



## 104 - Class Actions - New Developments & Practical Implications

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## Faculty Biographies

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Linda M. Kearney is managing associate general counsel for WellPoint, Inc. in their Austin, Texas office, where she works as in-house counsel. Ms. Kearney serves on WellPoint's litigation management team. Her primary responsibilities include managing litigation nationwide for WellPoint's UniCare/HealthLink subsidiaries.

Prior to joining WellPoint, she was a partner at the law firm of Porter, Rogers, Dahlman & Gordon, P.C., in Corpus Christi, Texas, where she primarily handled insurance and health law related litigation. She served as assistant attorney general in the law enforcement defense division of the Texas Attorney General's Office.

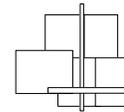
Ms. Kearney is a member of the American Corporate Counsel Association, ABA – Health Law Section, and the Austin Bar Association Health Law Section. She has served as an elected officer or appointed official for several other law related organizations, including serving as the district chairperson presiding over grievance hearings for attorneys in Texas who have been accused of professional misconduct. Ms. Kearney is Board Certified in Civil Trial Law by the Texas Board of Legal Specialization.

Ms. Kearney holds a J.D. from the University of Notre Dame Law School and a B.A. from The George Washington University.

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## Trends In Class Actions and Practical Implications- The In-House Counsel Perspective



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*Disclaimer: The views expressed herein are not made on behalf of WellPoint, Inc. or any of its subsidiaries or affiliates.*

## In-House Counsel Perspective

### Practical Responses to a Class-Action Complaint

- **Create team of in-house and outside counsel**
  - Selecting outside counsel:
    - Qualifications
    - Knowledge of the company
    - Fee arrangement
    - Local counsel/National counsel
    - Serve as central repository for all documents

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## In-House Counsel Perspective

- **Create a defense plan**
  - Interview and select company witnesses early
    - Cooperation clause in severance packages of key witnesses
  - Retain economists or enlist company finance department to help determine potential exposure
  - Develop early strategies to defeat or minimize the potential class size
  - Consider removal to federal court under CAFA
  - Depose class representatives

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## In-House Counsel Perspective

### **Managing the Public Message within the Company**

- Work with internal media department to develop talking points
- Internal messages to company employees
- Make strategy decision about whether to respond to media with "no comment" or to discuss litigation and any affirmative changes

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## In-House Counsel Perspective

### **Litigation Holds**

- **Identify location of relevant electronic information**
  - Determine the information that is central to the issues and reasonable to retain/retrieve
  - Don't forget e-mails and instant messages

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## In-House Counsel Perspective

### Litigation Holds (continued)

- **Determine who should receive litigation hold notices**
  - Generally, work with IT to develop a comprehensive list of systems, dates of use, purge schedule and person responsible for the system
    - IT personnel may have to testify about the systems
    - Use internal IT or vendor
  - Work with the business unit to determine the systems affected by the claims
  - Negotiate a narrow scope of retention in Rule 26(f) conference if possible
    - Consider negotiating a preservation agreement with opposing counsel and present to court for entry of an order

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## In-House Counsel Perspective

### Authenticating Your Own Evidence

- ***Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (2007) (detailed analysis of FRCP 901 and the most common types of ESI):**
  - Some courts have determined that the basic authentication issues with e-discovery are essentially the same as with paper discovery and require the same type of proof, while others employ a more rigorous standard.
  - If the ESI is critical to the success of your case and there is any question about which standard the court will apply to authenticate the electronic documents, it is more prudent to follow the more rigorous standard
  - Focus is not necessarily on the creation of the electronic document, but on the preservation of it

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## In-House Counsel Perspective

### **Authenticating Your Own Evidence** (continued)

- Be prepared to explain through an affidavit, deposition or live testimony:
  - The company's policies and procedures for the use of the computer equipment, databases and programs;
  - How access to the database and computers are controlled;
  - How changes in the database are logged or recorded; and
  - The structure and implementation of backup systems and audit procedures.
- **Request a stipulation from opposing counsel or propound RFA to determine which electronic documents will need to be authenticated. *Id.* At 574**

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## In-House Counsel Perspective

### **Challenges of an early exposure analysis in setting reserves and assessing potential liability**

- FAS 5 requirements: Must establish a reserve for pending or threatened litigation or claims if:
  - It is probable that the company has suffered a loss and
  - The amount of that loss can be reasonably estimated
  - Must disclose probable loss even if the amount of the loss is not capable of estimation.
  - Requires professional assessment and judgment
  - Judgment/assessment must be supportable

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## In-House Counsel Perspective

### **Challenges of an early exposure analysis in setting reserves and assessing potential liability** (continued)

- FIN 14 indicates that a company should make its best estimate of the amount of the probable loss, and if no amount is a better estimate, accrue at the low end and disclose the additional amount as a reasonably possible loss.

