Playing to Win . . .

Cutting Through the Clutter of Litigation "Management"

Wars are caused by undefended wealth.

—Ernest Hemmingway

As the Associate General Counsel of a global corporation, I am besieged by sundry consultants all hoping—as their email, voice mail, cold call, and written correspondences promise—to help us manage our litigation burden for greater cost efficiency.

Meanwhile, the legal press almost daily features the latest wisdom on this subject, sometimes even using the example of a large chemical or manufacturing company just like ours. Some poor tree died so that I can read all about "seamless" but elaborately multilayered processes defined by convenient acronyms at every stage.

One is thankful for these explications of the otherwise inexplicable. Sometimes, though, I am sufficiently self-deceived to believe that the men and women responsible for the disposition of sizable litigation—sizable in both severity and volume—might still stand a chance of surviving, and even succeeding, without the programmatic new strategies that predictably drive down the pike every 20 minutes.

Conflict Avoidance

Since the ascendancy of the mass tort phenomenon (and the tobacco cases that unleveled the playing field for decades), US businesses have been forced to deal with lengthy litigation driven by skyrocketing costs. While they ponder perplexing alternatives to presumably ease the cost burdens, it is now an instinct of corporate leaders to seek alternatives to legal action, making it go away in the present and hoping that it will not reappear in the future.

It's the most commonplace "strategy," yet the one guaranteed to incur long-term exposure and perpetually accelerating costs. Companies struggle with litigation on a case-by-case basis without any thought as to how their struggles are perceived by the very people who bring these actions.

On the defense side, the guiding objective is to combat rising litigation costs and control the legal department budget. The idea is simple: Reduce costs by putting downward pressure on that budget. As resources are slashed, the managers can declare victory because the clients and, presumably, the shareholders will cast approving eyes in the general direction of the bottom line.

Another related approach is to impose rigid timelines. It is often an equally disastrous approach, as many companies have begun requiring that all new litigation be resolved or at least gotten off the desk of the managing attorney within a specified period. The direct effect is quicker settlements, which are usually much higher than they need to be.

Make no mistake: Timelines are music to the ears of plaintiffs' lawyers, who naturally respond by filing more lawsuits that will be equally governed by internal pressures to settle.

Broader View

The solution must be based on a more comprehensive perspective and a persistent eye toward longer-term numbers. The first step toward such a solution is to figure out the TCL—the actual Total Cost of Litigation—on an ongoing basis. TCL reflects the total amount of all settlements, judgments, fines and penalties, attorney fees and expenses, discovery costs, and related litigation expense, minus reimbursements, indemnities, and recoveries.

Only when you actually know this number can you take decisive steps to reduce it.

This TCL should be included in a monthly briefing report from the litigation chief to senior management. By this means, everyone in the company who needs to stay up-to-date on litigation costs can do so. And let's keep it

merciful; five or six pages in 12-point type should be more than enough to convey and explain the data. In fact, clients are disserved when they're overwhelmed with unnecessary data that beclouds the key points.

Understand the importance of TCL for the client as a component in corporate planning, and how any number of business operations can or cannot be expanded in light of such longer-term cost factors. At most companies, senior managers see only the daily cost fluctuations of daily litigation management. How can such numbers possibly assist senior managers in thinking about future acquisitions, geographical expansion, or new product lines?

At any given juncture, TCL as a guiding number will encourage another very happy result: a corporate resolve not to settle, but to fight. It is one thing to fight because you think that the case against you has no merit. Such motive is altogether commendable, but it is all to the better when that decision is backed up by data showing that it also makes more economic sense to fight rather than surrender.

Rules of Engagement

Once the decision is made—based on both the substance of the matter and the long-term economic effect—to fight, fight like you mean it. Be efficient and aggressive. Do not compartmentalize litigation but lobby to have your litigation strategy incorporated as an integral component of corporate strategy. In more instances than might be expected, senior business leaders will be most receptive to a decisive approach geared to long-term cost reduction versus daily bandages.

Keep a watchful eye on plaintiffs' counsel, not only as your adversaries but also as potential allies. TCL is directly affected by how the company uses its own resources to protect its rights and capture its assets. As your advocates in business-to-business disputes, plaintiffs' lawyers are highly attractive because they are flexible on fee arrangements, they instinctively think in terms of shared risk, and, depending on the arrangement, their own money is at risk.

By employing top plaintiffs' lawyers in our cases, combined with refusing to automatically settle cases filed against us, LyondellBassell has reduced TCL by a stunning 80 percent. A TCL of "0" is usually unheard of, but we have proven that it is obtainable. To be sure, profit-centered litigation departments are not pipe dreams and the LyondellBassell example does not have to be idiosyncratic.

In dealing with all outside counsel, seek and establish on their part a palpable investment in, and irreducible responsibility for, the well being of the company. Don't nickel-and-dime them. Don't rate-shop for marginal savings. Flat fee arrangements are ideal as they mitigate the day-to-day grubbing that comes with billable hours and the sense of us-versus-them that hourly fees engender.

Examine each lawsuit on its merits and always measure what you see against TCL. A stubborn refusal to settle cases may increase internal costs at the outset, but again, keep your eye on the prize, which is a marked decrease in costs otherwise swollen by one settlement after another.

Remember, too, that the greatest economic rewards cannot be measured except by comparing litigation volume in prior years—if in those years the company was simply rolling over—to current caseloads. The good news for aggressive plaintiffs' lawyers is that there will always be greener fields to ravage once they see how much they have to invest, and the risk that they have to run, in continuing to target your client.

Bottom Line

Finally, you are a corporate leader, not just a lawyer on salary. As such, you must defend your client's core values, which are at stake in all the litigation that crosses your desk. We've talked about the economic justification for taking lawsuits to court. At the same time, your instinct should be to fight anyway, if you think that you're right and opposing counsel is simply flying the Jolly Roger.

Remember all the imponderables at stake. Everyone in the company has a stake in the case when the corporation is being accused of something for which it is not responsible or when its reputation is being assailed. Not just shareholders; you're drawing a line in the sand on behalf of

thousands of managers, employees, and anyone else who has chosen to be a part of the corporation that you represent.

It is indeed this moral dimension of "litigation management" that makes it so maddening when US companies buckle under. No wonder outside counsel seems slack and cynical or that these lawyers-for-hire are frequently disappointing their clients. By their lights, how much should they really care when the clients don't seem to?

No wonder the public distrusts corporations. When they are passive about defending lawsuits, they are passive about defending their own brands and reputations. The moral result is a quick-buck culture in which the quick buck that comes from the unconscionable settlement of lawsuits is no better than the quick buck that comes from selling lousy products and services.

The moral antidote is a culture based on winning, and a strategy to vindicate the honest principles that inform successful business enterprises.

Winning cultures celebrate victors and victories. We should reward successful litigation just as we reward public safety initiatives or environmental achievements. At the same time, there need be no scapegoats when cases go south. Losing is a learning experience under any circumstances. As one criminal attorney once quipped, "If you ain't losing, you ain't playing." At LyondellBassell, we have seen the effect of this approach—of rewarding victory and learning from defeat—in the quality and commitment of our outside counsel. They are excited about working with us, and the results show it. I am proud of them.

If history proves anything, it proves that peace must be won, not bought. On the other hand, you can certainly buy war. Just spend a few bucks on a bunch of fancy litigation matrices while investing constantly in the stopgaps of quick settlement.

The alternative is to find firm ground and stand there. It's never easy, but it is simple. ■

—Joseph F. Speelman

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