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5 Tips For Surviving A 'Judicial Hellhole'

By **Erin Coe**

Law360, San Diego (April 09, 2014, 9:31 PM ET) -- When corporations are sued in plaintiff-friendly jurisdictions, they may be tempted to throw in the towel early and settle the case, but defense lawyers who team up with local counsel, avoid courtroom gimmicks and preserve their arguments for appeal can help businesses survive and prevail in these so-called judicial hellholes, experts say.

Every December, the American Tort Reform Association ranks the jurisdictions where judges in civil suits systematically apply laws and court procedures "in an unfair and unbalanced manner, generally against defendants." The latest judicial hellhole list put California at the top, noting the state remained a breeding ground for consumer class actions, disability-access suits and asbestos claims. The Golden State was followed by Louisiana; New York City; West Virginia; Madison and St. Clair counties in Illinois; and South Florida.

In a judicial hellhole, half-baked legal theories raised by plaintiffs have a better chance of gaining traction, such as when a California court last year departed from courts in other states and allowed a public nuisance theory to proceed against lead paint makers as opposed to a higher evidentiary standard under product liability law, according to Darren McKinney, an ATRA spokesman who edits the annual judicial hellhole report.

A judge in Santa Clara County Superior Court in January ordered Sherwin-Williams Co., NL Industries Inc. and a ConAgra Foods Inc. subsidiary to pay $1.15 billion to fund a government-run program to address the health risks posed by lead paint in homes in California municipalities that brought the suit more than a decade ago, replacing a tentative order issued in December.

"When a company is sued in a judicial hellhole and can't move the case out of there, the defendant is more inclined to seek settlement talks instead of saying, 'No, we're not liable, and we'll see you in court,'" McKinney said. "It is far less likely to go to trial than it otherwise would be."

Former West Virginia Supreme Court of Appeals Chief Justice Richard Neely, who argued that judges would continue to take their states' interests into account until the federalization of product liability law, wrote in a 1988 book that, "As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so." Neely has claimed in news reports that he made the statement ironically to illustrate the rationale he thinks some judges use to find for plaintiffs.

"This quote crystallizes the fears that companies have about the intention of some courts going into a case, rightly or wrongly," said Archis Parasharami, co-chair of Mayer Brown LLP's consumer litigation

and class actions practice. “It shows why businesses might be nervous to litigate in a certain jurisdiction.”

But companies don’t have to feel helpless or doomed if they are targeted in litigation in one of these plaintiff-friendly jurisdictions, experts say. Here, experts share five tips on how to survive in judicial hellholes:

Connect With Local Counsel

Even if a case lands in a hellhole, the success of the litigation will depend on the judge, who may or may not align with the apparent reputation of the jurisdiction, and defense counsel should seek guidance from local counsel on the norms, procedures and preferences of the judge, according to Parasharami.

“If a client feels that it’s starting from behind because of a court’s reputation, it becomes especially important to get the best advice about the facts on the ground and in particular how the judge is likely to react to certain arguments and strategies,” he said.

While local counsel is not going to help out-of-town defense lawyers suddenly become part of the local legal community, forging a relationship with a firm that is well respected in the community could give defense lawyers credibility before a particular court in addition to useful information on the court’s unique dynamics, according toDechert LLP partner William Oxley.

“In certain courtrooms in Los Angeles, there are rules that you must use Mr. or Ms. when addressing someone, and so if you call a witness or clerk by their first names, you’re going to get knocked down a little bit,” he said. “In another jurisdiction outside California, when you cross-examine a witness, you need to sit at a table rather than stand. It’s good to know these details because you want to avoid anything that is going to clutter your presentation before the judge and jury.”

McKinney has criticized some local counsel for profiting from the status quo in certain judicial hellholes, saying they have been less vigorous in helping convince judges, state lawmakers and others that reforms — like anti-forum-shopping laws for asbestos litigation in a state — are needed.

“Some local defense counsel aren’t necessarily all that bothered by the shenanigans the plaintiffs bar and plaintiff-friendly judges are perpetrating on certain jurisdictions,” he said. “They think, ‘If all these new cases are being filed and Fortune 500 companies are hiring me to defend them, remind me again why I have beef with this set-up?’”

But at the same time, he acknowledged that local attorneys are critical to corporate defendants’ cases, and many are ready to go to the mat for their clients and fight in their best interest.

