

INTERNATIONAL COORDINATING COUNSEL: THE NEXT EVOLUTION OF LITIGATION MANAGEMENT

By Gregory L. Fowler* and Marc E. Shelley**

The year 2008 will likely be remembered as a watershed moment in the advent of globalization. We live in an interconnected global marketplace where financial risk and product risk can quickly affect shareholders and consumers across multiple countries. The clearest evidence, of course, is the recent financial crisis that brought the collapse of several U.S. investment banks, and the nationalization of insurance and mortgage companies following a massive bailout. The effect continues to ripple across markets in Europe and Asia.

The fall 2008 report by Lloyd's of London, *Litigation and Business: Trans-Atlantic Trends*, paints a startling picture of a risk-laden globalized market. "In principle, any company with an international dimension to its business could find itself being sued at any of its global locations."¹ — and, one might argue, wherever a company's products are sold. The report urges businesses to take note of the accelerated pace of the legal changes, particularly in the developing arena of class actions fueled by litigation funding and intercontinental forum shopping.² Such stark words of warning come at a time when multinational companies have already heard enough bad news and the idea of managing these global litigation risks can be yet another discouraging thought for their bottom line this year.

This year's financial crisis, as Thomas Friedman has suggested, demonstrates the extent to which globalization can both give and take.³ While many companies have certainly felt the "take" in recent months, the

* Gregory Fowler is a partner in Shook, Hardy & Bacon L.L.P.'s National Products Liability Division and co-chairs the SHB International Litigation & Dispute Resolution Practice. He has extensive experience in the management and litigation of individual product liability claims and mass tort litigation in state and federal courts throughout the United States and internationally in Asia, Australia, Latin America, North America and Western Europe. He has counseled U.S., Asian and European manufacturers on developments in products liability law and regulatory issues arising in those regions as well.

** Marc Shelley is an associate in Shook, Hardy & Bacon L.L.P.'s Geneva office where he is a member of the firm's Products Liability Division and International Litigation Practice Group. Marc's practice focuses primarily on product liability and consumer claims in Western Europe, Western Africa, the Middle East, and Eastern Asia. He has also been involved in legislative projects, such as class actions, in North and South America and Europe. He recently co-authored a chapter on developments in class actions overseas for the forthcoming *Current Law, Strategies and Best Practices in Product Litigation*, published by the Practising Law Institute.

1. Lloyd's of London, *Litigation and Business: Trans-Atlantic Trends*, Nov. 2008, at 24, available at http://www.lloyds.com/News_Centre/360_risk_project/Research_and_reports.htm.

2. *Id.* at 27; see also Evan Weinberger, *3rd-Party Funding Fuels European Litigation Growth*, LAW360, Nov. 18, 2008.

3. Thomas L. Friedman, *The Great Iceland Meltdown*, N.Y. TIMES, Oct. 19, 2008.

“give” has already reappeared as banks on the verge of bankruptcy have been able to raise capital through foreign acquisitions. Friedman predicts similar reports of larger companies buying weaker ones to spread to industries and soon “we will find ourselves living in a world of globalization on steroids — a world in which key global economies are more intimately tied together than ever before.”⁴

Product manufacturers are beginning to better understand this double-edged sword of globalization. On the one hand, it provides the ability to distribute goods to markets all over the world. It extends the reach and profit of hundreds of multinational companies, both big and small. It opens new markets, presents consumers with greater choice in goods at lower cost, and brings cultures closer together. But on the other hand, companies are more vulnerable than ever to liability exposure caused by different and lax regulations, and supply-chain problems. And it also increasingly provides entrepreneurial plaintiffs’ counsel the ability to pursue claims against these goods and to share news, knowledge, documents (including any alleged “smoking gun” documents), legal theories, and strategies around the world at broadband speeds.⁵ In short, the market for U.S.-style products litigation is becoming global as well.

In this article, we demonstrate how transnational manufacturers can respond to this global litigation marketplace by adopting an international coordinating counsel model to achieve the flexibility needed to respond quickly and cost-effectively to the emerging global product liability risks.

