

# Defending FRAUD CLAIMS in CONSUMER CLASS ACTIONS



Advanced strategies for cost-effective and expeditious resolution of class actions arising from claims of misrepresentations and unfair or deceptive practices

Leading consumer products defense counsel and in-house litigators will provide you with the most up-to-date and effective strategies for:

- **LIMITING** damages in the wake of multi-million dollar settlements
- **CONQUERING** class certification
- Early **DISMISSAL** of consumer protection class actions in light of *Prohias v. Pfizer, Inc.*
- **DEFEATING** the case on the merits
- **IDENTIFYING** the government's priorities in prosecuting false advertising or deceptive practices cases
- **MINIMIZING** the impact of adverse publicity during high-profile, high stakes consumer product litigation
- **DEVISING** a settlement strategy which will minimize future risk and liability

## Government and industry insights from:

*The Honorable Lloyd D. George*  
United States District Court Judge  
District of Nevada

*The Honorable Elliott Maynard*  
West Virginia Supreme Court of Appeals

*Thomas A. Cohn*  
Acting Regional Director,  
Northeast Region  
Federal Trade Commission

*Brian Christensen*  
AVP/Corporate Counsel - Litigation,  
Legal Systems & Records Policy  
H&R Block

*John Mulderig*  
Associate General Counsel  
Altria Corporate Services, Inc.

*J.L. Novak*  
Assistant General Counsel  
AOL LLC

**Master Class: October 17, 2007**

Dealing with Product Recalls and Government-Initiated  
Consumer Protection Actions

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# Mitigate the Enormous Financial Risks Associated with Consumer Product Fraud Class Actions

## Don't become the next company to lose millions

Consumer protection statutes arm consumers and the plaintiff's bar with a powerful weapon for suing consumer products manufacturers, retailers, wholesalers, and service providers. Not only can plaintiffs recover actual damages, but many state consumer protection statutes allow for treble damages in addition to an award of attorney's fees. Recent examples of the financial burden incurred as a result of these lawsuits include a financial company which settled consumer protection cases for \$215 million and an online payment company which agreed to pay \$5.2 million to settle deceptive practices claims.

Defending against claims brought under state consumer protection statutes is no small task – you must manage public media attacks while developing creative arguments to combat the case on the merits. You must also mine discovery to your client's advantage and develop a settlement strategy that will minimize risk and foreclose future liability.

### Minimize the risk of class actions and prevent devastating losses

Because these types of “economic injury” cases are easier to certify as class actions, defense counsel needs specific strategies to defend consumer fraud allegations. ACI's Defending Consumer Product Fraud Class Actions is the only conference to recognize the unique and daunting task of defending cases brought pursuant to consumer protection statutes. This conference has been specifically designed to provide consumer products manufacturers, retailers, wholesalers, and service providers with the best strategies for early disposition of cases, tips for defeating broad claims, and tactics for managing parallel civil and government proceedings. This conference will enable you to prepare for your next consumer product claim with winning results.

Register now to ensure your place at what is sure to be a sold-out event. Call 1-888-224-2480, fax your registration form to 1-877-927-1563, or register online at [www.americanconference.com/consumer](http://www.americanconference.com/consumer)

### AGENDA-AT-A-GLANCE

- Strategies for Using the Pre-Certification Period to the Defense's Advantage
- Advanced Tactics for Defeating Class Certification When Plaintiffs Don't Need to Prove Individual Knowledge or Reliance
- Taking the Case to Trial – and Winning – in “Economic Injury” Cases
- Managing Discovery of “Pattern and Practice” and Other Types of Evidence to Control Case Outcome
- Challenging Consumer Perception Survey and Other Experts at the Certification Stage
- Settling Consumer Protection Cases: Minimizing Liability and Foreclosing Future Claims
- Analyzing the Effect of CAFA on Class Action Litigation
- Minimizing the Effect of “Fraud” Cases on Corporate Image and Insurance Coverage
- Developing Ethical Class Action Management Tactics
- View From the Bench: Judicial Insights on Effective Theories and Defenses in Consumer Protection Litigation
- Refuting False Advertising Claims and Averting Regulatory Action

### Who You Will Meet

Corporate and Private Practice Attorneys representing Consumer Product Manufacturers, Retailers and Wholesalers

- Class Action and Products Liability Litigators, Insurance Counsel, Underwriters and Claims Specialists
- Risk Managers

### Continuing Legal Education Credits

Accreditation will be sought in those jurisdictions requested by the registrants which have continuing education requirements.



