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CHALLENGING TIMES AHEAD: MANAGING THE LEGAL SPEND IN LARGE LITIGATION

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I. INTRODUCTION

II. WHAT IS LARGE LITIGATION?

Among the largest and most challenging litigation situations are products liability claims being made against pharmaceutical manufacturers. These claims often involve thousands of different claimants, with lawsuits in state and federal courts across the country. It is not uncommon for such suits to involve MDL (Multi-District Litigation) treatment in Federal court along with similar consolidation treatment in various courts, all proceeding at the same time. Companies in this situation face the prospect of numerous trials, sometimes with more than one trial occurring at the same time. With multiple law firms involved across the country, extensive document and factual and expert witness discovery, it is not uncommon for the costs in such litigation to reach the hundreds of millions of dollars.

While this situation represents one scenario for large litigation, it is not the only scenario, nor is it the most common situation. There are different factors that can combine to turn a situation into a “large litigation” scenario, including the potential exposure to the company, the precedential importance of the case, the law firm or firms on the other side, the number of parties involved, or other factors. Despite the differences between these various scenarios, there are a number of issues that commonly arise in connection with the management of large litigation. Having a strategy for addressing these issues, whatever the context for your large litigation scenario, will help you ensure that the costs you incur are reasonable and necessary.

III. INITIAL HANDLING OF LARGE LITIGATION

When parties first become aware of a large litigation scenario, there are a number of common reactions. This section outlines initial steps that can be undertaken by the various parties involved in the large litigation situation, in order to minimize their legal

spend. These steps not only help to minimize the legal spend, but also serve as a foundation for developing a working relationship among the various parties.

A. Insured Perspective

The insured needs to be proactive to ensure that it is protecting itself. It needs to identify all the relevant stakeholders and interested parties (both internal and external to the insured) so that the insured can keep informed the people that need to be informed.

The insured also needs to identify outside counsel that is competent and capable of handling the large lawsuit. This may entail identifying several firms, keeping in mind that each firm should have a distinct and non-duplicative role.

At the same time the insured needs to identify necessary internal leaders, with delegated roles of responsibility, so that everyone is clear about what is being done, and by whom. Among the roles that should be identified are crisis management and document preservation.

The insured also need to immediately identify (perhaps with the assistance of coverage counsel) any available insurance potentially applicable to the matter, and address any obligations it has (such as notice) in connection with that insurance.

B. Insurer Perspective

The insurer also needs to be proactive, and quickly determine its coverage obligations. If appropriate under the policy, the insurer should be actively involved with counsel selection. Depending upon the nature of the large litigation, and assuming that the insured is not otherwise entitled to select independent counsel, the insurer may want to consider compromising with the insured on the selection of counsel, to ensure that the retained counsel is competent and otherwise capable of providing the insured an effective defense.

The insurer should also initiate litigation management discussions at this time, along with discussions with the insured about strategic objectives for the defense. It is important to establish clear lines of communication, and for all parties to understand each other's positions, even if there is disagreement.

C. (Outside) Defense Counsel Perspective

Outside counsel should identify the role it will be playing in the defense of the litigation. Will it be sole defense counsel? Will it be lead counsel of a multi-firm effort? Will it be part of a virtual law firm?

Ideally, and whatever the role, outside counsel should work to establish common ground between the insurer and the insured, making clear that outside counsel's sole objective is to defend the insured, and that outside counsel is competent and

capable of providing that defense. As part of this, outside counsel should work with the insurer and the insured to establish a protocol for setting strategy and managing the litigation, clearly identifying reporting responsibilities. Establishing clear lines of communication will not only ensure that everyone has the information they need, but will also assist with ensuring that defense costs are reasonable and necessary.

D. Coverage Counsel Perspective

Coverage counsel should work with the insured to identify any potentially applicable insurance coverage, and to help the insured establish coverage under any potentially applicable policies. To that end, coverage counsel needs to ensure the insured complies with the requirements of any potentially applicable policies, and ensure that the insured cooperates with the insurers.

Coverage counsel will also need to quickly address privilege issue so that the insured's interests are protected in the underlying litigation, while still providing the insurer necessary information about the conduct of the defense and the status of the litigation. Consider whether the situation could be assisted by associating counsel.

At all points, it is important for coverage counsel (and all parties) to move forward in good faith, to ensure that the parties understand each other, even if they disagree. To that end, coverage counsel should facilitate communication and exchanges of information between the parties.

IV. BALANCING COMPETING INTERESTS WITH LITIGATION MANAGEMENT

A. Insured Perspective

The insured's primary concern will necessarily be ensuring that the company is protected. The insured will need to ensure its counsel is effective, that defense costs are being well spent, and that the company's interests are protected. While ensuring that there is coverage is an important part of ensuring the company is protected, protecting the company is Job One.

