CLM 2019 Annual Conference
March 11-13, 2019
Orlando, FL

Staying Ahead of the Class – Strategies for Defending Professional and Management Liability Class Actions

I. INTRODUCTION

This topic addresses emerging trends in class action litigation involving professionals and directors and officers. As plaintiffs continue to develop theories of liability against lawyers, accountants, architects and engineers, and other professionals, insurance representatives and defense lawyers find themselves, with increasing frequency, evaluating and defending class-based claims.

II. CLASS ACTIONS GENERALLY

A class action is a lawsuit is which one or select few named plaintiffs bring suit on behalf of a class of other individuals who are not direct parties to the litigation. Under Federal Rule of Civil Procedure 23, a proposed class must be "numerous," there must be "common questions of law or fact" among the class, the plaintiff's claims must be "typical" of the claims of the class, and the plaintiff must be able to "fairly and adequately" represent the class. *See* Fed. R. Civ. P. 23(a). In addition, the proposed class must meet the requirements of Rule 23(b), which most often means that common questions of law and fact "predominate over" any individual questions and that a class action be superior to other methods of resolving the disputes. *See* Fed. R. Civ. P. 23(b)(3).

III. TYPES OF CASES AND TRENDS

A. Fair Debt Collections Practices Act ("FDCPA")

The FDCPA provides strict guidelines for certain parties (by definition any individual or entity that regularly collects or attempts to collect consumer debts owed to another person or institution) engaged in the practice of collecting debts. This includes collection agency as well as attorneys. The goal of the FDCPA is to eliminate abusive, deceptive and unfair debt collection practices by specifically prohibiting debt collectors from engaging in debt collection practices that harass, oppress or abuse consumers. Additionally, debt collectors may not make false or misleading representations in their collections of a debt and are prohibited from using unfair or unconscionable means to collect a debt.

When a violation of the FDCPA occurs, the consumer can proceed to court for statutory damages and recovery of attorney's fees. While these types of lawsuits can be brought by an individual plaintiff, they are often filed as class actions. Plaintiff's attorneys favor bringing FDCPA cases as class actions because of the initial costs associated with a class action, the fear it instills in the debt collector from a potential large damage awards and of course the fee shifting provision allowing prevailing plaintiffs to recover attorneys' fees and court costs.

While the judiciary has taken issue with plaintiffs' attorneys for bringing class action FDCPA claims as a matter of gamesmanship, the Court's and defendants' hands are often tied due to the strict liability nature of FDCPA. Defendants have to be aware that plaintiff's attorneys look to take advantage of form letters or innocuous mistake which could create the formation of a class.

B. Consumer Protection

Consumers are protected under various federal and state statues from deceptive and illegal activities of businesses. There appears to be no limit to what businesses can face a consumer protection class action. If one's business deals with the public as a consumer, then it likely can be the subject of a consumer protection class action. Consumer protection claims normally concern fraud, false or misleading advertising (including bait and switch techniques) deceptive labeling, failure to disclose material information in business transactions, deceptive product or service warranties ,improper overcharges and hidden fees.

Similar to FDCPA claims, plaintiffs' attorneys often attempt to take issue with a certain business practice and then locate class members who have been affected by such a practice. Again, while Court's disapprove of providing a loophole to plaintiffs by allowing class actions for nominal mistakes and nominal damages to any single plaintiff, proponents of consumer protection class action claims counter that allowing class actions deters businesses from conducting what might be considered minor fraudulent or deceptive conduct on the whole.

C. Privacy

It is no secret that data breaches, large and small, have brought waves of litigation including class action claims. This is especially true of the big name companies that make national headlines when a date breach is reported. Plaintiffs' attorneys, eying the prospective fees that can be recovered, again see the potential of taking on the cause for many class members, which in large scale data breach cases can be millions of consumers, who have only nominal damages, if any. In these cases, liability may be easier for a plaintiff to initially prove since the date breach itself and the immediate response to the data breach provide documentation of facts and circumstances to support the framework for a legal complaint. However, in this area, the Courts have prevented these types of class actions to proceed absent claims of actual damages.

