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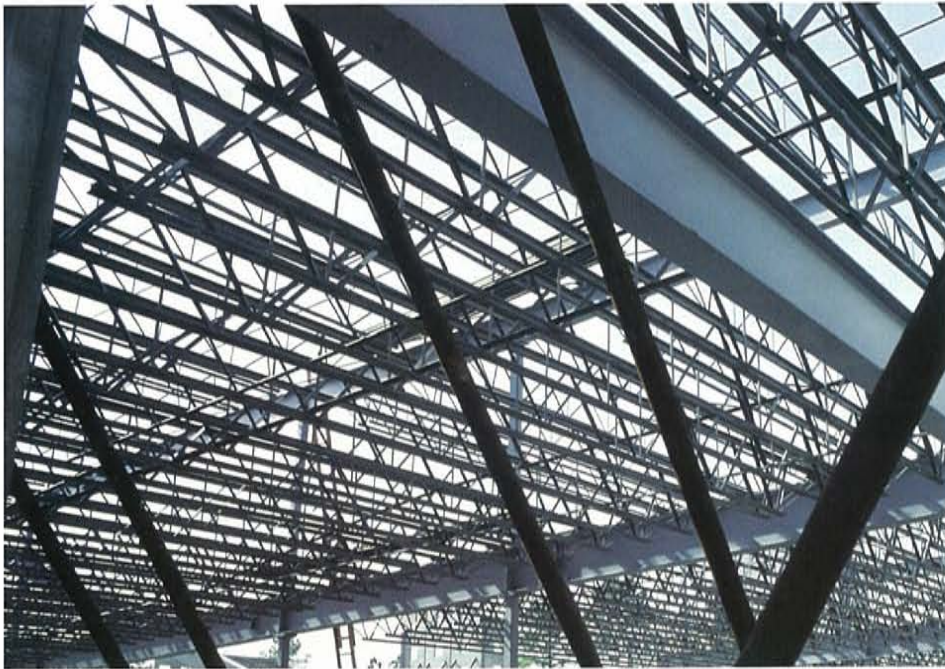
### ALSO IN THIS ISSUE:

- Employment Law
- Insurance Law
- A Framework for Managing Mass Tort Litigation
- European Chemical Regulation and Global Chemical Liability
- AND MORE

“Reports of my demise have been greatly exaggerated.”

# A Framework for Managing Mass Tort Litigation

By C. Douglas Goins, Jr., William L. Allinder and Gregory L. Fowler



Despite proclamations of the demise of mass tort litigation in the United States (calling to mind the famous quip from Mark Twain), major corporate law departments across America continue to manage the defense of hundreds, or even thousands, of such cases annually. Indeed, recent surveys indicate that litigation is on the rise and that the quantum of relief sought in

litigation is escalating as well. As a result, mass tort litigation continues to figure prominently in the minds and budgets of corporate in-house counsel.

Mass tort litigation also poses special challenges to in-house counsel. These cases can explode into prominence “naturally” or, more likely, through the careful orchestration of the plaintiffs’ bar, which often uses friendly or like-minded legislators, regulators and members of the media, not to mention advertisements and old-fashioned networking, to generate hundreds, thousands or even tens of thousands of claims in the space of days, weeks or months. When such litigation emerges, there is little time to react, much less plan. The litigation department must coordinate with corporate and government affairs departments, corporate management, and outside defense counsel. Knowing immediately who to turn to and how to use available resources is essential to avoid being overwhelmed and over-matched early in the litigation.

This article briefly outlines a proven framework that can be used to manage mass tort litigation. The goal of this framework is to establish a system that promotes a consistent, coordinated, centralized and cost-effective defense for a mass tort com-



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pany defendant. The basic elements of this framework, which are described in greater detail below, are:

- Establish an effective litigation management structure;
- Determine the important facts on which the litigation will turn;
- Prepare a litigation risk assessment;
- Develop a corporate-litigation strategy;
- Create centralized information management and communication systems;
- Develop a litigation budget that reflects the strategic plan.

The establishment and implementation of this framework for each mass tort litigation will facilitate the control and reduction of risk contingencies in the most cost-effective manner possible.

