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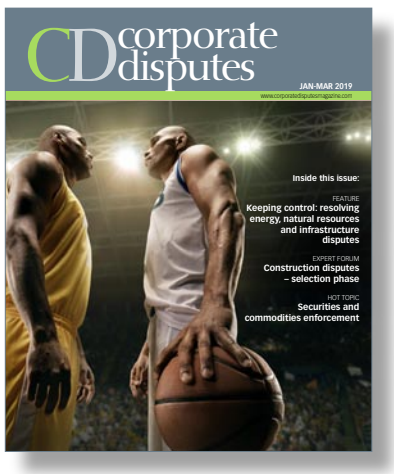
CD corporate disputes

DEFENDING CLASS ACTIONS

REPRINTED FROM:
CORPORATE DISPUTES MAGAZINE
JAN-MAR 2019 ISSUE



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Tucker Ellis LLP

Published by Financier Worldwide Ltd
corporatedisputes@financierworldwide.com

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MINI-ROUNDTABLE

DEFENDING CLASS ACTIONS

PANEL EXPERTS

Becky Kcehowski
Partner
Jones Day
T: +1 (412) 394 7935
E: rbkcehowski@jonesday.com

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.

Michael F. Williams
Partner
Kirkland & Ellis LLP
T: +1 (202) 879 5123
E: michael.williams@kirkland.com

Mike Williams is an experienced trial lawyer and appellate advocate in the Washington, DC office of Kirkland & Ellis LLP. He has extensive experience leading the representation of complex, high-stakes litigation extending across many cases, jurisdictions, regulatory agencies and practice areas.

Jeffrey S. Jacobson
Partner, Co-Chair, Class Actions Practice
Kelley Drye & Warren LLP
T: +1 (212) 808 5145
E: jjacobson@kelleydrye.com

Jeffrey S. Jacobson defends consumer, privacy and securities class actions, and represents media, technology and other companies in commercial litigation. A former director of the New Jersey Division of Law and chief counsel to the New Jersey Attorney General, Mr Jacobson helps companies resolve and minimise the reputational damage and business interruptions that can arise from litigation, particularly costly class actions.

Karl A. Bekeny
Partner
Tucker Ellis LLP
T: +1 (216) 696 2699
E: karl.bekeny@tuckerellis.com

Karl Bekeny chairs Tucker Ellis LLP's business litigation group. He is a commercial litigator with a national class action practice. He defends class actions in a variety of areas, including insurance coverage litigation, consumer claims, warranty litigation, product liability litigation, Employee Retirement Income Security Act (ERISA) claims and litigation involving public pension systems.

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*.

Williams: Class action activity has continued its steady increase over the past 12 months, even as Congress and the courts have continued to tighten standards to discourage the most abusive claims. On the one hand, recent Supreme Court decisions should eventually lead to the failure of class actions filed with no cognisable legal injury, or filed in forum-shopped venues. But on the other hand, plaintiffs are expanding class action litigation to new defendants and new industries, especially cases alleging consumer-protection violations. Decisions by the Supreme Court in cases like *Spokeo, Bristol Myers* and even *Wal-Mart* – which is now seven years old – tend to have a lagging impact as the lower courts apply these precedents to the cases before them. As a result, there has been no significant reduction in class-action activity over the last 12 months. Defendants should expect plaintiffs to keep adjusting to the Supreme Court's rulings.

Bekeny: Large class action lawsuits continue to grab headlines, but an increase in smaller-scale class filings has been the trend of 2018. For example, we have seen a shift in data breach cases, with an increasing focus on smaller breaches, often where the result is the exposure of employees' biometric data. There has been a surge in cases filed under the Illinois Biometric Information Privacy

Act, and we monitor those as well as the biometric privacy statutes being considered by other states. Additionally, increased scrutiny of class action settlements was a theme in 2018 and will be in 2019. Class-wide settlements, especially nationwide settlements, are drawing interest from state attorneys general. The same is true for courts. We will be closely watching the Ninth Circuit, where an *en banc* decision is expected regarding the *Hyundai* decision, which imposed substantial new hurdles on nationwide class settlements in 2018.

Jacobson: For every one class action alleging truly serious wrongdoing, such as diesel car 'cheat devices', there are at least 10 class actions where the defendant engaged in no real misconduct but still faces massive potential liability for some purely technical statutory or regulatory violation. For example, if a company engages in telephone or text-message marketing, and a plaintiff can allege some violation of the sometimes esoteric Telephone Consumer Protection Act, the defendant faces at least $500 per call or text in statutory damages. With that kind of money on the line, it is no wonder that class actions under this and similar laws continue to proliferate, even where the defendant believes it fully complied with all the relevant rules.

