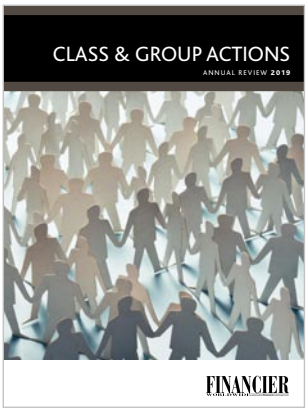

PIERCE ATWOOD LLP

Published by Financier Worldwide Ltd

ANNUAL REVIEW Reprint May 2019

CLASS & GROUP ACTIONS

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in class and group actions.

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Donald Frederico leads Pierce Atwood's class action defence practice. A senior trial attorney with more than 30 years of courtroom experience, he has represented defendants in a wide array of class actions in federal and state courts throughout the US, in areas including labour and employment, consumer fraud, product liability, environmental and toxic torts, antitrust and civil RICO. He has represented clients in such industries as financial services, building products, retail, pharmaceuticals, automotive, food and beverage, petroleum, chemical manufacturing, healthcare, high technology and higher education. He also offers his services as a mediator for class actions and other complex litigation.

Q. How would you characterise class and group action activity in the US over the past 12 months? What key trends would you highlight?

FREDERICO: Class action activity in the US remains strong. Employment class and collective actions are among the most prevalent categories of cases filed. Such cases significantly range in size, from large nationwide class actions against big companies that employ tens or hundreds of thousands of employees to localised cases against small businesses that employ hundreds or even just dozens of employees. Consumer class actions also remain prevalent, as do securities and antitrust class actions. Data privacy class actions seem to be gaining some traction in the courts. Trends vary by geographic region, as some federal appellate courts are more receptive to class litigation than others. Since the Supreme Court held in 2011 that class action waivers in contractual arbitration provisions are enforceable, and as that law has continued to develop in recent years, more companies have adopted such waivers, which has limited the number of class action filings and will likely continue to do so.

Q. Are there any common factors generally driving claims?

FREDERICO: There are a host of factors that drive claims. For example, many employment and consumer claims are governed by state law, and some states have laws that are more favourable to employees or consumers than other states. Also, if a class action challenging an industry practice is successful against one company, similar class actions often will be filed by the same or other lawyers against other companies engaged in the same practice. For example, we have seen such 'copycat' lawsuits with claims challenging banks' overdraft fee practices. Several years ago, plaintiffs' lawyers brought class actions against a number of large national banks alleging that their method of posting debits in consumer chequing accounts was unfair and deceptive, increasing fees assessed to customers' accounts. Most of those early cases settled for large sums of money, resulting in a second wave of litigation against smaller banks engaged in the same or similar practices.

Q. Could you outline some of the key challenges a class or group action defendant will typically face when a claim is made? What are the biggest risks and threats to companies?

FREDERICO: The most obvious risks are financial and reputational. Most class actions are not bet-the-company cases, but many are, and even those that are not can carry significant financial exposure for a company. Any publicity about the claims could also have a negative impact on the reputation of the company or the products or services involved. For public companies, these direct financial and reputational risks can, in some cases, also affect their market valuations. Many of the key decisions companies make about how to defend the cases will be driven by these types of factors, which may have little or no relationship to whether the claims have any merit. That is what makes class actions so frustrating for many management teams – their company may be threatened with significant liability even when the underlying claims are meritless.

Q. Given the nature of class or group action litigation, what strategies can in-house and outside counsel employ to effectively manage a case in the US?

FREDERICO: Conduct an early assessment of the case, under the direction of counsel to maintain privilege. If the case is filed in state court but there is a basis for federal jurisdiction, consider removing it to federal court. The decision will depend on factors specific to the case, but can have a significant impact. If the case is not disposed of on a motion to dismiss, request that discovery be phased, with the first phase limited to discovery relevant to class certification. Deferring discovery of facts that have no bearing on class certification can avoid considerable burden and expense. If plaintiffs rely on irrelevant or unreliable expert testimony to support class certification, file a Daubert motion, asking the court to rule the testimony inadmissible. At appropriate times, consider non-binding mediation. A mediator who understands how class actions work can help resolve a case that otherwise seems unresolvable. Finally, because most class actions settle, maintain a

constructive relationship with opposing counsel. Fight hard, but do not make it personal.

Q. At what point should the decision to fight or to settle be taken? To what extent can consulting experts and statistical analysis assist?

FREDERICO: A company's decision to fight or settle is largely driven by its business needs and its tolerance for risk. The choice should be considered and reconsidered at every significant juncture of the case, including when the complaint is filed, at the conclusion of discovery, and before and after the court rules on class certification. After the conclusion of each stage, parties will have more information with which they can make better-informed decisions regarding exposure, risk and the expense of further litigation. Consulting experts and statistical analysis can be very useful, particularly in evaluating damages exposure. In some cases, even before a defendant is required to produce class-wide data in discovery, it may be willing to share some of its data informally with plaintiffs' counsel to permit both sides to evaluate the case for settlement. Such data sharing may be based on statistical sampling methodologies which, though limited, are sufficient to give each side reasonable confidence that a settlement negotiation will be meaningful.

Q. How important is it to stay on top of discovery obligations? What options are available to more effectively and efficiently manage this process?

FREDERICO: Complying with discovery obligations is critical to a successful outcome. A party that unreasonably resists discovery risks losing credibility with the court, which can have a devastating effect on the case. Compliance with court discovery orders is especially crucial, as non-compliance can subject a party to costly and, in extreme cases, outcome-determinative sanctions. The Federal Rules of Civil Procedure, as well as some state rules, recognise the burden and expense of discovery, and give courts the flexibility to tailor discovery to make it more manageable. The federal rules anticipate that judges will engage with counsel in individual case management, and emphasise proportionality in determining the permissible scope of discovery. The federal rules, and some district courts' local rules, also provide presumptive discovery event limitations. Counsel should take a proactive and creative approach in proposing ways to streamline discovery.

Q. Do you expect to see the amount of class or group action litigation increasing in the US in the years ahead? If so,

“A company’s decision to fight or settle is largely driven by its business needs and its tolerance for risk.”

how do you foresee defensive strategies evolving?

FREDERICO: Trends in class action filings are a frequent source of conversation, and consternation, among class action lawyers. Supreme Court decisions over the past several years have significantly strengthened companies’ abilities to avoid or limit certain types of class litigation by incorporating in their agreements with third parties, such as employees or customers, provisions that require disputes to be resolved by individual, binding arbitration. Of course, not every dispute arises from a contractual relationship, and not every contract contains an arbitration clause, so many class actions are not affected by these rulings. The Supreme Court has cut back on class actions in other, more subtle ways as well, but many lower federal courts and state courts continue to view class actions favourably and permit class actions over vigorous challenges. Lower federal courts are divided on a number of legal issues relevant to the viability of class actions, but unless and until those issues are finally resolved in defendants’ favour, class action litigation will remain active. Plaintiffs’ lawyers will continue to be creative in their class action filings, and defendants will continue to challenge new theories of liability and arguments for class certification. ■

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Pierce Atwood LLP, a highly-regarded, full-service law firm based in New England, has 160 attorneys serving regional, national and international clients. These include regional and local enterprises, energy project developers, utilities, financiers, middle-market companies, entrepreneurs, and individuals, to Fortune 500 companies, multinational corporations, and state and foreign governments.