This transitional course is appropriate for both experienced and newly admitted attorneys. To request credit, please check the appropriate box on the Registration Form.

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MONDAY, OCTOBER 15, 2007

**7:45 Registration and Continental Breakfast**

**8:45 Co-Chairs' Opening Remarks**

*J.L. Novak*  
Assistant General Counsel  
AOL LLC (Dulles, VA)



*H. Joseph Escher, III*  
Partner  
DECHERT LLP (San Francisco, CA)

**9:00 Strategies for Using the Pre-Certification Period to the Defense's Advantage**



*Christopher J. Michie*  
Partner, Consumer Class Actions, Mass Torts & Product Liability  
DECHERT LLP (Princeton, NJ)



*John J. Mulderig*  
Associate General Counsel  
ALTRIA CORPORATE SERVICES INC. (New York, NY)



*Brian Anderson*  
Partner  
O'MELVENY & MYERS LLP (Washington, DC)

- Persuading the judge on substantive and procedural law issues in consumer protection cases
- Educating the judge on the merits of the case before the class is certified
  - building a factual record
- Strategies for defeating reliance and other elements of the state statute
- Determining whether or not to make dispositive motions
  - avoiding potentially unfavorable decisions that may shape the rest of the case
  - what to consider when conducting a cost vs. benefit analysis of affirmative motions
- Re-thinking traditional defenses available, and utilizing creative arguments, to seek early dismissal when dealing with claims that overreach or are legally impermissible
  - standing
  - statute of limitations
  - learned intermediary doctrine

**10:00 Advanced Tactics for Defeating Class Certification When Plaintiffs Don't Need to Prove Individual Knowledge or Reliance**



*Steven B. Weisburd*  
Partner, Consumer Class Actions,  
Mass Torts & Product Liability  
DECHERT LLP (Austin, TX)



*Robb W. Patryk*  
Co-Chair, Products Liability & Toxic Tort Group  
HUGHES HUBBARD & REED LLP (New York, NY)

- Building theories from day one to preclude class certification or to get the class de-certified later on
- Ascertaining which arguments against class certification will resonate with the court
- Employing procedural strategies to assist in defeating certification
- Proving key individual differences amongst plaintiffs to cripple plaintiff's argument in favor of a class
- Exploiting class characteristics to show all members are not similarly situated
- Strategies for making the best use of extensive depositions of plaintiffs, witnesses, and experts as a tactic for challenging certification

- Establishing a predominance of individual issues in (b)(3) cases
- Demonstrating why class certification is not a "superior" method to adjudicate the claims
- Avoiding the use and abuse of (b)(2) class certification
- Dealing with absent class member testimony
- Special privacy concerns associated with obtaining personal information about class members when challenging class certification
- Strategies for opposing partial certification requests from plaintiff's counsel

**11:15 Morning Refreshment Break**

**11:30 Taking the Case to Trial – and Winning – in "Economic Injury" Cases**



*Brian Christensen*  
AVP/Corporate Counsel – Litigation, Legal Systems  
& Records Policy  
H & R BLOCK (Kansas City, MO)



*Matthew M. Neumeier*  
Chair, Products Liability and Mass Tort Class Action Practice  
HOWREY LLP (Chicago, IL)



*Gregory P. Stone*  
Partner  
MUNGER, TOLLES & OLSON LLP (Los Angeles, CA)