THE EMERGING PRODUCT LIABILITY RISKS IN A GLOBAL MARKETPLACE

Consumers all over the world are increasingly gaining and asserting new rights in ways long familiar to U.S. corporate defendants. While this trend has been afoot for some time, recently it has raised the risks of legal action worldwide with the spread of specific American litigation hallmarks abroad including contingency fees, punitive damages, and collective redress or class actions.⁶

In recent years, a great deal of buzz has been generated about the entrance into Europe of prominent plaintiffs’ firms such as Milberg Weiss and Cohen, Milstein, Sellers & Toll⁷ (and with the recent departure of

4. *Id.*

5. See Sarah L. Olson, *The Impact of the Internet on Strict Product Liability Law*, IJN’s PRODUCT LIABILITY LAW & STRATEGY (Oct. 2008) (describing new ways the Internet has made consumer complaints more accessible and easier to compile).

6. Gregory L. Fowler, et al., *Emerging Trends in International Litigation: Class Actions, Litigation Funding, and Punitive Damages*, (forthcoming 2009); Mark A. Behrens, Gregory L. Fowler, & Silvia Kim, *Global Litigation Trends: Trying to Take the “Good” and Not the “Bad” from the American Civil Law System*, 17 MICH. ST. J. INT’L L. — (forthcoming 2008).

7. Alexia Garamfalvi, *U.S. Firms Prepare for European Class Actions*, LEGAL TIMES, June 25, 2007; see also Peter Geier, *A Wary Europe Moves a Step Closer to Class Actions*, THE NAT’L L. J., Dec. 5, 2006; *If you can’t beat them, join them; class actions*, THE ECONOMIST, Feb. 17, 2007; Lisa Rickard, *A Gift from America to Europe: Class Action Lawyers and their Costly Lawsuits*, Feb. 29, 2008.

Michael Hausfeld from Cohen, Milstein, now Hausfeld LLP too).⁸ But beyond the hype is the larger reality of consumer movements pushing for standardization of product safety⁹ and greater “access to justice,”¹⁰ which is arguably what plaintiff firms may be responding to as they develop international capabilities to take advantage of expanding litigation opportunities. The question, then, is whether companies and defense firms are reacting to these expanding opportunities.

According to a spring 2008 survey by Lloyd’s of London, most firms have experienced a lawsuit within the past three years, with actions brought by employees and customers being the most frequent.¹¹ Large companies are most likely to be targets for lawsuits, but smaller and fast-growing companies may be more exposed if they lack the infrastructure and experience to respond effectively. As a result, boards are reportedly allocating more resources to litigation issues, which is pushing up the price of products and services, and leading many companies to adopt more conservative business strategies.¹² Boards already spend thirteen percent of their time discussing litigation and expect this attention to increase further over the next three years.¹³ Valuable resources are clearly being spent on liability issues that could be better deployed elsewhere.

One solution that the Lloyd’s analysis offered for avoiding litigation is for companies to adopt “formal, proactive strategies” to monitor and manage these emerging risks.¹⁴ Currently, forty-three percent of companies do not have in place a formal risk-management policy. Richard Ward, Lloyd’s CEO, recommends that companies “monitor the risk environment in a structured way.”¹⁵ One way is to analyze the impact of legal activity in other countries with the help of government authorities, specialists, and risk-management consultants. These proactive measures may help prevent the escalation of litigation risks and not only help the company be better prepared to react to them, but will also give companies a

8. Dimitra Kessenides, *Litigator of the Week, Michael Hausfeld of Hausfeld*, AMLAW DAILY, Nov. 14, 2008 (noting in addition to London, the new firm’s intentions to have a “presence in India, Korea, and Japan; and a joint venture partner in China.”).

9. Gregory L. Fowler & Simon J. Castley, *Global Trade and Regulatory Oversight: Are Uniform Product Safety Standards on the Horizon?*, International Bar Association’s Product Law and Advertising Newsletter (May 2008).

10. Meglena Kuneva, European Commissioner for Consumer Protection, *Launch of new EU consumer investigations*, Jan. 31, 2008, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/53&format=HTML&aged=0&language=EN>.

11. Lloyd’s, *Directors in the Dock: Is Business Facing a Liability Crisis?* (May 2008), available at http://www.lloyds.com/News_Centre/Features_from_Lloyds/Liability_the_2008_buzz_word_for_Lloyds130508.htm.

12. *Id.*

13. *Id.*

14. *Litigious U.S. Ways Strangling Global Growth*, NEWSMAX.COM, May 29, 2008.

15. Del Jones, *Advice from the Top: Training of staff key to avoiding lawsuits*, USA TODAY, Sept. 14, 2008.

competitive advantage over companies that fail to be prepared for the variety of risks in a global market.

