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Top Ten Practice Points

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TOP TEN PRACTICE POINTS FOR EFFECTIVELY MANAGING MULTI-JURISDICTIONAL LITIGATION

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In-house counsel like nothing less than to see a barrage of complaints being filed against their companies. With the ever-increasing influence of social media, though, when one complaint is picked up on by the media or other internet purveyors, many more cases may follow, particularly in environmental, toxic tort, and products arenas. While certain types of claims may be relatively localized to a geographic region, others will be anything but. Cases may be initiated by individuals, groups of individuals or as proposed class actions, and may be filed in a series of state and federal courts. Corporate counsel's initiative, coordination, and active oversight role will be crucial to the effective and efficient defense of such proliferated litigation. Depending on the nature of your industry, and especially if litigation is anticipated, it makes sense to have a standardized (yet customizable) plan of action at the ready. The following contains pointers to help this process along.

1. Specifically designate an in-house attorney, or team, to oversee subject-specific litigation.

Once your company has identified specific issues or sets of issues that are being pursued in litigation in more than one forum, it makes sense to designate an individual member of your in-house legal department to be "the" person overseeing these matters for the company. This attorney will act as the hub, become involved with strategy, business-related decisions and communications with outside counsel; and he or she should be in a position to coordinate with outside and local counsel if necessary, as well as with potential insurance defense counsel. As the matters develop, this keystone attorney can evaluate if, and which, aspects of the litigation can be split off and to whom. If the cases are massive in scope or number, consider forming a team of people dedicated to these matters. This will avoid the inevitable problems of inconsistencies in arguments, experts, positions, etc., if each separate case were assigned to different attorneys who are not sufficiently familiar with how other matters are being handled.

2. Retain national counsel to take the primary lead in managing litigation across multiple jurisdictions.

Corporations confronting multi-jurisdictional litigation of a certain magnitude will retain national counsel to coordinate and monitor all cases. The national counsel will typically be an outside law firm (although in some instances in-house counsel may serve as national counsel). Considerations in selecting national counsel include the obvious factors of track record, competence, experience and reputation. But you should also consider business familiarity (is the counsel familiar with your business and sensitive to its goals, even if those goals may be counterintuitive relative to litigation); accessibility

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(is your outside national counsel of such stature and demand that he or she may be stretched too thin and not be able to devote the time and attention you need); philosophy (is a firm rigid or flexible in how it staffs cases); relationships (have you had positive working relationships with the outside lawyers that will be working on your cases, or have they been strained in the past); potential for conflicts to arise (while a firm's experience with a specific industry may be very helpful with your defense, you do not want to engage counsel where unwaiveable conflicts are likely to arise mid-case, for instance if as the facts develop you need to join other parties to the litigation, which your national counsel may also represent).

3. Together, develop overall strategies, that address your company's core goals.

Once your team is in place, key procedural and substantive questions will need to be addressed. It will be crucial to educate outside counsel concerning relevant business goals and practices, along with business or personnel intricacies that could impact the manner in which the cases are defended. Identifying potential problem areas (such as known "bad" facts, disgruntled current or former employees who are likely to be called as witnesses, or managerial differences of opinion) up front can help shape strategies and plans from the outset and diminish the likelihood of having to put out fires at more delicate stages of litigation. This will also be a time to assess broad-based defense strengths and weaknesses, the advisability of attempting to consolidate cases, and balancing risks. These considerations, and many more, will drive how the defense unfolds. For example, is the company more interested in defending at all costs, because any sign of weakness could yield a cascade of additional suits involving similar sets of facts, or involving a different substance or product about which the company may be vulnerable to lawsuits. Or, does the interest in confidentiality or averting setting unfavorable precedents significantly outweigh the costs you would incur by attempting to quickly settle all the cases subject to confidentiality agreements. What is the company's tolerance for settling some cases to avoid having to take certain positions, making bad law, or exposing the company to certain discovery, in order to protect its interests in other, more significant cases, or in which the law and/or facts may be more favorable to the defense. This will also be a time to put protocols in place for preserving and collecting information in documentary and electronic forms, and for contacting and interviewing company witnesses.

