

## **2019 IADC Corporate Counsel College**

### **Preparing Global Companies for Navigating through U.S. Litigation**

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## **Preparing Global Companies for Navigating U.S. Litigation**

When global companies find themselves caught in the net of mass tort litigation in the United States, executives of those companies who reside outside the U.S. often face a situation and risk of exposure unlike any they have seen before. Panelists of this IADC presentation will explore how in-house and outside legal counsel can prepare global companies for navigating the U.S. civil litigation system, with a focus on processes and tools that can be used to align legal and business strategies for litigation readiness.

### *Mass Tort Litigation in the United States*

Given the enormous potential liability associated with mass tort claims, it is important for a global company that is unfamiliar with the American civil justice system to develop an understanding of the legal process. This includes not only an understanding of the U.S. civil litigation system, but also—as the number of product liability mass tort actions consolidated through multidistrict litigation continues to grow—an understanding of the unique procedural processes associated with multidistrict litigation (MDL). This educational foundation is central to the company’s eventual comfort with adopting a legal strategy that will have a huge impact on the company’s financial exposure.

The MDL process—a federal legal procedure unique to the United States—was designed to generate efficiencies in the handling of complex cases. In 1968, Congress enacted 28 U.S.C. § 1407, empowering the newly created Judicial Panel on Multidistrict Litigation (JPML) to transfer groups of cases from federal courts throughout the country and assign them to a single district court judge for the limited purpose of conducting “coordinated or consolidated pretrial proceedings.”<sup>1</sup> The MDL process has evolved and grown in the decades since its inception, and product liability mass tort claims now comprise the vast majority of the MDL docket.

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<sup>1</sup> 28 U.S.C. § 1407 (Multidistrict Litigation).

According to a recent report based on data from the U.S. Courts and the Judicial Panel on Multidistrict Litigation, cases consolidated in MDLs account for more than half of the federal civil caseload, comprising 52% of all civil cases pending before U.S. district judges in 2018.<sup>2</sup> The same report found that the rise in MDL cases has been fueled by a growth in product liability mass tort claims. “The growth in MDL [product liability] cases alone accounts for almost 88% of the growth in MDL cases since [] 1992.”<sup>3</sup>

These trends underscore the importance for global companies facing mass tort litigation in the U.S. to gain an understanding of the procedural aspects of the MDL. As one commentator explains:

“The MDL process has indeed become a vortex with respect to mass torts. This is not necessarily a problem or wrong—indeed it is arguably fully consistent with the original conceptualization of the MDL process. But given the reality that well over 100,000 mass-tort actions are currently consolidated through the MDL process, it is important to examine carefully and critically how the MDL works.”<sup>4</sup>

To defendants uninitiated in U.S. litigation, the MDL process might seem arcane at first. In fact, the MDL process has been described as “something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies.”<sup>5</sup> However, in-house and outside counsel can prepare a global company for multidistrict litigation by building an understanding of how the legal process will unfold. To do this, consider the following:

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<sup>2</sup> Lawyers for Civil Justice, *MDL Cases Surge to Majority of Entire Federal Civil Caseload* (March 14, 2019), available at <https://www.rules4mdls.com/copy-of-new-data-on-products-liabil>.

<sup>3</sup> *Id.*

<sup>4</sup> Thomas Metzloff, *The MDL Vortex Revisited*, 99 JUDICATURE 36, 43 (2015).

<sup>5</sup> Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 111 (2015).

1. Provide an outline of the life-cycle of a mass tort in U.S. litigation which can provide a framework for the company to translate the litigation exposure risk into business decisions and strategies.
2. Describe historical precedents as examples of how mass torts are traditionally handled, showing how implementation of traditional methods may be appropriate or how innovative approaches may be more effective to achieve the company's goals.
3. Profile the key players in the process, their tactics and motivations, as well as their credentials and track records so that key strategic decisions can be made within a context of a better-understood adversary and/or judge.
4. Begin discussion and development of a post mass tort "new normal" protocol.

#### *Alignment of Legal Strategy and Business Goals*

In-house and outside legal counsel advising global companies embroiled in U.S. mass tort litigation have to view legal strategies in the context of the company's ongoing business. Instead of focusing on discrete problem solving, legal counsel must function as an engaged partner in the business with a full commitment to the company's goals. In-house and outside legal counsel should therefore adopt approaches to litigation readiness that achieve and maintain an alignment of legal and business strategy. To do this, consider the following:

1. Adopt an end-game strategy that begins by identifying the company's definition of success and then work backwards to identify the tools and strategies needed to get through the litigation.
2. Understand the company's business—including the company's position in the industry and its long-term goals. A comprehensive

understanding of the company's business enables outside counsel to ensure that business interests are reflected in litigation strategies.

3. Develop effective methods of communication between legal counsel and business executives. Legal counsel should communicate with business executives using tools that they are accustomed to: graphic timelines, flowcharts, bullet points and power point slides—rather than long legal memoranda.
4. Engage business executives in the process of legal decision-making. Involving key stakeholders in the legal work process can help legal counsel to better understand the company's business goals, while also building commitment and a sense of ownership from business executives with respect to proposed legal strategies.

### Conclusion

Global companies can successfully navigate mass tort litigation in the U.S. if legal counsel and business executives work together to develop litigation strategies that are attuned to the company's business position. An ongoing investment in education and learning about the unique aspects of U.S. litigation will enable business executives to maintain situational awareness throughout the life cycle of the mass tort. Legal counsel should make the same investment and commitment to understand the company's business strategy and goals, so that they can function as effective partners for the company throughout the legal process.

Alignment of the company's legal and business strategies is possible when management and mitigation of litigation risk is viewed as part of an organizational process, rather than as a matter of discrete problem-solving. With these principles in mind, the panelists of this IADC presentation will explore tools and approaches that legal counsel can adopt to prepare global companies facing mass tort litigation in the U.S.