### The Problem Defined

Mass tort litigation tends to be repetitive in nature—it is characterized by similar or identical legal claims, based on the same core facts, launched in pattern complaints, often spread across many states and jurisdictions, and filed on behalf of hundreds or even thousands of plaintiffs. Mass tort litigations differ one from the other depending on a number of factors, including (i) whether the alleged exposure is related to a single event, site or product, or whether the alleged exposures are numerous events dispersed widely, both temporally and geographically; (ii) the diseases, injuries or physical conditions alleged; (iii) the maturity of the litigation; (iv) the level of sophistication, coordination and financing of the plaintiffs' bar; and (v) the emphasis placed on the litigation by the national organization of plaintiffs' lawyers.

As noted, mass tort litigation poses special challenges to in-house counsel assigned to manage the defense of these claims. Mass tort plaintiffs may allege an array of different types of injuries, some clearly associated etiologically with the alleged exposure and others based on rapidly emerging epidemiologic, scientific and biomedical evidence. In addition to traditional product-liability theories, plaintiffs may assert novel liability theories, such as civil RICO and state consumer-fraud-act violations. Plaintiffs' counsel will also use nationally coordinated strategies to overwhelm the defense, including forum shopping, filing a multitude of claims in those

jurisdictions most unfavorable to corporate defendants, targeting weak defendants for early settlements, and sponsoring campaigns through a compliant press and sympathetic legislators or agencies to vilify the defendants and/or the product publicly.

For in-house counsel, management of the multitude of cases in a mass tort litigation, just in terms of ensuring the con-

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sistency and coordination of the defense, will be a significant challenge. Inconsistencies in company testimony, discovery responses or strategy, or trial losses, can increase the magnitude of, or make more certain, the potential costs for the company. These in-house counsel challenges are often magnified if the litigation defense involves multiple law firms. Mass tort litigation therefore requires different management tools and techniques when compared to cases involving claims based on a single transaction or event.

### The Solution Described: Establish an Effective Litigation Management Structure National Counsel

The first and most important step in establishing an effective framework for mass tort litigation management is to engage national counsel. Many mass tort litigations cannot be managed effectively without national counsel. The overarching role of national counsel is to develop, in partnership with assigned in-house counsel, the company's national litigation strategy and ensure its consistent, coordinated, centralized and cost-effective implementation in all cases.

In addition, national counsel must preserve and develop the company's factual defenses, identify and prepare company witnesses for defensive and offensive purposes, and identify and prepare necessary

expert witnesses to consult with and to testify on the company's behalf. By collecting and reviewing relevant corporate records, interviewing key company employees (both current and former), and investigating key third parties, such as trade organizations, national counsel must also quickly master the critical facts that will affect the litigation.

It is essential to interview and hire the right national counsel for the litigation. National counsel must have expertise in defending mass tort, personal-injury class actions or complex product-liability litigation—litigation that poses significant risk to the companies or industries involved. In mass tort litigation, there is no substitute for experience. There also is no substitute for the organization and strength of the national counsel firm; it must be nationally deployable with extensive auxiliary resources, such as stable associations with top-notch counsel in numerous jurisdictions.

National counsel must be knowledgeable about and sensitive to the company's business needs. After selecting experienced and skilled national counsel, in-house counsel must also educate national counsel about the company. National counsel must understand how the litigation fits into the bigger bucket of the company's overall litigation-defense costs and risk management structure and how the litigation affects the company's business. A solid understanding of the company's business expectations is essential for national counsel to develop and direct the corporate litigation strategy in a manner consistent with overall company goals and operating environment. The management of the litigation by in-house and national counsel should also be consistent with larger company concerns about business relations and public relations. In other words, company management should never be embarrassed by its counsel's conduct in any litigation.

Further, national counsel must understand and respond to the company's internal and external reporting requirements by providing in-house counsel with the information needed for its management responsibilities. National counsel must understand what information the company needs, when it will need the information, and in what format the information should be provided.

National counsel must closely coordinate litigation management with in-house counsel. This coordination includes (i) interviewing and hiring local counsel, (ii) developing reporting and other guidelines for local counsel, (iii) coordinating and overseeing all pleadings and discovery filed on the company's behalf, (iv) maintaining a depository of briefs, research and discovery responses, and (v) preparing and managing litigation budgets.

