504 Preparing For & Surviving the New Class Actions Game

William Crimmins
Vice President & Deputy General Counsel
Allstate Insurance Company

Bryan E. Hopkins
Vice President & General Counsel
Samsung Electronics America, Inc.

Edward F. Mannino
Partner, Chair of Philadelphia Litig. Group
Akin Gump Strauss Hauer & Feld

Michael J. Mueller
Partner
Akin Gump Strauss Hauer & Feld

Faculty Biographies

William Crimmins

William Crimmins is vice-president and deputy general counsel for Allstate Insurance Company in Northbrook, Illinois. He is currently responsible for all corporate litigation (which includes class actions of any form). Additionally, with respect to Allstate's property and casualty business operation, Mr. Crimmins is responsible for all legal advisory services and all state regulatory and governmental affairs (which includes rate and form filings). Mr. Crimmins' staff recently obtained a defense jury verdict in a nationwide class action tried in downstate Illinois. That case is now on appeal.

Prior to joining Allstate, Mr. Crimmins was an associate at the law firm of Sonnenschein, Nath and Rosenthal in Chicago. Mr. Crimmins was part of Sonnenschein's litigation practice group with particular emphasis on class action defense in connection with the financial services industry. Prior to joining Sonnenschein, Mr. Crimmins served as a law clerk for former Justice David Linn on the First District, Illinois Appellate Court.

Mr. Crimmins received his B.A. from Saint Mary's University in Winona, Minnesota and is a graduate of IIT-Chicago Kent College of Law.

Bryan E. Hopkins

Bryan E. Hopkins is vice president and general counsel of Samsung Electronics America, Inc. in Ridgefield Park, New Jersey. As Samsung's general counsel, he is responsible for managing Samsung's law department, advising Samsung's North America management on legal issues, setting policy, overseeing litigation, and negotiating agreements.

Before joining Samsung, Mr. Hopkins served in an executive legal capacity at such companies as Telcordia, Racal Electronics, Samsung Co., Ltd., and Kumho Petrochemical, where he was assistant general counsel. Mr. Hopkins also lived in Seoul, Korea for six years, where he worked for the general counsel's office of the Samsung Group.

Mr. Hopkins graduated with his J.D. from Florida State University and attended the M.B.A. program at the University of Washington, Seattle, Washington.

Edward F. Mannino
Partner, Chair of Philadelphia Litig. Group
Akin Gump Strauss Hauer & Feld

Michael J. Mueller

Michael J. Mueller is a partner in the Washington, D.C. office of Akin Gump Strauss Hauer & Feld, LLP. He is the leader of the firm's nationwide class action team.

Mr. Mueller has litigated cases involving antitrust, conspiracy, contracts, foreign military sales, Foreign Corrupt Practices Act, labor law, racketeering, securities law, tortious interference, and wage-hour law. He has served as lead counsel in more than a dozen class-action and secretary of labor cases involving wage-hour rights of employees at a major restaurant chain and a major food-processor. Most recently, he was lead trial counsel in an overtime case involving 3,900 plaintiffs. Previously, he was co-counsel at the landmark trial of tort claims brought by a major supermarket chain against a television network for an "undercover" segment on PrimeTime Live. His other trials have included federal securities and racketeering claims against a major real estate developer, the valuation in bankruptcy court of the intangible assets of a major money-wire service, and a contracts trial involving three classes of employees at a major airline.

Since 1997, he has donated his time as a faculty member of the annual trial advocacy skills program sponsored by Georgetown Law School and the National Institute of Trial Advocacy. Previously, he was the chair of the litigation committee of the Bar Association of DC, and chaired committees within the ABA's antitrust and labor & employment sections.

Mr. Mueller attended The University of Michigan, where he received his A.B. with highest distinction and his J.D. cum laude.

ANDREWS LITIGATION REPORTER
THOMSON WEST

Class Action

COMMENTARY REPRINTED FROM VOLUME 12, ISSUE 3 / APRIL 2005

The Brave New World of Removal Practice Under the Class Action Fairness Act

By Michael J. Mueller, Esq., and Tobias E. Zimmerman, Esq.*

The newly enacted Class Action Fairness Act of 2005[1] expands federal diversity jurisdiction over class actions.[2] In general, a state class action involving 100 or more members can be removed to federal court if any class member is diverse from any defendant and the aggregate value of the class members' claim is greater than $5 million.[3]

It will take some time for the nuances of CAFA to be fully developed in the courts, but already it is apparent that the act will significantly expand the breadth and intensity of removal disputes. This article examines several aspects of removal and remand proceedings that are likely to be dramatically different than previous practice.

To Remove or Not to Remove

A defendant served with a state class-action complaint now has greater latitude to remove it to federal court under 28 U.S.C. § 1446.[4] But defendants should ask themselves whether there might be advantages in acquiescing to state court jurisdiction.

In the time since CAFA was first proposed, some states have undertaken judicial and legislative reform of their class-action rules that may make it more attractive to stay in state court. For example, several decisions by the Texas Supreme Court since 2000 have imposed major limitations on plaintiffs' abilities to pursue class claims.[5]

Also, CAFA's "Consumer Class Action Bill of Rights," Sections 1711-1715, imposes two conditions on settling class actions in federal courts that can be avoided by staying in state court.

First, in settlements involving coupons, only the value of redeemed coupons will be considered for determining contingent attorney fees.[6] This may discourage plaintiffs' lawyers from agreeing to coupon settlements or encourage them to insist upon a greater cash settlement to compensate. By agreeing to stay in state court, a defendant expecting to settle has more room to negotiate a mutually beneficial coupon settlement.

Second, CAFA requires class-action defendants to notify state regulators prior to finalizing any settlement.[7] This may lead to closer scrutiny of class settlements by politically motivated officials and may also induce state attorneys general to file their own actions. Ironically, by staying in state court the class litigants may be better able to minimize this type of scrutiny and intervention by state officials.

Finally, defendants should explore the possibility of eliciting a stipulation that the plaintiffs will not seek, and will not accept, any damages more than $5 million in exchange for a waiver of removal under CAFA.[8] Such a stipulation mitigates one of the biggest perceived drawbacks to state court litigation: the unpredictability of state juries.

Not So Fast — The 'Race to Remove'

In a departure from tradition, CAFA allows any defendant to remove unilaterally without obtaining the consent of other defendants.[9] This makes it imperative to seek out and coordinate with other defendants as quickly as possible. Otherwise, all of the defendants could see their positions affected by a single defendant.

In addition to the fact that state law might be more favorable on class issues, there are other reasons defense counsel should be wary of a rush to remove. First, the aforementioned leverage of trading state jurisdiction for a stipulated damages cap is lost once the removal notice is filed. This is because a stipulation to limit damages is effective for jurisdictional purposes only if it is made *prior* to filing a notice of removal.[10] It could be frustrating for a primary defendant close to securing a $5 million cap on liability to see its efforts negated by an over-anxious minor defendant who rushes to remove without consulting the co-defendants.

Second, the jurisdictional allegations in the notice of removal are likely to take on greater importance under CAFA. On a motion to remand, the court weighs the allegations in the notice against the jurisdictional allegations in the complaint.[11] In typical removal actions alleging diversity jurisdiction, the two elements of diversity — citizenship and amount in controversy — were heretofore likely to be fairly apparent, or at least easier to prove than under CAFA.

Pre-CAFA, the defendant was required to show diversity only between it and the *named* plaintiffs — a relatively straightforward issue. Because most circuits also required that every class member's claim be worth at least $75,000,[12] this tended to keep out of federal court state law claims involving a small effect on a each person even if the potential class was very large.

