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## Preparing For And Surviving The New Class Actions Game – Part I

*The Editor interviews Edward F. Mannino and David L. Comerford, Partners, Akin Gump Strauss Hauer & Feld LLP. The firm has prepared a 61-page booklet entitled "Preparing For And Surviving The New Class Actions Game," which is available upon request.*

*Editor's Note: Part II of this interview will appear in our April issue.*

**Editor: Defense counsel and their corporate clients now face new challenges. Among these, what would you single out as the most important?**

**Mannino:** At one time you litigated the class action and that was the end of it. The most significant new development is the proliferation of additional litigation that is spawned by a class action. Other lawyers, who were not included in the group bringing the class action, aggressively look for ways to share in the spoils. No longer does a defendant sued by class action lawyers have the luxury of dealing with a single group or an individual law firm throughout the entire case.

In the last five years, we have seen a proliferation of constituencies with a lot of niche players. In a typical securities case, you have, as in the past, a shareholder class action, but in addition other types of cases are also filed on behalf of various other constituencies. There may be a separate class action or individual actions on behalf of bondholders. Typically, there are several bondholder



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claims because each bondholder group may be represented by a separate law firm. The bankruptcy or litigation trustee may bring a suit against the directors and officers advancing corporate claims. There are also lenders who believed that their debt was secured who also bring suits.

These additional lawsuits are triggered by law firms who, because they were left out of the class action, seek ways to participate in the litigation. They look for their own theory on which to bring suit. Often these people will represent some public fund like CalPERS or one of the New York pension funds. They may file on their own behalf so that they can reach a separate settlement.

As a result of this proliferation of



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lawsuits by claimants with competing interests, fights between claimants complicate the work of defense counsel. On the other hand, often the claimants say inconsistent things and blame other constituencies. For instance, the bondholders may say that the lender pulled the plug too quickly and that is why the company went down, so they seek recovery from the lender as well. Meanwhile, the lender is suing the directors and officers, saying that they mismanaged the company. As a defendant, you may be able to play off these different groups against each other.

**Editor: Class actions have become a big business for plaintiffs' counsel who have reinvested their huge fees in**

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**improving their chances for success. They aggressively seek to taint the jury pool and affect stock prices by publishing misleading PR and seek allies among AGs and legislators to increase the pressure on defendants to settle. What can be done about this?**

**Comerford:** Companies should consider putting together a team to counter these strategies. A reactive posture is not going to produce the best results. If you have the players in place and they have been trained in what they have to do, they can deal with potential problems as opposed to having to scramble.

The inclusion of a media specialist on the defense team can be helpful. Trying cases in the press is part of the plaintiffs' bar's business model. The plaintiffs seek to define the case in the press even if the way they define it is unrelated to the actual claims. We have seen mock question-and-answer sessions on Web sites that make issues look like news when they are not. The plaintiffs' bar tends to front run a perceived social ill or a developing social trend, and will use the media to connect their case with that trend. Most defendants on the other hand are not in the business of litigation. Defendants rarely win the press battle because plaintiffs' lawyers make good copy and many times can paint the situation as a "David v. Goliath" confrontation. The communications person on your team can counter negative themes with the positives of the business. Often the only message that comes from defendants is that they deny the allegations and they will vigorously defend. It is sometimes better to get the positives of the business out there so that the company is not always on the defensive – but be careful about overstating your case; that too can be used against you.

Including government affairs people on the defense team may also be prudent. Plaintiffs often seek to enlist government support and push for regulatory changes. They may use associations to propose legislation. Even if the legislation does not have a realistic chance of passing, it can still put pressure on a company. It may be possible to line up former government employees from

relevant agencies to argue that the legislation is unnecessary or flawed. There often can be parallel government actions – investigations or civil or criminal proceedings. Having former prosecutors or agents on the defense team can be helpful in dealing with such efforts.

**Mannino:** I would recommend that any major corporation have a dedicated team put together that meets once a month to talk about class trends and how they should prepare to meet a challenge if it should arise. General counsel should be involved as well as the other players mentioned by David. People who have direct contact with customers or other members of a potential class of plaintiffs should also be involved because they can be good sounding boards.

When we get involved in a case, we often find that plaintiffs' counsel or their agents have had contacts with people in the company to fish for information. This is very common today in IP litigation. If someone is about to sue you for infringement, they will sometimes contact members of your sales staff to ask about your business practices. A similar approach is used in class action litigation to get basic information about company practices. People who do investor relations need to be part of the litigation team as well because they too may get calls from plaintiffs' counsel or those working with them. Others who are likely to get such inquiries should either be part of the team or advised to report to the team on the calls they are getting, and be sensitized to when and how they should provide information.

**Editor: How should companies sensitize themselves to the possibility that a claim that may have been filed against a competitor will be filed against them?**

**Comerford:** We believe that it is important for companies to track litigation trends. If plaintiffs' lawyers find fertile ground they will plow that ground many times. That is evident in the proliferation of constituencies filing claims. Companies should have an awareness of relevant news and industry information.

VeriSign provides a service called Real Time Publisher Services that is a news harvester. That is an excellent resource for keeping track of news on a particular industry. Other things that companies can do include periodic searches of Web sites on class actions. You can get email alerts from some of these sites. One resource is [www.lawyersandsettlements.com](http://www.lawyersandsettlements.com). That site lists cases being investigated and lawsuits that have been filed. It has a section that allows people to submit their issues for review. There is another called [www.classactionlawsuit.org](http://www.classactionlawsuit.org), which has links to Web sites devoted to specific cases and topics. Another Web site is [www.overlawyered.com](http://www.overlawyered.com), which is updated often and draws on various publications to discuss news and trends in class actions.

Another thing to do is to get software such as Web Trends that allows you to monitor domain names that read your Web site to see who is investigating you. You can also make periodic Freedom of Information Act requests to find out who is filing these requests about your company.

Both Westlaw and LexisNexis offer products that allow you to monitor docket information to learn about the companies being hit, the law firms representing the parties, the nature of the litigation and where they are being sued.

**Mannino:** Also check the Web sites of the leading plaintiffs' law firms and those of organizations that are encouraging people to bring or participate in lawsuits. An example is the Milberg Weiss Web site, which lists new litigation opportunities and solicits people to become named plaintiffs. You can look at your industry to see if you or your competitors are potential targets for litigation.

The AARP is one of the largest voluntary organizations in the U.S. and deeply committed to defending retired employees' rights with regard to pension and other fringe benefits. They have filed as *amicus* in a number of cases in which we have been involved. Checking Web sites of associations like AARP can give in-house counsel a heads-up for coming trouble.