Importantly, national counsel's centralized and coordinated responses to discovery will avoid the significant problems that too many mass tort defendants have faced when they found that their representations in discovery were inconsistent with prior testimony, records or discovery responses. It was this sort of inconsistency that led to the second wave of asbestos litigation. The first wave was marked by defense successes. The second wave, where the bankrupting successes of plaintiffs began, featured the defense testimony and sworn pleadings from the first wave that were inconsistent with newly discovered corporate records. Equally as important is national counsel's coordination with in-house counsel to ensure adequate measures are taken to identify and preserve corporate records, including electronically stored records that are potentially relevant to the litigation. National counsel's technical and litigation experience with Electronically Stored Information (ESI) is of particular importance in the era of the amended Federal Rules of Civil Procedure and emerging local default rules for e-discovery.

National counsel should also centralize critical information regarding pending cases and existing work product on Web-based applications so that this information is easily manipulated for management purposes and readily accessible to the company and its local counsel. National counsel must exercise active and effective management of local counsel to ensure consistency in company positions and strategies further. Such coordination and oversight will ensure the efficient use of company defense resources consistent with a single national litigation strategy.

While a national counsel firm is principally selected and engaged for the foregoing reasons, it should also be expected that national counsel will actively direct and

conduct the litigation. Although assignments of responsibilities among counsel will be made as is appropriate for the circumstances of the litigation and individual cases, it is expected that national counsel will assume the lead in preparing pleadings, motions and discovery responses; conducting and defending fact and expert depositions; arguing key motions; and

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National counsel must be knowledgeable about and sensitive to the company's business needs.

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trying cases. National counsel should not just serve in a litigation management role. National counsel are also strategists, litigators and lead trial counsel.

#### Local Counsel

National counsel, with the input and approval of in-house counsel, must hire local counsel in every jurisdiction with pending cases where national counsel does not have offices. Regional counsel, an intermediate management layer between national counsel and local counsel, may be appropriate or even necessary for some litigation, but should not be the default choice; regional counsel should be a part of the organizational structure only if dictated by the circumstances of the litigation. Essential selection requirements for local counsel ordinarily include: visibility and reputation for integrity in the legal community and the community at large; substantial, intimate knowledge of the local practice, local bar, courts and judges; substantial courtroom skills and trial experience in the locality; and substantial credibility with the judge, plaintiffs' counsel and/or co-defendants' counsel in the jurisdiction. Perhaps of equal importance, local counsel must be willing to work cooperatively with national counsel. Local counsel should also have the judgment and confidence to know when to suggest strategies or approaches that are outside the company's established global litigation strategy.

When selecting local counsel, all organizational assumptions concerning the relative roles of national and local counsel must be reconsidered in the context of the jurisdiction in question. Should local counsel take the lead or a prominent role in any trial? Are there reasons for national counsel to stay in the background in the initial litigation stages? How many cases are on file? Who is the primary plaintiffs' attorney? Who is the judge (and what are his/her political affiliations)? And so on.

#### Coordination with Co-Defendants

An effective global litigation strategy can be undermined by inconsistent positions among co-defendants. For that reason, communication and coordination with the national counsel of the other principal defendants is essential to defend mass tort cases effectively. This task is more easily accomplished when the major co-defendants have also adopted a national counsel structure and recognize that what may be an expedient strategy in one jurisdiction, may be counterproductive in others. It is also helpful if co-defendants have engaged, as national counsel, law firms that are prominent and experienced in other mass tort litigations.

#### Financial Management and Client Reporting

National counsel will prepare an annual litigation budget for in-house counsel's approval. The budget should include all projected national and local counsel fees/expenses in a line-item format specific to each jurisdiction or major defense activity. Budget documents should be sufficiently detailed for in-house counsel to use them as yardsticks against which to measure progress toward the company's strategic goals. Budgeting is as much an element of strategic planning as it is a financial management tool. It should project a considered and cost-effective approach to the achievement of the company's litigation defense and risk management objectives.

National counsel should provide periodic reports on the litigation's status and on the progress of critical national counsel projects timed to coincide with internal company reporting deadlines. Instructions for the frequency, format and content of reports is provided by in-house counsel. In-

house counsel should meet periodically with national counsel to be briefed on the litigation's status and to compare progress on the national counsel projects against an approved timetable. In addition, national counsel should periodically prepare an actual-to-budget analysis so in-house counsel can monitor defense costs against the approved budget.

