Preventing and Defending Class Actions: Key Information to Protect Your Company

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What Makes Class Actions Different?

- Size and scope
  - Larger cohort of plaintiffs & more $ at issue
  - Usually fundamental issues
    - Products = design flaws
    - Services = disclosures, sales or billing practices
    - Employment = pay or promotion patterns & practices
- Discovery & document retention burdens
- Federalization
  - Class Action Fairness Act of 2005
    - Minimal diversity; $5 million at issue; > 100 members
  - Designed to move class actions to fed court – and it’s worked!
Class Action Life-Cycle

- Depends on type case:
  - Securities/Antitrust:
    - 3.5 years average time between filing and settlement
  - State-law (i.e., diversity jurisdiction) cases depend on several factors (data taken from a FJC study of 225 cases)
    - 55% of all diversity class actions are voluntarily dismissed – average length before dismissal = 1 year;
    - 29% of all diversity class actions are dismissed by dispositive motion – average length before dismissal = 16 months;
    - 13% of all diversity class actions are eventually settled – average length before settlement is 21 months;
  - Motions to dismiss increasingly common – even if not likely to prevail on all claims (can force positions that make class certification harder).
An Ounce of Prevention …

- Proactive customer service
- Enhanced disclosures
  - Helps argue variations to defeat certification
- Arbitration provisions & class action waivers
    - FAA preempts state laws voiding class action waivers
- Choice of law clauses for consumer’s home state
    - May limit exposure to single-state class actions
Communications Plans for Class Actions

Beware overreaction
- Press rarely interested in corporate spin
- Don’t prolong or multiply the news cycle
- Focus on constituencies that matter
  - Analysts, specialty press, etc.

● Internal communications plans
  - Consider whether truly necessary
  - If so, stick up for the brand
  - Solicit feedback

● Cautionary note:
  - Can’t forbid employees from talking to plaintiffs
Government Investigations & Class Actions – All is Not Lost

"We decided to recall our new drug because a common side-effect is lawsuits."
Dealing With Similar Lawsuits & Government Investigations

- Can limit the likelihood via Forum selection clause, consolidation/MDL;
- Settle nationwide, if possible; acts as bar to other class cases
- Move to dismiss copy-cat complaints under Rule 11
- Consider benefit of government settlement as basis to kill class actions
- If government investigation is criminal lots of big decisions to make quickly
  - Separate counsel for officers and directors likely needed;
  - Seek a stay of the civil proceedings for several reasons:
    - avoid witnesses taking the Fifth Amendment in civil depositions;
    - avoid de facto double jeopardy (bars later gov’t civil investigation).
Class Action Discovery

- Strategies To Minimize the Pain Before the Wheels Come Off
Minimize Discovery Costs

- Seek to bifurcate Class vs. Merits discovery until certification is resolved
- Limit Geographic Scope
- Concede expensive elements --
  - E.g., If you concede it, you can get an Order barring discovery into that area. See *Shields v. Morgan Fin., Inc.*, 130 Wn. App. 750, 759 (2005) (stipulation to not contest public interest element of CPA meant discovery into other borrowers was “irrelevant and not required”).
- Coordinate where expenses are bilateral – depositions, etc.;
  - Plaintiffs’ lawyers have a lot more skin in the game than defense lawyers as to immediate costs, and have incentive to keep (potentially unrecoverable) costs down.
Motion Practice & Appeals

- Early motions to dismiss
  - Risk? No res judicata vis a vis the class
  - Reward? Deters plaintiffs from investing in the case

- Class certification motions
  - Evolving into more fact-driven process

- De-certification motions

- Appeals
  - State court: Discretionary review available & often granted
  - Federal court: Unusual interlocutory review process
  - Absent interlocutory review, appeal only from final judgment
Settlement Considerations

- **Individual settlements**
  - Early pre-certification dispositions sometimes possible
  - But no bar against other class actions
  - Common after denial of certification

- **Class settlements**
  - Is it *only* about the fees? (Courts can tell)
  - Settlement structure
    - Common fund settlements
    - Fixed payment settlements
    - Claims-made settlements
  - Scope of release & class vs. criteria for payment
  - Non-monetary relief