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**APPLYING THE LESSONS OF THE PAST TO
THE LITIGATION OF THE FUTURE**

We have been asked to provide you with our assessment of certain mistakes that manufacturers of consumer and industrial products have made in the defense of mass tort product liability claims – and to offer certain suggestions that will help all of us shape a better future. In our respective roles as an in-house counsel for a member of the pharmaceutical industry (which, as an industry, has faced a wide array of aggregated claims in multi-district litigation, class actions and state court coordinated proceedings) and as an outside counsel whose role as national product liability coordinating and trial counsel has required a national defense effort and trials in a variety of jurisdictions, we have seen many changes in the mass tort landscape over the past ten years. Although we clearly are not comfortable nor qualified in serving as seers, our common experience has helped us identify certain “mistakes” which members of industry have made defending the mass tort. Our suggestions may not work for all mass tort litigation, but clearly, will work for most.

THE MISTAKES OF THE PAST

What mistakes? And how do we define the “past”?

Over the past decade, several PLAC corporate members have for the first time found themselves faced with class action and mass tort litigation for a number of “new” developmental torts. Although certain of these mass torts are anything but new (e.g., asbestos, lead paint, etc.), newly developed pharmaceuticals and medical devices, certain food and chemical products and several automotive and construction products have been beset by thousands of newly filed lawsuits in jurisdictions virtually unknown for no other reason than having become a mass tort litigation center. Increased networking by plaintiff law firms, ready access to information to a widespread plaintiff population, a concerted effort by organized labor to collectively “improve” the lot of their members and aggressive consumer advertising in television and newspaper markets have created near immediate accessibility to the mass tort litigation marketplace. Clearly, the past ten years have found electronic mail and websites producing a much more accessible plaintiff population for mass tort plaintiff lawyers.

Further, over the past decade, the American public’s perception of corporate culture has dramatically changed – for the worse. Jury researchers report that before Enron and like scandals, approximately 30% of the lay public believed that corporations were more concerned with profits over safety as an existing bias or prejudice. Since Enron, Worldcom, Adelphia and other highly publicized corporate tragedies, that 30% number is now viewed to be as overly conservative – with projections of 60% of Americans distrusting corporate actions. Thus, six of every ten prospective jurors may likely believe before hearing any evidence that a corporate defendant is more likely to consider profits over safety. This is sobering information – but clearly one which affects every corporate defendant in mass tort litigation.

US vs. THEM

Today, a greater population exists of those who criticize corporate America than ever before. Over the past decade, corporate defendants have faced a much more aggressive plaintiff's bar, jurors who come to the courthouse with an outspoken bias against corporate witnesses and corporate cultures, a more activist judiciary willing to permit near unrestricted corporate document production and a legion of corporate witnesses for deposition interrogation and a media willing to provide access to a constant barrage of anti-corporate propaganda. Clearly, the "underdog" in today's litigation environment is not the injured "common man" plaintiff, but instead, the corporate defendant who is faced with wide open discovery of its proprietary information, a well-financed plaintiff's bar, a distrusting judiciary and, of course, the overpowering element of sympathy for every plaintiff who seeks damages for personal harm. A defense verdict is a much greater achievement today than ever before – requiring greater attention by defense counsel to even the "routine" garden-variety product liability lawsuit.

NOT SEEING THE "BIG PICTURE"

A common mistake made by many companies and their counsel today is the failure to see the "big picture" – and seeing it soon enough. For several years, many in-house corporate counsel did not sense that his or her company was facing a potential mass tort situation when two or three cases involving the same defect contention are served upon the company. Today, in-house counsel are much more wary. What was once considered an individual product liability case must be evaluated for its likelihood to be the basis for a mass tort. In-house counsel knows that a mass tort needs to be predicted well before the company is suddenly faced with a petition seeking multi-district assignment for a product.

As well, significant consideration must be given to the public's perception of corporations today, that perception being one of deception and arrogance. The plaintiff's bar does not have to rely on Hollywood movies to get out the message that companies are willing to be heartless and are willing to put the public at great risk to serve corporate ends. Although the public may be entertained by watching "Erin Brockovich", "The Insider", "Silkwood" and "The Verdict", the energy, chemical, tobacco and automobile industries did not find these films appealing. The mass media have undoubtedly influenced the growth of mass tort litigation these past years. However, we cannot solely blame the media. Instead, certain members of industry have contributed to this unfortunate situation. Television news stories depicting corporate executives in handcuffs, guilty pleas by medical device companies for hiding disclosure of injury incidents, and news stories of Chapter 11 filings of companies soon after corporate executives have cashed out significant stock holdings are not Hollywood inventions – but real world news stories. Regrettably, these corporate tragedies affect the public's growing distaste of corporate culture – sensing top management's true mission consists of deception, arrogance and greed.