### **Determine the Important Facts on which the Litigation Will Turn**

Knowledge of the key facts early in a mass tort litigation is absolutely essential. This, of course, is a fundamental principle of litigation and risk management. It is a principle, however, that cannot be emphasized enough in high-stakes, mass tort litigation. Unfortunately, it is one that is often given little more than lip service. A good litigation risk assessment or corporate-litigation strategy cannot be based on inaccurate or incomplete information—being wrong costs money. It also produces mistakes in testimony, discovery responses and strategy. Such mistakes may be lasting and may significantly prejudice the company's ability to defend its cases successfully in the long term. Facts do count, and they count a lot. Cases are often shaped in ways that can never be changed by the early development of important historical facts. Fact development, then, should be one of the first priorities of national counsel, along with ensuring the corporation is taking adequate steps to preserve potentially relevant records.

Plaintiffs' counsel in mass tort litigation work particularly hard to know and manage carefully the information that may influence the ultimate litigation outcome. They try to know the information better and sooner than the defendants and are typically quite aggressive in discovery. They hope for and count on the defendants making mistakes about document preservation or historical facts early in the life of the litigation. A key component of their litigation strategy is to reveal these mistakes in ways that will embarrass the company and its counsel and irreparably damage the company's credibility with judges, jurors, legislators and the general public. Thus, plaintiffs' counsel attempt to transform claims based on long-past events into cases directed at the current management of the corporation. Plaintiffs' counsel recognize

that many of their cases are not interesting and are not likely to produce large awards unless they can point to some current corporate misconduct.

To learn the key facts affecting the litigation, national counsel will need to identify the company records (paper and electronic) that pertain to the litigation. These records will likely need to be retained for the life of

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It must be accepted that the company's litigation strategy will need to be adjusted periodically.

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the litigation. Some will need to be copied for immediate use by national counsel for litigation strategy development, discovery response preparation or witness preparation. National counsel will also need to identify and interview key company employees and former employees. Many of these individuals will be identified during the collection and review of relevant documents.

The company records that national counsel collect must be adequately managed and secured, whether to understand the facts; prepare pleadings and discovery responses; produce to the plaintiffs; use in preparation of company, third-party or expert witnesses; or prepare as exhibits for depositions or trials. At a minimum, some basic handling procedures must be instituted, such as a unique and fixed identification number for each document. And national counsel must implement a system for recording information about the litigation significance and use of the documents that can be preserved, managed effectively and rapidly communicated to the company's trial counsel.

It will also be necessary for national counsel to analyze some of the collected documents. Locating, collecting and identifying important documents should proceed quickly at the beginning of the litigation; so, too, should the initial analysis of the collected documents. Plaintiffs will serve written discovery requests and request the depositions of present or for-

mer company employees or corporate representatives. A complete understanding of the critical documents will be necessary to respond to discovery requests and prepare witnesses for testimony. This document analysis will also help identify the key affirmative documents, fact witnesses, defense themes and affirmative defenses.

National counsel will also need to review the company's current records management policy and, in some instances, historical records management documents that pertain to company records relevant to the litigation. Both national counsel and in-house counsel must ensure that the company is presently taking reasonable measures to meet its legal obligations to preserve records related to the litigation. It is also important that national counsel confirm that these documents are being retained in accordance with the company's current records management policy. These records retention and management requirements demand special focus and care in connection with ESI in the current litigation environment given the *Zubulake* line of cases, the recent Federal Rules changes, and the dramatic litigation and negative reputation effects that can result from failure to preserve such information properly.

Copies of some of the corporate records management documents should also be collected by national counsel for all of the reasons previously outlined. Plaintiffs are certain to seek broad discovery of the company's records management policy and all related documents concerning the preservation of records potentially relevant to the litigation. Records management and document retention will be targeted in plaintiffs' requests for production of documents and other written discovery. In addition, this information will be the subject of corporate representative deposition notices and included in the deposition examination of present and former company employees. Further and independent of the discovery that the plaintiffs initiate, an understanding of the company's records management practices is necessary to meet the affirmative disclosure requirements of Federal Rule of Civil Procedure 26.

To determine the key litigation facts, counsel may have to obtain information from other defendants and third parties. National counsel may need to obtain infor-

mation about the testimony or likely testimony of other defendants' potential fact witnesses and trade association employees, and about important documents produced by these entities. Also, national counsel will need to know what documents plaintiffs' counsel represent to be the critical documents in the litigation.

