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CD corporate disputes

DEFENDING CLASS ACTIONS

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MINI-ROUNDTABLE

DEFENDING CLASS ACTIONS

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Becky Kcehowski litigates complex commercial matters in US courts and international tribunals and has 15 years of experience as trial counsel in class actions, multidistrict litigation and cross-jurisdiction coordinated proceedings. She has defeated class certification in cases seeking hundreds of millions of dollars and successfully defended consumer, antitrust, mass tort and economic fraud class actions, including class actions alleging violations of the FCRA, the Sherman Act, state and federal securities laws and consumer statutes, as well as common law products liability, toxic exposure and contract claims.

CD: How would you characterise class action activity over the past 12 months? What factors have generally been driving claims?

Kcehowski: Class action activity in the US has generally grown in each year of the past decade, and 2018 was no different. The past 12 months saw increases in class actions related to banking and structured financial products, insurance, cyber security, healthcare and pharmaceuticals, employment disputes, manufacturing and products liability, and consumer protection. There are many factors driving these increases. There continue to be monetary incentives under the Federal Rules of Civil Procedure, particularly Rule 23(h), and state equivalents, for class counsel to conceive of and pursue inventive class-based claims. Other driving factors include increasing electronic access to public and consumer information, as well as advances in technology. Cryptocurrencies, for instance, have resulted in new securities class litigation. Additionally, the US Supreme Court has consistently shown interest in class issues lately, including questions about the timeliness of class claims in *China Agritech v. Resh*, state court jurisdiction over securities actions in *Cyan, Inc. v. Employees Retirement Fund* and class arbitration in the labour context in *Epic Systems v. Lewis*. Important questions about class settlement fairness are also before the court in *Frank v. Gaos*.

CD: Could you outline some of the key challenges a class action defendant will typically face when a claim is made? What represents the biggest risks and threats to companies?

Kcehowski: One key challenge to defending against class claims is determining the best time to attack the plaintiff's class allegations. The Federal Rules, for example, allow some flexibility on timing – certification must be determined at "an early practicable time" after suit is filed. And there are certain opportunities to attack class allegations at the pleadings stage. But Rule 23 is generally more than a pleading standard. In most cases, it requires a fact-based inquiry. Facts, of course, mean discovery, and discovery means defence costs. So a critical question arises for companies facing class actions: should independent discovery, including through expert witnesses, proceed on class certification issues as early as possible, or should it await and coincide with merits discovery? The answer depends on each case's unique circumstances. Getting that answer right, however, can help avoid wasted resources, increased defence costs and missed opportunities to narrow the scope of the case, or to rebut class allegations at the earliest possible stage.

CD: Given the nature of class action litigation, what strategies can in-house and outside counsel employ to effectively manage a case? How important is it for defendants and counsel to be proactive from the outset?

Kcehowski: On effective strategy, counsel should focus on how the jurisdiction in question treats class actions. Even in federal courts, some jurisdictions recognise defences that do not exist elsewhere. For example, some federal circuits require named plaintiffs to demonstrate 'class standing' apart from Rule 23's requirements. Others demand a showing that a putative class is 'ascertainable' before Rule 23's inquiry begins. And still others subject expert opinions on class issues to rigorous scrutiny under the Federal Rules of Evidence. Proactive research and knowledge of the relevant jurisdiction can, therefore, ensure that all available defensive tools are used effectively. Other potentially effective case-management strategies include the removal of state claims to federal court where possible, consolidation in one forum under multidistrict litigation statutes or procedures and challenging the merits early through a motion to dismiss, which, if successful, can eliminate claims entirely or narrow the scope of claims subject to class treatment.

CD: With a class action defendant facing multi-million dollar damage claims, broad and disruptive discovery and significant defence costs, at what point should the decision to fight or to settle be taken? To what extent can consulting experts and statistical analysis assist?

Kcehowski: The decision to fight or settle must be assessed on a case-by-case basis, with a realistic evaluation of the merits at every stage, and with an eye toward the company's ultimate business goals and needs. Sometimes the best path forward is to fight, for example where the arguments against class certification have strong support in law and fact, or where certification's denial would discourage tag-along lawsuits and send a broader message to potential future claimants. Sometimes settlement is the better option, for instance when certification seems likely, where the benefits of a quick settlement would outweigh the high costs and uncertainty of litigating a class action through final judgment and appeals, or where a class-wide settlement would enjoin a broader swath of potential future claimants who might later attempt to bring similar claims. The decision might also turn on the specific judge presiding, as one judge might be sceptical of class allegations generally, while another might look askance on class settlements, subjecting them to more rigorous, and thus more costly, review.

CD: In a class action context, with the defendant typically possessing the bulk of the relevant and electronically-stored information, how important is it to stay on top of discovery obligations? What are law firms doing to more effectively and efficiently manage this process?

Kcehowski: Staying on top of discovery obligations is very important in class action litigation. Class certification motions and oppositions are fact-based. The facts, therefore, make or break a defence strategy, and they must be marshalled accordingly, with the utmost care and precision. To do so cost-effectively, law firms are, for instance, consulting with e-discovery experts during discovery and working with outside vendors and contract attorneys to streamline document review with technology, such as predictive coding and analytics. It is not always true, however, that the defendant possesses the bulk of relevant information in the class context. For example, in class litigation involving complex investment products or commercial transactions, named plaintiffs are often sophisticated institutional entities, seeking to represent a putative class of other such entities. Important discovery obligations, therefore, often run both ways in class litigation.

CD: What options are available to defendants to control or limit negative media exposure in the wake of a class action claim?

Kcehowski: This will turn on the case at hand. Some class actions are objectively unreasonable and will not elicit a public reaction; others will truly test a company's public image. In either case, consultation with public relations (PR) experts is sound strategy when dealing with potentially negative media exposure. Concerted efforts with internal and external PR staff, particularly before major court filings or hearings, or after major court rulings, can ensure that a company speaks with one unified voice and that the public understands the 'big picture' context of often-complicated class

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proceedings. There are also ways to ensure that sensitive information does not leave the courthouse. In certain circumstances, court documents can be filed under seal, shielded from public scrutiny. Many courts also rely on appointed special masters to manage the multilayered process of discovery in class actions. This can assist in reducing public filings of sensitive information. Where appropriate and available, these tools can be used to mitigate the effects of potentially negative media exposure.

CD: Do you expect to see the amount of class action litigation increasing in the years ahead? If so, how do you foresee defensive strategies evolving?

Kcehowski: US class action filings have seen a general uptick in every year of the past decade, including 2018. We see no signs that this will stop in 2019 or beyond. Even jurisdictions outside the US are increasingly adopting class action devices for consumer protection and other litigations – at least six non-US jurisdictions have done so since 2014. Class procedures in many non-US jurisdictions, however, remain inchoate or offer plaintiff-friendly procedures, presenting unique challenges for companies operating internationally. Class action risks are becoming truly global, with copycat litigation growing. As for evolving defence strategies in US litigation, look for expert witnesses to play increasingly important roles in class certification, particularly in complex commercial cases. Currently, federal circuits vary in how they apply the rules of evidence to class experts. Federal trial courts, however, are beginning to demand more from class experts. Also, look for arbitration clauses and class waivers to continue to play a key, pre-litigation defence role under *Concepcion* (2011) and its progeny. CD