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?

Williams: The greatest challenge to a class-action defendant is uncertainty. There is probably no type of lawsuit that involves less clarity about the potential liability, the size and scope of the case and the availability of special or even punitive damages. Especially at the outset, even plaintiffs' counsel, typically, does not have much more than a general idea of the size of the class or the magnitude of the damages sought. There is no reliable mechanism for nailing down plaintiffs' damages theories before the case proceeds into discovery. This uncertainty makes it complicated for defendants to decide whether settlement is a viable option early on. The best way to address the uncertainty is adopting an aggressive approach to investigation and discovery as soon as a defendant receives the demand letter or complaint.

Bekeny: Assessing the scope of the case, including class size, evidentiary issues, potential exposure and choice-of-law, especially in nationwide class actions, is an important initial challenge faced by the defence. And it is one that must be addressed immediately, especially since the party may have incomplete records, gaps in sales data for example, or may need information from third-parties, like retailers, to accurately assess the class allegations. Only after making this initial assessment can class

counsel devise a comprehensive class strategy. Moreover, this assessment will define the risks. For example, in a consumer products class action, a defendant's limited exposure for products currently on the market may be eclipsed by other factors, like the potential for injunctive relief or a negative impact to its relationships with retailers, but you cannot weigh those considerations until you have made at least an initial assessment of the class scope.

Jacobson: Class actions, by their nature, are asymmetrical. A good plaintiff's lawyer can craft and file a complaint with just a minimal investment in time and money. Moving to dismiss that lawsuit, by contrast, inevitably costs tens of thousands of dollars, at least. If a case survives the dismissal stage, discovery in a class action will cost the defendant hundreds of thousands of dollars, while the plaintiff's burden will be much lower. And, of course, the defendant has much more to lose from an adverse outcome in the case than the plaintiff. Those economics are deeply unfair and create strong incentives to overpay to settle even the most meritless cases. Companies correctly believe that if a case can be settled for less than the cost of litigating it, compromising to avoid the risk posed by the case can be a prudent business decision. The greater problem, however, is when the plaintiff's counsel does not offer a reasonable settlement, forcing the defendant into a bet-the-company posture even when it would prefer to settle. Early case assessment is critical and deciding when to attack the plaintiff's class allegations is also a key strategic question.

"Early case assessment is critical and deciding when to attack the plaintiff's class allegations is also a key strategic question."

Jeffrey S. Jacobson, Kelley Drye & Warren LLP

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?

Bekeny: We often advise parties to consider mounting early challenges to class action claims because doing so carries various cost-related and strategic benefits. Class-wide discovery is an expensive proposition and early motion practice, either through a motion to dismiss or a pre-certification motion for summary judgment, can limit the scope of discovery by knocking out key causes of action or restricting the scope of the potential class. In our experience, courts are often open to these pre-certification challenges if persuaded that doing so will streamline the issues. Moreover, pre-certification summary judgment helps to 'spread the risk' by giving parties an avenue to challenge the plaintiff's case before engaging in a 'winner take all' battle over class certification. Thus, even if the court eventually certifies a class, parties can be favourably positioned to restrict the size or breadth of that class.

> **"Especially when facing new claims, the defendant's best strategy for mitigating risk is to be proactive in investigating the facts and developing legal defences."**
>
> *Michael F. Williams, Kirkland & Ellis LLP*

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.

Jacobson: With class actions, early case assessment is critical. We recently saw a case where an unforeseen technical problem prevented a company from delivering a promised service to some consumers. The company did the right thing from the outset, immediately providing full refunds to people it knew did not receive the service even before the inevitable class action suits were filed. That proactive step took a lot of the wind out of the plaintiffs' sails, and providing this complete relief to many claimants before lawsuits arrived made it relatively easy and inexpensive, once class plaintiffs arrived on the scene, to enter into a settlement and thus allowing the rest of the potential claimant universe to come forward for the same refunds. The other side of that same coin is a quick investigation demonstrating that a threatened or filed class action complaint is simply wrong, allowing defence counsel to explain that situation to the plaintiff's counsel and either procuring a dismissal or, at worst, an early individual settlement which costs far less than protracted litigation. Early challenges to a plaintiff's class theory can be a good strategy, but defence counsel sometimes overuse this tactic. Courts are very hesitant to throw out a plaintiff's class claims before letting that plaintiff take discovery, so I prefer to reserve these early strikes for the clearest cases, where we can show the court that no possible discovery can help the plaintiff establish the existence of people 'similarly situated'.

