

The

# Corporate Counselor

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## SECTION RECEPTION

April 16th  
**CITY CLUB**  
(see p. 4 for details)

## ANNUAL SEMINAR

May 16—18  
**WESTIN MISSION  
HILLS RESORT  
RANCHO MIRAGE**  
(see p. 6 for details)



## Effective Strategies for Defending Class Actions

*By: Robin J. Samuel, Esq. and Laura J. Wilson, Esq.  
Hogan & Hartson LLP*

**F**or virtually all companies, class action litigation poses a substantial threat. The typical class action defendant faces multi-million dollar damage claims, broad and disruptive discovery, significant defense costs, and inordinate trial risks. Class actions also often attract negative publicity, with unfavorable outcomes not only hurting the bottom line, but also jeopardizing a company's hard-earned image.

Given the risks, class action litigation demands proactive management by in-house and outside counsel from the outset. This article outlines several strategies that counsel can employ to effectively manage and defend class actions and, thereby, gain the upper hand in this difficult type of litigation.



### Strategy #1: Decide upfront whether you should fight or settle

All too often, companies adopt a "fight to the death" approach to class litigation. Faced with huge damage exposures or other bet-the-company consequences, defendants often prefer to pay their outside counsel to fight on every issue rather than face the music upfront. And outside counsel—natural born fighters that we are—instinctively take to the battle.

The problem with this approach is that it usually ends up costing the company significantly more in the long run, especially when liability and damages are relatively clear. Obviously, it is better to resolve a clear liability for pennies on the dollar today than it is to spend years paying attorneys' fees and

dealing with litigation distractions, only to end up paying the same amount or more to settle the case. Knowing upfront whether you should settle or fight will greatly assist your defense and decision-making and avoid wasting time and resources where early settlement is in fact the best option.

To answer the fight or settle question, you need a good

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understanding of both the facts and your probabilities of success on class certification and the merits. Any good class action defense should begin with an aggressive internal investigation to determine the facts. If your investigation confirms that there is a problem, you will be in a position to own the bad facts and drive the case towards early settlement. Consider conducting a statistical analysis or using consulting experts from the outset to help guide your investigation and decision-making. And in some cases, take early depositions of the named class representatives or other witnesses to help evaluate the case.

Once you know the facts, determine your client's potential liability. Team with outside counsel to critically analyze defenses to class certification and the

likelihood of success on dispositive motions. Only when you know what the case is truly

about will you be in a position to decide whether to settle or fight. And you shouldn't be answering this question for the first time several years into a case.

**Strategy #2:**

**If you decide to fight, fight smart**

Although you represent the defendant, you should still take charge of the litigation to achieve the best results. While the traditional class action defense will (and should) focus on challenging the identified class representatives and opposing class certification, there are various tools and remedies available to defense counsel that can greatly increase your odds of success on these issues.

For example, you should find the best forum for the fight. Certain class actions can be removed from state to federal court based on diversity. Pursuant to the Class Action Fairness Act of 2005, or CAFA, class actions may be removed on the basis of diversity where the amount in controversy exceeds \$5 million, at least one class member resides in a state other than the home state of any defendant, and there are 100 or more class members. For class actions involving plaintiffs in several states, a federal forum can help prevent overlapping or "copycat" lawsuits, local biases and inconsistent rulings. According to a study issued by the Federal Judiciary in April 2007, the number of diversity class actions in federal court have more than doubled, showing that defendants are taking advantage of CAFA. Other class actions can be removed on the basis of federal question jurisdiction.

Also consider, and take advantage of, arbitration, forum selection or judicial reference clauses where possible. It is not uncommon for putative class members to have agreed to an alternate forum for the resolution of disputes, and some such clauses prohibit the hearing or consolidation of claims on a class-wide basis. While courts are not always willing to enforce these "class action

waivers,” even where only a portion of the putative class has agreed to an alternate forum, consider whether you can gain an advantage by splitting the class into different subclasses for forum selection purposes. As a general rule, the more you can fragment the class, the better off you will be.

Also consider your options for controlling (or at least limiting) media exposure. Press coverage of class actions, especially those filed against a large, visible company, often can undermine the company’s business reputation and integrity with the public, as well as affect the parties’ ability to settle. If your case may attract significant public attention, consider asking the court to limit public communications by both sides to prevent or limit the long-lasting, adverse impacts of negative publicity. Also consider hiring a media consultant to help develop short and long-term communication strategies for the litigation.