- Defending against nationwide consumer class actions
  - what are the effects of applying one state's law to a nationwide class?
  - how can differences in various state's laws be used advantageously?
  - preparing for unique litigation issues associated with MDL litigation
- Preparing arguments against injunctive relief and/or damages in hybrid consumer class actions
- Defeating causation assertions and injury requirements in consumer class actions
- Making use of evidence regarding absent class members
- Demonstrating product efficacy as a rebuttal to defending arguments that the product is defective
- Proven tactics for limiting damages and dealing with punitive damages
- Managing administrative issues associated with litigating class actions

**12:45 Networking Lunch**

**2:00 Managing Discovery of "Pattern and Practice" and Other Types of Evidence to Control Case Outcome**

*J.L. Novak*  
Assistant General Counsel  
AOL LLC (Dulles, VA)



*Mark Herrmann*  
Partner  
JONES DAY (Cleveland, OH)



*Michael L. Mallow*  
Partner  
LOEB & LOEB LLP (Los Angeles, CA)

- Determining what your corporate document retention, suspension, and hold policies are in advance of litigation
- Strategies for inventorying evidence during litigation
- Eliciting information from uncooperative or un-informed plaintiff witnesses
- Tracking down absent class members and obtaining useful evidence from them
- Dealing with OSI and "pattern and practice" evidence during discovery



- Effectively using discovery requests to identify defense-adverse witnesses early on in the case
- Curtailing the negative impact of potentially damaging internal documents
- Ethically limiting the scope and production of potentially damaging evidence
- Attacking foundation and admissibility of evidence to weaken the plaintiff's case
- Proactively preserving the trial record for appeal and objection
- Updating your corporate policies to ensure compliance with the updated FRCP
  - examining revised Rules 16, 26, 33, 34, 37, 45 and Civil Form 35
- Storing and disclosing privileged documents in a manner that ensures their access and protection
- Avoiding the top ten e-discovery mis-steps

### 3:00 Afternoon Refreshment Break

### 3:15 Challenging Consumer Perception Survey and Other Experts at the Certification Stage



**Thomas A. Smart**

Partner

KAYE SCHOLER LLP (New York, NY)



**Neal Walters**

Partner

BALLARD SPAHR ANDREWS & INGERSOLL, LLP (Voorhees, NJ)

Plaintiffs are increasingly attempting to use experts to satisfy class certification standards in consumer litigation and other types of class actions. Courts have traditionally construed consumer claims and class certification requests liberally in favor of the plaintiff. However, it is arguable that such liberal treatment should not extend to the courts' determination of the admissibility of an expert's opinion. Courts around the country have recently expressed differing opinions about the extent to which Daubert challenges should be allowed at the class certification stage. In addition to the courts' treatment of expert testimony, defense counsel must evaluate strategic considerations when determining whether or not it makes sense to seek to preclude an expert. Hear from experienced class action and trial counsel about practical strategies for challenging expert testimony at the class certification stage and at trial, as well as a discussion of the current state of the law on this important issue.

### 4:00 Settling Consumer Protection Cases: Minimizing Liability and Foreclosing Future Claims



**Suzanne V. Wilson**

Partner

ARNOLD & PORTER (Los Angeles, CA)

- How to coordinate a global settlement of multi-jurisdiction litigation so as to comply with the specific laws of each jurisdiction
- What to do differently when settling state AG actions vs. private party settlements
- Considering the long term effects of agreeing to a settlement
  - assessing the impact on future liability and further consumer protection actions
  - addressing changes to the law during the progression of the case
- Addressing notice of settlement concerns with opposing counsel
  - methods and forms of notice
  - managing the cost of notice
- Determining advantages and disadvantages to settling as a class vs. settling as a single plaintiff case
- Minimizing the effect of media publicity on settlement leverage

### 5:00 Conference Adjourns to Day Two

5:00 - 6:30 Cocktail Reception Hosted by

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**TUESDAY, OCTOBER 16, 2007**