D. Construction Defects

Class action plaintiffs' counsel are increasingly bringing class based claims for construction defects and the professionals' use of allegedly faulty construction products. In

these types of claims, the attorneys find and recruit similarly situated plaintiffs based living in a common interest community or homeowners who have purchased in the same subdivision or during the same time period from the same builder. Not only do plaintiffs' counsel solicit class members who can claim similar defects as a matter of fact, Plaintiffs' counsel also attempt to create a class of all homeowners of the community or all homeowners who purchased property by a certain builder by using a small sample of the defect and using expert testimony to extrapolate the defect to additional parties.

Accordingly, in these types of cases, the "commonality" and "typicality" requirements of class certification are the most important. The plaintiff as proponent of the class will argue that the defect is dispositive for all homeowners. The defense side must respond that construction defects and the damages arising there from are specific and unique to each potential class member and each property; whether and why a particular defect occurred or exists is an inherent individual inquiry.

E. Directors and Officers

Securities class action suits remain the largest category of claims brought against Directors and Officers and there is no sign that those types of claims will not continue to grow. In addition, directors and officers must be aware that they face potential class action claims for a variety of causes of action including but not limited to consumer protection claims, cyber and data breach claims referenced above.

F. Miscellaneous Professional Liability

Small business professionals cannot assume that they are immune from class action litigation because they provide services to a small group of clients. All professionals must be aware of the manner in which they practice their profession. Class actions may be brought against a professional that breaches its duties and obligations to its clients in a manner that creates a common injury. If the professional's breach is pervasive and consistent such that all of his/her clients are affected in the same or similar manner, a creative plaintiffs' attorney can and will consider bringing such claims as a class action.

G. Trends

There has been a marked uptick in the frequency of class action claims being filed. Historically, large, well-established Plaintiff's firms initiated class action cases. These established Plaintiff's firms typically have a war chest and no cash flow issues and would hold out for the big payday. The claim life span was commonly 3 years from inception to resolution. However, that is changing. The increased frequency of class action filings is due, in part, to the entry of new, aggressive and less established Plaintiff's firms that have jumped into the class action water. These new and aggressive Plaintiffs will typically cave earlier and are willing to settle or resolve cases for less money than the more established firms. Thus, the parties are getting to the ultimate number sooner, usually 18-24 months from start to finish.

Another factor to the frequency uptick is due to the fact that the cases can now be brought simultaneously in both state and federal courts. The standards of proof are generally

easier to meet in state courts than in the federal courts. Moreover, filing the Motion to Dismiss is not the stopping point in the state court filings as it was historically in the federal court actions. Thus, the carriers need to post reserves earlier when there is a pending state court action. In federal court actions, the carriers will wait to see if the complaint survives a MTD before posting reserves.

IV. Defeating class certification

Efforts to defeat a class action begin before the proposed class is certified. As with all cases, defense lawyers need to closely evaluate the Complaint for a possible Motion to Dismiss. At this stage, when the class is pled but not yet certified, common grounds for dismissal are: lack of jurisdiction, insufficient pleading (especially in federal court), lack of standing, and failure to state a claim. Because of the cost of discovery and potential exposure in a class action case, is it often worth putting resources towards a Motion to Dismiss or other early dispositive motion.

A. Certification requirements and defenses

If the case survives an early dispositive motion, the defense focus shifts to defeating the Plaintiffs' forthcoming motion to certify the class. Under the federal rules (and many states), Plaintiffs must plead and/or prove (1) the class is so numerous that joinder of all members is impracticable ("numerosity"), (2) there are questions of law or fact common to the class ("commonality"), (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class an adequate class definition ("adequacy"). Due to the individual nature of professional services, these requirements can be difficult for Plaintiffs to establish against professionals. Defense counsel must immediately analyze how they can identify and expose weaknesses in the Plaintiffs' proposed class.