Under CAFA, the class-action defendant may demonstrate that *any* class member is diverse.[13] But to make this showing, some factual inquiry about the scope of the class will be required to counter the plaintiffs' inevitable claim that their action mainly involves residents of the forum state, which, as discussed below, could keep the case in state court if certain conditions are met.[14]

Also, showing the $5 million aggregate damages may require an understanding as to the size of the class and the possible damages owed to each class member if liability is established. Although Section 1446(a) requires only "a short and plain statement of the grounds for removal," a defendant should consider including in the removal notice its best knowledge of the jurisdictional facts to improve the chances of defeating a motion to remand. However, a possible contrary strategy is discussed below.

Are All Class Actions Removable?

The language of CAFA seems to allow a defendant to file a notice of removal even when the defendant suspects that the federal court might be required to refrain from asserting jurisdiction under Section 1332(d)(4). CAFA's new removal provision, Section 1453, broadly permits removal as follows: "A class action may be removed to a district court … in accordance with Section 1446, … without regard to whether any defendant is a citizen of the state in which the action is brought."

There is no stated requirement to plead in the removal notice the elements of diversity jurisdiction under Sections 1332(d)(2) and (3), such as the amount in controversy or the number and location of class members.

On its face, this language seems to permit removal of *any* "class action" (as defined in the section, and excepting securities actions and corporate governance actions), under any circumstances. In other words, remove first and ask questions later. This may seem counter-intuitive, but it is consistent with the general goal of CAFA to minimize abuses by class-action counsel through provision of a federal forum. The removal provision vests in the federal courts a gatekeeper function, so that more state class actions are examined early for possible abusive pleading and to determine whether ostensibly single-state actions will have an effect in other states.

The limiting factor that defense counsel should consider is the admonition in Section 1446, which still applies except as amended by Section 1453, that the notice of removal be "signed pursuant to Rule 11 of the Federal Rules of Civil Procedure." Thus, as with any filing in federal court, the notice of removal cannot be filed for an improper purpose of harassment or unnecessary delay.

Where Is Everybody?

Traditional diversity analysis was a piece of cake compared to CAFA. The court compared the citizenship of the defendant to a few named plaintiffs. Now, even if 99 of 100 class members are known to be from the forum state, the citizenship of the 100th plaintiff might be worth exploring because diversity between *any* defendant and *any* class member is sufficient to trigger original federal jurisdiction under CAFA.

This analysis is complicated by the fact that the true identity of the particular class members is not likely to be known by plaintiffs early in the litigation. The defendant is probably in a much better position to identify potential class members, including those outside the state where the action was filed, since the defendant knows the scope of its activities and perhaps the locations of affected persons at issue (*e.g.*, customers).

Nonetheless, the defendant needs to consider carefully the potential downsides of pleading the existence of out-of-state class members and frame its jurisdictional allegations so as not to inadvertently support plaintiffs' substantive claims. For example, imagine a class complaint that alleges damages arising out of pollution to a river in one state. The defendant would be poorly served by a

jurisdictional argument that the class includes persons in downstream states. Not only might such an allegation be construed as an "admission" that the pollution occurred, it might also incite eager downstream plaintiffs who had not previously considered themselves to be candidates for recovery.

The new "three-tiered" analysis of class actions under CAFA presents a completely new calculus never before required in federal courts. Presuming a defendant has shown at least one class member diverse from itself (not a very high burden), there remains the question of whether the court should nonetheless exercise its discretion to refrain from asserting jurisdiction pursuant to Section 1332(d)(3) if the class is between one-third and two-thirds local, or whether the court *must* refrain from exercising jurisdiction pursuant to Section 1332(d)(4) because more than two-thirds of the class members are local.

Which party will bear the burden of proving jurisdictional facts under this new regime has yet to be determined. Traditionally the party asserting federal diversity jurisdiction bears the burden of proof on the issue.[15] Where the case is removed from state court it therefore falls to the defendant to establish the existence of federal jurisdiction.[16]

But CAFA's intended goal of quashing class abuses in state court means that courts may not be in a rush to apply the old analysis, and they would find support in the legislative history that indicates that Congress intended to place the burden on the *opponent* of federal jurisdiction.[17] It is entirely plausible that courts will develop a new test whereby, once a defendant has proven diversity of parties under Section 1332(d)(2), the burden will then fall on the plaintiffs to show that remand is nonetheless warranted under the provisions in Section 1332(d)(3) or (4).

In the event that the plaintiffs assert mandatory remand under Section 1332(d)(4), more than just the citizenship of the parties is at issue. Not only must two-thirds of the class be from the forum state, but one of two other conditions regarding the defendants must be met.

First, remand can be had if *any* defendant is local, provided it be a defendant "from whom significant relief is sought" and "whose alleged conduct forms a significant basis for the claims asserted," and the controversy is local, *i.e.*, the "principle injuries … were incurred in the [forum] state."[18] These factors are undefined and undoubtedly will result in some contentious remand proceedings. Alternatively, remand can be had if "the primary defendants are citizens of the [forum] state."[19]

The definition of "primary defendants" is left to the courts, but it could put one defendant (who is local) in the position of arguing that another defendant (who is from outside the forum state) is the "primary" defendant. This may create some antagonistic relations as co-defendants point the finger at each other.

Don't Let Plaintiffs Sell Themselves Short

The new aggregated $5 million amount-in-controversy minimum under Section 1332(d) raises the likelihood that plaintiffs will plead damages below the threshold. Defendants will want to demonstrate that such pleadings are understated and that the true amount in controversy exceeds $5 million.

Admittedly, this topsy-turvy situation occasionally arose under the old diversity rules, but it may now become more common. A defendant in a relatively small claim (one in which the plaintiff claimed less than $75,000) previously could remove and invoke federal jurisdiction by demonstrating that the dispute really involved a few thousand more dollars than $75,000. By raising the minimum amount in controversy to $5 million, CAFA raises the stakes dramatically. Defendants will now be required to publicly contend that *millions* more dollars are at stake to safely demonstrate that the statutory threshold will be crossed.

As discussed above, defendants under CAFA should find it easier to establish the existence of diversity of citizenship. Class-action plaintiffs are therefore more likely to argue the amount in controversy as the basis for why jurisdiction does not exist under the new provisions of Sections 1332(d)(2)-(4).

Plaintiffs may seek to rely upon prior case law favoring them where the amount in controversy is disputed. Under that law, so long as the complaint does not plainly state on its face that it is seeking more than the federal jurisdictional minimum, it falls to the defendant to establish (to varying degrees of proof) not merely that the damages recovered might be in excess of the minimum but, in fact, that the damages cannot legally be less than that.[20]

As noted above, however, the legislative history suggests that the burden may now be on the plaintiffs.[21]

The aggregation of damages under CAFA further complicates the issue. The parties not only have to litigate the amount of damages likely to be collected by the typical class member but also the overall size of the class. The plaintiffs, for example, might argue that, even if each class member would be entitled to $1,000, federal

Class Action

jurisdiction does not exist because the class cannot exceed 5,000 members. Under CAFA, the defendant must decide early not only whether to assert that its conduct caused more damage to each injured party than plaintiffs contend, but also whether to contend that *more people* were potentially affected.

Further adding to the difficulty of litigating these questions will be determining the value of any injunctive relief sought by plaintiffs, since that amount is also considered for jurisdictional purposes.[22] Under traditional diversity analysis courts have applied different tests in valuing injunctive relief. Some courts have examined the value of injunctive relief "from the plaintiffs' point of view" while others look to the "objective value" or even the "defendant's view."[23] The vastly higher stakes involved in CAFA litigation will certainly motivate parties to devote more resources to this issue than in the past.

Bring on the Experts

Jurisdictional discovery in the federal courts is not new. Where a legitimate dispute arises over jurisdictional facts, courts typically permit limited discovery for the purpose of adjudicating those facts. However, the complexities of class diversity and aggregate amount in controversy portend the acceleration of expert discovery to the very beginning of the case.

Both the geographic scope of the class and the amount in controversy may very well be suitable for expert opinion in many cases. Courts considering jurisdictional questions on remand motions have previously considered the allegations in the pleadings, unsworn representations and "summary judgment type evidence."[24] The latter would include expert reports and testimony.