Finally, national counsel needs to determine where, within the company, there is or will be ongoing management activity regarding the litigation and establish effective coordination with those areas of the company. Again, this is necessary because plaintiffs' counsel often try to make current corporate conduct an issue in the litigation. They will seek discovery without date limitations, often of the highest corporate officers, to find out what decisions are being made today about the litigation.

### **Develop a Corporate Litigation Strategy**

#### **Develop an Initial National Litigation Strategy**

Development of the company's initial litigation strategy should proceed in parallel with the development of the key historical facts, but it cannot be finalized until national counsel have a better understanding of the plaintiffs' claims, the evidence that is critical to disposition of the claims, the plaintiffs' strategies and, if possible, the plaintiffs' "end game" for the litigation. Development of the initial national litigation strategy will be informed by the litigation risk assessment and national counsel's initial determination of the facts on which the individual claims in the litigation will turn. As part of the strategy, national counsel should develop a matrix or system by which meritorious claims, if any, can be distinguished from fabricated claims (e.g., claims generated through mass screening for asbestosis or silicosis) or claims that are otherwise specious as to the company.

For meritorious claims, the litigation strategy should include a plan to confirm, through discovery or otherwise, the merits of individual claims and an assessment of whether such claims can be fairly and economically resolved. For the unmeritorious claims, the litigation strategy should identify the affirmative measures that can be taken not only to defend the company against the litigation itself, but also

to shape, narrow and defeat proactively the environment in which the multitude of baseless claims exist.

### **Two Key Issues Will Likely Influence National Litigation Strategy**

#### **Consolidation of Claims**

The first hope of many plaintiffs' counsel, of course, is to succeed in bringing

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The budget should be constructed and presented to in-house counsel with separate line items for all discrete litigation components.

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mass-plaintiff cases, whether class actions, consolidated proceedings with multiple plaintiffs, or state consumer-protection-act claims in which a single consumer can bring an action on behalf of all affected consumers in the state. Claim consolidation is a tool plaintiffs' counsel can use to impair or defeat the defendants' ability to distinguish between meritorious and unmeritorious claims and to overwhelm a company's ability to defend a multitude of claims. A key component of the company's litigation strategy will be whether to oppose mass adjudications, which may be biased, both procedurally and substantively, in the plaintiffs' favor. Rarely will a company's substantive rights not be adversely affected in a mass adjudication, although, in some litigations, a consolidation of claims in some form might best support the company's national litigation strategy.

#### **Fraud and Conspiracy Claims**

In individual cases, key issues with the potential to generate significant verdicts will be fraud, conspiracy and current corporate misconduct. Compensatory damages will often be insufficient in individual cases to warrant significant attention by most plaintiffs' counsel. Exemplary damages will be the plaintiffs' goal, and it is the intentional torts that justify exemplary

damages in most jurisdictions. The company's historical conduct, the "what did you know, when did you know it, and what did you do about it" issues will hopefully be fully defensible or at least not outside the bounds of responsible corporate conduct. Greater threats, perhaps, may be the prospect that the company is linked to and alleged to be responsible for the conduct of trade associations and their member companies, or that the company is found to have not met its records retention or discovery obligations. Also, as outlined above, current management conduct in response to the emerging litigation may become a primary issue in the litigation and a target for plaintiffs' counsel.

#### **Re-evaluate and Modify Litigation Strategy as Necessary**

Mass tort litigation, like any other, will proceed as predicted in some ways and completely contrary to expectations in others. In military circles, the adage is that no operations plan survives first contact with the enemy. Although that is not a truism for mass tort litigation, it must be accepted that the company's litigation strategy will need to be adjusted periodically to address changed circumstances, to take advantage of new opportunities and to react to new challenges.

### **Create Centralized Electronic Information Management and Communication System**

The development of a well-conceived, integrated and remotely accessible electronic litigation-support system is a priority strategic objective for national counsel. Many of the company's national coordination and cost-containment goals for mass tort litigation depend on an early and effective implementation of the system and its component parts. In-house counsel should be involved in the development of the litigation support systems, including the establishment of the system's design objectives and cost parameters, the selection of the system's software and hardware, and the selection of the outside vendors who will design such systems. The involvement and support of the company's Information Services Department is essential to ensure the compatibility, integration and remote access availability relative to the company's existing automated systems.