Williams: There is no substitute for early engagement between in-house and outside counsel. Especially when facing new claims, the defendant's best strategy for mitigating risk is to be proactive in investigating the facts and developing legal defences. This is a scenario where an investment in resources early on could save a lot of time and trouble later in the case. The sooner counsel can get their arms around the potential liability and scope of the case, the easier it will be for a corporate defendant to plan, budget, report and work up a strategy for resolving the lawsuit. It is a tremendous advantage for the defendant to deal with plaintiffs' lawyers from a position of strength, even in the earliest interactions. It takes prompt action and good collaboration between internal and external counsel to make that happen.

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?

Jacobson: The decision to fight or settle must be revisited constantly, based on the latest information. A defence attorney may estimate your chances of defeating a case on a motion to dismiss at 80 percent and quote you a price of $50,000 to seek dismissal. That assessment may cause you to rebuff a $100,000 settlement demand, but what if the demand drops to $15,000? And what if the dismissal motion loses, suddenly inflicting perhaps $500,000 in discovery costs? What if you predicate a decision to fight class certification on the expectation that helpful facts will emerge during discovery, but the facts turn out differently? A company and its defence counsel must be in constant contact throughout a case, continually evaluating the situation, looking at the economics of the case, and looking for creative resolutions. Sometimes, there is no choice but to fight, such as when the plaintiff is challenging a core corporate practice that the defendant cannot change without taking a massive revenue hit. It is a rare situation, however, when a reasonable 'off-ramp' from potentially crippling litigation does not present

itself, and when it does, defendants should not feel constrained by prior decisions to fight that may have been correct based on then-known information that is no longer correct.

Williams: Unless the defendant has recently resolved a class action that is substantively very similar, it needs to prepare to defend the lawsuit. There will be exit ramps for the client to consider settlement options as the case proceeds. The rulings on dispositive motions or motions to strike class allegations, for example, provide obvious inflection points. But it is unlikely that a defendant could ever reach a reasonable settlement without reliable information about potential liability and without the credible threat that it will litigate the case to resolution. In this respect, consulting experts who provide economic or statistical analysis can be excellent investments in the early stages of the case. Consulting experts can arm the company and its lawyers with hard data for making decisions, and their analysis is unlikely to be wasted effort. It should provide a valuable jump-start for developing defences or approaching plaintiffs' counsel.

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.

Bekeny: Setting goals early is the key to making the right choice to fight or settle. With the involvement of senior management, counsel and subject matter experts, the litigation team should assess the risks and benefits of litigation versus settlement at each key stage of litigation, keeping in mind the economic motives of their opponents and undertaking strategies to disrupt them. Settlement can be the correct decision out of the gate, during trial or at any point in between. And while favourable pre-trial resolution of class actions is a frequent goal, outside counsel must prepare for trial from day one. Subject matter experts can play a big role in this analysis by assisting with quantifying the damages, conducting statistical analyses to estimate settlement and litigation payouts, predicting the impact of settlement or litigation on brand image and revenue streams, and understanding the cash flow and tax implications.

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?

Williams: Class actions are not qualitatively different from other types of litigation. Discovery obligations, with their attendant costs and burdens, are present in every case. Every lawyer needs at least a basic technical proficiency for dealing with electronically-stored information, and every lawyer should be able to work with IT personnel to make sure that information is preserved, reviewed and disclosed as appropriate. It is also important not to lose sight of plaintiffs' own burdens of preservation, production and proof. The expense of class-action litigation is asymmetric, and unfavourable to defendants, but defendants should keep in mind that there is no exception in Rule 23 for holding plaintiffs to their proofs.

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.

Bekeny: Reining in discovery costs is key to controlling a class action defendant's potential exposure because the lion's share of e-discovery obligations and expenses in a class action are borne by the defendant. Outside counsel must have the requisite experience and a dedicated team to actively direct this process at a high level of competence, rather than merely passively managing an e-discovery vendor. The field of e-discovery is quickly and constantly evolving, and counsel that is well versed in the latest technological and legal developments will anticipate a party's needs and work seamlessly with their legal and IT departments. Discovery obligations can begin even before a defendant is served, so counsel must engage early to promptly develop and execute a discovery strategy that balances the scope of the case with the company's budget. This strategy should include using experience and advanced technologies to streamline document collection, review and production.

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>
> *Becky Kcehowski, Jones Day*

Jacobson: More than 20 years ago, when discovery technology was still in its infancy, document collection and review had to be handled

manually, and there was no such thing as a 'discovery attorney' whose billing rate typically is much lower than a law firm associate. Today, many companies archive their emails in real-time, making collection of relevant evidence easy and inexpensive. Technology-assisted review reduces the need for manual inspection of every potentially relevant document, and much of the review process can be performed by lower-billing personnel on- or off-shore. Class action discovery is still too expensive for the defence, but less so than it used to be. That is, of course, provided that the defendant has experienced counsel who knows how to manage the process. Woe betide the defendant that mismanages the process and allows potentially relevant evidence to be lost through inadvertence.

