

## National business

---

### Managing risk to limit exposure

Wednesday, December 2nd, 2009 | 5:50 am

#### Canwest News Service

The sheer time and expense companies face when hit with a class action can be staggering. While companies might not be able to prevent such litigation, they can take steps to bullet-proof themselves from such claims and mitigate their liability before any writ is served.

There are a number of things companies can do, say litigation lawyers who defend companies in class suits. They range from conducting a review of the company's written materials and insurance policies to adding arbitration clauses in consumer contracts.

"What we do with clients is pro-actively [undertake] audits and review their materials so they're no longer interesting to a plaintiff's counsel," says Timothy Buckley, a partner and national leader of the class-action practice group at Borden Ladner Gervais in Toronto.

Barry Glaspell, a partner and litigation lawyer at the same firm, says one of the things he advises some companies to do is introduce an ombudsman.

"People sue when they're angry. If you have a way of diverting that negative energy" consumers might be less inclined to take legal action.

He also helps clients assess consumer feedback to identify possible grounds for litigation in advance. "Developing a sensitivity or an eye for the correspondence that comes in to the company can help [see problems in advance]," he says.

Including an arbitration clause in consumer contracts could also provide an alternative recourse to class actions, says Mr. Glaspell, although he notes that the Supreme Court of Canada has granted leave to appeal in the case of Seidel v. Telus in which the arbitration requirement is being challenged over the right of plaintiffs to have their dispute heard by a court, rather than an arbitrator.

Lawyers also urge that companies keep a close eye on the courts south of the border, where roughly half of the class actions launched in Canada originate after consumers here get word of a case.

Being forthright when a crisis occurs can also help diffuse a situation and resolve cases quickly. Jeffrey Leon, a partner in the litigation group at Bennett Jones in Toronto, points to the successful damage control taken by Maple Leaf Foods, which issued a massive recall of products and publicly apologized over a bacteria contamination.

"Often companies are better off dealing with issues in an up-front way," says Mr. Leon. "If you've done something wrong, sometimes you're better off acknowledging it, say you're sorry and figure out a way to deal with it."

He also assists urges clients to undertake a litigation audit, which looks at areas of a business that could expose a company to legal action.

"If you have an area that could attract litigation, it's best to be able to head off issues before they become litigious," he says.

Mary Thomson, a senior partner at Gowling Lafleur Henderson in Toronto, says companies in industries that could be more vulnerable to class actions, such as the pharmaceutical field, should have a professional review their insurance coverage to make sure it is adequate.

She notes that news coverage of class actions are fueling their frequency. "A lot of class actions in Canada now are prompted by media attention," she says, adding that executives can perhaps learn from news reports and take action to protect themselves from similar litigation.

Due to the "huge amounts of money involved" when a company is served with a class action, it's becoming imperative for corporate clients to seek legal advice to minimize their risk, says Alan D'Silva, a partner at Stikeman Elliott in Toronto.

"I spend a lot of time with clients looking at their liability policies," says Mr. D'Silva. "Litigators have taken on a bigger role in risk management, making sure clients' disclosure is accurate and that they have proper director and officer insurance in place that can protect them if they ever get sued."

Ron Slaght, a partner at Lenczner Slaght litigation boutique, also provides risk-management advice to corporate clients, although he says some companies tend to wait until they've been served with a lawsuit before they seek help from a law firm.

"Then they tend to go into 'frozen mode' and become defensive," Mr. Slaght says.

Besides helping clients minimize their liability, he also assists with developing strategies in the event of a lawsuit to mitigate long-term damage to a company's reputation.

"What I've learned is disclosure, a willingness to make changes and respond, is the best approach. Don't go into defensive mode; go into offensive mode and say, 'Okay, there's this claim, why don't we take the wind out of its sails by being proactive?'"

This entry was posted on Wednesday, December 2nd, 2009 at 5:50 am and is filed under National business. You can follow any responses to this entry through the RSS 2.0 feed. You can skip to the end and leave a response. Pinging is currently not allowed.

© 2009 Kelowna.com. All Rights Reserved.