The electronic information management system should provide in-house, national and local counsel with “one-stop shopping” for the information they need to manage the litigation internally, locally and nationally. The information available on the system should include searchable repositories of pleadings, discovery responses, valuable research, briefs, company and expert witness files, transcripts, and key company and other documents. Consideration should be given to whether the system should include features such as a central calendar for national counsel projects, calendars for each jurisdiction, and an electronic meeting room for online collaboration on legal research memoranda and briefs. The system should be capable of providing various levels of access so that certain areas or files can be restricted as appropriate. Insurance companies, for example, might thereby be provided limited access to parts of the system, thereby relieving the company of some reporting requirements. All system features should be designed for the purpose of providing access to the information necessary for in-house and national counsel to provide a cost-effective and consistent defense for the company.

### **Develop a Litigation Budget that Reflects the Strategic Plan**

While the primary objective for the development of any litigation budget is the accurate forecasting of fees and expenses necessary to defend the company properly in a particular litigation, the preparation of an annual litigation budget cannot simply be an accounting exercise. Its preparation should entail careful strategic consideration about the proper objectives for the coming year’s risk management and litigation defense efforts, and the most cost-effective way to achieve those objectives. This process requires extensive communication and agreement between national counsel and the company about the strategic objectives and management of the litigation. It is also a process that requires national counsel to consider the company’s national objectives and, with the assistance of local counsel, the jurisdiction-by-jurisdiction planning (taking into account the relative importance of various jurisdictions, tasks and threats) necessary to support those national objectives.

Budgeting is as much an element of strategic planning as it is one of financial management. Budgeting should be done initially in a litigation in conjunction with the preparation of a risk assessment of the litigation as a whole, as well as the development of the company’s risk management and litigation strategy. Budgeting allows the company to predict its litigation-related expenses during the fiscal year better and opens a dialogue between counsel and the company regarding the projected developments and strategies for the litigation in future years. In short, the budgeting process should be a strategic planning exercise focusing on a careful delineation of the company’s risk management and litigation objectives, and the costs thereof, which should allow for the company to consider fully the various elements of the annual budget in the context of the overall strategic plan.

The budget should be constructed and presented to in-house counsel with separate line items for all discrete litigation components. That is, each national coun-

sel project and each jurisdiction should be broken down into their separate components and presented in “blocks” for individual consideration and adjustment by in-house counsel. Thus, for example, a particular jurisdiction’s budget might have distinct descriptions and proposals by county or a discrete group of cases, for trials, for jurisdiction-specific projects, and each subsection should be further broken down by national counsel, local counsel and third party (*e.g.*, vendors and expert witnesses) fees and expenses. For each line item, the “budgeting assumptions” should be included in the description of the event or activity. With this format, in-house counsel can consider each component on its individual merits and make adjustments on a line item basis in the initial approval process. Further, each component of the budget may then be monitored during the course of the year for actual-to-budget analysis and for adjustment as litigation circumstances and strategies evolve.

**Mass Tort**, continued on page 72

### **Prepare a Litigation Risk Assessment**

National counsel should prepare a litigation risk assessment soon after engagement. Although initial development of the key facts must proceed first, national counsel should have early discussions with in-house counsel about the risk assessment’s preparation. While the scope, format and detail of the risk assessment may vary, it should be neither lengthy nor elaborate. Rather, it must succinctly provide national counsel’s best advice and judgment about the likely course and outcome of the litigation, and its recommendations as to strategy and litigation management. A litigation risk assessment will commonly include consideration of the following factors:

- History of company’s involvement in the business or product at issue;
- Background of the litigation, including:
  - Current case load (company and litigation-wide);
  - Historical and projected future rates of disease/injury alleged in litigation and severity thereof;
  - Plaintiffs’ counsel’s attempts to generate claims;
  - The climate for the litigation in courts/among public at large;
  - Trials and settlements of similar claims; and
  - Company’s litigation experience with similar claims;
- Predictors for present and future liability, including:
  - Legislation/rule changes;
  - Sophistication of plaintiffs’ counsel;
  - Significant decisions (substantive and procedural);
  - Evolution of plaintiffs’ claims/theories of recovery;
  - Creation of consolidated proceedings (class actions/MDLs);
  - “Smoking gun” events; and
  - Evolving scientific evidence regarding the diseases or injuries alleged;
- Evaluation of risk contingencies;
- Availability of insurance coverage, and notice to insurers; and
- SEC reporting implications.