As with many things, preparation is important. There are many things that an insured should do before facing a large litigation situation. This includes:

- identifying and establishing relationships with effective counsel;
- developing and *utilizing* protocol for to manage counsel;
- developing plans for what you will do, and who you will use for the various issues you may face;

- work with your insurers beforehand, and attempt to establish common ground on various issues, including which guidelines will be used (insured's? insurer's? hybrid combination?) and what litigation management protocol will be utilized; and
- be able to demonstrate how the counsel you have selected have provided effective services in the past while charging only reasonable and necessary costs.

B. (Outside) Defense Counsel Perspective

Outside counsel should work to establish an agreed-upon strategy early on in the litigation. With that strategy in mind, outside counsel must then develop a team. The team development should reflect deliberate choices, rather than passive addition, to ensure efficiency. Some tips to keep in mind:

- construct a team where there are defined roles for all firms and vendors, and defined roles for all the people involved;
- monitor the team to ensure that everyone is performing their role, and only their role; and
- monitor the team to ensure that the firms and vendors can adequately handle their roles.

If there is a “virtual law firm” arrangement, there should be an established protocol for communicating within the virtual firm, for assigning work within the virtual firm, and for monitoring the work that is being done. With any large defense team, eliminating unnecessary duplication of effort is critical to ensuring that defense costs are kept to what is reasonable and necessary. Effective communication is key to eliminating such overlap, and is also key to maintaining an effective defense.

For a successful partnership, it is essential that everyone (insured, insurer, counsel) be on the same page, and knows what is happening in the litigation. To facilitate that, outside counsel should establish a protocol for working with in-house counsel, and establish a protocol for working with the insurer.

Outside counsel should also employ budgets, which will not only serve to communicate the litigation plan, but also promote “buy-in” from the various parties. Effective budgets should be broken down into component parts (including tasks and phases), so that everyone can determine what each piece of the litigation is projected to cost. As part of this budgeting process, outside counsel (with input from the insured and insurer) should determine what litigation tasks can be outsourced. A budget should clearly identify who is doing what, at what price.

C. Insurer Perspective

The insurer, while committed to providing an effective defense for the insured, also needs to ensure that defense costs are reasonable and necessary. Where there are independent counsel issues, the insurer should be proactive in working with the insured on the retention of counsel. Even in situations where the insured does not have the right to independent counsel, it may be in the insurer's interest to compromise with the insured on the selection of counsel.

Insurers should also attempt to negotiate hourly rates with retained counsel, as insureds can sometimes be reluctant to negotiate pricing with counsel. In the event the insurer is not able to negotiate acceptable rates with the outside counsel, the insurer should attempt to negotiate with the insured about splitting the costs of counsel, in exchange for the insured being able to select its preferred firm.

Equally important is working with the insured on the implementation of litigation management protocol. Insurers should be careful about being inflexible with any of these things. Compromise can often pay large dividends in controlling overall spend.

After counsel is selected and litigation management protocols are put in place, insurers should attempt to work cooperatively with outside counsel to assist with management of litigation. Insurers should offer whatever connections and resources they have available (including and preferred pricing arrangement with vendors) to assist with the insureds defense.

Finally, when assessing the reasonableness of the litigation spend, do so intelligently. Be sure to evaluate the litigation costs in the context of what is happening in the litigation.

D. Coverage Counsel Perspective

Coverage counsel should continue to protect the interests of the insured. In addition to continuing to address any coverage disputes that may exist between the insurer and the insured, coverage counsel should continue to ensure that the insured is complying with its obligation to cooperate with the insurer. Coverage counsel should continue to facilitate communication and exchanges of information between the parties.

V. EMERGING TRENDS IN MANAGEMENT OF LARGE LITIGATION

In our collective experience, there are a number of trends that can assist with ensuring that the defense of large litigation is limited to reasonable and necessary defense costs. Among these trends are:

- creation of litigation guidelines and management controls at the outset of the litigation, based upon the cooperative input of the insured, insurer, outside counsel and coverage counsel;

- creation and utilization of “virtual” defense teams, with attorneys with particular expertise from different firms being retained to address different and aspects of the litigation;
- outsourcing of litigation tasks to contract attorney services and other vendors;
- implementation of e-discovery cost controls;
- utilization of e-billing systems to better track budgets and costs; and
- utilization of expert consultants to assist in the selection of counsel, with the creation of a defense team, to assist with the creation and implementation of litigation management protocols, and for regular monitoring of the reasonableness of the defense costs.