This raises an interesting issue as to the selection of the defendant's expert and his long-term role in the case. The expert will be expected to opine on damages exceeding $5 million without the benefit of full discovery. If the court credits that expert and retains jurisdiction, the client presumably will seek to *minimize* damages later in the case. Should the defendant continue to retain the expert as a testifying witness? The expert might be impeached with his prior opinion.

For this reason, defendants may even want to consider hiring a new damages expert after the jurisdictional dispute is decided. The new expert could disclaim the prior expert analysis more credibly than the first expert could do so. The original expert could continue to provide assistance in a non-testifying capacity. Either way, CAFA could cause jurisdictional discovery and ultimate damages discovery to be far more expensive.

If You Can't Win the Game, Change the Rules

Another significant departure from traditional Section 1446 removal is CAFA's elimination of the one-year deadline for removing on diversity grounds. Under prior Section 1446(b), a notice of removal had to be filed within 30 days of receipt of the pleading in which federal court jurisdiction became apparent, but a case could not be removed on diversity grounds more than one year after it was initially filed unless there were grounds for equitable tolling of the one year limit (*e.g.*, fraudulent joinder of a defendant or concealment by plaintiff of jurisdictional facts).[25]

New Section 1453 says, "A class action may be removed to a district court … in accordance with Section 1446 (except that the one-year limitation under [Section] 1446(b) shall not apply)."[26] Without the one-year time limit, a class-action defendant may file for removal within 30 days of receiving "an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."[27]

Late-stage removal may occur more often than one might think. CAFA's rules apply before *and* after class certification.[28] Although removal normally would occur early in the case and before the court order defining the class, the defendant could remove after the class is officially defined and thus the size and geographic dispersion are known for the first time to establish federal jurisdiction. Alternatively, a summary judgment ruling on available damages might suddenly push the total claim over the jurisdictional minimum amount in controversy.

In the most extreme situations removal might occur after part of the case has already been tried to a state court jury. This could occur if class certification was put off until after the first phase of a bifurcated (or trifurcated) trial, or where the state court grants the equivalent of a directed verdict against a local subclass, or in favor of a local defendant, whose presence had previously kept the action in state court under Section 1332(d)(3) or (4). The procedural value of removing a case so late must be considered, however, since state court rulings in the case are binding on the federal courts upon removal.[29]

The federal courts already frown on blatant forum-shopping, and it is unlikely that they will be very receptive to defendants who remove for no other reason than to avoid an unfavorable turn of events in state court. But if legitimate questions of CAFA jurisdiction are first raised by late-stage damages theories and legal rulings, such as on the scope of the class, late-stage removal will certainly be tested, and possibly permitted.

Your Appeal Not Wanted Here

The brave new world of removal and remand is not limited to the district court. The new removal provision, Section 1453, has built-in appellate procedures different from anything previously seen in the federal courts.

First, either party aggrieved by the outcome of a remand determination has a right to seek review from the federal court of appeals. Thus, plaintiffs may seek review of a denial of remand, and defendants may seek review of a grant of remand. Previously, neither party could immediately appeal a remand ruling (although a party unsuccessful in seeking remand might appeal the existence of federal jurisdiction following judgment).[30]

The party seeking review must apparently do so within seven days of the remand decision. (Actually, the statute says that the appeal must be filed "*not less than* seven days after entry of the order" but this is most likely a drafting error. It will be interesting to see whether the courts read this language literally if Congress does not fix the error.) Like an interlocutory appeal under Rule 23(f), the appellate court has discretion to accept or reject the appeal.

CAFA also imposes the remarkable new requirement that, if the court of appeals *does* accept the appeal, it must consider the entire appeal and reach a decision *within 60 days* from the date of initial filing. The entire briefing schedule, oral argument (if any) and drafting the court's opinion must all occur within that period (with the possibility of only a single 10-day extension for good cause). If the appeals court does not issue its decision within the statutory time period, it has the same effect as if it had never accepted the appeal.

This arguably unrealistic timetable is almost certainly going to dissuade the circuit courts from accepting large numbers of Section 1453 appeals. Because of the tax on judicial resources, the courts of appeal will likely give priority to those cases where the district court's decision directly affects the federal courts, *i.e.*, those cases where remand was denied. Review will probably be further limited to cases defining key concepts in CAFA of general applicability, as opposed to review of facts (such as the dispersal of plaintiffs or the amount in controversy).

Notes

[1] This article presumes background familiarity with the Class Action Fairness Act of 2005, Pub. L. No. 109-2. For background on the act, see *Class Action LR*, Vol. 12, Iss. 2.

[2] *See* Pub. L. No. 109-2 (enacted Feb. 18, 2005), *codified at* 28 U.S.C. §§ 1332(d), 1453 and 1711-1715.

[3] *See* 28 U.S.C. § 1332(d) (as amended) *and* 28 U.S.C. § 1453 (newly enacted).

[4] All section references henceforth are to Title 28 of the U.S. Code.

[5] *See Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000) (predominance of common issues must factor into certification decision; trial court must determine trial plan at the time of certification); *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398 (Tex. 2000) (class definition cannot depend on ultimate outcome of claims); *Henry Schein Inc. v. Stromboe*, 102 S.W.3d 675 (Tex. 2002) (Texas courts cannot impose Texas law on class members who enjoy better protections under their home state's laws); *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657 (Tex. 2004) (certification must consider choice-of-law issues in class actions concerning plaintiffs in multiple states and limiting applicability of Texas Rule of Civil Procedure 42[b][2] classes).

[6] *See* 28 U.S.C. § 1712.

[7] *See* 28 U.S.C. § 1715.

[8] This may raise an issue of adequacy of representation for plaintiffs' counsel, and a court might not find such a stipulation binding on class members who did not get notice of the limitation. *Cf. Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 667-68 (Tex. 2004) (ordering that class members be given an opportunity to opt out of a Texas Rule of Civil Procedure 42[b][2] class where plaintiffs' counsel sought only injunctive relief and sought to forego consequential damages).

[9] *Compare Chicago, Rock Island & Pac. Ry. Co. v. Martin*, 178 U.S. 245 (1900), *with* 28 U.S.C. § 1453(b) (saying class actions may be removed "by any defendant without the consent of all defendants").

[10] *See generally* Moore's Federal Practice § 107.14(2)(g) at 107-86.1 to 107-86.2 n. 114.2 (3d ed. 1997 & Supp.) (citing *In re Brand Name Prescription Drugs Antitrust Litig.*, 248 F.3d 668, 671 [7th Cir. 2001]).

[11] *See generally* Moore's Federal Practice § 107.14(2)(g) at 107-83 to 107-84 (3d ed.).

[12] *See generally* 14B Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3704, at 160-173 (3d ed. 1998 & Supp. 2004) (discussing judicial uncertainty over whether the 1990 codification of supplemental jurisdiction in 28 U.S.C. § 1367 overrules the previous rule that each class member's claim meet the jurisdictional minimum, as established by *Zahn v. International Paper Co.*, 414 U.S. 291 [1973]).

[13] *See* 28 U.S.C. § 1332(d)(2)(A) (as amended) (diversity exists in any case in which matter in controversy exceeds $5 million and "any member of a class of plaintiffs is a citizen of a state different from any defendant").

[14] *See* 28 U.S.C. §§ 1332(d)(3) and (4) (as amended) (respectively, permitting or compelling remand of removed class actions where more than one-third, or more than two-thirds, of the class members and the primary defendant are from the forum state).

[15] *See generally* Moore's Federal Practice § 102.107(1) (3d ed.) (burden is on the party asserting jurisdiction).

[16] There is a circuit split over the defendant's burden of proof on a remand motion. Courts have applied varying burdens from

preponderance of the evidence up to the requirement that the defendant prove diversity jurisdiction "to a legal certainty." *See* Moore's Federal Practice § 107.14(2)(g) at 107-81 to 107-83 & nn. 103 to 106.2 (3d ed.).