### 9:00 Co-Chairs' Opening Remarks

### 9:15 Analyzing the Effect of CAFA on Class Action Litigation



**Jeffrey S. Jacobson**

Partner

DEBEVOISE & PLIMPTON LLP (New York, NY)



**H. Grant Law**

Partner

SHOOK, HARDY & BACON L.L.P. (San Francisco, CA)

- Determining which party has the burden of proving federal court jurisdiction post-CAFA
  - who bears the burden of proof if an exception to CAFA jurisdiction applies?
  - how have the courts interpreted revisions to federal court jurisdiction post-CAFA?
    - exceptions to CAFA jurisdiction
    - remand to state court
    - removal to federal court
- Strategic venue considerations triggered by CAFA when dealing with multiple filings in various jurisdictions
  - understanding the relationship between MDL process and the multi-state law/manageability inquiry
- How the courts have interpreted remand and removal provisions post-CAFA
- Bracing for follow-on or parallel administrative/government enforcement and private litigation triggered by CAFA settlement reporting requirements
- Coordinating government and private plaintiff actions in order to consolidate liability and manage litigation costs
- Incorporating CAFA implications into your settlement strategy
  - timing and content of CAFA notices
  - knowing which regulators need to be notified based on the parties involved in the litigation
  - preparing for heightened scrutiny from various government agencies triggered by CAFA reporting requirements
  - coordinating the communication of settlement to state Attorneys General and other government regulators to avoid class members from withdrawing from the settlement

### 10:00 Morning Refreshment Break

### 10:15 Minimizing the Effect of "Fraud" Cases on Corporate Image and Insurance Coverage



**Jonathan M. Cohen**

Partner

GILBERT & RANDOLPH LLP (Washington, DC)



**J. Russell Jackson**

Partner

SKADDEN, ARPS, SLATE, MEAGHER & FLOM (New York, NY)

- Acknowledging the importance of the initial consumer response as the first step in minimizing risk and preventing additional litigation
- Establishing a unified communication strategy at the outset of litigation to address the media response to the initial filing and throughout litigation
- Mitigating damage caused by publicity exposure to reduce the probability of a tainted jury pool
- Dealing with adverse publicity particularly when claims are cast using "fraud" language
- Preparing for collateral damage and other contingent liabilities associated with high profile consumer product litigation
- Addressing shareholder and investment community concerns that arise as a result of consumer protection litigation
- Coordinating the litigation defense strategy with the insurance strategy

- Securing insurance coverage for product recalls when insurance companies argue that standard third-party liability insurance does not cover this
- Finding alternative risk financing when product recalls make it difficult to obtain insurance
- Balancing the needs of a company's defense, insurance, and business strategies in responding to a product-related crisis
- Aligning litigation strategies with business practices
  - identifying the corporation's litigation policies
  - how far is the company willing to go on damages?
  - who will handle settlement?

## 11:45 Networking Luncheon

## 1:00 Developing Ethical Class Action Management Tactics

**ETHICS CREDITS**

**Michael Hassen**

Partner

JEFFER, MANGELS, BUTLER & MARMARO LLP (San Francisco, CA)



**Robert D. Phillips, Jr.**

Partner

REED SMITH LLP (Los Angeles, CA)

- Making the critical determination of when it is permissible to contact class members in order to learn more about the case or enter into settlement talks
- Avoiding assisting plaintiff's counsel when he/she is engaged in unethical behavior (e.g., settlements without the plaintiffs' consent)
- Specifying the ethical duties and responsibilities of in-house counsel before, during, and after class action litigation
  - entering into settlement talks
  - responding to discovery requests
  - discussing the case with internal witnesses
- Ensuring representations made to the court in briefs or oral argument are accurate
  - factual representations
  - representations regarding legal holdings
- Structuring a settlement with class representatives and members that is fair, reasonable and adequate

