

LITIGATION

Managing mass tort litigation

BY PAULINE RENAUD



Mass tort litigation has seen a sharp increase in recent years, encouraged by legal developments and new scientific evidence confirming the dangerousness of certain products. As the spectre of bankruptcy is looming for many companies worldwide, it has become even more important than ever to address such litigation risks. Civil action involving numerous plaintiffs against one or many corporate defendants in court may cover several matters, such as mass disaster torts, mass toxic torts, mass product liability torts, and mass fraud torts. In order to mitigate risks as much as possible, companies need to take several key steps, the first being to recognise the magnitude of the problem. But there is no one-size-fits-all solution, which means companies need to be particularly careful when implementing their strategies to respond to unique problems created by mass tort litigation.

The rise in mass tort litigation over the last decade has various underlying drivers. In the US, for example, the number of litigations in product liability, sales and marketing, as well as air crash disaster, has burgeoned following accidents or revelations regarding the impact of certain products on people's health. In this regard, asbestos and tobacco-related litigation have represented a large number mass tort

cases. Some experts believe that the continued efforts of plaintiffs' law firms have also largely contributed to the developments of such litigations, as they are considered to be particularly lucrative for plaintiff attorneys. "This is not to say that individual plaintiffs who are actually injured do not deserve compensation, but in many mass tort cases, the number of individuals on whose behalf suit is brought vastly exceeds the number of plaintiffs who are actually seriously injured," says Mark F. Rosenberg, a partner at Sullivan & Cromwell LLP, arguing that, in such circumstances, not only are defendants hurt, but also plaintiffs, as money that may otherwise be available to compensate them will be paid instead to defend and settle unmeritorious claims. Because of the attractiveness to plaintiffs' counsel of mass tort litigation, some law firms representing defendants have argued that the passage of federal asbestos tort reform would not stem the tide of mass tort litigation as a whole, but would, instead, simply result in asbestos plaintiffs' counsel shifting their energy to other mass torts.

The increasing expertise in the plaintiff's bar of bringing class actions is also believed to have encouraged the development of mass tort litigation in recent years, with many more firms specialised in that particular area of the

law, given the high risk/great reward profile of such suits. This is particularly true for 'third-party payer' suits, explains Russell Jackson, a partner at Skadden Arps. "Each time a medicine is recalled or has a significant warning added to the label, there is a particularly robust trend of suits against the pharmaceutical industry brought by so-called 'third party payers' – primarily union health benefit funds and other 'insurers' who pay for members' medicines – claiming they were defrauded and either paid too much for the product or never would have bought the product at all," he says.

The US legal system itself also encourages the development of certain cases by, for example, permitting counsel to represent allegedly injured plaintiffs on a contingent fee basis. "Another driver of the mass tort litigation is the continued availability of favourable forums and laws for the pursuit of these cases," explains Philip Goldstein, a partner at McGuire Woods. "While much on the tort reform spectrum over recent years has been positive, such as in Mississippi and Texas, many other jurisdictions continue to offer plaintiff counsel a hospitable location to file these types of cases." Various self-reporting requirements under US law, and therefore the availability of public records, also provide an easy roadmap for litigation.

Recent developments

Global market turmoil has encouraged several countries to consider amending their laws on mass tort litigations, or even creating new laws. In Austria, for example, the civil proceedings code does not currently provide for the possibility of mass tort litigations. Similar proceedings, known as 'class actions with an Austrian imprint' however, allow an injured person to convey his or her claims to a third party for the sole purpose of filing a single lawsuit covering multiple claims. But with the financial crisis, discussions on a draft by the Austrian Federal Ministry of Justice, introducing class actions, were re-ignited. "Under the current draft, class actions would only be possible if they gather at least 100 claims, based on the same facts and raising the same points of law against the same

persons or entities,” points out Árpád Geréd, a partner at BMA Brandstätter Árpád Rechtsanwälte GmbH. “Conversely, the new class action proceeding would greatly streamline the current proceedings by omitting the time and cost consuming findings regarding the level of each claim, and instead concentrating on the facts and points of law common to all claimants.” Mr Geréd adds that such class actions will likely be introduced in Austria sooner rather than later. Consequently, many companies will likely face mass tort litigation in the years to come for damages caused today, given the three-year-statute of limitations for tort claims in the country.