[17] *See* S. Rep. No. 109-14, at 43 (2005) (saying "new Section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions be heard in a federal court if properly removed. … It is the intent of the [Judiciary] Committee that *the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded* to state court [*e.g.*, the burden of demonstrating that more than two-thirds of the proposed class members are citizens of the forum state]") (emphasis added); H. Rep. No. 108-144, at 37-39 (2003) (same) *and* H. Rep. No. 109-7 (2005).

[18] 28 U.S.C. § 1332(d)(4)(A) (as amended).

[19] 28 U.S.C. § 1332(d)(4)(B) (as amended).

[20] *See* Moore's Federal Practice § 107.14(2)(g) at 107-86.1 and n.112 (3d ed.) (following removal a defendant can remain in federal court if "he or she could show that, should plaintiff prevail, an award less than the jurisdictional amount would be outside the range of permissible awards because the case is clearly worth more than that amount"). *See also* Moore's Federal Practice § 102.106(1) (describing the "legal certainty" test established by *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-289 [1938]).

[21] *See supra*, note 17.

[22] *See generally* Moore's Federal Practice § 107.14(2)(g)(vii) (3d ed.).

[23] *See id.* at 107-86.2 to 107-86.2(1) & nn. 115 to 116.

[24] *See* Moore's Federal Practice § 107.14(2)(g)(v), at 107-83 to 107-84 and n. 108.1 (3d ed.).

[25] *See* 28 U.S.C. § 1446(b). *See, e.g., Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 426-27 (5th Cir. 2003) (agreeing that one-year limit is procedural, not jurisdictional, and as such is subject to equitable tolling). *See generally* 14C Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3732, at 341-48 (3d. ed. 1998 & Supp. 2004)

[26] 28 U.S.C. § 1453(b) (as amended).

[27] Federal courts have previously accepted cases on removal even after entry of judgment in state court for the purpose of appeal to the federal appellate court. or:*See, e.g., In re Matter of Meyerland Co.*, 960 F.2d 512, 515-16 (5th Cir. 1992) (noting "the power of Congress to authorize removal of cases on appeal has been repeatedly affirmed"), citing *Martin v. Hunter's Lessee,* 14 U.S. [1 Wheat.] 304, (1816) ("Congress … may authorize removal either before or after judgment."); *Gaines v. Fuentes,* 92 U.S. 10, 18 (1876); *Tenn. v. Davis*, 100 U.S. 257, 269 (1880). Although it is not settled whether appellate removal is permissible under 28 U.S.C. § 1441, *see Meyerland*, 960 F.2d at 515 n.5, the district courts have not hesitated to accept removal jurisdiction over cases where a judgment can still be set aside by the trial court under Federal Rule of Civil Procedure 60. *See, e.g., Barrett v. S. Ry. Co.*, 68 F.R.D. 413, 421-22 (D.S.C. 1975) (setting aside entry of default judgment by state court, and denying motion for remand). *But see State Farm Indem. v. Fornaro*, 227 F. Supp. 2d 229, 241-42 (D.N.J. 2002) (holding the "Rooker-Feldman doctrine" and 28 U.S.C. § 1257 prohibit any lower federal court from reviewing a final judgment of a state court).

[28] *See* 28 U.S.C. § 1332(d)(1)(B) (defining "class action" as any suit *filed* under Rule 23 or equivalent); Section 1332(d)(1)(D) (defining "class members" to be those persons who fall within the definition of "the *proposed or certified* class"); Section 1332(d)(8) (new diversity provisions apply "to any class action *before or after* the entry of a class certification order").

[29] *See* 28 U.S.C. § 1450 ("All injunctions, orders, and other proceedings had in [a removed] action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."). *But see also Munsey v. Testworth Labs.*, 227 F.2d 902 (6th Cir. 1955) (state court judgment that might be set aside in state court prior to removal is subject to same hazard in federal court after removal).

[30] *See* 28 U.S.C. § 1447(d).

** Michael J. Mueller is the partner in charge of the nationwide class-action group of Akin Gump Strauss Hauer & Feld. In the past seven years, he has been lead counsel in a dozen class actions for a nationwide restaurant chain and a food processing company, and he recently tried a class action with 3,900 plaintiffs. He can be reached at mmueller@akingump.com. Tobias E. Zimmerman is an associate in the firm's litigation group. He can be reached at tzimmerman@akingump.com.*

Session 504: Preparing For & Surviving The New Class Actions Game

William Crimmins
Vice President & Deputy General Counsel
Allstate Insurance Company

Bryan E. Hopkins
Vice President & General Counsel
Samsung Electronics America, Inc.

Michael J. Mueller
Partner, National Class Action Team Chair
Akin Gump Strauss Hauer & Feld

Edward F. Mannino
Partner, Chair of Philadelphia Litig. Group
Akin Gump Strauss Hauer & Feld

Trends: State Filings

- Class action filings are on the rise
  - Between 1988 and 1998, U.S. corporations reported a **1000%** increase in state class actions filed against them

    Class Action Watch, Vol. 1, No. 1 (1999) (Federalist Society)

Trends: State Filings

- Class actions are increasingly filed in "magnet courts" (or judicial hellholes)
  - "[W]hat I call the "magic jurisdiction," . . [is] where the judiciary is elected with verdict money." Top plaintiffs' tobacco lawyer Dickie Scruggs
  - A 1998 survey of corporations established that 69% of class actions were filed in just five jurisdictions:
    - Alabama
    - California
    - Louisiana
    - Ohio
    - Texas

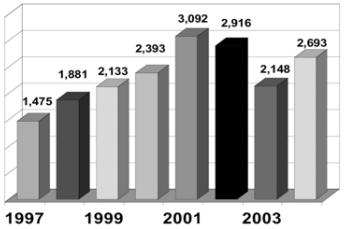
    Class Action Watch, Vol. 1, No. 3 (Federalist Society 1999)

State Court Systems: Best to Worst

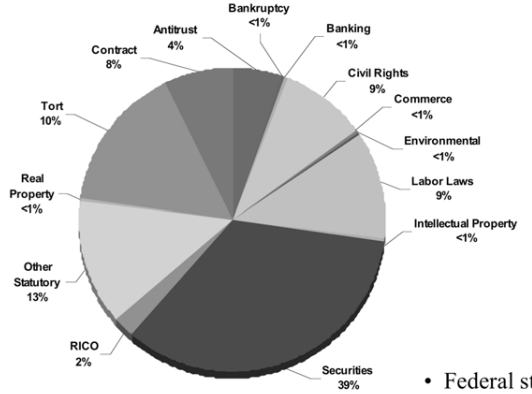
Best		Moderate		Worst	
1.	Delaware	16.	Kansas	36.	Kentucky
2.	Nebraska	17.	Wisconsin	37.	Montana
3.	North Dakota	18.	Connecticut	38.	New Mexico
4.	Virginia	19.	Arizona	39.	South Carolina
5.	Iowa	20.	North Carolina	40.	Missouri
6.	Indiana	21.	Vermont	41.	Hawaii
7.	Minnesota	22.	Tennessee	42.	Florida
8.	South Dakota	23.	Maryland	43.	Arkansas
9.	Wyoming	24.	Michigan	44.	Texas
10.	Idaho	25.	Oregon	45.	California
11.	Maine	26.	Ohio	46.	Illinois
12.	New Hampshire	27.	New York	47.	Louisiana
13.	Colorado	28.	Georgia	48.	Alabama
14.	Utah	29.	Nevada	49.	West Virginia
15.	Washington	30.	New Jersey	50.	Mississippi
		31.	Massachusetts		
		32.	Oklahoma		
		33.	Alaska		
		34.	Pennsylvania		
		35.	Rhode Island		

Trends: Federal Class Action Filings

- Since 1997, class action filings are up over 80%
- 2001 filings were double filings in 1997; due in part to market crash
- Drop-off in cases in 2003 has turned around
- CBO estimates that Class Action Fairness Act of 2005 will lead to hundreds of new cases in federal courts