As globalization shrinks the world, it also expands and multiplies risks associated with the manufacture and sale of products. We say “associated with” because classic product liability litigation is only one risk that awaits multinational product manufacturers. Product recalls, for example, are increasing around the world. In the United States, five times as many recalls occurred in 2007 than in the previous year.¹⁶ In Europe, product recalls rose by fifty percent in 2007.¹⁷ While perhaps too soon to assess the final tally for 2008, it has also seen its share of recall news, particularly the spread of melamine-contaminated milk in China that rattled the boardrooms of several food companies in the United States and Europe.¹⁸

In short, risk management must include a careful consideration of different and sometimes conflicting regulatory schemes, product safety standards, and even the specter of criminal liability (including corporate officer manslaughter charges arising from defective products),¹⁹ all of which arise within legal systems and regulatory regimes that are distinctly different from the domestic milieu.

The type of specialist or risk-management consultant needed to assist companies with such varied risks as recommended by Lloyd’s is coordinating legal counsel. With these concerns and the possibility that hallmarks of U.S. litigation will be adopted elsewhere, a heightened need to coordinate litigation defense on a transnational stage is evolving. Unless a company has a large in-house counsel staff devoted to these types of claims, however, coordinating consumer cases on a global scale may quickly overwhelm available resources — if the need for such coordination arises at all. Should the calamity of large-scale international litigation not appear tomorrow or the next day, then in-house counsel must justify to the board of directors each year why a large staff is necessary. On the other hand, if transnational litigation overwhelms existing staff, then an

16. Michelle Fujimoto, Laurel Harbour, Greta McMorris & Erin Sparkuhl, *Importing Products: Legal Risks and Defense Strategies*, IADC DEFENSE COUNSEL JOURNAL, at 238 (July 2008); see also Lucy P. Allen, Renzo Comolli, & Simona Heumann, *China Product Recalls: What’s at Stake and What’s Next*, NERA Economic Consulting, Feb. 22, 2008 (noting that while there were more consumer product recalls in 2007, the number of recalls has been on the rise for the past several years).

17. *Litigious U.S. Ways Strangling Global Growth*, NEWSMAX.COM, May 29, 2008.

18. Edward Wong, *Courts Compound Pain of China’s Tainted Milk*, N.Y. TIMES, Oct. 17, 2008; Leslie Schulman, *China lawyers allege political pressure after aiding parents of sick infants in milk scandal*, JURIST LEGAL NEWS & RESEARCH, Oct. 8, 2008; Peter Ford, *What China’s tainted milk may not bring: lawsuits*, THE CHRISTIAN SCIENCE MONITOR, Sept. 22, 2008; see also *Italy’s first case of melamine tainted milk*, THE ASSOCIATED PRESS, Oct. 16, 2008.

19. Laurel J. Harbour & Natalya Y. Johnson, *Can A Corporation Commit Manslaughter? Recent Developments in the United Kingdom and the United States*, DEFENSE COUNSEL JOURNAL (July 2006).

urgent ramping up internally and externally would be required, which would come at the cost of precious time and money.

GLOBAL LITIGATION RISKS REQUIRE GLOBAL LITIGATORS

Companies expanding globally are often seeking to sell the same product in new ways to new markets. Even though the product often has the same design and a unified branding strategy, there are obvious inefficiencies and strategic risks if the product's liability defense is not as coordinated. While such coordination may seem to be a luxury for big companies, it can be more cost-effective than the *ad hoc* alternative. This innovation first appeared in the United States with the advent of the national mass tort litigation boom in the 1970s when many companies adopted the national coordinating counsel defense model. This model effectively combines economies of scale and consistency of strategy with local counsel acumen.

When operating in multiple jurisdictions, many companies already use "international" counsel for their global transactional needs. These counsel might, for example, handle mergers and acquisitions. Such lawyers provide a valuable service to their clients by knowing their business and objectives and by delivering consistent results in country after country despite variations in law and differing customs, practices and legal systems (i.e., common law vs. civil law). But for most transnational manufacturers, product liability and other tort litigation has been orchestrated strictly by in-house counsel through a reactive response as each issue arises, often by relying on the same corporate counsel who may negotiate a settlement and make a few limited court appearances. This model may have worked fine if cases were infrequent, smaller in scale and isolated to just a few jurisdictions. This is not the connected global market of risks that the Lloyd's report envisions.