In other countries, several legal developments have also influenced mass tort litigation. In the US, the enactment of the Class Action Fairness Act by Congress is said to have shifted many mass torts from state courts to federal courts in recent months. In addition, several experts have noticed that many plaintiffs have been resorting to different theories of product liability, such as public nuisance, in mass torts. Simultaneously, some experts argue that several state courts have been retrenching from the Daubert standard – which is a rule of evidence regarding the admissibility of expert witnesses’ testimony during federal legal proceedings – and have therefore taken a more relaxed approach to admitting expert evidence on causation. As a result, some law firms fear that the combined effect of nuisance doctrines and the Daubert standard will mean that cases might survive to verdict, even in the absence of evidence regarding the dangerousness of a defendant’s product. “Additionally, plaintiffs have been looking to peripheral defendants – meaning companies that may have sold, but not produced an asbestos-containing product – in an effort to find viable defendants because many companies involved in the mass torts from their inception have filed for bankruptcy,” notes Kenneth R. Meyer, a principal of Porzio, Bromberg & Newman.

Plaintiffs are also asserting statistical modeling as a means of determining the ‘diminished value’ of a product as a result of an allegedly fraudulent statement. Mr Jackson explains that the problem with consumer fraud claims is that if a court is asked to apply the consumer fraud laws of all 50 states in a nationwide class, the case becomes unmanageable due to the fact that these laws vary substantially. “Plaintiffs have been attempting to eliminate this problem by pleading fraud under the federal organised crime statute (RICO), thus allowing the court to apply only one law to a nationwide class,” explains Mr Jackson. “This has resulted in a series of mass tort decisions

involving the required elements of this statute and whether they have been met.” Other legal developments have included several US Supreme Court decisions: one on rejecting the rule that allegations of the complaint must be accepted as true – regardless of the actual facts – and another one on punitive damages that should not be disproportionately excessive. Both those decisions benefit defendants. However, a decision in the Wyeth v. Levine case has, reportedly, severely restricted the federal pre-emption defence for mass tort defendants.

Other high-profile cases have made the headlines in recent months, either due to the record number of plaintiffs in a case, or given the potential short- and long-term impacts of the verdict for both plaintiffs and defendants. In Austria, for example, the AWD case is expected to substantially impact the legal landscape going forward. Last June, Austrian consumer protection agency VKI filed the first of two class action-type lawsuits against financial adviser AWD Gesellschaft für Wirtschaftsberatung GmbH for systematic false consultancy. Around 2300 persons, who suffered damages through AWD totalling €40m, have conveyed their claims to the VKI for the purpose of filing those lawsuits. On 19 November, the lawsuit was admitted by the Commercial Court of Vienna. “The impacts of this decision are tremendous,” believes Mr Geréd. “Not only does the admission of the suit encourage similar mass lawsuits against banks or other providers of financial services for alleged misinformation, but it also means that the criteria of ‘same facts’ and ‘same points of law’, which under the current of Austrian class action proceedings are essential for the admissibility of a class action lawsuit, are broader than previously thought,” he explains. The US has also seen several large cases in the financial sector, as a result of the financial crisis. But the country has also been marked, in recent years, by an increasing number of suits being brought against the food & drink sector for marketing products as presenting certain health benefits. These include Cheerios, for statements about lowering cholesterol, as well as Frosted Mini Wheats, for claiming that eating these cereals reinforce children’s concentration at schools. Some explain that companies can avoid a significant amount of litigation risk by not making health-related claims in their product marketing.

Several high-profile lawsuits have also targeted pharmaceutical companies. “Historically, pharmaceutical mass torts did not begin until a drug was recalled from the market. Recently, however, more pharmaceutical mass torts have begun to be filed involving drugs

that are still on the market and are still considered to be safe and effective by the FDA,” highlights Mr Meyer. Such litigations include HRT and Accutane/Isotretinoin, which have led to several verdicts across the country, many of which are now being appealed. The resolution of those appeals is expected to have a significant impact on whether there will be more trials looking ahead or whether parties will instead seek to achieve a global settlement. The pharmaceutical industry has been impacted by other groundbreaking developments. Vioxx, a pain killer alleged to cause injury to the heart, was a striking example of mass tort litigation that mainly settled without the use of a class action device. Instead, the settlement was based essentially on buying the ‘inventory’ of claims held by several plaintiffs’ law firms. Other large cases have included medications which, allegedly, did not work at all, were over-promoted, or presented undisclosed risks, such as Zicam, Chantix and Yasmin.

Other industries such as environmental, industrial and manufacturing have also seen large lawsuits, based upon a large variety of products and chemicals, including asbestos, silicosis and carbon emissions. Even baby bottles have resulted in mass tort litigation. Mr Rosenberg notes that “numerous class actions have been coordinated as part of a multidistrict litigation, claiming unspecified damages against nearly every manufacturer of baby bottles and ‘sippy cups’ arising out of the use of bisphenol-A in those products.” The lawsuits allege that manufacturers were aware that the chemical could pose a serious health risk.