Trends: Federal Filings (2004 Breakdown)



- Federal statutory cases: 81%
- Non-statutory claims: 19% (Tort, Contract, Property)

Top Plaintiffs' Class/Mass Action Firms

- Baron & Budd
- Berger & Montague
- Bernstein Liebhard & Lifshitz
- Bernstein Litowitz Berger & Grossman
- Cohen, Milstein, Hausfeld & Toll
- Cotchett, Pitre, Simon & McCarthy
- Gibbs & Bruns
- Korein Tillery
- Lerach Coughlin Stoia Geller Rudman & Robbins
- Lieff Cabraser Heimann & Bernstein
- Milberg Weiss Bershad & Schulman
- O'Quinn, Laminack & Pirtle
- Susman Godfrey

Source: National Law Journal 7/26/04
"The Plaintiffs' Hot List"

What Motivates Them

- Revenue Over $75 million in 2003
  - Baron & Budd (24 partners)
  - Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor (14 partners)
  - Lieff, Cabraser, Heimann & Bernstein (31 partners)
  - Milberg Weiss Bershad Hynes & Lerach (38 partners at original firm; 56 at spin-off)
  - Motley Rice (10 partners)
  - Nix, Patterson & Roach (10 partners)
  - Reaud, Morgan & Quinn (2 partners)
  - Weitz & Luxenberg (3 partners)
- Revenue $50-75 million in 2003
  - Berger & Montague (35 partners)
  - Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando (13 partners)
  - Girardi and Keese (19 partners)
  - Kreindler & Kreindler (12 partners)
  - O'Quinn, Laminack & Pirtle (3 partners)
  - Provost & Umphrey Law Firm (20 partners)

Source: American Lawyer Litigation 2004 Issue

Modern Plaintiffs' Tactics: Pre-filing

- Research of target companies and industries
  - Lawful: Review of gov't filings, Internet postings
  - Questionable: "Dumpster diving"
  - Unlawful: security breaches (trespass, hacking)
- Development of novel legal theories
- Testing themes with focus groups and mock juries
- Template pleadings shared among collaborators
- Stable of repeat plaintiffs
- Aggressive solicitation of plaintiffs with help from
  - Major labor unions
  - NGOs and advocacy groups
  - Web sites

Modern Plaintiffs' Tactics: Out-of-Court

- Enlisting government support
  - Opinion letters to "develop" the law
  - Regulatory changes
  - Investigation/prosecution of company
- Trying cases in the press
  - Coverage planned before filing
  - Press releases and staged events
- Urging consumer boycotts
- Driving down stock price
  - Talking to analysts
  - Letter-writing to government officials
  - Publication of above events
  - Short-selling to benefit from results

Modern Plaintiffs' Tactics: In-Court

- Follow-on lawsuits
  - Other types of employees
  - Suits against other parts of company
- Distract management and consume resources
  - Voluminous document requests
  - Allegations of spoliation of evidence (eg, e-mails)
  - Many depositions; burdensome 30(b)(6) notices
  - Allegations of perjury
- Leverage the company's pressure points
  - Specter of crippling damages, drop in sales/stock
  - Sue individual officers/directors and publicize
  - Accuse counsel of misconduct

What Can Your Law Department Do?

- Reduce your exposure before litigation
  - Contractual devices (shortened limitations period, choice of law and forum clauses, arbitration)
  - Be careful what you say (review warranties, product literature, ads)
  - Be careful who you deal with (manufacturers, suppliers and vendors); seek indemnity
  - Train workforce to avoid creating "bad" documents
  - Adopt a good document retention policy/processes
  - Insurance coverage (e.g., recalls, ad claims)
  - Product loss control committee
  - Regulatory protection

What Can Your Law Department Do?

- Organize your law department effectively
  - Involve all of your attorneys/practice groups
  - Everyone should watch for individual suits that may become class actions, or today's class action against one arm of company that may spread
  - Legal should be integral part of company's compliance processes
  - Educate the business units on class action risk
    - Teach them how to spot "danger signs"
    - Work to avoid conduct that creates risk of class loss
  - Annually work with core business units to manage legal risk based on sensitive issues

What Can Your Law Department Do?

- Receipt and tracking of class action lawsuits
  - Immediately identify, collect and track in one place class action suits filed anywhere in U.S.
  - Do the same for any suit that has potential to become class suit (e.g., challenges a policy)
  - Keep track of number and cost of pending cases
  - Regularly assess and prioritize importance of pending cases, strategies, effectiveness of counsel, "lessons learned" (e.g., should company make changes?)

ACC's 2005 Annual Meeting: Legal Underdog to Corporate Superhero—Using Compliance for a Competitive Advantage

October 17-19, Marriott Wardman Park Hotel

What Can Your Law Department Do?

- Reviewing complaints and assignments to counsel
  - Screen complaints ASAP in-house and outside
    - Attorneys should be familiar with your pending and closed cases, other lawsuits against industry/sector, the product/service at issue
  - If case has potential to be tried, make sure you have a strong trial lawyer before too long

What Can Your Law Department Do?

- Coordination of efforts
  - Coordinate all related class actions and key individual cases (unless this function is handed to outside counsel)
  - Coordinate with parent company and affiliates
  - Coordinate with all relevant departments and business units
  - Coordinate with public relations
  - Coordinate with other industry members
    - Joint industry effort may be needed to avoid conflicting arguments and strategies
    - May be worthwhile to assist "weaker" companies whose loss on an issue may set a bad precedent

What Can Your Outside Counsel Do?

- Recommend defensive posture, and execute
  - Lock in putative class member testimony early
  - Interview and select company witnesses early
  - Retain private investigator early
  - Retain economists and other experts early
  - Remove to federal court under CAFA
  - Seek to dismiss the case
  - Seek to defeat or diminish the class
  - Seek broadest protective order possible
  - Prepare from early on to try the case if needed
- Serve as "national coordinating counsel"
  - Manage local counsel in class and individual cases
  - Serve as a central document/pleading repository

What Can Your Outside Counsel Do?

- Consider whether to adopt offensive strategy, too
  - "First to file": choose your preferred forum to decide the underlying issue
  - Work with regulators/legislators: tell your story first
  - Use discovery process to your advantage
    - Look for improper use of class action device
    - Take discovery from affiliated third-parties
    - Explore connections between plaintiffs, plaintiffs' counsel, NGOs, analysts, government, press
    - Explore what other lawsuits/claims are coming
  - Monitor and object to misconduct by plaintiffs and their counsel (misleading Websites, flyers, improper solicitation to join case or opt out of settlement)

ACC's 2005 Annual Meeting: Legal Underdog to Corporate Superhero—Using Compliance for a Competitive Advantage

October 17-19, Marriott Wardman Park Hotel

What Can You Do Together?

- Communicate, communicate, communicate!
  - Assemble team with all relevant players (in-house and outside counsel, management, operations, Human Resources, public & government affairs)
  - Hold regular conferences; make sure all members know the game plan and latest developments
  - Consider establishing a secure extranet site
- Identify relevant categories of documents early and preserve them to prevent sanctions
- Have a media strategy in high-visibility cases
  - Deploy and direct public relations professionals to counteract unwanted press coverage of case
  - Craft defenses and pleadings to tell your story

What Can You Do Together?