It might sound like common sense to use international *transactional* coordinating counsel specialized in transactions for international transactions, and to use international *litigation* coordinating counsel for international litigation. These litigators can provide a valuable service to clients by knowing the client and knowing the litigation (from plaintiff's theories and key documents to jurisdictional idiosyncrasies and key defenses). Enlisting experienced international coordinating litigation counsel can reduce the drain of repeated start-up costs.

THE USE OF USEFULNESS OF INTERNATIONAL COORDINATING COUNSEL

As with the national coordinating counsel model, the ability to appear in court is only one small part of a company's defense. In fact, companies do not choose their national coordinating counsel based on where their attorneys are admitted to practice. Rather, they will hire the lawyers who are best at defending corporate interests, knowing that national counsel will either be able to secure a *pro hac vice* appearance in most

jurisdictions or associate with the best local counsel to create a team that will get the job done. Part of that job is to facilitate the intersection of in-house counsel's broad perspective and business goal awareness with the national and local counsels' understanding of jurisdictional legal and cultural sensitivities. Both perspectives are essential to a successful defense.

For example, the copycat trend was a major impetus for adopting a national coordinating counsel model in the past. If a medical device or tobacco claim were filed in California, then one could be sure that nearly verbatim pleadings and document exhibits would follow shortly thereafter in Illinois, Mississippi, Florida, and other jurisdictions. Now, globalization suggests that a multinational company could encounter *inter-* as well as *intra-*national copycat lawsuits.²⁰

The international coordinating counsel model adds value by providing consistent counsel and litigation support to ensure a seamless defense, even — or especially — in more limited contexts. For example, as markets become more global, manufacturers' broader, transnational supply chain means broader documentation and more difficult discovery requests. Courts in the United States have recently upheld the enforceability of a foreign party's discovery obligations, even where the discharge of those obligations would violate the laws of the foreign party's home jurisdiction.²¹ And other countries and international bodies may be considering expanding the availability of discovery in dispute resolution.²² Adding international coordinating team members can streamline production and preparation across multiple borders in support of the primary in-house or local case strategy team.

Another targeted use exists where the case is the first of its type for the jurisdiction or for the company — or both. Growing pains will inevitably occur in countries recently introducing or expanding the availability of consumer redress. International coordinating counsel can provide additional consultation on strategies when companies face risks posed by the bench and bar's lack of experience with such liability claims and a dearth of developed jurisprudence to guide the litigants. In short, the

20. For further discussion of cross-border litigation trends, see Laura Fey & Harley Ratliff, *A Brave New World: The Dawn of Hyper-Complex Litigation*, Bloomberg Law Reports: Litigation, Vol. 2, No. 27, July 7, 2008, and Anthony R. McClure, *Section to Develop Protocols for Class Actions Pending Simultaneously in the U.S. and Canada*, ABA Litigation News, Vol. 33, No. 4 (May 2008).

21. See, e.g., *Weiss v. National Westminster Bank*, 242 F.R.D. 33 (E.D.N.Y. 2007) (court ordered discovery despite UK blocking statutes); *Strauss v. Credit Lyonnais*, 242 F.R.D. 199 (E.D.N.Y. 2007) (court ordered discovery despite French blocking statute).

22. See, e.g., Adrienne Margolis, *Global trade litigation explained*, INTERNATIONAL BAR NEWS, Oct. 2008, at 25 (discussing idea of expanding access to evidence and efforts by WTO panels and appellate bodies with respect to the provision and protection of evidence); see also The Sedona Conference, Working Group 6, *Framework for Analysis of Cross-Border Discovery Conflicts: A Practical Guide to Navigating the Competing Currents of International Data Privacy & e-Discovery – Public Comment Version*, available at http://www.thesedonaconference.org/dltForm?did=WG6_Cross_Border.

value of international coordinating counsel does not come from appearing in court, but in knowing the right national counsel to employ, having prior experience to put in play and helping prevent early strategic missteps when defending litigation in a new jurisdiction.

But managing the client's litigation remains the job of in-house counsel. When a company is sued anywhere in the world, in-house counsel must answer familiar and predictable questions by the general counsel or the board of directors: Should we be concerned about this claim? What will it cost to defend it? Should we settle or litigate? In other words, he or she is charged with the ultimate responsibility for the successful defense of the company, measured by both outcome, precedent, and price tag.