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## In-House Counsel Perspective

### **Challenges of an early exposure analysis in setting reserves and assessing potential liability** (continued)

- Setting a reserve with a "claims made" settlement
  - Collect published reports or studies on redemption rates as a baseline for estimating the expected redemption rate
  - The more complicated it is to make a claim, the lower the redemption rate (point of sale coupons v. submission of claims forms and supporting claim documentation)

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## In-House Counsel Perspective

### Arbitration Clauses

- **Arbitration provisions that are silent as to class treatment of disputes interpreted differently by the federal circuits.**
  - Some circuits hold that a court lacks authority to certify class arbitration unless expressly provided for in the contract even if inefficiencies result.
  - Others allow consolidation of arbitration claims.
  - Make an express statement for or against class-wide arbitrations.
- **Drafting Point**

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## In-House Counsel Perspective

### Class Action Waivers

- **Contracts sometimes include arbitration clauses that prohibit or force parties to waive their rights to participate in any class action**
  - Some circuits have generally found such contract clauses valid and enforceable (3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup> and 11<sup>th</sup>)
  - Other circuits have determined that such clauses are unconscionable and unenforceable (1<sup>st</sup> and 9<sup>th</sup>)

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## In-House Counsel Perspective

### Mediation

- Deciding when mediation makes sense
- Preparing for mediation
- Analyze class size and scope
- Estimate allocation of damages for various categories of purported class members
- The attorney's fees "dance"
  - Decide the maximum percentage or amount you will not object to the plaintiffs' counsel receiving after settlement agreement reached

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## In-House Counsel Perspective

### Settlement

- **Settlement must be fair, adequate and reasonable (FRCP 23(e)(1)(C) and CAFA).**
  - The *Bennett* factors (*Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11<sup>th</sup> Cir. 1984)):
    - The likelihood of success at trial;
    - The range of possible recovery;
    - The point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable;
    - The complexity, expense and duration of the litigation;
    - The substance and amount of opposition to the settlement; and
    - The stage of the proceedings at which the settlement was achieved.

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## In-House Counsel Perspective

### Settlement (continued)

#### ■ Claims-made settlements

- Coupon settlements disfavored
- Opponents claim coupon settlements are not fair, adequate and reasonable because:
  - no meaningful compensation provided
  - fails to disgorge defendant of alleged ill-gotten gains
  - requires class members to do business with defendant in the future

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## In-House Counsel Perspective

### Settlement (continued)

- Coupon settlement considerations (*Figueroa and Garner v. Sharper Image Corp.*, (U.S. Dist. Ct., Southern Dist. FL, Miami Div., Document 444, Case 1:05-cv-21251-CMA)(\$19 coupons to purchase merchandise at Sharper Image; "settlement is excellent model for post-CAFA coupon settlements"):
  - Transferability
  - Product Selection
  - Duration of Redemption Period
  - Aggregation
  - Administrative Restrictions/Claims process
  - Allocation of Merchandise Credits to Settlement Class Members
  - Cash Distribution or Cy Pres Fund
  - Tying of Attorney's fees to Redemption Rate

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## In-House Counsel Perspective

### Settlement (continued)

- Heightened scrutiny under CAFA (2/18/05)
  - Court must make written findings of the fairness following a hearing
  - Court may, in its discretion require the settlement to provide for distribution of a portion of the value of the unclaimed coupons to one or more charitable organizations (limited *cy pres*)
  - Distribution and redemption of proceeds cannot be used to calculate attorney's fee

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## In-House Counsel Perspective

### Settlement (continued)

- Establish bucket of settlement funds available for each category of purported class members
- Determine amount named class members will receive
- Determine whether the remainder after all claims are paid reverts back to the company (non-coupon settlements)
- Use of a vendor to handle/adjudicate claims

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## In-House Counsel Perspective

### **Letter to class members**

#### **Requirements to make a claim**

- Deadlines
- Supporting documentation
- Notarization

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## In-House Counsel Perspective

### **FINAL THOUGHTS:**

**Be prepared to act quickly and retain experienced class counsel**

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## Class Actions: Defense Strategies and Recent Trends

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### BIBLIOGRAPHY OF SELECT CASES