- Early assessment of case and company policy/practice
  - Strength of claims, defenses, class certification
  - Jurisdiction/venue/judge, and alternatives
  - Likely scope of discovery
    - What good or bad/sensitive documents may exist?
    - Potential witnesses (current, former, third-party)
  - Named/unnamed business partners (e.g., vendors) who may be important
    - Will they cooperate? Are they litigation "savvy"?
    - Consider tender of defense, contribution, indemnification
  - Relationship to current/past regulatory issues
  - Settlement potential and options
    - Possibly fold planned business changes into settlement

ACC's 2005 Annual Meeting: Legal Underdog to Corporate Superhero—Using Compliance for a Competitive Advantage

October 17-19, Marriott Wardman Park Hotel

Discussion of case study

- You are the new GC
- A series of unfortunate events rapidly unfolds

  (See case study in your course materials.)
- What do you do?
  - Don't "scream"
  - Solve the problem

PREPARING FOR & SURVIVING THE NEW CLASS ACTIONS GAME
Association of Corporate Counsel 2005 Annual Meeting
Session 504

CASE STUDY

You are the new General Counsel of a mid-size and rapidly growing publicly traded company, with headquarters in Pennsylvania and major operations in Alabama, North Carolina, and Pennsylvania. When you came on board on July 1, things were in pretty good shape. The biggest legal concern was a false advertising and Lanham Act case filed in federal court in Pennsylvania facing your business unit that sells goods and services to consumers. But you're not too concerned. Your assistant GC in charge of the unit tells you the case is under control and should be won on summary judgment. The company's stock is trading at a 5 year-high of $40 per share. It looks like smooth sailing for the rest of the summer. And, you were just invited to speak at the ACCA conference in D.C. in October. Life is good. Then, in rapid succession, the following events occur. What do you do?

- 8/20 – Four African American women in North Carolina file a charge with the EEOC alleging violation of the Equal Pay Act and Title VII of the Civil Rights Act.
- 8/22 – Flyers are circulated in the neighborhoods surrounding your Alabama plant soliciting attendance at a meeting to be held on 9/5 to discuss environmental concerns related to the company's operations.
- 8/27 – Three African American women in Alabama file a charge with the EEOC alleging violation of the Equal Pay Act and Title VII of the Civil Rights Act.
- 9/4 – Seven African American women in Pennsylvania file a charge with the EEOC alleging violations of the Equal Pay Act and Title VII of the Civil Rights Act.
- 9/5 – A meeting is held in a local hotel near your Alabama plant to discuss environmental concerns related to the company's operations. Attorneys from a well known plaintiffs' class action law firm are present. Also present are regional and national representatives from two organizations: Citizens for a Lasting Environment and New Earth (CLEANE), and Workers United for Pay Justice (WUPJ). Attendees at the meeting are requested to sign a form indicating their willingness to participate in litigation against the company.
- 9/6 – You learn that the law firm present at the 9/5 meeting has posted on its Website a notice of possible litigation against your company and a form for potential plaintiffs to fill out to become participants in the litigation.
- 9/7 – The *Washington Post* runs an article about possible sex and race discrimination at the company. The story quotes a prominent plaintiffs' class action attorney as saying that he and a consortium of plaintiffs' lawyers will represent plaintiffs across the country.
- 9/8 – The company's share price drops to $35.

- 9/20 – North Carolina female employees file a class action in federal court in North Carolina alleging Title VII violations. They file a motion for preliminary injunction to halt the company's promotion practices. An ad is run in the local paper publicizing the suit and inviting other employees to contact attorneys at a 1-800 number if they are "witnesses" to the allegations. The attorney quoted in the *Post* article is the lead attorney on the complaint. Notice of the lawsuit is posted on the firm's Website to solicit additional "witnesses."
- 9/22 – Pennsylvania and Alabama employees each file class actions in federal court in Pennsylvania and Alabama alleging Title VII violations. They also file motions for preliminary injunction to halt the company's promotion practices. As in North Carolina, ads are run in local papers soliciting other employees to come forward as "witnesses," and plaintiffs' attorneys solicit additional "witnesses" through their Websites.
- 9/22 – The consortium of plaintiffs' attorneys in the employment discrimination class actions issues a press release expressing the view that the company has multi-million dollar exposure.
- 9/23 – The company's share price drops to $30.
- 9/23 – The company's Director of Communications and Public Relations receives calls from numerous journalists about the new litigation and the company's employment practices.
- 9/23 – A class action is filed in Alabama state court alleging violations of several states' environmental laws by attorneys present at the 9/5 meeting. Commercials are run on local radio stations discussing the lawsuit and soliciting additional plaintiffs to participate in the litigation.
- 9/25 – A Fair Labor Standards Act collective action is filed in federal court in Pennsylvania by employees alleging violations of wage and hour laws through a claimed corporate policy that allegedly required employees to work overtime without pay, and an order is sought requiring the issuance of notice to employees nationwide to opt into the collective action. Ads run in local papers in Pennsylvania, Alabama, and North Carolina soliciting additional plaintiffs. In addition, plaintiffs' counsel solicits additional participants in the litigation through its Website.
- 9/26 – CLEANE and WUPJ issue press releases condemning the company's alleged employment and environmental practices and calling for a consumer boycott of the company until the practices are remedied. They concurrently send letters to the Environmental Protection Agency, the Department of Labor, and the Attorneys General of Pennsylvania, Alabama, and North Carolina, requesting investigations of the company's practices.
- 9/26 – A lead industry securities analyst informs you that she was contacted by plaintiffs' counsel in the Title VII cases and received a package consisting of the class action complaints and press releases.
- 9/27 – The company's share price drops to $26.
- 9/30 – The securities analyst informs you that she has also been contacted by plaintiffs' counsel in the environmental and wage and hour litigation and received information similar to that provided by the Title VII lawyers.
- 10/1 – A products liability class action is filed in California state court alleging that foreseeable use of one of the company's best-selling consumer products has caused lead poisoning in children.
- 10/4 – The Senate Health, Education, Labor & Pensions Committee announces a budget hearing.
- 10/8 – The plaintiffs' consortium issues a press release urging the Senate committee to closely examine the company's employment record.
- 10/10 –The Senate Health, Education Labor & Pensions Committee holds budget hearings and grills the EEOC Chairman and Department of Labor officials concerning the company. The EEOC Chairman and DOL officials agree to take a hard look at the company's employment record.
- 10/10 –The lead plaintiffs in the Title VII cases and plaintiffs from the wage and hour case testify about the litigation allegations before Congress at the budget hearings.
- 10/11 –The plaintiffs' consortium issues a press release about the budget hearing and the testimony of the lead plaintiffs. The release also publicizes the wage and hour, environmental, and products liability litigation. The story is picked up by national print and television media. Sales plummet.
- 10/12 –The company's share price drops to $19.
- 10/13 –A class action is filed by company shareholders in federal court in Pennsylvania, alleging fraud due to the failure to disclose illegal employment practices, environmental problems, and product defect issues now disclosed in the various litigations. You learn that the lead plaintiff is a "professional" who has been lead plaintiff in five other shareholder class actions brought against other companies. The plaintiffs' law firm is well-known as a plaintiffs' securities class action firm and for extracting large settlements from multiple Fortune 500 companies.
- 10/13 –A shareholder derivative case is filed by company shareholders in federal court in Pennsylvania, alleging oversight failure by the Board of Directors concerning the company's employment, environmental, and product development/approval practices. Another well-known plaintiffs' firm is counsel.
- 10/17 –A national news magazine runs a full-length feature on the company's recent woes, with extensive quotes from the various plaintiffs and their counsel, CLEANE and WUPJ, and a senator.
- 10/18 –You learn that two of the major television network news magazine programs plan to run features on the company's problems in the next week.