By outsourcing the litigation coordination, in-house counsel can save on legal fees otherwise generated by hiring more staff and developing new counsel in each jurisdiction from scratch. Instead, an international firm with an existing network of reliable collaborating firms can quickly assemble the necessary knowledge from previous experience, parlay that to its existing partner counsel in a given country, and have a refined and coordinated response in significantly less time.

THREE WAYS INTERNATIONAL COORDINATING COUNSEL ADD VALUE

1. *Perspective, Prediction, and Preparation*

Part of the value of international coordinating counsel is the ability to reflect on and respond to litigation trends; that is, recognize copycat trends or recurring issues or documents in different countries. Naturally, there is a tremendous strategic value that derives from familiarity with both civil and common law countries. Because many of the civil codes historically relate to one another, having a relationship with counsel on several continents will help know and understand, for example, how and why Brazilian judges are more influenced by Italian decisions, or that Korean and Japanese jurists will be more influenced by German decisions than by those in neighboring countries. Coordination enables international counsel to use this knowledge to develop leading indicators or test markets for successful legal strategies. More fundamentally, being familiar with which jurisdictions require unusually rapid action and knowing which countries' courts require the filing of full answer and defense materials (including expert reports) within twenty days of service — can add value and prevent defaults and forfeitures.

The need for a consistent and uniform defense exists internationally much like within the United States. Because product safety standards worldwide are converging,²³ and the product being attacked is virtually

23. For further discussion, see Gregory L. Fowler & Simon J. Castley, *Global Trade and Regulatory Oversight: Are Uniform Product Safety Standards on the Horizon?*, International Bar Association's Product Law & Advertising Newsletter (May 2008); Gregory L. Fowler & Simon J. Castley, *Product Manufacturers, Take Heed: International Markets Bring International*

the same in every instance, the same documents, and expert and company witness preparation will be necessary to defend litigation around the world. Thus, preparing a transnational defense strategy includes having coordinating counsel familiar with these resources and able to work with national and local counsel, thus obviating the need for the client to re-train outside counsel to address each new claim.

The experience to better predict outcomes also goes a long way toward a successful defense. Companies that may find themselves the potential target of transnational claims should consider enlisting the assistance of an international firm that has an active monitoring system. An international coordinating firm with an established network of vetted national counsel can act as a “canary in the mineshaft” for legislation and other access-to-justice initiatives that can subtly and unexpectedly tip the courtroom balance.

All of these monitoring avenues enable international counsel to assist in-house counsel with risk assessments that identify problematic jurisdictions in advance or evaluate risks in newly filed cases. These assessments take into account the primary landmines in a given jurisdiction — existing procedural and substantive concerns such as class actions, punitive damages, and contingency fees, or proposed access-to-justice issues and more intangible atmospheric accounts — which may be helpful in evaluating whether to enter a market.²⁴

2. *Training, Testing, and Troubleshooting*

An international coordinating firm can assist in briefing the counsel it associates with regarding the expectations of its clients and is able to attest to the quality of representation. The firm can also know and communicate to national counsel the client’s history, its positions and its business goals. Consequently, international coordinating counsel can assure a measure of quality control.

Perhaps most importantly, international coordinating counsel can act as the intermediary between national counsel bent on winning the case with jurisdiction-appropriate tactics and techniques that may not stand the test of international scrutiny and standards. In other words, while prevailing in discrete litigation around the globe is national counsel’s narrow focus, international coordinating counsel must have the broader perspective of defending litigation with consistent positions on key factual and philosophical issues that can be played out in jurisdictions all over the world — not just the one at hand.

Regulatory Oversight, Safety Standards and Liability Concerns, 2 BLOOMBERG CORP. L. J. 83, 92-93 (2007).

24. To see how these assessments can be a helpful guide, consider the general jurisdiction assessments found in Harvey L. Kaplan & Gregory L. Fowler, *Global Overview, in Product Liability in 36 Jurisdictions Worldwide* (2008), and GREGORY L. FOWLER, *INTERNATIONAL PRODUCT LIABILITY LAW – A WORLDWIDE DESK REFERENCE* (Aspatore Books 2004).

3. *Communicating, Cooperating, and Case Managing*

International counsel already familiar with the national counsel and the jurisdiction can more quickly distill relevant information into a format that allows the client to make appropriate business decisions. In-house counsel should be able to make one call to international coordinating counsel to check the status of pending cases. Otherwise, even if only a dozen or so small claims are scattered around the globe, that exercise would require a dozen or so calls by in-house counsel, coordinated to accommodate different time zones. Anyone who has engaged in this exercise knows that a simple information-gathering process can take days (or longer) to complete.