Stay on top of your discovery obligations. Because the vast majority of corporate information is stored electronically these days, discovery burdens—especially in the class action context where defendants typically possess the bulk of the relevant information—can be overwhelming if not proactively managed from the start of the case. Ensure your client is fully compliant with applicable e-discovery rules, particularly with regard to electronic records and backup. Courts nationwide have addressed counsel’s obligation in preserving relevant information, making it clear that counsel should not only issue a hold order placing a litigation hold on relevant documents, but also notify employees of the hold, oversee compliance with its terms, and periodically remind employees of their obligations.

Communicate with your peers. Class action litigation is copycat by nature, and odds are that others in your industry have been through the same or similar litigation recently. Counsel can glean extremely useful information from previous cases by searching legal databases, joining litigation discussion groups, following industry press or, more directly, contacting other

defendants or their counsel. Your peers probably are in the best position to tell you what strategies succeeded or failed in similar circumstances, and often will be eager to help considering that your case may likewise affect them in the future. Joining defense-side discussion groups can be particularly fruitful, allowing you to get feedback on points of law, judges, plaintiff’s attorneys, mediators, and other relevant issues.

Finally, consult early and often with class action administration firms. These firms have can provide valuable information for your defense, especially on class certification questions, communications with class members, and class participation rates.

**Strategy #3:  
If you decide to settle,  
be creative**

When your initial investigation suggests that you should settle, frame your strategy accordingly to achieve the most favorable outcome. Time your settlement overtures to match the named plaintiffs’ risk and reward profiles; for example, most plaintiffs will substantially discount the value of a claim in return for an early settlement, and positions obviously harden as the case progresses and plaintiffs’ counsel is forced to spend time and money prosecuting the merits.

An early mediation, and its associated exchange of information, often provides the best



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# Section Reception

At

# THE CITY CLUB

## Bunker Hill

333 South Grand Avenue, 54th Floor

GUEST SPEAKER

## ROCKY DELGADILLO

Los Angeles City Attorney

Wednesday, April 16, 2008

6:00 p.m. - 8:00 p.m.

Hearty hors d'oeuvres

Hosted Wine, Beer & Soft Drinks

Attendance is Complimentary to Corporate Law  
Departments Section members and one adult guest



Please rsvp to LACBA Member Services by April 11th @ (213) 896-6560  
Complimentary parking with validation



insight into your opposing counsel's motivation, and how that motivation can be used to get the case resolved quickly.

And while CAFA has rightfully limited so-called "coupon settlements," in which plaintiff's counsel essentially receive a payoff while the class receives little or no value from the settlement, there are still creative ways to resolve claims in a way that is advantageous to both your business and the class. Get advice from tax consultants regarding ways to structure settlements for maximum tax advantage, don't underestimate the value of non-monetary relief, and consider whether "claims made" settlements are appropriate.

**Strategy #4:**

**Don't sabotage your defense by prematurely fixing the problem**

If the plaintiff has identified a continuing

deficiency or problem, you will want to address it to avoid additional future claims. However, before you rush off to fix the problem, consider the potential ramifications in your existing lawsuit. For example, if you "correct" the problem on a class-wide basis without considering the differences between class members, you may have just substantially lowered the bar for plaintiff on class certification.

While class action litigation can be challenging for any company, well prepared and creative counsel can significantly reduce the risk, expense and fallout from such litigation for their clients. Actively managing and understanding a class action from the outset will greatly increase your chances of a successful outcome, and will help guide your decision-making and strategy throughout the life of the case.\*

**INTELLECTUAL PROPERTY ISSUES  
IN CORPORATE TRANSACTIONS**

**May 8, 2008**

Meal/Reception 11:30 AM

Program: 12:00—1:30 PM

*Presented by Business & Corporations Law Section*

*Co-sponsored by Corporate Law Departments Section*

**\$80 for Corporate Law Departments Section members including meal**

The program will discuss intellectual property issues in corporate transactions, including (i) providing a basic understanding of the different types of intellectual property, (ii) exploring the differences between owning and licensing intellectual property, (iii) surveying different types of agreements involving intellectual property, and key provisions in those agreements, and (iv) providing a roadmap for spotting IP issues in corporate transactional due diligence.

**Speakers:**

**Michael K. Lindsey**, Paul Hastings Janofsky & Walker LLP

**Kathrine L. McDaniel**, Fulwider Patton LLP

LACBA Conference Center

281 S. Figueroa Street, Los Angeles

*To register, call (213) 896-6560*

**REGISTRATION CODE: 009934**

Corporate Law Departments Section  
**Annual Seminar**

May 16—18, 2008

Westin Mission Hills Resort

Rancho Mirage



Join the Fun!!

