TRENTON H. NORRIS

On ENVIRONMENTAL LAW

For our clients, the most satisfying victories are those that are won without litigation. In the environmental arena, there is much that is unavoidable — new rules, new interpretations, new science, and new public concerns. But surprisingly few of our clients control what they can control — the terms of their agreements with other businesses. That can lead to the least satisfying form of litigation — litigation that disrupts important business dealings.

Regardless of the industry, little is accomplished in the modern economy absent an interlocking network of business relationships. Consumer product companies develop and produce goods through a complex chain of design, manufacturing, assembly, quality control, distribution, and marketing. Real estate developers produce buildings by coordinating the products and services of other businesses. And this is nothing compared to the complexity of business relationships required in mining, transportation, or oil and gas development.

For most businesses, these are not mere purchases but relationships built over years, involving a multitude of transactions and a wealth of knowledge about the businesses, products, and services involved. These relationships are both complex — often crossing national and cultural boundaries — and critical to the success of the businesses involved, whether they are procuring or offering goods or services. When a problem blows up — sometimes literally — it is a problem for everyone in the supply chain.

It is therefore surprising how few of these critical relationships are governed by carefully negotiated agreements that acknowledge and allocate environmental risks. Large players tend to rely on their size as insurance: if an environmental problem arises, they figure they can force the smaller players in the chain to address it. But they can miscalculate, particularly in a crisis. For example, if a contaminant is found in a toy, just before the holidays, and the only factory with any capacity to fix the problem is also the one that caused it, you have no choice but to accept their terms. And even for next holiday season, you may find that there are few alternatives available that meet other important criteria for the business.

Instead, the time to make use of negotiating leverage is in negotiating the agreement that governs the relationship. Litigators can inform these negotiations. With a focus on consumer product supply chains, here are a few of the most common mistakes that lead to litigation:

Not Having an Agreement. There is very little law that applies to these business relationships in the absence of a written agreement, and it mostly relates to enforcement of commercial terms for delivery and payment. The "battle of the forms" is not a game that can be played effectively by dozens of non-lawyer employees contracting for goods and services, and even if it could be these deals are often made across borders with differing default rules. A standard master supply agreement, with employees trained in its use, is a necessity of modern compliance and risk management.

Not Customizing Compliance Requirements. When there is an agreement, it often contains a provision requiring the supplier to "comply with all applicable laws." But does the supplier know where the product is to be sold and what rules apply in that jurisdiction? What if it is sold in other jurisdictions? Does the supplier control the distribution? Unless the agreement is clear on these points, disputes will arise.

Not Determining Control of Defense and Publicity. Environmental claims are often brought by third parties such as governments and activist groups, and they are often debated in the public arena as much as in the courts. A perfectly reasonable legal defense for the supplier (e.g., "the chemical is legal and not all that toxic") may not serve the interests of the company whose brand reputation is at stake. Who controls the defense as well as public statements should be spelled out.

Trenton H. Norris

Not Considering Dispute Resolution. Supply agreements will often specify a U.S. court as the venue for resolving a dispute, but unless they also address jurisdiction over the parties, service of process, required travel to the U.S. court, and similar issues, they are not as useful. Similarly, some companies have a "one size fits all" alternative dispute resolution process that may be more bureaucratic than is merited for common disputes, or too perfunctory for more significant ones.

Not Investigating Security and Insurance. If something goes wrong, many suppliers either do not have the resources to back up their indemnity obligations, or what resources they have are beyond the reach of U.S. courts. Both simple and complex security arrangements can be negotiated. Likewise, in some situations third-party insurance may be available.

Not Providing Access to Information. Ready access to information — such as product formulations — is critical to solving product integrity issues. With appropriate protection for trade secrets, agreements need to require prompt sharing of information.

Environmental litigators not only win lawsuits — we can also help avoid them. And in today's interconnected world, compliance requires working through the network of business relationships on which the client depends.

Mr. Norris is a partner in the San Francisco office of Arnold & Porter LLP. trent.norris@aporter.com.