But importantly, international coordinating counsel is essentially one member in a defense team. The value of the international coordinating counsel model is its flexibility to respond to almost any scale of product liability exposure imaginable. It is predicated on creative and cooperative coordination with national counsel. Specifically, the model affords in-house counsel access to international counsel with a short list of quality firms available to address small, one-off filings, as well as an existing defense tree ready for larger, coordinated surprise attacks with the ability to cross-reference cases in neighboring jurisdictions.

CHANGING LANDSCAPES AND THE NEED FOR INTERNATIONAL COORDINATING COUNSEL

Law Reformers Have Begun to Rebalance the Scales in the United States . . .

The decades-long difficulties with product liability and related litigation have resulted in a concerted effort to reform tort litigation in the United States. Some have even gone so far as to suggest that the plaintiff's bar is in retreat.²⁵ In an *American Lawyer* cover article, senior writer Alison Frankel opines that mass torts are waning because tort reformers have been successful at packing courts "with judges amenable to their agenda" and getting state legislatures to adopt tort reform packages which those judges are reluctant to overturn. And given tipping-point decisions that have revealed alleged fraud in silica and asbestos cases, there is an understandable and welcomed chilling effect on such litigation abuse. Of course, many predict that this chill may thaw somewhat under the Obama administration and the possible change of tenor regarding preemption.²⁶

. . . But Are the Scales of Justice Becoming Unbalanced Elsewhere?

Outside of the United States, many legislatures are seeking to give better access to justice to consumers, including proposals introducing class actions, relaxing the traditional "loser pays" rule applicable in most

25. THE AMERICAN LAWYER, December 1, 2006.

26. *Obama, Democratic Congress Could Change FDA Preemption Policy*, FDA WEEK, Nov. 14, 2008.

civil law jurisdictions, and doing away with prohibitions against contingency fee arrangements and third-party litigation funding.²⁷ Some countries are also seeking to make punitive damages available even though their legal systems rejected them for a long time.

Indeed, a great deal of activity is already taking place on the EU- and Member State-level in Europe to adopt or expand class actions.²⁸ For example, on March 12, 2007, the European Commissioner for Consumer Protection, Meglena Kuneva, made a statement at the annual meeting of Trans-Atlantic Consumer Dialogue urging the adoption of “plans for collective redress” by 2012.²⁹ Further, she committed to encouraging a strong consumer movement on the national level and strong trans-Atlantic cooperation between the EU and the United States, such as the agreements already forged with the U.S. Consumer Product Safety Commission to exchange information on product defects, as well as other regulatory agencies.³⁰ She reiterated these points in a June 29, 2007 speech in Leuven, during a “brainstorming” session on collective redress. She observed the number of Member States that have or are currently introducing collective redress mechanisms “to better ensure the enforcement of consumer rights,” but was quick to add that “both judicial and non judicial [collective redress], *could* be an effective means to address this problem.”³¹ The Consumer Commission will release its Green Paper on Collective Actions on November 26, 2008, and it is expected to report on the Commission’s analysis to date. It may also include a discussion on class action funding and it may explore alternative avenues for introducing class actions at the EU level through an expanded Injunctions Directive.

Italy’s Parliament has considered nearly a dozen class action models in the last few years, several of which proposed using class actions in mass torts and permitting claims under contract, tort and strict liability. A few of these bills also discussed contingency fee arrangements, which are now permitted generally under the 2006 Bersani Decree.³² In mid-December 2007, a class action proposal was adopted into the country’s Consumer’s

27. Evan Weinberger, *3rd-Party Funding Fuels European Litigation Growth*, LAW360, Nov. 18, 2008.

28. Michael D. Goldhaber, *Shell Games*, FOCUS EUROPE (Winter 2008); *If you can't beat them, join them (class actions are coming to Europe)*, THE ECONOMIST, Feb. 15, 2007; Laurel J. Harbour & Marc E. Shelley, *The Emerging European Class Action: Expanding Multi-Party Litigation To A Shrinking World*, THE PRACTICAL LITIGATOR (July 2007).

29. Annual Meeting of Trans-Atlantic Consumer Dialogue, *available at* http://ec.europa.eu/commission_barroso/kuneva/speeches/ann_meet_tacd_speech12032007_en.pdf.