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**Warning**, from page 67

- The warning information will be included in a standard.

Empirical testing provides no guarantee that all users will notice, read and comply with the warning information. Also, it does not eliminate the possibility of litigation. The decision to test must arise from the knowledge and experience of the design team, working in coordination with legal counsel. At times like this, enlisting the assistance of an expert experienced in the design and development of warning information might be prudent. Warning information experts can help determine if empirical testing is necessary, and if so, design and conduct the necessary tests.

If the design team has made the decision that empirical testing is necessary, there are several factors they should consider:

- What type of test(s) will be used?
- What research methods will be employed?
- Will intended product users be tested?
- How will the company recruit participants?
- Will the warning information as a whole be tested or certain components (e.g.,

text, symbols, signal words, color, etc.) of it?

- What criteria will be used to determine if the warning information is appropriate?


**Phase 5: Final Approval and Documentation**

The design team is not finished until the completed process has final approval and has been documented. The design team should receive final approval from appropriate company personnel. If necessary, the design team can present the warning information to appropriate regulatory agencies for approval. It is important that the design team document the process used to develop the warning information. A documented process is easier to replicate in the future. Additionally, the documents can demonstrate that reasonable care was taken to identify and understand product hazards and develop warning information that adequately communicated the hazards to potential product users.

Finally, the company might want to consider implementing a monitoring program. This could include keeping track of changes

in regulations and standards, changes in competitor's warning information, new scientific findings regarding warning information, warranty returns, customer service complaints and litigation claims to identify when a periodic review of the product's warning information might be necessary. Such actions would demonstrate a good faith effort on part of the company regarding their duty to provide post-sale warning information.

**Final Thoughts**

The use of a warning information development process can aid a company in the design and development of new warning information or when auditing previously developed warning information. Unfortunately, many companies are unaware that a process exists for developing warning information and that there are warning information experts who can assist them in dealing with the challenges they may face. Companies that successfully implement the process can maximize their time and money, create consistency across product lines, and potentially create a more defensible position when litigation occurs. 

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**Difficult Forum**, from page 44

retain appellate counsel at the outset of the litigation to ensure that the case is properly presented for the appeal. In addition, corporate defendants should be prepared to use interlocutory appeals if necessary or to seek mandamus to require a local court to follow nondiscretionary requirements.

Finally, the corporate defendant should consider whether deviations from the rule of law are so serious as to constitute a violation of due process. A due process claim on the basis of egregious discovery, evidentiary, or other trial rulings is difficult to bring. But just as in the punitive damages arena, the court has recognized limits to what states can do, so too might it find a violation on the basis of other violations of due process. For example, the exclusion of critical evidence may be so arbitrary and prejudicial that it deprives a party of the due process right to be heard—particularly if punitive damages are being sought. Although this type of due process violation, so far, appears to have been recognized

only in criminal cases, *see, e.g., Chambers v. Mississippi*, 410 U.S. 284 (1973), the due process clause also applies in civil cases. These issues should be preserved so that, if necessary, the corporate defendant is well-positioned to petition the United States Supreme Court for a writ of certiorari on due process grounds.

**Since One Good Turn Deserves Another: Finding Your Way Safely Home**

Alice's story resonates with lawyers because it mirrors the difficulties we face when dealing with an imperfect judicial system. The ideal is rarely to be found, even in a judicial system correctly lauded for being the envy of the world. Jurisdictions like those in Wonderland are also rarely found. But when a corporate defendant is sued in a difficult jurisdiction, normal strategies will not work. Still, there are steps that can help to manage and reduce the risk of a bad outcome. 

**Mass Tort**, from page 39

In short, in-house counsel should be able to look at the proposed budget and tell at a glance whether a certain event is likely to occur in that budget cycle and to assess other factors that bear on whether the individual components of the budget ought to be funded. The budget should be structured to allow in-house counsel the greatest flexibility possible to prioritize the component parts of the proposed litigation budget and to determine the proper allocation of available resources and money.

**Conclusion**

In mass tort litigation, a national counsel structure and national litigation strategy is more a necessity than a luxury. Implementing the framework outlined above will ensure the development of a comprehensive and cohesive strategy for addressing the company's litigation risks, offer the necessary resources to implement the strategy successfully and provide the tools in-house counsel require to manage complex and massive litigation effectively. 