## 2:30 Afternoon Refreshment Break

2:45

## View From the Bench: Judicial Insights on Effective Theories and Defenses in Consumer Protection Litigation



**The Honorable Lloyd D. George**

United States District Court Judge

DISTRICT OF NEVADA (Las Vegas, NV)



**The Honorable Elliott Maynard**

WEST VIRGINIA SUPREME COURT OF APPEALS (Charleston, WV)

**Moderator:**

**Michael Hassen**

Partner

JEFFER, MANGELS, BUTLER & MARMARO LLP (San Francisco, CA)

Gain firsthand insights from renowned jurists experienced in complex consumer litigation as they discuss and share their perspectives on cases brought under state consumer protection laws. Take note as judges tell you which theories and defenses they find most effective, describe how evidence is weighed, analyze approaches they have found most convincing, and describe which arguments have turned a case one way or another. Join us for this insightful discussion on how judges interpret and dissect your case, and come prepared with your most pressing questions and concerns to get the most out of this interactive session!

4:00

## Refuting False Advertising Claims and Averting Regulatory Action



**Thomas A. Cohn**

Acting Regional Director, Northeast Region

FEDERAL TRADE COMMISSION (New York, NY)



**Jeffrey A. Greenbaum**

Partner

FRANKFURT KURNIT KLEIN & SELZ, PC (New York, NY)

- Identifying the government's priorities in prosecuting false advertising or deceptive practices cases
- Complying with federal and state standards for advertising and marketing products
- Substantiating advertising claims
- Examining recent cases and enforcement trends
- Carefully evaluating your marketing message and language

5:00

## Conference Concludes

**WEDNESDAY, OCTOBER 17, 2007 • 9:00 a.m. – 12:00 p.m. (Registration begins at 8:30 a.m.)**

## MASTER CLASS ON DEALING WITH PRODUCT RECALLS AND GOVERNMENT-INITIATED CONSUMER PROTECTION ACTIONS



**Christopher R. Brewster**

Washington Counsel, KAYE SCHOLER LLP (Washington, DC)

Former Associate Director, FTC, Bureau of Consumer Protection

Former Assistant Attorney General, Missouri

**Adam B. Siegel**

Partner, COVINGTON & BURLING LLP (New York, NY)

Former Assistant U.S. Attorney

Deputy Chief & Chief Appellate Attorney,

Criminal Division U.S. Attorney's Office

- Understanding how government actions differ from civil litigation
- Simultaneously managing private causes of action and enforcement proceedings brought by state AGs under state consumer protection statutes
  - preparing for civil actions that may arise as a result of government actions
    - whistleblower actions
    - warning letters
  - defending against various types of claims brought under State and Federal consumer protection statutes
    - sales pitches
    - marketing tactics
    - deceptive advertising

- Deciding what and how to concede in a government initiated action
- Responding to government subpoenas in a manner that will address publicity concerns while also maintaining good government relations
- Knowing what defenses are and are not available when involved in a state AG action
- Bracing for civil remedies available in state AG actions
- Managing the interrelationship between private litigation and actions by the Consumer Product Safety Commission
  - complying with the duty to notify CPSC of potential safety hazards and the benefits of full disclosure
  - examining the impact of CPSC actions on product liability and consumer protection act claims
- Appreciating the differences between state actions and FTC actions
  - do the states and FTC think alike?
- Identifying and defining an "unfair or deceptive trade practice"
  - what does "unfairness" mean
  - are all false claims "deceptive?"
- Strategies for defending and resolving cases before the FTC and CPSC that can make or break the case
  - determining when to fight and when to throw in the towel
- Avoiding the biggest mistakes made when presenting cases to the FTC and CPSC

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# Defending FRAUD CLAIMS in CONSUMER CLASS ACTIONS

Advanced strategies for cost-effective and expeditious resolution of class actions arising from claims of misrepresentations and unfair or deceptive practices

## MASTER CLASS:

Dealing with  
Product Recalls  
and Government-  
Initiated Consumer  
Protection Actions

October 17, 2007

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