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Preparing For And Surviving The New Class Actions Game – Part II

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 I of this interview appeared in our March issue.

Editor: I understand that a number of plaintiffs' law firms have worked out sweetheart arrangements with pension and other employee funds. Please tell us about these.

Mannino: Some of the larger plaintiffs' firms have blanket retainers with certain large employee pension funds. Under these arrangements, plaintiffs' counsel look for negative news about a company that significantly lowers its stock price. They maintain open access to the funds' portfolios so that they can easily track which funds have investments in the security. Once they make a match they will draft a complaint for the funds with which they have standing arrangements and send them over to be filed on behalf of the fund. I call this the "institutionalization of litigation." The plaintiff's law firm selects the lawsuits and prepares complaints without any input from the actual plaintiff. That is a major new development in the last few years.

Editor: Is involvement in civil justice reform efforts helpful?

Mannino: That is something that cannot hurt. It is important to emphasize legiti-



Edward F. Mannino

mate concerns and not appear to be overreaching. For example, a push may be made to get legislation to exempt an entire industry from regulation. That may be counterproductive because it may be viewed as heavy-handed. On the other hand, it may be highly desirable to push legislation that clarifies elements of a legal claim or counterbalances the plaintiffs' efforts to facilitate their ability to launch unmeritorious litigation. You should try to get sensible clarifications of the law, such as the reforms supported by the securities industry in the 1990s.

Editor: Are you concerned about attempts by state and federal prosecutors and government agencies to undermine the attorney-client privilege?

Mannino: A lot of government regulators



David L. Comerford

now demand that you waive the privilege or they will assume that the corporation is a bad actor. The government needs to understand that the result is counterproductive. If corporate officials believe that they cannot consult a corporation's attorneys for advice on a confidential basis, lawyers will lose their ability to counsel and warn their clients to avoid unlawful behavior. We are supportive of efforts being made by the organized bar to defend the privilege.

Editor: Another area that in the judgment of corporate counsel badly needs reform is e-discovery.

Mannino: The proposed amendments to the Federal Rules with respect to electronic discovery address some of the major concerns of corporate counsel. They provide

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that a neutral document retention policy will not be held against a company if documents are destroyed as part of that policy before the company knew about a litigation threat. Reform of the Federal Rules is a good first step, but it is not enough. Similar rules also need to be adopted at a state court level.

Comerford: The new Federal Rules provide a safe harbor only if the company has adopted a reasonable litigation hold policy. It is essential that companies adopt good document retention policies and institute a process for implementing such policies that addresses electronic documents, including email. The policy should have a clearly articulated purpose, such as reducing business expenses. It should be objective and systematic.

Editor: Can the maintenance of a culture of compliance within the company help assure that damaging e-mails will not be generated?

Comerford: It is important to train the workforce with respect to their internal communications. Email problems exist because people do not think before sending an email. You need to train the workforce to communicate the facts and to be objective. They should not be conversational or make jokes because plaintiffs' counsel will treat emails as reflective of official company attitudes.

Mannino: I have always been impressed with people that do training well. My wife did training on Wall Street, and co-authored a chapter in my book on Lender Liability and Banking Litigation. She set forth what to do when training bankers in litigation and loss prevention. It is incredible to see the types of things some bankers write. My book quotes a collection of memos sent by bankers that resulted in courts upholding large jury verdicts against their banks. You have to train people to think about the implications of an email. They should know that they will be creating documents that will be read to a jury as examples of the bad attitude of management. Any email that mentions that a co-worker is getting older can be devastating in an age discrimination suit.

Editor: How helpful are protective clauses?

Comerford: If you have form agreements, you can consider disclaimers that limit dam-

ages. You can also consider a "no class action" clause. Some courts accept these but others do not. In Pennsylvania, Judge Bernstein in the Philadelphia Commerce Court recently found that a "no class action" clause is unenforceable in contracts of adhesion. There is a split in the federal courts on this issue. AAA may not accept an arbitration of a class if the parties agreed not to have any class actions. You should also review company warranties, advertisements and provisions in personnel manuals for opportunities to insert protective language.

Editor: Have the courts restricted the use of junk science?

Mannino: As a result of the *Daubert* case and its progeny, we have been successful in federal courts in getting judges to throw out product liability cases based on junk science. In federal securities class actions, judges are holding plaintiffs to significant burdens of proof on issues like an efficient market. On the state level, a number of jurisdictions follow *Daubert*. However, in Pennsylvania, the state courts do not apply *Daubert*. I would recommend working with an association to file amicus briefs in junk science cases. You need more of that across the board in the areas involving securities and commercial litigation.

Plaintiffs tend to use the same stable of experts in many cases regardless of the type of case. These experts are frequently very good communicators, but may be lacking in necessary academic background. They do not follow the best practices that *Daubert* would require. In preparation for invoking *Daubert*, you want to review all the cases that the expert has testified in and you may want to use VeriSign's Real Time Publisher Services to get news coverage on these experts. For example, a prominent plaintiffs' expert was recently indicted by a federal grand jury. You should also check the Web site of the expert's company. We found that a person who was selling himself as an expert in an area for our case had a different expertise listed on the company's Web site. These are things you need to look for when examining plaintiffs' experts.

Editor: What about the resolution of employee, supplier and other disputes with groups of stakeholders through ADR programs that typically involve a company ombudsperson?

Comerford: These programs have value to

the extent that they allow a company to identify and address issues at an early stage and to correct practices or supervisory behavior that could become the basis for serious litigation.

Editor: What are some of the reasons why defendants might not want to invoke the Class Action Fairness Act to remove a case to a federal court?

Mannino: Any forum can be bad. You have to make a judgment before you try to move a case into federal court. Some states like Pennsylvania have special business courts. These judges tend to be very sophisticated and fair. You may have a federal court that may not be as good.

Editor: Defendants sometimes complain that there is undue pressure from the judge to settle a class action. How should this be dealt with?

Mannino: One way to deal with that is to file an early dispositive motion, such as a motion for judgment on the pleadings, to tee up an important legal issue. This may enable you to get a quick decision so that the judge does not force a settlement. There are also innovative state court procedures that balance the desirability of a settlement with the defendant's need for a ruling on the law. In Philadelphia's commerce court, there is a new program where you can get a three-judge panel of the court to rule on an issue in a case and then you go to ADR once that issue is decided. That is a creative approach that balances both interests. We are seeing more mandatory mediations. They tend to work better if they take place after some discovery.

We find that some judges are encouraging summary jury trials on a non-binding basis as a prelude to settlement discussions. The jury doesn't know that this procedure is advisory so they take it seriously. The use of devices like this are a good blend of settling and litigating. The old-fashioned approach of the judge forcing a settlement is changing.

Comerford: When there is a settlement, it is important to structure it to avoid follow-on suits as much as possible. Many of the lawyers in the plaintiffs' bar are pilot fish. They swim along the side of the large plaintiffs' firms. They will sue again and again if they find an area where an argument was successful. You want to structure settlements to avoid these cases.