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

Jacobson: Most class action cases proceed without significant media attention, or with coverage limited to the legal press. If your company faces a class action that the mainstream media concludes on its own is ridiculous – think of, for example, the recent cases where plaintiffs sued a popular coffee chain because its iced drinks contain ice – no comment the defendant might give will make the story any better or worse. If you have a class action case that is being litigated very much in the public eye, however, having a media consultant as part of your team can be crucial. Critically, however, the company must pay careful attention to issues of attorney-client privilege and attorney work product. The media team *can* be covered by the work product umbrella, but not in all circumstances. Make sure to obtain attorney advice about the best way to engage a media consultant and when it is and is not appropriate to include that consultant in discussions of legal strategy. Also, whether one does or does not engage a media consultant, remember that every brief filed in a high-profile case has two audiences, the court and the public, or, put another way, the court and the press.

> **"Defendants can limit or reduce the impact of negative media attention by working to tell their story throughout the case, whether through pleadings, briefing or settlement."**
>
> *Karl A. Bekeny, Tucker Ellis LLP*

Bekeny: Class allegations typically invoke a perception of a more significant case. And a certified class may suggest some truth to the allegations. If that were not enough negative attention for a defendant, where there is one class case there are generally more. The filing of multiple class actions can create a cascade of negative attention. Defendants can limit or reduce the impact of negative media attention by working to tell their story throughout the case, whether through pleadings, briefing or settlement. If there is a good merits defence, focusing on why a defendant should prevail in court filings can temper negative media coverage. Also, a settlement agreement can tell a party's story and help control the message. In many cases, what the settlement says about the case can be more important than the settlement amount. These subtle techniques that build a party's story can effectively control negative media coverage.

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 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.

Williams: This is another area where purposeful, informed strategy is essential. We can all think of cases where a communications misstep exacerbated the risk from a class action. This is not the sort of problem that a defendant should try to muddle through. There is a broad range of options that might be right under the circumstances, from taking an affirmative, proactive media approach, to remaining more reactive and less visibly public-facing. But the defendant needs to fully understand the case before it can begin to develop a message that is clear, accurate and helpful. It is critical that the defendant not make a statement, in litigation or otherwise, that later turns out to be less than 100 percent accurate. Again, there is no substitute for early engagement on the facts and law by in-house and outside counsel.

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?

Bekeny: Class action spending rose in 2018, and will continue to occupy a growing portion of litigation budgets in 2019. To address growing costs and exposure, we expect to see companies proactively combat class actions at an early stage. The Supreme Court's 2017 *Bristol-Myers Squibb* decision offers one tool for such an occasion, allowing companies to challenge the plaintiffs' ability to establish personal jurisdiction over alleged nationwide classes. And the recent *Epic Systems* decision will encourage companies to seek to enforce class action waivers or mandatory arbitration clauses, especially in light of the repeal of the Consumer Financial Protection Bureau's rule banning such clauses. At the same time, we predict a decrease in the number of nationwide class settlements finalised in statutory violation cases while we wait for *Hyundai* to work its way through the courts.

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.

Williams: Class-action litigation will continue to increase. Congress and the courts have been increasingly clear in requiring class actions to comply with the same requirements of standing, jurisdiction and venue as single-plaintiff lawsuits. But there is still no reliable mechanism for resolving most class-action lawsuits without discovery. Plaintiffs know that many defendants would rather settle than take on the costs of litigation, and these plaintiffs will continue to sue. Looking ahead, defendants are likely to turn to pre-emptive strategies, such as bringing early motions to strike class allegations from the complaint. Most courts

agree that these motions are procedurally proper under Rule 12, and they provide a potential way to resolve a lawsuit that ultimately could not satisfy the standards of Rule 23.

Jacobson: Class action plaintiffs' attorneys are among the most creative and persistent members of the legal profession. When courts close one door to class action litigation, such as by upholding arbitration agreements in consumer contracts, thereby putting several industries that contract directly with consumers beyond the reach of certain kinds of class action suits, the class action bar finds a way to open another. The US, however, is due for another round of class action reform. In 1995, in the US, there was a major reform of class action lawsuits involving alleged securities fraud. In 2005, there was an equally major reform of consumer class actions, causing many more cases to be litigated in federal court where claims are thought to be more rigorously scrutinised. Both of those reforms were bipartisan, and both left holes that have become apparent through time. Now may be the time for businesses to band together through their trade groups and lobby for changes both to the class action rules and to some of the federal laws that have become too-frequent fodder for the class action bar. CD