

LDSI Litigation Best Practices Series

THE CLASS ACTION LAWSUIT: LITIGATE IT OR END IT?

Major defendants in class action litigation have been retaining separate counsel to explore settlement efforts while litigation counsel continues to aggressively defend the litigation. Lew Goldfarb, former litigation partner at Hogan & Hartson and Associate General Counsel for DaimlerChrysler, makes the case for the use of settlement counsel as the most cost-effective means of controlling complex litigation.

Editor: Why would corporate counsel want to retain separate settlement counsel in the midst of a hotly contested class action or other complex litigation?

Goldfarb: Litigation counsel lacks the incentives and the mindset to aggressively and creatively pursue alternatives to what frequently becomes protracted and costly litigation. They are often so invested in a "litigated" solution to the problem that they fail to consider the quicker, less costly options.

Editor: What are the warning signs in a litigation that company counsel should look for that suggest that a dedicated settlement counsel should be brought in?

Goldfarb: Here are some of the warning signs that I think are most relevant:

The underlying claims are especially difficult to dispose of summarily, i.e. allegations of deception or unfair trade practices;

Class certification, at least on a state wide basis, will be difficult to defeat;

The litigation involves products or ser-

vices critical to defendant's business and is receiving substantial adverse publicity;

The litigation is pending in multiple or hostile jurisdictions;

Substantial animosity has developed between plaintiffs' and defense counsel; or,

Defense costs are mounting with no clear end in sight.

Since more than 90% of class actions settle before class certification is determined, why not introduce the settlement possibility before enormous resources are expended?

Editor: Why isn't a defendant better off winning a motion to dismiss or summary judgment that would create deterrence to future class actions rather than showing a lack of resolve by offering to settle?

Goldfarb: When I am retained as settlement counsel plaintiffs know that the litigation will continue without delay and that the settlement

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window is very limited in time. Exploring settlement in this way does not show any lack of resolve, rather it is an act of common sense. While dispositive motions can be useful to educate the Court, they are rarely granted. As to a summary judgment motion, extensive discovery is usually required before the Court will even consider it—a costly process with a small likelihood of success. The pivotal event in class actions is the class certification motion, which typically occurs only after expensive and protracted litigation.

Having a fresh set of eyes on both sides of the litigation is indispensable to the successful pursuit of possibilities that just never occur to hard-nosed litigators.

Editor: Why do you believe that your approach to settlement is any better than litigation counsel? They have a big stake in getting a good outcome and they know the case inside and out—wouldn't they be at least as effective as you in resolving the case?

Goldfarb: It's amazing how the impulse to win can impair defense counsel's ability to objectively discuss settlement. Litigation counsel are certainly capable of resolving the case but they will not recommend it to the client until the litigation tactics have run their course. In one recent case, it was the outside litigation counsel who recommended my involvement because of repeated failed settlement attempts on his part. My approach comes into play much earlier in the game, before significant resources have been expended, and before animosities build up between plaintiffs' and defense counsel. One tactic I use is to insist the plaintiffs' team also appoint a separate lawyer, not involved in the litigation, to do the negotiation.

Editor: What have you done in situations

where your initial assessment is that the case can't be settled for a reasonable amount? Do you just tell this to the client and step back.

Goldfarb: Plaintiffs counsel always want to settle, eventually. To get there, it is often necessary to simply say no to a settlement demand and walk away from the table. The goal is to create settlement terms that provide reasonable relief to class members without imposing too great a cost on the defendant. Obviously, attorneys' fees are always an important part of the negotiation. While ethically they must be negotiated after the settlement terms are agreed upon, they do have an effect on the plaintiffs' counsel's openness to reasonable terms for the class members.

Editor: Doesn't defense counsel assigned to the case become agitated when you are retained to work on a settlement? How do you handle this, especially when the retained counsel may already be working directly with the CEO and other company executives?

Goldfarb: They may become agitated but the answer is easy. Most lawyers, even litigators, abide by this simple principle—the client is always right. When in house counsel decides to bring in separate settlement counsel, the litigators know enough to cooperate fully.

Editor: Does the litigation of the case come to a halt when you get involved as settlement counsel? Doesn't this hurt the progress of the case?

Goldfarb: An important component of my strategy is that the litigation is not delayed or suspended in any way by the introduction of settlement counsel. This includes all court proceedings, motions, discovery etc. Plaintiffs' counsel are told that I've been given a mandate to explore settlement that is limited in time and has no effect on the continuation of the litigation. The benefits of this approach

are two fold: one, my involvement does not signal defendant's lack of confidence in the merits of its case, and two, the settlement process moves quickly and is taken seriously by plaintiffs' counsel.

Editor: You have said that plaintiffs' counsel in these cases are more "trusting" of you than litigation counsel when you are brought into these cases. What do you mean by this and why would they trust you when you are working for the defendant?

Goldfarb: Hard-nosed litigation tactics often breed distrust between defense and plaintiffs' counsel. I come to the settlement table as a new face without all the ill will that often develops between litigation counsel. Also, the positive experience I have had over the years in settling class actions with many top tier plaintiffs counsel has enhanced my credibility

with the plaintiffs' bar. This is not to say that the relationship is anything but adversarial. It is adversarial but without the edge.

I have successfully settled more than three dozen class actions on behalf of defendants.

Editor: How many cases have you been involved with as settlement counsel where you didn't bring the matter to a favorable settlement? I mean, what's your ratio of successes to failures?

Goldfarb: There has only been one instance in which I was retained as settlement counsel that did not result in a favorable settlement. In that case, the client decided that it did not wish to settle with the class and chose instead to resolve the individual claims.



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