4. Select local or regional counsel as appropriate.

As cases are filed, you will need to retain local counsel to handle individual cases in conjunction with national counsel. Your company and national counsel should both have input in selecting local counsel, whether in big cities or small towns. Ample investigation should be undertaken to ensure that local counsel is capable of providing a suitable level of service, and that personalities and relationships will facilitate an appropriate balance between your local counsel's willingness to take direction from national counsel, and initiate and complete necessary work independently without constant handholding of national counsel. The scope of what role local counsel will play vis-à-vis national counsel should be established up front, with room for local counsel to take a more or less active role as needed. State laws will vary; a toxic tort case in one state may support personal injury and medical monitoring claims based on substantially similar facts brought in another state where the same facts might justify a damages action only. For substantive, organizational and logistical purposes, the company and national counsel may choose to group various cases together by jurisdiction, type of relief sought, or viability of asserted causes of action. Your local counsel will help you with knowledge of local rules, court systems, judges and potential jury considerations. Especially in cases with higher monetary stakes, local knowledge and insight concerning the public's perception of plaintiffs and defendants could be invaluable (i.e., was the plaintiff in a small town in Texas the beloved captain of the high school football team, or a local hoodlum? does the community credit the defendant with saving the town through increasing employment, or destroying it through mass lay-offs?)

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5. Contact your IT department.

Involving your IT department early-on will save time later. As cases are filed in various jurisdictions, depending on the size and locations of your business, one or more litigation holds will need to be issued. Electronically-stored documents will take time to search, compile, review and produce, and procedures should be put in place for interfacing among you, your IT department, national counsel and local counsel. If the services of an outside vendor are needed, evaluate whether one vendor can manage the entire job, nationally, to maintain document control and a standardized approach to document compilation, review, production and privilege logging.

6. Make sure the right hand knows what the left hand is doing.

One thing is assured in multi-jurisdictional litigation – there will be a lot of moving parts. It is critical that those parts be coordinated as well as possible so that positions taken to benefit the defense of one case do not undercut strategies used in other cases. Procedures, themes, strategies, and key positions should be clearly articulated by the company and national counsel to all local counsel. A secure website, accessible only with a password, can be a good way to distribute information and solicit questions; it could also serve as a roll-call device, to maximize the likelihood that every local counsel is staying informed of major developments in these cases. Depending on the number of cases and lawyers involved, scheduling periodic all-hands conference calls may be feasible. If that is unwieldy, as it may be in mass cases, calls can be held among sub-groups to discuss strategy, give directions, explain approaches to discovery, identify and clarify factual discrepancies, and vet legal arguments. Of course, local variations in rules, law and procedures need to be taken into account, but it will be national counsel's responsibility to ensure that local counsel are by and large defending cases on a consistent basis, and that deviation occurs only after consultation between national and local counsel. Judges will not look kindly on defendants if plaintiffs' lawyers point out that a defendant took a diametrically opposed position in another case in a different jurisdiction. Local counsel should also be required to provide regularly-scheduled updates on developments in their particular cases and jurisdictions. These could be scheduled according to the calendar and/or upon the happening of litigation benchmarks. As a cost-saving measure, consider requiring your local counsel to provide litigation summaries on a non-billable basis, as a condition of their engagement.

7. Coordinate retention of experts.

Retention of experts will be a crucial building block in mounting your defense. In multi-jurisdictional litigation, it is likely that some experts will be able to play a role across the entire spectrum of cases, particularly consulting experts who work with counsel to evaluate case strategy and understand the industry, technical, epidemiological, toxicological and/or scientific strengths and vulnerabilities of your defense. Other experts will need to be retained on a more regional or local basis, especially experts retained to rebut personal injury claims. When it comes time to identify testifying experts, national counsel should consult with local counsel regarding potential reactions of local judges and juries to out-of-state experts (e.g., would a highly-compensated expert from New York City, with degrees from elite universities, be more or less trusted and liked than a local college professor). In addition, if an expert is renowned in numerous jurisdictions and her opinions have been widely-accepted by a range of courts in certain areas of the country, but in another jurisdiction her expert opinion was not credited, there may be reason to substitute the expert in particular cases.

