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Parallel Regulatory and Civil Actions: A Dozen Tips From the Front Lines

From the Experts

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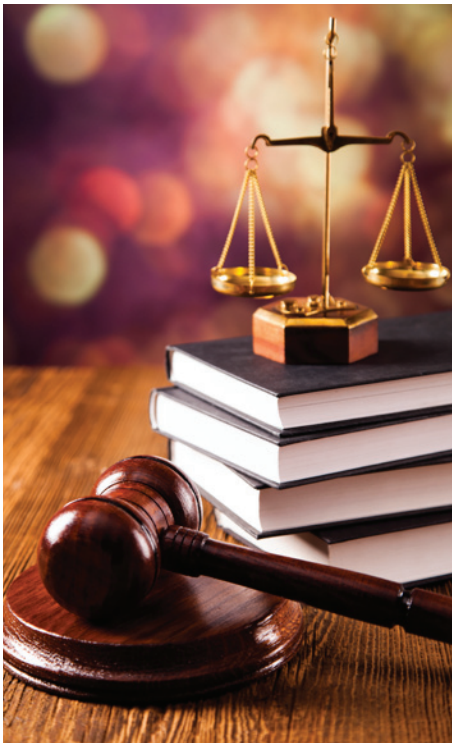
At any moment, without warning, almost any company or financial institution could find itself facing a nationwide barrage of parallel private and regulatory lawsuits and investigations— all arising out of the same business practice or basic facts. This article, which draws chiefly on our personal experience having served for over two years as national counsel for a company bombarded with litigation, will describe and discuss best practices for the general counsel whose company is in a similar situation. The failure from Day One to appreciate the full scale of what's confronting you—and how to work through it—can have deep consequences.

It takes only one allegedly faulty part in a product, or one type of unpopular financial instrument or one erroneous business rule applied to thousands of transactions—and any company can be dropped into the litigation kettle, with lawsuits and investigations coming fast from every direction. The matters could range from simple complaints filed by individual plaintiffs, to massive class actions alleging dozens of legal violations, to investigations, cease-and-desist orders or preliminary injunctions sought by state and federal agencies.

The possibilities are limited only by the imaginations of government agencies and plaintiffs lawyers. All told, the exposure—both in terms of liability and litigation expense—can reach multiples of your company's net worth.

Examples are common. Automobiles have allegedly sticky gas pedals, and the company is suddenly hit with a government investigation and dozens of private and regulatory actions across the country. Financial institutions that issued mortgages at subprime rates 10 years ago are still facing investigations and private and regulatory lawsuits across the country. Chain-restaurant customers are sickened by food-borne bacteria, and the company faces nationwide private lawsuits, federal grand jury subpoenas and FDA investigations. Deluges of this kind are hardly limited to publicly traded, megasize companies.



On the basis of our experience, as well as our background in the realms of white-collar, regulatory and civil litigation, we have identified a dozen best practices to help companies and general

counsel in similar situations, so that they do not just weather the storm but beat it back.

1. Evaluate the reach of your risk and act early. At the first sign that a new issue has the potential to turn into multiple suits on parallel tracks or presents exposure risk, it is essential to keep in mind that first steps often have an everlasting impact. This applies to initial decisions made about fact-gathering, voluntary disclosure, discovery provided in civil matters and press statements. Responding immediately in a proactive but also prudent manner, with skilled, experienced and fully engaged outside counsel, will put your company in the best position to avoid or mitigate loss downstream.

2. Select counsel. With cases occurring across the country, you almost certainly will need to hire outside counsel from a firm with nationwide reach. Not only can they quickly offer the attorneys and experience needed to counterpunch against the onslaught of incoming filings, they also will use their network to identify local counsel throughout the country who can serve as nationwide counsel's wing. Local counsel will have invaluable, experience-based insight into all the key players and local norms.

3. Learn the facts—and practice consistency and prudence in their presentation. The facts surrounding your emerging issue will not be clear-cut. In many ways, as with a variety of complex litigation, you should be undertaking a thorough internal investigation alongside your litigation preparations. However strong a grasp you believe you have over the underlying facts, be careful about how they are presented. Parallel litigation of this sort is an echo chamber, where those statements, made even just once in one matter, will find their way into all of your matters. Remember that absolute statements to adversaries and judges are tough to pull back from, and recurrent inaccuracies or inconsistencies will harm your defense and tax your credibility.