#### I. COURTS REVIEW OVERLAPPING MERITS AND CLASS CERTIFICATION ISSUES

- Traditional approach, limiting analysis of the merits. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).
- Courts move away from a rigid application of Eisen. General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982); Szabo v. Bridgeport Machines, Inc., 249 F.3d 672 (7th Cir. 2001); Newton v. Merrill Lynch, 259 F.3d 154 (3d Cir. 2001); Johnston v. HBO Film Management, Inc., 265 F.3d 178 (3d Cir. 2001); Gariety v. Grant Thornton, LLP, 368 F.3d 356 (4th Cir. 2004); In re Initial Public Offerings Securities Litigation, 471 F.3d 24 (2d Cir. 2006); Unger v. Amedisys, Inc., 401 F.3d 316 (5th Cir. 2005); Blades v. Monsanto Co., 400 F.3d 562 (8th Cir. 2005); In re PolyMedica Corp. Securities Litigation, 432 F.3d 1 (1st Cir. 2005); Oscar Private Equity Investments v Allegiance Telecom, Inc., 487 F.3d 261, 268-69 (5th Cir. 2007).
- Experts can be used to defeat class certification. Heerwagen v. Clear Channel Communications, 435 F.3d 219 (2nd Cir. 2006); In re Med. Waste Servs. Antitrust Litig., 2006 WL 538927 (D. Utah March 3, 2006); Telco Group, Inc. v. Ameritrade, Inc., 2007 WL 203949 (D. Neb. Jan. 23, 2007).

#### II. COMMUNICATION WITH POTENTIAL CLASS MEMBERS

- Prior to the certification of a class, a defendant may communicate with putative class members who are not represented by counsel. Cox Nuclear Medicine v. Gold Cup Coffee Services, Inc., 214 F.R.D. 696 (S.D. Ala. 2003); Bublitz v. E.I. duPont de Nemours and Co., 196 F.R.D. 545 (S.D. Iowa 2000); Great Rivers Co-op. of Southeastern Iowa v. Farmland Industries, Inc., 59 F.3d 764 (8th Cir. 1995); Hammond v. Junction City, 167 F. Supp. 2d 1271 (D. Kan 2001); In re McKesson HBCO, Inc. Secs. Litig., 126 F. Supp. 2d 1239 (N.D. Cal. 2000); Jenifer v. Delaware Solid Waste Authority, No. CIV.A. 98-270 MMS, 1999 WL 117762 (D. Del. Feb. 25, 1999); In re Winchell's Donut Houses, L.P. Securities Litigation, 1988 WL 135503 (Del. Ch. Dec. 12, 1988) U.S. E.E.O.C. v. TIC-The Indus. Co., No. Civ.A. 01-1776, 2002 WL 31654977 (E.D. La. Nov. 21, 2002).
- Defendants may not engage in abusive conduct towards putative class members, such as providing misleading information or coercing, threatening, or intimidating class members. Bernard v. Gulf Oil Co., 619 F.2d 459 (5<sup>th</sup> Cir. 1980); Keystone Tobacco Co., Inc v. U.S. Tobacco Co., 238 F. Supp. 2d 151 (D.D.C. 2002); Cox Nuclear Med. v. Gold Cup Coffee Services, Inc., 214 F.R.D. 696 (S.D. Ala. 2003); Haffer v. Temple University, 115 F.R.D.

506 (E.D. Pa. 1987); Hampton Hardware, Inc. v. Cotter & Co., Inc., 156 F.R.D. 630 (N.D. Tex. 1994); Impervious Paint Indus., Inc. v. Ashland Oil, 508 F. Supp. 720 (W.D. Ky. 1981); Kleiner v. First Nat'l Bank, 751 F.2d 1193 (11<sup>th</sup> Cir. 1985); In re School Asbestos Litig., 842 F.2d 671 (3d Cir. 1988); Tedesco v. Mishkin, 629 F. Supp. 1474 (S.D.N.Y. 1986).