**“MANAGING BUSINESS RISK”**

*7 Hours of Continuing Legal Education Credit*

**Friday:**

12:00—1:00 p.m. Registration  
1:00—5:15 p.m. Program  
6:30 Reception & Dinner

**Saturday:**

8:00 a.m. Breakfast  
8:30—1:15 Program  
Afternoon: Golf & Tennis  
6:30 Reception & Buffet Dinner

**For information or to register call Gail Coleman (213) 896-6548**

# From the Chair

By: *John Barry*  
*Bank of America*

Dear Section Members:

With an early Easter fast approaching and Daylight Savings Time upon us, it is not too early to mark our calendars for our Section's next two major events: our **Annual Meeting on April 16, 2008** and our **Annual Seminar from Friday, May 16 through Sunday, May 18**.

Our Annual Meeting is an evening reception where Section members and guests (one guest per member) may drop by after work and socialize with wine, beer, or soft drinks and hors d'oeuvres. This year's event will be held at the City Club in downtown Los Angeles from 6:00 p.m. to 8:00 p.m. It is complimentary for Section members and their guests, so I hope to see you there. The City Club has convenient parking under the building, which will be complimentary with a validation. We will enjoy spectacular views of Los Angeles along with the City Club's exceptional cuisine, with specially selected hot hors d'oeuvres, including crispy crab cakes with Cajun aioli, Dungeness crab stuffed mushrooms, miniature beef Wellington, and more.

Our May event, the Annual Seminar, is perfect for those of us who can take advantage of combining MCLE with a weekend desert getaway at the Westin Mission Hills Resort & Spa, all at a bargain price. This event will start at 1:00 p.m. on Friday and end Saturday night, with check-out from the hotel on Sunday morning. Four hours of MCLE will be provided on Friday afternoon with a further three hours on Saturday morning, with topics designed to be of special interest to in-house counsel with the general theme of "Managing Business Risk."

After the MCLE sessions, there will be time for relaxing, whether taking a swim in the beautiful pool, playing a little tennis or golf, or simply enjoying the balmy desert evenings with a glass of wine, as the setting sun paints a pink glow on the

dramatic mountain peaks. We also have a formal dinner on Friday night and a casual buffet or barbecue on Saturday night, at which families and guests are welcome. So please watch your mail and e-mail boxes for further details, and be sure to register promptly to reserve a room at a discounted rate.

Our Corporate Law Roundtable has just ended, and I want to thank Roberta Kass and the members of her committee for organizing this year's very

enlightening and entertaining event. The roundtable format promoted in-depth, flexible discussions of this year's topics. Especially interesting were the presentation and discussion of the Perfect 10 copyright cases, from both

business and legal perspectives. Any in-house counsel whose practice involves copyright law or whose company creates or supplies "content" capable of being accessed through the internet should keep watch over the next three or four months to see if the U.S. Supreme Court grants certiorari in *Perfect 10, Inc. v. CCBill, LLC*. If you weren't able to attend this year, please keep this worthwhile event in mind for next year.



Sincerely,

*John S. Barry*

2007-2008 Chair  
Corporate Law Departments Section  
[john.s.barry@bankofamerica.com](mailto:john.s.barry@bankofamerica.com)

## Calendar of Events

### Section Reception and Annual Meeting

#### **City Club, Bunker Hill**

333 South Grand Avenue

Wednesday, April 16, 2008

6:00 pm—8:00 pm

*(See page 4 for details)*

### Annual Seminar

#### **Westin Mission Hill Resort, Rancho Mirage**

“MANAGING BUSINESS RISK”

May 16—18, 2008

*(See page 6 for details)*

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## Welcome New Members

#### **Mark J. Goldzweig**

*Kia Motors America*

#### **Izabelle Barraquiel Reyes**

*Occidental Petroleum Corp.*

#### **Richard P. Dieffenbach**

*Scheffer, Lax, McNoughton & Chen*

#### **Fredrick James**

*Schmid & Voiles*

#### **Payman Pezhman**

*United Health Group-Ovations*

#### **David J. Ambrose**

*Digital Insight*

#### **Carter Jon Erickson**

*Allstate Communications*

#### **Victoria A. Brunn**

*Amgen Inc*

#### **Megan J. Knight-Facey**

*NBC Universal*