear of the room.

Diane Sullivan was 28 and a fifth-year associate at Hannoch Weisman, which was then the largest law firm in New Jersey, her home state. “There were at least a hundred or so people there, and Marla was in charge,” she says. “As a young woman, it was something you just didn’t see. You don’t see it that much now, let alone then.”

Sullivan had spent the first few years of her career doing insurance defense work. Hannoch Weisman represented a company that insured drug stores, and slip-and-fall cases became Sullivan’s passport to the courtroom. “If a shelf fell on a customer at a store, I was able to do the opening and closing,” Sullivan says. She also pitched in when her firm did product liability cases for Baxter.

As Baxter’s breast implant docket in New Jersey grew, Baxter hired Hannoch Weisman as its New Jersey counsel. A few months before departing for the meeting at Baxter, a partner pulled Sullivan into the breast implant work. “He said to me, ‘They’re looking for women, so I’m bringing you,’” she says.

When she walked into Baxter’s auditorium, she noticed the gender breakdown among the lawyers immediately. “It was so nice to see a room full of people who looked like me,” Sullivan says. The partner she was with “was grumbling about ‘all these women,’ and all I could think was, ‘This is so great!’”

That partner ended up leaving Hannoch several months later, before he and Sullivan took a case to trial. Despite the partner’s departure, Baxter kept Sullivan as its New Jersey counsel and added her to its national

trial team. It was a matter of right place, right time, Sullivan says—and Marla had enough faith in me to keep me on board.”

For the next six years, Sullivan was Baxter’s local counsel in New Jersey and helped try two cases in Houston, cross-examining plaintiffs, doctors who treated the plaintiffs, and experts. Baxter won both cases. “That was my big break,” Sullivan says. “Without that litigation, my career could have turned out much differently.”

Baxter’s courtroom victories often came against high odds. Case in point: Crystal City, Texas—a notoriously plaintiff-friendly venue 50 miles northeast of the Mexican border that bills itself as the spinach capital of the world. A Popeye figurine now sits on the desk of Christy Jones, a partner at Butler, Snow, O’Mara, Stevens and Cannada in Jackson, Miss., who tried an implant case for Baxter in Crystal City in 1995. (Jones was on Baxter’s radar because she had represented American Hospital Supply in the early 1980s.)

The town didn’t have a hotel to use as meeting space, so her trial team rented a Winnebago camper with a pink velour interior and parked it outside the courthouse. “I prepared my closing argument for that trial on top of a trash can because our legal assistants were using the camper’s one table to make ham and cheese sandwiches for lunch,” Jones says. “I blame Debra Pols for leading me to that godforsaken place,” she jokes.

Someone had to go. Plaintiffs lawyers had filed the suit against Baxter on behalf of two local women with breast implants who claimed that exposure to silicone gave them fibromyalgia. “Filing a suit in that county alone was considered a serious advantage for plaintiffs,” says Jones. The jury deliberated for about two hours before announcing a defense verdict. Jones got the same result in the two other trials in the South too, and handled a fourth case that settled before trial.

“Some of Baxter’s wins came at trial in places where people believed you just could not win,” Jones says. “At the time, when there were thousands of cases pending against Baxter, everybody was anticipating each trial outcome. Any defense verdict sig-

nificantly reduced the cost of the resolution for the client.”

Throughout the years of litigation, Baxter steadfastly denied that it was responsible for illnesses and contended that the science behind the plaintiffs’ claims was flawed. In the later stages of the litigation, Baxter kept some of the scientific evidence out of the courtroom and pre-empted trials altogether by challenging the admissibility of the plaintiffs’ evidence under a 1993 U.S. Supreme Court decision, *Daubert v. Merrill Dow Pharmaceuticals*, which set standards for the admissibility of expert testimony at trial.

Representing Baxter in cases pending in Colorado, New York and Oregon, Mary Wells—then a partner at Weller Fredrich Ward & Andrew and now a partner at Wells, Anderson & Race in Denver—persuaded state court judges to toss suits by arguing that different pieces of evidence that the plaintiffs were attempting to use to link silicone breast implants to a wide variety of illnesses were inadmissible under Daubert.

“The plaintiffs were trying to use as evidence the testimony of doctors who would say, ‘I’ve seen 350 women, all have complained of this sort of illness and they all have implants, so there must be a connection.’ That is not how science works. You have to use epidemiologically controlled studies, and they just didn’t have those,” she says.

