

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

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What Makes Class Actions Different?

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

Class Action Life-Cycle

- o Depends on type case:
 - o Securities/Antitrust:
 - o 3.5 years average time between filing and settlement
 - o State-law (i.e., diversity jurisdiction) cases depend on several factors (data taken from a FJC study of 225 cases)
 - o 55% of all diversity class actions are voluntarily dismissed – average length before dismissal = 1 year;
 - o 29% of all diversity class actions are dismissed by dispositive motion – average length before dismissal = 16 months;
 - o 13% of all diversity class actions are eventually settled – average length before settlement is 21 months;
- o 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
 - *AT&T Mobility v. Concepcion*, U.S.S.C. No. 09-893 (Apr. 27, 2011)
 - FAA preempts state laws voiding class action waivers
- Choice of law clauses for consumer's home state
 - *Schnall v. AT&T Wireless*, 2011 WL 1434644 (Wash. Sup. Ct. Apr. 14, 2011)
 - 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



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

- o Individual settlements
 - o Early pre-certification dispositions sometimes possible
 - o But no bar against other class actions
 - o Common after denial of certification
- o Class settlements
 - o Is it *only* about the fees? (Courts can tell)
 - o Settlement structure
 - Common fund settlements
 - Fixed payment settlements
 - Claims-made settlements
 - o Scope of release & class vs. criteria for payment
 - o Non-monetary relief