Such cases highlight the various risks faced by companies in mass tort litigation lawsuits. “Issues are numerous, with the most obvious being the financial exposure that a company may face in the form of jury verdicts, settlement costs, attorneys’ fees – both defence attorneys and plaintiffs’ attorneys in certain actions – treble damages, litigation expenses, and punitive damages,” says Mr Meyer. Huge expenditures of money, resources and time are the top risks, which can financially cripple a company and damage its reputation. “Such mass tort litigation can generate a public relations nightmare,” confirms Mr Rosenberg. “Even if the litigation is ultimately won, business can be significantly adversely impacted as a result of the bad publicity. In addition, the possibility exists that officers and directors may be brought in as defendants, thereby exposing them personally to liability.” In order to limit the impact of bad publicity, some companies have had to change their name. ▶▶

Europay Austria, a market leader in card-based transactions, was found guilty of abuse of dominance by the Austrian Supreme Court a few years ago. The damage on the company's image was expected to be so great that it subsequently decided to change its name to Paylife.

Solutions to limit damages

In addition, international companies run the risk of being sued not only in their own jurisdiction but also abroad, particularly in countries that permit mass tort litigations. Businesses that are not familiar with such proceedings must therefore be particularly careful. Besides jurisdictional issues, companies may also be held accountable for the conduct of a predecessor or acquired entities. "In the US, the successor liability laws have unfortunately created a key source of potential exposure for any company contemplating a merger or an acquisition," points out Mr Goldstein. Indeed, under the successor liability doctrine, a buyer who purchases the assets of a business may be held accountable for the seller's debts and liabilities in several circumstances. There again, caution is the key word for businesses. But there is no magic panacea applicable in mass tort litigation – mitigation strategies will depend on the jurisdiction, the sector in which a company operates, and also on the facts of the case itself. However, involving external advisers early in the process can be a great help. "Upon identifying potential exposure, experienced outside counsel can work closely with the company to put together a core strategy to address the potential liability," says

Mr Goldstein. "This will be a multi-faceted approach and includes, for example, analysis of product issues, review of relevant company documentation, interviews of appropriate company personnel and consideration of successor liability issues." One of the main aspects of this strategy should be coordination with all attorneys representing the company in different jurisdictions, so that a common approach can be reached regarding the outcome of the litigation.

Companies should determine whether it would be better to seek an early settlement or not, depending on the nature of their products, the nature of the allegations against it, the possibility that such a settlement may lead to even more claims, and the potential damage to their brand's reputation if litigation proceeds. "Regardless of what the end-game actually is, you must understand it in order to avoid wasteful and potentially damaging decisions at each turn in the litigation. Deciding whether to challenge venue, oppose the creation of a multidistrict litigation, or assert certain defences, all can be impacted by the strategy for ultimately resolving the litigation," explains Mr Jackson. He adds that understanding the facts behind the litigation and the surrounding issues – such as insurance, securities law, criminal law, relations with regulators and shareholders – is essential to making the right decisions. These decisions need to be made early in the process. Indeed, once the suit has been filed, several options exist. In Austria, for example, the first rule is to reduce the number of claims in the class action, according to Mr Geréd. "The main ar-

gument is always that the claims are not based on the same facts and therefore do not raise the same points of law, which may lead to the class action being rejected outright. However, by pointing out any difference between the claims, at least a reduction of the number of claims is possible," he says. Such a move may help to limit potential damages to the company. Voluntarily recalling products can also be an effective tool in Austria, not only to reduce the number of potential claims, but also to limit media coverage. Conversely, in the US, whenever a product has to be recalled, mass tort litigation may well ensue.

But of course, one of the main solutions to limit potential risks would be to prevent mass tort litigation from happening in the first place. Although it remains difficult for companies to know exactly if and when litigation will happen, monitoring steps and preemptive actions can be very useful from that perspective. Companies should, for example, structure their operations to address risks. This may include efficient product and environment risk management and an appropriate insurance coverage. Providing training to employees regarding potential issues, structuring strong relationships with subsidiaries to avoid imposition of derivative liability based on the assumption that such subsidiaries are "mere instrumentalities" of the parent, as well as thoroughly planning the acquisition of new businesses to understand historical liabilities and minimise successor liability risks, should also be part of the overall process aimed at managing mass tort litigation. ■



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