That argument didn’t always gain traction, including in the five cases that Wells helped take to verdict. She won four.

Wells joined Baxter’s team in 1994. At Weller Fredrich, she had carved out a niche in aviation product liability, but when Congress passed the Aviation Revitalization Act in 1994, which shortened the statute of limitations for plane-crash related claims, her practice slowed down. A partner at her firm referred her to Baxter. “I was very interested in getting in it,” Wells says. “And frankly, it was fortuitous in terms of the timing.”

**By the late 1990s, the breast implant mass tort started to wind down, due in large part to ongoing settlement negotiations and the consolidation of thousands of claims into a federal multidistrict litigation (MDL). In June 1992 a judicial panel had transferred what would ultimately amount to 26,500 breast implant suits filed in federal court to a federal district court in Birmingham, before Judge Sam Pointer. (Tens of thousands of suits remained in state court.)**

The manufacturers’ first attempt to settle the litigation came in late 1994, when Pointer approved a global settlement worth \$4.25 billion—the largest of its kind at the time—that would give any woman with breast implants between \$100,000 and \$2 million. That settlement collapsed a year later because the damages pool was too small to compensate the 430,000 plaintiffs who had opted in.

In 1995 Dow Corning went bankrupt in the face of 20,000 suits, so the other manufacturers brokered a second settlement on their own. Baxter, Bristol-Myers and 3M entered into a revised settlement program worth \$2 billion–\$3 billion in October 1995, which awarded plaintiffs between \$10,000 and \$250,000 each. That helped wind down the litigation for Baxter, as did a 1998 report by a science panel convened by Pointer.

The panel concluded that there was no scientific evidence to show that silicone breast implants caused autoimmune conditions. The finding, which also could be applied to the pending state court cases, prompted Pointer to remand the cases to their original jurisdictions, where they settled or were dismissed.

For the female attorneys who represented Baxter in its litigation around the country, the litigation and its accompanying national media coverage helped launch the next phase of their careers. Mary Wells continued to try cases for Baxter. The breast implant litigation had introduced her to the medical device and pharmaceutical fields, and she parlayed her work for Baxter into other mass torts in those areas. She now counts GlaxoSmithKline as a client.

“I came to the attention of potential clients because of the breast implant litigation.”

tion," she says. "Those clients were either following the cases or were referred to me from other Baxter lawyers."

Within a year of her last breast implant case, Baxter again hired Diane Sullivan for a new mass tort, this one involving latex gloves. She secured the first trial win for Baxter in that MDL in 2002. Her profile and courtroom success continued: In 2011 she secured a defense win for Philip Morris in St. Louis, where 37 Missouri hospitals had sued the tobacco company for \$500 million for economic loss and punitive damages tied to the cost of treating smoking-related illnesses.

Prior to the breast implant litigation, Christy Jones had tried only one case outside of Mississippi. "I love the great state of Mississippi, but it's been tarnished with a reputation for sometimes being less than sophisticated. When people wanted a sophisticated lawyer they went to Chicago or D.C. or New York City," she says. "The breast implant litigation was particularly important to me because it showed that someone from Mississippi could go to other parts of the country and try cases."

Jones, who has worked at **Butler Snow**

her entire career, was also hired to represent Merck on Vioxx litigation in trials in Alabama and New Jersey, and she's represented Johnson & Johnson in trials in California, Pennsylvania and New Jersey. "I think the fact that I had the trial experience in such a high-profile case definitely played into the decision to hire me," she says.

Debra Pole started receiving phone calls from companies looking for representation just as the breast implant litigation wound down. "One woman said she had called me because she'd seen my closing arguments in one of the breast implant trials," Pole says. She continues to represent Baxter and serves as counsel to Merck in its Fosamax litigation.

Pole says the female lawyers on Baxter's defense team didn't dwell on the significance of their roles at the time. "We were just happy to have the work, and we concentrated on defending the client," she says. They may not have been looking for corporate America's attention, but that's what they got. ●

*Claire Zillman writes for The American Lawyer, a Daily Report affiliate.*



MICHEL LEROY

Looking back on a groundbreaking defense that jumpstarted their careers are, from left, Christy Jones, Mary Wells, Debra Pole and Diane Sullivan in New York in November.