Managing And Defeating Class Actions: Sound Infrastructure, Policies, and Practices

by

William Crimmins, Vice President and Deputy General Counsel, Allstate Insurance Company
Bryan E. Hopkins, Vice President and General Counsel, Samsung Electronics America
Michael J. Mueller, Partner and National Class Action Chair, Akin Gump Strauss Hauer & Feld

1. Internal Law Department Organization

- All of your attorneys/practice groups should touch and have an interest in class action litigation, not just your litigation group.
- Gone are the days when class action defense was handled "on the side" while the balance of your staff went about its day-to-day functions of providing legal services to the organization. This is particularly true for lawyers who may be embedded in (or assigned to) a particular business department and, in addition to being their day-to-day counselor, operate as a "doorway" to your Law Department's general legal services.
- Whether it is legal advisory services, regulatory and legislative responsibilities, corporate governance, IP, HR or other functions, everyone must be familiar with, learn from and contribute to the handling and defense of class actions and the spotting of trends. Today's complaint or individual dispute is tomorrow's class action. And today's class action in HR may have attributes that tell you it can be tomorrow's class action in business operations.
- Your company must have a strong compliance program and associated processes; you and your staff must be an integral part of them. Moreover, your compliance program must feed into class action risk assessment systems.
- If one of your company's goals is Legal Risk Management, it is critical that your organization/structure facilitate your business partners' continual education with respect to:
  - the current and ever evolving litigation environment you live with; and
  - the "class action litigation factor" embedded in that environment.
- You want your business partners to live, breathe and appreciate the environment you contend with each day. This is a critical foundation for making them 'partners' in the Legal Risk Management process. Put another way, you are often asked to help your business partners find alternative ways to accomplish their goals as opposed to simply saying one approach is legally impermissible or unwise. While there is merit to that statement, it is too narrow and one-sided. Legal Risk Management is their responsibility as much as it is yours. Properly exposed to and educated about the environment and your industry's ongoing experience in it, management should be filtering their brainstorming and business analysis – based on their knowledge of that environment and experience (past and present) — before they even contact a lawyer.
- Other than the Law Department's organization and operation per se, how does one make that happen?
  - Communication, communication, communication.
    - *Intra* - Find ways and reasons to communicate within the law department. If your structure does not make it happen in the normal course, form multi-disciplinary teams to oversee certain litigation topics and business practices. Develop methods for measuring litigation trends.
    - *Inter* - Find ways and reasons to continually educate your business partners on the legal environment and your company's and industry's litigation challenges. It is not just important for today, it is an investment in the future. You will be amazed how relatively easy tough issues and decisions become when you have been doing this on a regular basis.
  - Conduct workshops and seminars for your business partners. Topics might include:
    - "What is the class action litigation factor everyone is talking about?"
    - "The Dangers of E-mail"
    - "Words Matter"
    - "What is Legal Risk Management, why is it important and what is my role?"
    - "Privilege and Work Product Issues"
  - Annually calibrate, with your business partners, the legal risk management status of those core business functions containing sensitive legal/regulatory issues.
  - Include your business partners in trend spotting -- but to accomplish this you need a systematic approach to educate business partners in the types of issues that could lead to class action exposure. This involves both spotting trends and avoiding conduct (e.g., certain types of e-mails with company-wide statements or legal conclusions by business personnel) that could lead to liability or exposure.

2. Receipt and Tracking of Class Action Lawsuits

- Structure and processes must facilitate:
- The *immediate* identification, collection and tracking, in one centralized location, of class action suits filed and served anywhere in the country.
  - Published referral guidelines can help ensure this happens real time. If it looks, smells or feels like a class action, don't think about it — send it in.
  - If it is pled as an individual lawsuit but says anything about reserving the right to amend later to add class action allegations or if the cover letter from plaintiff's counsel, accompanying an individual complaint, uses the phrase class action or alleges other persons are "similarly situated" – send it in.
- You may want to also include any suit, even if not pled as a class action, which challenges general business practices. In other words, where an adverse result would effectively have class-wide import and require the Company to change its practices going forward – whether in that state or around the country. If you don't do this, you have a blind spot that the plaintiff's bar may attempt to exploit. Also, you may be doing well in defending a class action on a particular issue/practice only to wake up one day to the fact an individual lawsuit targeting the same issue/practice was just lost (at the trial level or on appeal).
- Non-centralized class action defense handling, as opposed to tracking, raises a whole host of challenges/dangers and is not recommended, although the challenges may be manageable if your class action activity is minimal.

- If your class action activity is more than minimal, you should be looking for ways to regularly (re)assess (no less than every six months):
    - The relative significance of the pending matters. Prioritize your top five, ten, fifteen, twenty, etc. This will fluctuate — there are different standards by which to assess legal expenses, exposure, practice change implications to business models/plans, etc.
    - The current expense run rate by matter/area. This will often but not always give you an early warning sign of a matter in trouble or where the near-term horizon has a certification hearing or trial date that is commanding greater resources. (You may want to do this monthly.)
    - For your priority matters, your defense strategy, the competency of their handling to date, the likelihood of success, any "learnings" obtained so far, what are the current pros and cons, should subsequent remedial measures be considered while the litigation is being defended, the integration and communication with the relevant business partners, the effectiveness of your defense counsel (inside/outside), whether there are any settlement options, etc.
- Class action metrics. If you have more than just minimal class action activity, it may pay to conduct some benchmarking type studies. For example, you can break down the key constituent elements of the class action litigation process (i.e., internal investigation, class discovery, class certification briefing and hearings) and compare the scope of expenses.
- It is important to continuously review your own metrics (i.e., number of class actions filed, breakdown by state vs. nationwide, breakdown by issue, number certified, number dismissed, settled, tried, won, cost per resolution, etc.). It is also a good idea to measure your own experience against external benchmarks, such as the Rand Report on class actions.

3. Reviewing Complaints And Assignments to Counsel

- Summons and complaints need to be screened immediately by attorneys, inside or outside, with class action experience and who know:
    - your pending litigation stable (class action or otherwise)
    - a good part of your company's past and closed litigation experiences
    - your inside/outside attorneys associated with the current litigation stable and who were associated with those past experiences
    - your industry's general class action activity (e.g., is this related to other lawsuits pending against your competitors?) and your sector's general class action activity (e.g., is this related to lawsuits against other financial services companies?).
    - the expertise of your inside/outside attorneys
    - their familiarity with the business process/product/policy being challenged.
- Your upfront filter should be designed to ensure that assignments of the new complaint to internal/external attorneys facilitates, rather than obstructs, an efficient, tactical and robust early matter assessment.
- At some point, normally well after you receive a complaint, if you believe you have a class action that has real potential to be tried on the merits to a jury or judge — as opposed to a case that will be resolved at the class action certification hearing or by dispositive motion — do you have a trial attorney on board? The vast majority of class action practice is tactical, motion practice and certification hearings. Attorneys who are good at that are not necessarily right for handling a jury trial. The timing of that assignment is important – you don't want it to be done too soon or too late.

4. Early Case Evaluation Process

- Besides a legal evaluation of the claims and class certification factors, you need to conduct a rigorous assessment of a number of additional issues:
    - the judge and any options for recusal if desired
    - the jurisdiction and venue, including whether there are better forums and potential appellate avenues
    - potential application of The Class Action Fairness Act to remove (or keep) the case in the jurisdiction (state or federal) that you prefer for that case
    - local/circuit case law on point or analogous to the issues alleged
    - case law from other parts of the country
    - the likely scope of discovery
    - what discovery may surface, pro or con, including particularly sensitive documents (that may not even be directly related to the merits of the claims in the litigation)
    - potential witnesses, including former employees, current employees, and third-party witnesses
    - Sensitive witnesses, particularly those out of your control in terms of preparation
    - Vendors or other third parties that are named or if not named will be important to the matter's defense
        - Can you depend upon their cooperation and will they be litigation savvy?
        - Consideration of tender of defense, contribution and indemnification issues.
- Need for outside experts – consulting or testifying. If the lawsuit is one of many filed against others in your industry or has the potential to be one of many, don't wait too long to line up some experts. You don't want to pick from the bottom of the barrel.
- Potential regulatory implications
    - Has the company had any past or current regulatory experience that might be relevant in this jurisdiction or elsewhere?
    - Are there potential regulatory type defenses, such as primary/exclusive jurisdiction? How will they play out in this jurisdiction?
    - What is the likelihood the regulator will be drawn into the dispute by you or by plaintiffs? Should that be a factor, how do you see that playing out – in your favor or the plaintiffs'?
    - Do you have the right defense counsel should the regulator and his/her staff become important to the dispute? Consider adding to your outside team an attorney with regulatory / lobbyist experience where appropriate. This is particularly important where plaintiffs have attacked simultaneously on both the regulatory and litigation fronts.