#### III. CLASS ACTION FAIRNESS ACT ("CAFA")

- Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).
  - Changes in amount in controversy requirement for diversity jurisdiction: Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546 (2005); Tate v. United States Bank National Association, No. 06-1204-HU, 2007 WL 1170608 (D. Or. April 17, 2007); Brill v. Countrywide Home Loans, Inc., 427 F.3d 446 (7th Cir. 2005); Lowery v. Alabama Power Co., 483 F.3d 1184 (11th Cir. 2007); Miedema v. Maytag Corp., 450 F.3d 1322 (11th Cir. 2006); Rogers v. Central Locating Service Ltd., 412 F. Supp. 2d 1171 (W.D. Wash. 2006); Ongstad v. Piper Jaffray & Co., 407 F. Supp. 2d 1085 (D.N.D. 2006).
  - Diversity determinations hinge on purported class members' domicile. See Scott v. Ing Clarion Partners, LLC, No. CIV.A. 1:06CV1843 RLV, 2006 WL 3191184 (N.D. Ga. October 31, 2006).
  - Home State Exception. Frazier v. Pioneer Americas LLC, 455 F.3d 542 (5th Cir. 2006); Evans v. Walter Industries, Inc., 449 F.3d 1159 (11th Cir. 2006); Serrano v. 180 Connect, Inc., 478 F.3d 1018 (9th Cir. 2007); Robinson v. Cheetah Transp., No. 06-0005, 2006 WL 3322580 (W.D. La. November 14, 2006); Preston v. Tenet Healthsystem Memorial Medical Center, Inc., 485 F.3d 793 (5th Cir. 2007); Kearns v. Ford Motor Co., No. CV 05-5644 GAF(JTLX), 2005 WL 3967998 (C.D. Cal. November 21, 2005); Frazier v. Pioneer Americas LLC, 455 F.3d at 546; Kitson v. Bank of Edwardsville, No. 06-528-GPM, 2006 WL 3392752 (S.D. Ill. Nov. 22, 2006).
  - Local Controversy Exception. Escroe v. State Farm Fire and Gas Co., No. 07-1123, 2007 WL 1207231 (E.D. La. April 27, 2007); Caruso v. Allstate Insurance Co., 469 F. Supp. 2d 364 (E.D. La. 2007); Preston v. Tenet Healthsystem Memorial Medical Center, Inc., 485 F.3d 793; Frazier v. Pioneer Americas LLC, 455 F.3d 542 (5th Cir. 2006); Evans v. Walter Industries Inc., 449 F.3d 1159 (11th Cir. 2006); Kitson v. Bank of Edwardsville, No. 06-528-GPM, 2006 WL 3392752 (S.D. Ill. Nov. 22, 2006); Mattera v. Clear Channel Communications, Inc., 239 F.R.D. 70 (S.D.N.Y. 2006).
  - Interest of Justice Exception. Schwartz v. Comcast Corp., No. Civ.A. 05-2340, 2006 WL 487915 (E.D. Pa. February 28, 2006).

#### IV. RULE 23 AMENDMENTS

- Class certification order must define "the class and the class claims, issues, and defenses." Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of America, 453 F.3d 179 (3d Cir. 2006).

- The amendment to Rule 23 that mandates a class certification decision at an “early practical time” rather than the “earliest practical time” gives defendants and courts more time to gather the information necessary to make the certification decision. Oscar Private Equity Investments v. Allegiance Telecom, Inc., 487 F.3d 261 (5th Cir. 2007); Greenlee County, Ariz. v. United States, 487 F.3d 871 (Fed. Cir. 2007) Good v. Altria Group, Inc., 231 F.R.D. 446 (D. Me. 2005); Talley v. NCO Financial Systems, Inc., No. 2:06-CV-48-PPS-PRC, 2006 WL 2927596 (N.D. Ind. 2006); Arnold v. Arizona Dep’t of Public Safety, 233 F.R.D. 537 (D. Ariz. 2005); Coburn v. DaimlerChrysler Services North America, L.L.C., No. 03 C 00759, 2005 WL 736657 (N.D. Ill. 2005); Adair v. Johnston, 221 F.R.D. 573 (M.D. Ala. 2005).
- Conditional certification is no longer explicitly authorized. In re Initial Public Offering Securities Litigation, 471 F.3d at 39; In Re Ephedra Products Liability Litigation, 231 F.R.D. 167 (S.D.N.Y. 2005). Denney v. Deutsche Bank AG, 443 F.3d 253 (2d Cir. 2006); Sylvester v. Cigna Corp., 225 F.R.D. 391 (D. Me. 2005); In re WorldCom, Inc. Securities Litigation, No. 02 Civ.3288 (DLC), 2005 WL 78807(S.D.N.Y. 2005); Denney v. Jenkins & Gilchrist, 230 F.R.D. 317 (S.D.N.Y. 2005).

#### V. STATE “CONSUMER PROTECTION” CLASS ACTIONS

- State consumer protection statutes have departed from common-law fraud standards, making certification easier. Varacallo v. Massachusetts Mut. Life Ins. Co., 752 A.2d 807 (N.J. Super. Ct. 2000); Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998); In re Ford Co. Vehicle Paint Litig., 182 F.R.D. 214 (E.D. La. 1998); Banks v. New York Life Ins. Co., 737 So.2d 1275 (La. 1999); Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234 (2005); Int’l Union of Operating Eng’rs Local #68 Welfare Fund v. Merck & Co., Inc., 894 A.2d 1136 (N.J. Super., 2006); Group Health Plan, Inc. v. Philip Morris Inc., 621 N.W.2d 2 (Minn. Supreme Court, 2001); Curtis v. Philip Morris Cos., No. PI 01-018042, 2004 WL 2776228 (D. Minn. Nov. 29, 2004); Massachusetts Mut. Life Ins. Co. v. Superior Ct., 97 Cal. App. 4<sup>th</sup> 1282 (2002).
- Connecticut Supreme reversed class certification for lack of predominance because it would be necessary to examine each plaintiff’s claimed “ascertainable loss” in evaluating liability. Collins v. Anthem Health Plans, Inc., 880 A.2d 106 (Conn. 2005).