4. Learn the law. Though the matters you are combating are likely to be very similar in many respects—the same facts, the same accusations—the jurisdictions from which they emerge might not be. Hand-in-hand with selecting excellent local counsel is the need to thoroughly understand the law of each locality. The statutes and cases and rules across jurisdictions will not be homogenous, and a failure to appreciate that could mean that you overlook important defenses and thorny obstacles.

5. Know your adversary and calibrate your tone accordingly. Parallel regulatory and class action litigation often requires triaging of resources. Understand the different weapons your adversaries possess. Emergency relief might be available to an AG's office that no private party litigant could ever obtain. Damages can be multiplied, and fines levied, in enforcement actions in a way that has no analog in the private party context. Know each threat's maximum exposure, and the speed with which it can be reached. Similarly, you must calibrate tone for each audience. Aggression that may work wonders responding to a putative class action could prove ill-fitting for a regulatory subpoena.

6. Focus on the big picture—but do not lose site of the little pictures. When defending against nationwide parallel regulatory and civil litigation, all key case-level decisions need to relate to an overarching strategy. A lack of a clear strategy, and a lack of focus on that big picture, will result in decision-making miscues. This does not mean, however, that you should focus only on the "big" cases while giving less attention to the matters where fewer dollars are at stake. The full litigation portfolio is interwoven, and it can be assumed safely that all of your current and future adversaries are tracking each of your matters. A bad decision or ruling or fact that emerges from even the smallest one will affect the larger ones.

7. Understand the "known unknown" threats. However many threatened and active suits you are confronting, odds are that there are more brewing. Take inventory of the other potential threats. What federal or

state agencies might jump in? Are more civil suits likely? Are related issues not yet touched on by your adversaries likely to be swept in? Is there possible criminal exposure, which necessarily implicates a slew of additional unique concerns? Is your matter attracting political attention? Could congressional subpoenas be expected? It is critical to bear in mind all of these subsurface threats, as decisions made within existing cases will almost certainly need to take these contingencies—some of which may carry greater exposure than what you are currently focused upon—into account. Do not make unnecessary admissions or arguments that could end up hurting you in cases that have yet to emerge.

8. Defend yourself. The weight of parallel action can have a variety of psychological impacts, discouraging an aggressive defense. But the alternative could be disastrous. Showing all adversaries and those on the sidelines who are considering jumping on the bandwagon that you are no pushover can curb litigation losses and deter the threats you are facing.

9. Settle to lock in the good and avoid the bad. Find opportunities for early wins—jurisdictions with better law, opponents with less firepower, and the like. A key early victory could be wiped out by a later development in the same case, or an appeal. But not if the case is settled. Locking in those victories when facing an onslaught provides scaffolding for your other cases—positive precedent from which to stage your defense, achieve additional wins and leverage for favorable settlements. On the other hand, when it is clear that highly damaging facts or legal rulings are poised to surface in one case that happens to be miles ahead of others, consider carefully if it is time to resolve the case, even if the price is painful. Otherwise, the harm caused will hobble your defenses and settlement leverage elsewhere. This is just another way in which the interwoven nature of your nationwide docket cannot be forsaken.

10. Ensure meticulous organization. Put outside counsel on the hot seat and ask how their firm is making sure that all of the many, many moving parts are being tracked and archived for later review. A lack of organization—tracking files, correspondence, discovery, deadlines—will cost the company. In these circumstances, you must have a well-oiled machine in your corner.

11. Identify efficiencies. This is expensive. Paying the firm to rewrite the same brief that contains the same legal arguments over and over again is wasteful. Reviewing the same documents over and over again for different productions is too. Tell outside counsel to identify ways to ensure that the work being done will serve double- and triple-duty, and then some.

12. Communicate. Obvious though it may sound, because parallel litigation of this variety can become a slog, it is vital that all involved—your business; your fellow in-house counsel; and your outside counsel—have clear, open and robust lines of communication to guarantee that all case and matter developments are tracked, and that the overall strategy is being executed properly.

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