- Related litigation against others in the same industry or in different lines but raising similar issues. Many legal theories/lines of cases morph from one industry attack to another.

- Settlement potential and options, taking all the above into account. Companies often delay consideration until a stage in the case when plaintiffs may have more of an upper hand or after huge expenses have been incurred. To manage both (a) the amount of your own legal expenses, and (b) the fees that may need to be paid to plaintiffs' attorneys should the matter settle (the earlier in the life of the case the greater the likelihood those class counsel fees will be less), dictates conducting an early in-depth analysis of your chances of defeating class certification.

5. Retention Holds and Discovery

- For some class action plaintiff firms and in some jurisdictions in particular, the first strategy for success has little if anything to do with the merits of the case. Rather, their goal is to catch a defendant slipping up with respect to its retention obligations or being, in any way in their eyes, less than complete (if not perfect) with respect to its discovery responses, objections and production. If you have the right outside/inside defense counsel, you will know when you are up against this type of strategy. And should that be the case, you cannot spend too much time or too much money countering this strategy. If you don't get the high ground here, you will never have a full and fair shot at the merits.

- Remember that in class actions the retention directive must focus not only upon the substantive documents relating to the claim but electronic and other data that would assist in the identification of the alleged class. This can be a tough issue to systematically get your hands around at the inception of the case when you may be unaware of the likely class definition, but it is imperative to try to identify those records that you will need.

- Do not wait until you are served with a complaint and discovery requests to consider the need for retention of documents and other data. Begin to consider such retention when you become aware that a matter may be filed or served or that class allegations may be added to an existing case.

- Verify that your document retention policy works. Implement a policy if one is not in effect. Plaintiff attorneys often use spoilation allegations to detract the judge or the jury from the weakness of the claim itself.

- Consider contracting with outside vendors to coordinate and organize document product efforts. These vendors provide personnel to search for and organize documents, and their hourly rates are usually less than what private law firms charge.

6. Legal Assessment of the Company Policy/Practices at Issue

- Effective risk assessment is driven not just by levels of possible legal risk, but also by the degree to which core company practices are at issue.

- If the company is considering for business reasons the alteration of company practices, it may be propitious to consider folding such into a settlement. It increases the business risks/expense to the company if this is not considered until later in the litigation.

7. Coordination

- Coordination of other suits against the Company

  - Consider the need for national coordinating outside counsel in certain circumstances. This may be worthwhile if there are similar class action suits against your company in multiple jurisdictions.

  - Consider how to coordinate related individual cases while the class action is pending. These may be cases that ordinarily would be independently handled but the totality of circumstances may require the coordination of their defense by the same team managing the class action.

  - Consider methods of coordination between outside firms and your Corporate Litigation department (e.g., team conference calls, coordination meetings, distribution of briefs).

  - Numerous issues regarding substantive coordination (e.g., MDL, selecting best jurisdiction to litigate) are beyond scope of this presentation, but are crucial for your consideration.

- Coordination with the parent company is critical. If a subsidiary is the target of a class action, the parent's documents may also be in play, especially if the parent manufactured a product that is the basis of the claim.

- Coordination between law department and business units is also critical. As discussed above, regular communications with other departments within the enterprise will cause them to buy-in to the defense approach. You will also learn whether they really want to fight or settle, or have particular interests that are affected by the litigation.

- Coordination with Public (Corporate) Relations

  - Consider whether to include this department on the team from the inception, particularly if the plaintiffs already have used the media or if the case will generate publicity. You do not want to be scrambling the first time the press becomes involved. Plaintiffs are adept at inviting media to key court events.

  - There are privileges issues associated with internal/external corporate relations personnel being part of the litigation team. There is some older case law indicating that the attorney-client and work product privileges may not apply, with some more recent case law recognizing it does apply. In any event, it is something you must remain conscious of and sensitive to.

- Industry Coordination

  - In many circumstances your fate may be determined by actions of other industry defendants. Plaintiffs are adept at tightly coordinating efforts and will often "pick off" weaker companies for settlement (which funds their war chest) or to create bad precedent for you. Industry joint defense groups may be imperative to coordinate and even let weaker companies rely on your work product.

2. Methods of Reducing Exposure Before Litigation Begins

- Contractual Devices

  - Utilize provisions to shorten your exposure (e.g., specified contractual limitations periods as opposed to being subject to general state/federal limitations periods).

  - Choice of law clauses, including those that would limit application of a single state's law to a multi-state class

  - Choice of forum clauses, such as a forum that will make discovery and trial more convenient for your document production and witness testimony.

  - Arbitration provisions. It is important that you stay on top of fast-moving developments in the class action/arbitration area. For example, there are two issues that are currently subject to litigation in a number of jurisdictions:

(i) Whether a mandatory arbitration clause may expressly bar the plaintiffs from pursuing class action relief. Some states (e.g., California) have enacted legislation limiting a company's ability to do this, while courts are considering the extent to which such provisions may violate their public policy.

(ii) If an enforceable arbitration clause does not expressly address the class issue, may class issues be decided in an arbitration proceeding? The U. S. Supreme Court has ruled (albeit only in a plurality opinion) that the arbitrator decides this issue where the contract is silent.

- Warranty and related contractual provisions
  - Use provisions to minimize breach of warranty and product defect claims, which are ripe for class litigation.
  - Review product warranties and disclaim warranties not intended, or add provisions that restrict or eliminate liability.
  - Develop warnings and cautionary statements (e.g., fast food companies getting in front of obesity claims). Companies should develop warnings that describe the product's limitations, stress the dangers of not following the printed procedures and instructions, as well as highlight correct methods of product and part substitution. The labels and warnings must comply with federal, state and industry regulations and standards.
  - Product literature and advertising claims. Class actions are frequently based on marketing claims. The Law Department needs to review all sales and promotional materials to ensure that they accurately describe the product. Disclaimers and limitations should be incorporated into sales literature and sales agreements whenever possible.
  - Careful selection of vendors. When vendors fail to perform their assignments, the manufacturer frequently bears the brunt of the resulting litigation. Vendors and suppliers must be able to indemnify the manufacturer from potential claims. Even when vendors perform as warranted, claims can flow from use of the vendors' products and services. Therefore, in addition to an indemnification provision, you should also spell out your litigation support expectations in vendor contracts.
  - The supplier or manufacturer must minimize defects in its products or components to minimize defect-related class actions. Ask about the seller's or manufacturer's policies, if any, to insure its vendors or suppliers properly test and inspect the products. Ask if there is a quality assurance program to detect and remedy defective products.
- Document creation and retention protocols
  - A high percentage of class action litigation is related to the location and compilation of documentation requested by plaintiffs' attorneys. Those costs can be minimized by instituting clear corporate procedures regarding the length of time materials are to be retained pursuant to a document retention policy.
  - It is common for unfortunate documents to be created through informal and/or inappropriate written communications. It is important to adopt policies on the proper use of the Company's e-mail system, and hold workshops to minimize flippant or informal e-mail traffic that could have damaging repercussions.
- Insurance coverage
  - It is possible to purchase insurance coverage for some disparate risks, such as product recalls and advertising claims, which would allow the company to budget and cap its liability for certain kinds of class actions.
- Product loss control policies
  - A company should establish a product loss control policy and committee to enforce it. The policy should establish a written program to monitor claims, identify potential problem areas and institute corrective activity. The loss control committee membership will vary depending on the type of operation (manufacturing, service, etc.) and should have sufficient representation from all strategic departments (e.g., R&D, engineering, design, QA, QC, marketing).
- Regulatory protection
  - Though beyond the scope of this presentation, increasing efforts are being directed toward legislative or statutory limitations. For example, regarding the obesity claims mentioned above, legislation has been enacted in a number of states restricting liability for such claims.