

International co-ordinating counsel in product liability cases: is it really necessary?

COMPANIES WITH INTERNATIONAL MARKETS can find themselves defending product liability claims in any of the countries in which their products are sold. As sales expand into emerging markets, major brands are finding that they are increasingly vulnerable to liability exposure in obscure jurisdictions, particularly where there may be lax regulation or supply chain issues.

The reasoned response to the expanding global litigation marketplace is to engage international co-ordinating counsel to ensure that processes are in place to respond quickly and cost effectively to existing and emerging global product liability risks.

With downward pressure on legal budgets, some in-house counsel may be tempted to keep the co-ordination role in-house or deal with international litigation on an ad-hoc basis. However, this may be a false economy.

EMERGING GLOBAL PRODUCT LIABILITY RISKS

Consumers all over the world are increasingly gaining and asserting new legal rights. Trends towards class actions, punitive damages and contingency fees are spreading around the globe. In parallel with this, claimant law firms are developing international capabilities and extending their reach. Manufacturers, suppliers and their insurers need to be in a position to provide an effective, swift and robust response to any liability issues which may arise.

Large companies are traditional targets for international product liability claims. However, smaller and fast growing companies can be vulnerable if they do not have adequate risk management strategies and procedures in place and if they lack experience and the necessary infrastructure to respond quickly.

Risk monitoring and management is key. The scale of product liability litigation

and the number of product recalls are increasing globally, and it is important for manufacturers to have procedures in place to deal with these emerging risks.

Many international companies use international counsel to deal with global transactions, but international litigation is often dealt with on an ad-hoc basis, through reactive response. This is neither an effective nor commercially sound approach.

COMPILING THE BEST TEAM

When international litigation arises, in-house counsel often have to make a quick decision as to the international counsel who will deal with the matter. Without the benefit of experienced international co-ordinating counsel, this decision is often based on the recommendations of colleagues, a few telephone calls or an internet search. The experience and reliability of the appointed counsel – and consequent likelihood of a successful result – are often unknown. The members of the hastily formed team may never have worked together before, which can bring its own co-ordination problems, detracting from the important legal business at hand.

Experienced co-ordinating counsel will have invested many years in developing a network of tried and trusted local counsel around the world, with a track record of quality advice and successful defence of product liability claims. This means that in-house counsel, and their insurers, receive a rapid response to any global safety problem (whether litigation or recall) and a reliable recommendation of an appropriate local counsel.

KNOWLEDGE AND CONSISTENCY ACROSS JURISDICTIONS

As the legal systems differ across Europe, the Americas, Asia and Africa, so familiarity with the legal processes, social, cultural and political issues that may impact on the management of litigation in each jurisdiction is essential.



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Alison Newstead, senior associate, Shook, Hardy & Bacon
E-mail: anewstead@shb.com

Without an international co-ordinating counsel that is familiar with your company's products, customer base and the nature and goals of your business, it will fall to the in-house counsel to educate the many lawyers in the different markets of these key issues. In-house counsel often train local counsel on relevant commercial and product history, preferred legal strategies and business goals. This takes time and can be a major distraction to the in-house team, who often need to be addressing more immediate risk management issues.

All cases, wherever they may be in the world, need to be handled in a consistent way and a co-ordinating counsel will play a pivotal role in ensuring that conflicting defences are not advanced in different jurisdictions – an error that can have costly and potentially disastrous consequences. Timing of hearings can also be key. Understanding the significance of interim hearings and the impact of likely outcomes needs to be managed in each jurisdiction so as not to have an adverse effect elsewhere in the world.

A key benefit of international co-ordinating counsel is their global outlook on a business's entire caseload of product liability litigation. This can ensure that local counsel does not become focused on narrow local issues, to the detriment of wider global, legal and business concerns.

PERSPECTIVE, PREDICTION AND PREPARATION

A specialist product liability firm manages product liability claims all the time across many different industry sectors. This knowledge and insight can be invaluable in developing a successful defence or settling claims at an early stage.

Having a global perspective of product liability litigation enables co-ordinating counsel to reflect on and advise clients as to how to respond to emerging trends. Emerging and copycat trends can be tracked and experience can determine how they may play out in practice. With experience in both civil and common law jurisdictions,

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co-ordinating counsel can understand how and why certain jurisdictions are influenced by the decisions of other countries and how this may impact on the management of particular litigation issues.

Familiarity with many jurisdictions also helps to manage cases efficiently from the outset. Some jurisdictions may require the filing of a defence within as little as 14 days. Other jurisdictions may focus on early expert analysis. Knowledge of how different jurisdictions function ensures that the focus is on the right issues at the right time.

The same documents, company witnesses and expert evidence may be needed around the globe when similar litigation arises in several countries. A co-ordinating counsel will be familiar with these resources and will work with local counsel in advising as to resources, and defences, that may be available. This avoids the need for the in-house team to spend valuable time re-educating local lawyers on key issues and preferred strategies when new claims arise.

Established local counsel act as the 'eyes and ears' of co-ordinating counsel, monitoring new legislation and access to justice issues that may subtly affect defence strategies and the approach to be taken in the litigation process or at any hearing or trial.

These extensive monitoring capabilities provide real added value as they assist in identifying potentially problematic jurisdictions and evaluate risks. Substantive concerns such as class actions, punitive damages and contingency fees can all be quickly assessed in newly filed cases.

EFFECTIVE COMMUNICATIONS AND PROJECT MANAGEMENT

Co-ordinating counsel will have a global picture as to the status of all your product liability cases at any one time. Status and strategies may therefore be conveyed to the in-house team in one telephone call, as opposed to many telephone calls from several jurisdictions – often in different time zones and languages. Important information can be distilled and conveyed in minutes, avoiding an information gathering process that can often take days, and allowing important business decisions to be made quickly and efficiently, in possession of all the relevant facts.

Case strategies, whether to defeat claims or bring them to a close in the most commercial and cost effective way possible, can be conveyed, understood and acted upon without delay.

SUMMARY

Importantly, international co-ordinating counsel is just one member in a defence team, but it can make big difference in how efficiently and effectively product liability litigation is defended around the world, significantly increasing your chances of a successful commercial outcome.

If you have a global brand to protect, investment in international co-ordinating counsel is a sound commercial decision, which will not only protect your brand, but save you time and – more importantly – costs.

*By Alison Newstead, senior associate,
Shook, Hardy & Bacon.
E-mail: anewstead@shb.com.*