LJN LAW JOURNAL NEWSLETTERS

LJN'S Product Liability Law & Strategy®

An incisivemedia publication

Volume 29, Number 1 • July 2009

PRACTICE TIP

Reducing Product Liability Litigation Costs

Ten Questions for In-house Counsel

By Ronald J. Levine and Jennifer Smith Finnegan

Although companies have long chalked up the costs of litigation as part of the "cost of doing business," the current financial crises have placed added pressure on in-house counsel to reduce their budgets in all litigations, including product liability defense. In turn, in order to remain competitive, managers of defense law firms must find new ways to reduce client costs without sacrificing quality and profitability.

This article poses ten questions in-house corporate counsel should ask themselves when they are preparing to defend a case and are in the process of retaining outside counsel. Some of these questions have been built into "Outside Counsel Guidelines," which a number of law departments have issued. The bottom line is: How do I maximize the bang for my litigation buck when I face a potentially costly product liability defense?

One: Is Our Company Prepared In Advance for the Storm?

Corporate counsel in any sort of manufacturing or product distribution business can be relatively certain that litigation can or will hit the company at some point in the future, if it has not already begun. The trick is to have the necessary resources ready and available to deal with the litigation before they are needed. Some of these resources already may be on file somewhere in the company; others may have to be created. In any event, it would save the in-house counsel a great deal of time and expense if a notebook with the following information is kept close at hand:

- Key internal corporate contact information;
- Government regulatory contact information;
- Document retrieval and organization plans, including information on the locations and types of computer systems;
- Insurance coverage;
- Protocols for dealing with the media;
- Litigation forms and procedures for predictable aspects of pre-trial preparation, including early case assessment procedures, discovery requests, discovery responses and legal briefing on key legal or regulatory issues specific to the company and likely to be raised in almost any litigation; and
- Contact information and biographies of consultants and professionals who should be retained (for example, accountants, computer specialists, environmental and safety engineers, investigators and public relations consultants).

This information will also help lend a uniformity of approach to the company's litigation docket, resulting in further efficiencies and cost-savings.

Two: Do Our Cases Have a General?

Any litigation that is being handled by a team of outside lawyers should have one partner at the law firm — the General — who is the point person reporting directly to the in-house counsel. That partner must serve as the client's eyes and ears at the law firm. The General should be told: "You are our representative at your firm. We trust you to make sure that our litigation is being handled in the most effective and efficient way." At the outset, this partner should ask to come up with creative, value-based alternative billing arrangements, such as success fees and retainers. It also should be the General's responsibility to estimate both the trial and settlement value of a case.

Three: Has Our General Told Us the Plan?

In wartime, a good general would not commit troops to battle without a strategy. In defending any product liability litigation, the General should have at least two parallel strategies mapped out — the plan for defending the case and, if the client is so inclined, the plan for settling the case. An early, well-informed case assessment is critical. As soon as possible after the complaint is served, the General should collect the information needed through investigation and discovery to allow the company early on to assess its prospects for success as well as the costs of proposed strategies for the litigation.

The Discovery Plan

Unless the litigation is fairly simple, internal fact-finding, as well as discovery of the plaintiff and third parties, will be required. Primary to any case strategy should be an early discovery plan. "Random acts of discovery" must be avoided.

Electronic discovery plans must be carefully mapped out in advance. Too often, defense counsel do not appreciate the cost of reviewing thousands of e-mails. Electronic discovery can become the "black hole" of the litigation. Before dumping hundreds of thousands of e-mails on CDs and shipping them off for review to junior associates and paralegals, consider whether there are less costly alternatives — such as reaching an agreement with the adversary or obtaining a court order limiting the scope of the discovery.

The Motion Practice Plan

The General should be asked to estimate in advance the odds of success in making any motions, particularly dispositive motions. Often, defense counsel may follow the "usual plan" to make a motion to dismiss the complaint — just to "educate the court." That strategy may not only be very costly, but could also lead to adverse rulings early in the case

Ronald J. Levine, a member of this newsletter's Board of Editors, and Jennifer Smith Finnegan are partners in the litigation department of Herrick, Feinstein LLP in Princeton, NJ, and New York, NY. Phone: 609-452-3800.

and could serve only to educate the adversary about how to strengthen its case. If outside counsel recommends making a motion to dismiss, ask what is going to be accomplished. Will the plaintiff merely be given leave to re-plead? Unless the chances are very good that a dispositive motion will result in a dismissal with prejudice of the complaint or portions of the complaint or will result in other tactical advantages, in-house counsel may decide that the company's litigation resources are better spent elsewhere.

Four: Are We Considering lternatives to War?

In-house counsel should challenge any General who does not have a "peace plan." Outside counsel should be working with in-house counsel to weigh all business options as alternatives to litigation, including relief that a court might not be able to award, such as alternative business arrangements with an adversary or other non-monetary settlement agreements. In addition, the wide array of alternative dispute resolution procedures, including mediation and arbitration, should be carefully evaluated.