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TOP TEN POINTS (cont'd)

8. Contact your IT department.

In addition to promoting consistency, you can achieve a degree of savings by standardizing pleadings, briefs, discovery, counterclaims, confidentiality orders, etc. While these documents will obviously need to be tailored to reflect local practice and factual and legal issues that are unique to each case, maintaining a bank of materials that local counsel can access and conform can help avoid constant wheel-reinventing. Among other things, national counsel can prepare form answers, counterclaims, cross-claims and joinder papers; motions to dismiss, for protective orders, for summary judgment, in limine, and to disqualify experts; interrogatories, document requests, requests for admissions, and objections and responses thereto; and proposed confidentiality agreements. These forms can be accessed from a protected site; and each time a brief is filed, discovery served, etc., it can be added to the document bank, to further assist practitioners in other jurisdictions. Deposition outlines and transcripts can similarly be uploaded for reference by other counsel across the country. Be mindful that because some jurisdictions will allow unlimited discovery requests, and others will strictly limit discovery (for example, allowing only 25 interrogatories), your opponents may use more expansive opportunities for litigation in one jurisdiction to develop evidence to use against you in other locales. Likewise, national counsel should closely coordinate what documents your company is producing in each case. It is not unusual for different attorneys to take a more liberal or conservative view of what materials should be withheld on the basis of attorney-client privilege, work-product, or even relevance. National counsel should have guidelines in place, and may even itself produce documents to local counsel for production to plaintiffs. With respect to some aspects of discovery, your company may designate the same witnesses for Rule 30(b)(6) or corporate designees, and may need to produce the same fact witnesses on a repeat basis. In those cases, you will need to weigh whether it is necessary to have national counsel participate in those depositions. In other matters, it will be more effective to have your local counsel take the lead in depositions. In jurisdictions where the scope and protections of attorney-client privilege rules may substantially diverge from other jurisdictions, consider having national and local counsel participate if testimony could be elicited from your witnesses that could be damaging to your defense beyond the contours of that one case.

9. Cooperating with other defendants.

Plaintiffs will often sue multiple defendants. Their goals in doing so may vary, including efforts to defeat diversity jurisdiction and keep you in state courts, which may bring more favorable judges and potential jury verdicts. Other cases may name multiple defendants because plaintiffs cannot determine, at least at the outset, by which defendants' product they were harmed. Or, plaintiffs may sue defendants under various legal theories, or every potential defendant in the chain involved with an allegedly offending product or chemical. In some of these cases, your company may actually have preexisting agreements with another defendant delineating particular risks, and indemnity and duty to defend obligations. This would not be atypical where a plaintiff sues (i) his employer, for failure to take necessary precautions and warn employees of risks of working with materials later alleged to be harmful, and (ii) the supplier which manufactured and supplied the alleged harmful substance to the employer in the first instance. In other situations, multiple defendants' only connection may be that they are in the same industry or manufacture similar products. It will be necessary for you to preserve your claims against other defendants, but you should also explore the extent to which you

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can cooperate to first fight the battle against plaintiffs together. Your national counsel can devise ways to structure strategies to promote a mutual defense, without waiving the right to claim against each other at a future time, if necessary. To ensure that privileges are maintained, consider entering into joint defense agreements at the more global and local levels. Because most cases resolve via settlement anyway, defendants can often settle their respective liabilities at the same stage they settle with plaintiffs. In multi-jurisdictional litigation, this process will be complicated, but may lend itself to a series of defense arrangements, based on subsets of cases grouped by common defendants, or perhaps where common plaintiffs' counsel is on the other side of a series of proceedings.

10. Public relations strategies.

In large-scale multi-jurisdictional litigation, your communications and public relations representatives can be an integral part of your defense team. This will be important from the perspective of staying abreast of the filing of new cases around the country, and monitoring case developments – and how those developments are being portrayed in traditional and social media – and determining the how and when of publicizing the company's message. The timing and manner in which your company attempts to preempt anticipated negative reporting as damage control, or decides to strategically respond to mounting media attention may impact on litigation in one or more forums. Staying on top of the way case developments are being reported by various media in the different jurisdictions where cases are pending will help to integrate your communications and legal positions. There may be times when PR issues trump litigation concerns, and vice versa. Accordingly, significant litigation strategies that could adversely reflect on the company's image should be vetted with your communications representatives; company press releases should be run by your in-house and/or national counsel before being released; and your local counsel should be instructed concerning permissible and off-limit interactions with the media.