Mass tort litigation is more than a mere cost of doing business of American corporations today. Rather, it appears to be a part of our American culture, triggering an unjustified redistribution of wealth to a select few, causing the plaintiff's bar to garner more and more political and financial power. The end result for some companies and their workers: job losses and, later, federal bankruptcy protection. The "bottom line" is that many companies face significant financial jeopardy, if not failure, because of the change of our litigation environment triggered by mass tort litigation.

FINGER-POINTING AMONGST DEFENDANTS

Today, more than ever, corporate defendants must be sensitive to the fact that criticizing co-defendants is not a way of bringing mass tort litigation to early closure. Rather, a corporate defendant's open criticism in press releases, discovery responses and trial settings have stimulated additional lawsuits, creating the recipe for class actions and MDL's. A lengthy discussion with examples is unnecessary here – as many members of PLAC can attest. We merely play into our adversaries' hands by engaging in open warfare with each other. Instead, we need to engage in joint defense agreements and no cross-claim agreements (described below) to decrease the risk that an uncontrollable mass tort will develop.

“REAL” SCIENCE AND THE COMPANY STORY

The early understanding of the science involved in the case, the development of good experts, and the development of the “company story” are critical to the successful defense of any case. Often plaintiffs' attorneys have trouble or do not put a lot of effort into developing causation. Understanding that this weakness in the plaintiffs' case can be a defense strength is important. Tactically, pushing for early proof of causation requires plaintiffs' attorneys to develop the more costly aspect of their case.

Early development of the “company story” is often a huge and expensive but necessary task. The company story is developed through the company documents and its people. Document collection, including electronic documents, is an awesome task. We are all mindful of the unfortunate circumstances when electronic documents have been destroyed or hard copy documents shredded. These unfortunate mistakes create a gleefully delightful opportunity for plaintiffs' attorneys to create a sideshow from which a corporation may have difficulty

recovering. Again, the broad and immediate dissemination of such mistakes in the media provides the public with the ammunition necessary to keep the mistrust of corporations alive.

LEARNING FROM OUR MISTAKES

What should today's companies do to remedy these mistakes to survive in the mass tort litigation world? We offer a few suggested remedies.

First, do not neglect to timely recognize the mass tort as it approaches. Two or three cases may be more than enough to justify your attention – and for you to soon engage in early preventive measures to get yourself prepared. Such measures may possibly prevent the mass tort from ever developing. Second, hire national counsel early. Hire a law firm that has actually defended mass tort claims. Do not necessarily rely on your existing panel of counsel. Search out lawyers with “hands-on” experience.

Third, develop your corporate testifying witness well before you need to produce one for deposition. Fourth, engage in a thorough accumulation and review of your corporate documents well before discovery requests are served upon you – and get your national counsel involved in document management. Rely upon your national counsel to develop your discovery responses to promote uniformity and mistakes. Do not rely on a variety of local counsel law firms to do the work which one experienced mass tort law firm can thoroughly and accurately perform on your behalf.

Fifth, meet with other members of your industry who currently are faced or likely will be faced with similar lawsuits. Develop a joint defense agreement amongst members of your industry, which may prove crucial in developing consistent litigation strategies to support your own company's effort and your industry's brethren.

Sixth, work with your national counsel to develop a “select counsel” trial team. There is no need for you to have each of your local counsel firms serve as your trial lawyer for every case in each jurisdiction. Develop a corps of four or five of your proven trial lawyers to serve as your trial team no matter where the litigation is brought. Although circumstances may require a truly “local” counsel based upon the cultural realities in the jurisdiction where a case is brought, it is a waste of resources to have to train dozens of different lawyers to serve as your trial counsel – as opposed to a small cadre who can “first chair” your cases. Moreover, this more sophisticated trial team will establish credibility for your company to your plaintiff attorney adversaries. The goal is to assure that your trial attorney has the knowledge and allegiance to your company’s litigation philosophy for a given mass tort. You do not want a local counsel to “learn on the job” in a mass tort trial situation.