If appropriate, the company should consider retaining separate "settlement counsel," whose only role is to try to settle cases early, as opposed to trying them. It can be difficult for the litigator to fight the adversary vigorously in court on one day and then try to talk settlement the next. By hiring a specialist to work on case settlement, the litigator can stay focused on the "fight," while settlement counsel works on a potential "diplomatic" resolution.

Five: Are Our Cases Being Staffed Properly?

Significant costs can be saved by not overstaffing the defense team, and by using more junior lawyers, who work at lower billing rates, where appropriate. The General should be asked to take the following steps when staffing the case:

- Avoid changes in staffing. If the same law firm is used on multiple matters, whenever possible use the same attorneys, who will have gained valuable institutional knowledge about the business and its legal issues that will be transferable from matter to matter.
- Avoid ramp-up costs. The client should not have to pay the price for educating the outside firm's young lawyers. Law firms that hold themselves out as experts on product liability defense should not bill clients for the time a first-year associate may take to read the state's product liability laws.
- Utilize paralegals. Not every task must be performed by an attorney. Identify tasks that should be delegated to paralegals, who likely have significantly lower billing rates than junior attorneys.
- In-source whenever possible. The in-house law department should look for opportunities to have in-house employees undertake tasks that might otherwise be handled by outside counsel, such as preparing chronologies and gathering records.

Six: Are We Reinventing The Wheel?

A company facing similar product liability claims in California, New York and Texas and using a different law firm in each of those states should not pay all three firms to prepare an initial set of interrogatories in each case. The same is true for discovery responses. If the company is regularly involved in litigation where similar issues are raised — such as in product liability claims involving the same product line — each outside counsel hired to defend the cases in various venues should not craft the company's responses to discovery from scratch. Unless the case is the first of its kind, the company's outside counsel for each litigation should not start from square one. Rather, they should be provided with a standard "kit" for discovery and investigation that can be adapted for each state's procedures and for the nuances of each individual case. Such a centralized approach to discovery not only leads to significant litigation cost-savings, but also helps ensure a unified, consistent approach to discovery issues that, in turn, results in further efficiencies for the company's legal department.

Seven: Are We Taking Full Advantage of Potential Cost Savings with Outside Vendors?

Some of our larger clients have cut deals, in advance, with vendors, such as forensic computer firms, litigation support companies, online research vendors and court reporters. These clients have obtained better rates with the vendors by requiring all outside counsel to use them rather than using the law firm's vendors. Similarly, if it is preferred that outside counsel use its own vendors, in-house counsel should be sure to require that outside counsel pass on to the company any cost-savings or rebates that the law firm receives as a result of its own discount or volume plans with its vendors.

Eight: Are We Receiving Regular Budgets and Bills For Our Cases?

Litigation can be fast-moving, and there can be a great deal of activity in any month. In-house counsel should demand monthly budgets and detailed bills. Outside firms should account for the work they have done, and plan to do, each month. No firm should be permitted to submit an invoice that merely contains a dollar amount and no description of the work performed or who performed it. Also, electronic billing can make it easier to keep track of legal fees and can force the firm to bill in a manner that makes the firm more accountable — such as by using task coding and requiring a single entry for each task completed.

Nine: Can Our Outside Firms Provide Support on The Home Front?

Many companies are asking their in-house legal departments to trim their in-house staffs, as well as their outside legal fees. The in-house counsel should ask their regular outside firms to consider "seconding" attorneys in the law department. Law firms may be more than happy to send associates to work in the company and may absorb a portion of the cost. This can be a win-win situation for the outside firm as well. Its associates will develop valuable relationships with the client's law department and will get exposure to the life and concerns of an in-house attorney, which will make them better at anticipating and efficiently addressing clients' needs and legal issues in the future.

Inside counsel should also ask outside counsel to train the company's legal department. Most larger firms run internal training and continuing legal education programs. Outside counsel should be told the types of "free" training the company needs.

Ten: Are We Keeping Track of Results?

The most important question the in-house counsel should ask after each litigation has concluded is "what can we learn from this?" When the "war" is over, whether through a settlement or verdict, a post mortem should be conducted. The General should be asked to provide a candid assessment of what worked and what did not — and, significant in terms of cost savings, what the company can do next time to reduce fees and costs. While there is a constant inflation in the cost of living, there does not necessarily have to be an ever-increasing cost of litigating.

Conclusion

By asking these questions, and making the initial investment in arriving at the appropriate answers to the these questions in relation to the company's litigation, in-house counsel and outside counsel can work together to create significant cost savings and efficiencies in litigation. The cost savings and efficiencies not only help the company's bottom line, but also help outside counsel solidify its relationship with the company by becoming an indispensable part of its defense forces.