30. See Fowler & Castley, *supra* note 23, at 84-85.

31. The June 29, 2007 Speech and the seminar on collective redress, Leuven, are available at http://ec.europa.eu/commission_barroso/kuneva/speeches/speech_leuven_29062007_en.pdf.

32. “Bersani Decree” (Title 1 of Law 4 August 2006 nr. 248) *available at* http://ec.europa.eu/comm/competition/sectors/professional_services/conferences/20061230/lirosi.pdf.

Code.³³ This two-stage model will apply to standard form contract disputes or as a consequence of tort liability, unfair trade practices or anti-competitive behavior. The new law was to go into effect at the end of June 2008, but was postponed until January 1, 2009, in order to expand its standing and application.³⁴

Similar efforts to aid consumers' "access to justice" are growing outside the EU as well. In Australia, the Victorian Law Reform Commission's report solicited public response on a number of measures to expand the reach of class actions.³⁵ For example, it proposed that all class members would no longer be required to have individual claims against all defendants in a class action. Instead, a class may be certified against multiple defendants provided all class members have claims against at least one defendant. It also proposed introducing (or clarifying) the judicial authority to order *cy pres*, or public interest remedies in class actions. In Latin America, Brazil has seen several proposals to expand class-action standing, and Argentina just recently enacted amendments to the Consumer Protection Act that introduce class actions and permit recovery of punitive damages of up to \$1.7 million per plaintiff.³⁶ The bill became effective April 7, 2008.

USING A FAMILIAR BUT EVOLVING MODEL OF COORDINATION TO MANAGE NEW GLOBAL LITIGATION RISKS

In a time of drastic change it is the learners who inherit the future. The learned usually find themselves equipped to live in a world that no longer exists.³⁷

A successful defense requires the anticipation of risk, pre-emptive fortification, and flexible strategies. When new litigation arises in previously quiet jurisdictions, in-house counsel must sometimes make a quick decision to select counsel based on a few telephone calls, possibly a face-to-face visit and recommendations from colleagues, and hope that the selection works out. Depending on the stakes of the lawsuit and the likelihood of recognition and enforcement of any judgment, that degree of familiarity with the company's defenders may not quell the unease in anyone's gut. Alternatively, rapid response from an international firm that

33. Italian Finance Act 2008, Bill no. 244/2007, *Provisions regulating the drafting of the annual and multi-year State budget*.

34. Law Decree No. 112 of June 25, 2008; see also Francesco Manacorda, *Quelle cause collettive mai decollate davvero (Those class actions never really started)*, LA STAMPA, June 16, 2008.

35. The Victorian Law Reform Commission's report is available at <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Civil+Justice/LAWREFORM++Civil+Justice+Review%3A+Report>.

36. See Gregory L. Fowler & Diego Gandolfo, *Class Actions in Latin America: A Report on Current Laws, Legislative Proposals and Initiatives*, 1:1 Latin American Forum Newsletter (International Bar Association), Oct. 2008, at 72; Mark A. Behrens, Gregory L. Fowler, & Silvia Kim, *Global Litigation Trends: Trying to take the "Good" and not the "Bad" from the American Civil Law System*, 17 MICH. ST. J. INT'L L. — (forthcoming 2008).

37. ERIC HOFFER, *REFLECTIONS ON THE HUMAN CONDITION*, Harper and Row 1973.

has a network of vetted counsel in nearly all countries where litigation is likely to arise can go a long way toward putting one's mind at ease.

International coordinating counsel, like its national analogue, can provide efficiency of scope and economies of scale through:

- maintaining a deep appreciation not only for the client's litigation but also the client's business to deliver the level of service and reporting necessary to meet the client's business needs;
- developing and employing a thorough understanding of common law and civil law traditions (and the variations in both) to adapt winning litigation strategies and arguments to the case and country at hand;
- hiring and training product liability attorneys in all jurisdictions, resulting in a vetted network of counsel around the globe;
- achieving the proper cost-effective flexibility to respond quickly to whichever direction the litigation threat heads;
- ensuring a consistent line of defense against copycat allegations and evidence; and
- monitoring major law reform movements and litigation trends.

With the anticipated spread of consumer and mass tort litigation beyond U.S. borders, the international coordinating counsel model can assist companies build upon prior experiences and adapt them to new challenges, thus achieving the same unified approach to the defense of litigation claims that applies to their global business strategies.