Fortifying ourselves for 2023: Six key takeaways from DLA Piper’s D&I Product Liability Symposium

Even before the pandemic, businesses have been facing new challenges in disputes – not just the extent of disputes, but their very nature.

DLA Piper’s first annual Product Liability Symposium, hosted by our Product Liability Diversity and Inclusion Committee, addressed an array of these important litigation trends. We also looked at the significance of diversity and inclusion efforts in dealing with such litigation and in handling legal challenges in a dynamic and uncertain environment.

As you prepare for 2023, here are six key takeaways that we hope will help you identify potential trends you may face in litigation, along with our suggestions for a comprehensive approach to addressing such litigation.

1. Why is there such a substantial increase in class action and mass tort filings? The trend over the last decade has been an increase in mass tort cases filed and transferred into an MDL. In particular, 2022 has seen a tsunami of new filings. The key reasons leading to this uptick in filings are:

   - A significant increase in litigation funding
Higher levels of coordination among plaintiffs’ law firms
The use of social media to reach a broader client base
Plaintiffs’ firms and “aggregators” spending millions in advertising to drive up the number of claims

2. **Class action-type litigation is increasing in the European Union.** In 2020, the European Parliament formally endorsed a Collective Redress Directive – legislation that provides the potential for collective consumer lawsuits in the European Union. Many plaintiffs’ firms in the US have partnered with firms in the EU and are sharing their playbooks. Companies should anticipate an increase in class action type litigation in the EU and take steps to prepare.

3. **Don’t get caught flat-footed: learn to identify trends that may lead to new or increased litigation.** Mass tort and class action litigation may arise for various reasons, but much of the litigation is typically sparked by specific events. Taking the following steps could help you anticipate and stay ahead of the litigation:

   - Stay apprised of the relevant medical literature. Litigation often arises from newly published medical studies that suggest a link between a certain drug, chemical, or event and a disease.
   - Pay attention to news stories related to your products and business.
   - Be mindful of the political climate and the impact that elections may have on the regulatory framework. Watch for changes in regulations that may impact your business.
   - Watch where plaintiffs’ firms and “aggregators” are spending their money on advertisements, and watch those advertisements as well.
   - Network – develop and maintain relationships with law firms and other business leaders to help identify trends.

4. **Once a potential litigation is identified, what can we do to prepare?** The plaintiffs’ firms filing cases now are the same firms that have been filing class actions and mass tort litigation for years. They are highly experienced in this area of law and have developed detailed playbooks on how to approach and succeed in such cases. It is important to get ahead of the filing of new lawsuits and take the following steps when it looks like significant litigation is on the horizon:

   - Engage legal counsel that has the experience to anticipate the course of the litigation, the knowledge to navigate the complexities, and the resources to assemble the right team.
   - Retain medical and scientific experts early on.

5. **Network with your local leaders and state AGs.** When a company is under state investigation, having connections within your legal community will prove useful to interpreting and navigating local regulations. State AGs can be more aggressive than federal agencies, such as the FDA and EPA, as they seek to litigate claims under the lens of consumer protection. Moreover, for litigation support, several state AG offices may pull in outside private counsel who are attuned to ongoing MDLs and toxic torts. Because these public suits often trail behind the private suits, they leverage the discovery, expert opinions, and scientific evidence already deployed by private parties to save resources and advance their litigation strategy.

6. **Diversity and inclusion are increasingly essential.** Recruiting in new places so that your employees look like your consumers; sponsoring and mentoring both staff and students/trainees; and devoting company time and resources to community service are all examples of initiatives that can boost your diversity and inclusion, and ultimately your bottom line. With a pathways program and employee rating system, as some companies have done, implementing leadership development programs and obtaining formal feedback ensures accountability while amplifying the voices of diverse employees in corporate decision-making. Secondments to clients and hosting regular roundtable discussions on key values and current events are other great ways to support employees and include their voices in your overall business strategy. D&I is successful when we think about opening minds, not changing minds.

**Going forward**

For more information about the ramifications of these takeaways, and preparing your company for what may come next year, please contact either of the authors or any member of DLA Piper’s Product Liability, Mass Tort and Product...
Stewardship team.

AUTHORS

Adam A. DeSipio
Associate
Philadelphia | T: +1 215 656 3300
adam.desipio@dlapiper.com

Nur Kara
Associate
Boston | T: +1 617 406 6000
nur.kara@dlapiper.com