Last, early recognition of a mass tort requires more than merely hiring counsel and getting your written discovery materials “ready”. Equally as important is developing your “science case” for your defense. Hiring your defense expert team well before a mass tort develops is crucial. Do not rely upon “proven” experts whom you have called upon for other product litigation your company has defended over the years. Getting “true” experts helps forestall mass tort litigation. Recruiting experts in a variety of scientific areas who have actually engaged in research of the relevant scientific issue before your mass tort first developed are the people you want to recruit. Moreover, providing research grants to help “create” additional scientific support for your defense is essential. Peer reviewed articles published in respected journals is what you need – along with qualified experts who actually did the research. Working with national counsel in qualifying this research and identifying the scientists who should engage in it is a necessary litigation defense task.

OTHER CONSIDERATIONS

In developing a meaningful defense posture in mass tort litigation, we offer a few suggestions. Consider the following: Agree to the appointment of a multi-district litigation judge in your mass tort. Doing so will help avoid duplicative document production, avoid inconsistent discovery rulings from different jurists, avoid repeat corporate witness depositions, and importantly, giving a rational reason for state court discovery to follow the federal multi-district judge's lead. Although many companies have opposed the creation of an MDL, others now believe that an MDL assignment actually favors the long-term interests of the company in the mass tort litigation environment.

Further, instruct your national and local counsel to avoid engaging in "hardball" litigation tactics. No company has ever "won" the case except before a judge and jury. Hardball tactics make your company "stand out" from others in your industry faced with the same mass tort; making your company the favorite target for a vengeful plaintiff's attorney. Sophisticated product liability targets have learned that taking a more pragmatic, professional approach not only reduces the overall litigation's cost, but importantly, reduces the company's chances of becoming the prime target in an ever-developing mass tort environment.

Also, consider working with as opposed to "controlling" smaller industry members. A lengthy discussion is not required here. Dictating what your co-defendants "need" is not necessarily in the best interest of your company. Instead, develop strategic alliances with your industry members. Their support will assist you in voicing a consistent defense position, offering a greater potential of bringing earlier closure to your mass tort.

Enclosed in these materials are a few form "agreements" worthy of your review. A "Joint Defense Agreement" amongst companies named as co-defendants in mass tort litigation

sets out a workable format to assure consistency of defense positions, the development of a uniform discovery strategy, and the permissive sharing of litigation strategies. Also, we provide a “No Cross-Claim Agreement” which helps legislate avoidance of “finger-pointing” amongst co-defendants in the mass tort case environment. Deferring the “finger-pointing” evidence to a post-trial arbitration proceeding promotes a unified defense effort before the jury at trial and helps prevent a damage award from going out of control. Many juries are prone to increase a verdict damages award when one defendant corporation pits its defense case upon the culpability of a co-defendant. Such a strategy permits the plaintiff’s attorney to play one company off against the other before the jury at trial.

Consider developing an alliance with a co-defendant which includes taking over the co-defendant’s defense. We have provided a hypothetical Joint Defense Agreement which involves a drug company, (not Bristol-Myers Squibb), which is willing to take over the defense of physicians who prescribed its medication which later became the subject of hundreds of lawsuits in state and federal courts throughout the country. By agreeing to pay for the defense of the prescribing physicians and agreeing to indemnify the physicians for any judgments rendered against them, the drug company is able to develop greater predictability by creating a uniformity of interest with the physicians and its counsel early in each case. This also helps permit the physician community to develop comfort and confidence that the drug company was not only willing to support the defense of its drug – but also those who prescribed it.

CONCLUSION

In the current environment, it is more challenging than ever to be a defendant in mass tort litigation. The key to a successful defense is to recognize early that any product liability litigation can have the potential to be a mass tort and be prepared to act with urgency. Hire

experienced counsel who is willing to dedicate the necessary resources to support your company's needs on a going forward basis. Develop the company story before depositions are taken so that the story is not being developed as discovery goes forward. Know the science early and develop experts early in a variety of scientific areas necessary to the defense of the case. Perhaps most importantly, do not think of mass tort litigation narrowly, i.e., as a big product liability case. An important lesson learned is that mass tort litigation has broader ramifications to a company than the litigation itself.

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