In addition to numerosity, commonality, typicality, and adequacy, Plaintiffs must establish that:

(1) prosecuting separate actions by individual class members would create a risk of:

(A) inconsistent or varying adjudications that would establish incompatible standards of conduct for the defendant(s); or

(B) adjudications that would essentially dispose of or substantially impair the interests potential class member non-parties to the individual adjudications, and

(2) the defendant acts or omissions are generally consistent to the class, so that declaratory relief is appropriate as to the class as a whole; or

(3) questions of law or fact common to class members predominate over those affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

B. Focused and effective discovery

A preliminary issue to address with discovery is whether it will be initially limited to class discovery. This limitation can be appealing for the defense, particularly in cases where the defense believes class discovery will support its opposition to class certification. Discovery in class actions must be approached differently from the typical malpractice case because of the nature of class actions. Particular and specific focus must be given to the requirements described above, and written discovery must be tailored to establish why Plaintiffs cannot meet the numerosity, commonality, typicality, and adequacy requirements or the consistency and efficiency requirements. If defense counsel believes that the substantive defenses are strong, and a motion for summary judgment could be successful, agreeing to initially limit discovery to class discovery might not be a good strategy. Again, it is important for the defense to not be reactionary, rather, they must thoroughly analyze the class and the claims on the front end to develop a string defense plan and tailor discovery accordingly.

Because professional services are often personal, individual, and varied, the commonality element can be used to highlight differences in the proposed class. For example, if numerous different agents sold an insurance product, the facts of every interaction would be different. Damages claimed by the named plaintiffs could be vastly different from those in the purported class. Multiple states' laws could be implicated. Discovery should be used to expose these differences and illustrate why the class should not be certified. On the other hand, claims with statutory damages and similar services to numerous clients, such as Fair Debt Collection tend to be more likely to receive class certification.

C. Agree to certification?

A common mistake made by defense counsel is automatically opposing class certification. Circumstances exist where it might be advantageous to consent to class certification. Some factors supporting this strategy include: 1) if the overall exposure in the case exceeds anticipated costs of class discovery, 2) substantive defenses are so strong that spending a lot of time and money on class discovery are not warranted, and 3) if settlement is the resolution strategy, knowing the scope of the class can expedite settlement discussions.

D. Settlement strategies

Settlement of class actions can involve just the plaintiffs or a true class settlement. While it is typically preferable to obtain a class settlement, because it completely forecloses the possibility of a future claim, they are more expensive and time consuming. Settling with the Plaintiffs individually prior to class certification or without addressing class certification can be a good strategy under certain circumstances. Just as an early and thorough case evaluation is critical in developing defense strategy, it is also important in reaching a favorable settlement if

that is your client's or insured's goal. It may be that your client or insured is able to determine the size of the proposed class, and the value of the claims, without doing much discovery. With this information, the defense can present to Plaintiffs' counsel its best possible recovery, setting a ceiling for settlement discussions. Depending on the strength of procedural and substantive defenses, and the stage of the case, having a clear understanding of the potential exposure can help negotiate an early and favorable settlement.

V. Coverage Issues

A. Statutory Fines and Penalties

Class actions often involve alleged violation of statutes that pose the risk of fines and penalties, in additional to civil litigation damages. Professional and management liability insurance policies often have exclusions for statutory fines and penalties. Defense counsel and claim handlers need to advise insured early on about possible exposure that will not be covered by insurance. Similarly, due to the nature of class action litigation, the total damages alleged can greatly exceed the limits of the policy, thus, counsel, claims handler, and insured client must have early and often discussions about this potential for a verdict in excess of the policy limits. If the insured has excess coverage, all involved must ensure that the excess carrier is involved and aware of the potential exposure.

B. Types of Self-Insured Retentions and Deductibles

Deductible and Self-Insured Retentions (SIRs) can vary greatly. From an amount in the hundreds to the hundreds of thousands to the insured's ability to select counsel, to the insurer's involved during the SIR period, defense counsel must have a handle on these issues to ensure their clients are protected and aware of how costs and exposure will be allocated. This can have a significant impact on early settlement negotiations and decisions on defense and resolution strategies.