“Local defense counsel are before the judges and across from local plaintiffs counsel every day,” he said. “If you don’t have local expertise, you’re going to get fleeced.”

Skip the Gimmicks

When defending a case in the South, some out-of-town lawyers may think attempting a Southern accent or donning cowboy boots will help them win over the decision maker, but lawyers should instead make an extra effort to ensure their opening statements, closing arguments, witness examinations and overall presentation before a judge and jury are grounded in honesty, according to Oxley.

“If you are a phony, you will end up fitting into the stereotypes that jurors have about defense lawyers,” he said. “If you’re prepared and you’re playing it straight, you don’t have to have a big belt buckle to get the jurors’ attention. It’s not the belt buckle that matters. It’s the substance of what you’re telling them.”

Regardless of whether a case is taking place in a difficult jurisdiction or nirvana, Oxley said he believed that judges and juries are trying to make the right decision and that lawyers shouldn’t blame the jurisdiction as an excuse for a poor result for their client.

“Just because you’re in a jurisdiction where the plaintiff's lawyer may know the judge or there are a lot of plaintiffs verdicts, I don’t buy into the notion that something unfair is going on,” he said. “As a trial lawyer, you always have to do everything you can to gain the court’s and jurors’ trust. You have to present in a way that is sincere and honest.”

Take the Case to Trial

If a defendant can’t remove a case out of a judicial hellhole, it may want to consider taking the case to trial, according to McKinney.

“If the facts are on your side and you can afford to do it, defendants may want to make their case an example by taking it all the way to the jury,” he said. “You are putting your faith in the jurors and that takes guts, but it is one means to trump plaintiffs lawyers and their buddy judges in some jurisdictions.”

McKinney noted that although Madison County, Ill., is a popular jurisdiction for filing asbestos litigation and accounts for one in four asbestos suits filed in the U.S., the last nine trials have resulted in verdicts for the defendants.

“Even in a judicial hellhole, trial lawyers and judges don’t always get their way,” he said. “Sometimes juries come back with good decisions for defendants.”

However, because the path to trial is a risk and often expensive, some defendants, especially smaller businesses, don’t necessarily have the option to take the case before a jury, he said.

“Just the cost entailed with billable hours to take a case all the way to trial may be something that a defendant can’t contemplate, and in those situations, settlement is more likely than a jury verdict,” he said. “But if a defendant is large enough and has the financial wherewithal to stand up to a judicial hellhole, it can pay off.”

Have an Appellate Plan Ready

When a case is proceeding in a judicial hellhole, it becomes even more important for defense lawyers to identify significant legal arguments and ensure they are preserved for further review by state appellate courts, which may be more hospitable to businesses’ positions, according to Parasharami.

When a judge or jury hands down a decision that seems unfair or wrong, a defendant needs to be especially careful and brave in guarding its appellate record, according to Oxley.

“Sometimes lawyers are afraid to tell a judge when they think a ruling is erroneous or to give the judge a

chance to fix it, but lawyers have to avoid that fear," he said. "They need to tell the judge forcefully but politely why their position is right and why the court is getting it wrong so at least it's on the record."

The best way to ensure that important issues are preserved for appeal is to have counsel thinking about those issues the moment a complaint comes in, according to Parasharami.

"Potentially, once issues are waived, they are gone forever," he said. "My recommendation to business defendants if they are facing a class action in a judicial hellhole is to think right from the outset what their appellate strategy is going to be. When lawyers are thinking five to 10 steps down the line as opposed to just the next task, that strategic approach can make a big difference in the success of a case."

Raise Federal Defenses

When fighting proposed class actions in state court, some defendants don't think to raise certification arguments based on federal law, but that approach can be one route to appellate review, according to Parasharami.

"A favorite argument of mine is asserting federal due process constraints on class actions," he said. "If a business raises and preserves federal grounds for defeating class certification, it's one way to get the U.S. Supreme Court to intervene."

State supreme courts also take notice when defendants rely on arguments that point to a case's federal implications, and such a move could increase the chances that a state high court will interpret its own state law in a way that follows federal requirements, which tend to make class certification less likely, Parasharami said.

"When state supreme courts think the U.S. Supreme Court might be watching a case, they are more likely to interpret state law based on federal requirements," he said.

--Editing by John Quinn and Philip Shea.
