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Frying Pans and Fires: When Government Investigations Turn into Class Actions

McGuireWoods LLP

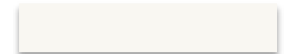
by

John Adams, Government, Regulatory and Criminal Investigations
& Andrew Trask, Complex Commercial Litigation

8 March 2011

What is a Government Investigation?

- **Government investigations can take many forms and involve any number of regulatory and law enforcement entities working alone or in concert.**
- **Because of their seriousness, stigma and potential high profile, any investigation by law enforcement or government regulators must be handled in a deliberate, cautious and strategic fashion.**



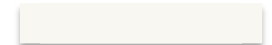
What are the keys to success in handling Government Investigations?

- **Take ownership in an effort to get out in front of law enforcement and regulators.**
- **Identify areas of concern and determine how best to provide the investigators what they need to satisfy those concerns.**
- **If at all possible, cooperate, and make the company a partner rather than an adversary.**
- **Take no action that puts you or your client's credibility with the investigators at risk.**



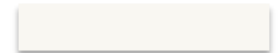
What are the first steps?

- **Engage with the investigators to establish lines of communication and determine the scope of the issues involved.**
- **Initiate a document hold.**
- **Develop internal communications to ensure personnel are informed and sensitized without creating anxiety.**
- **Identify key personnel likely to have been involved in the issues.**
- **Consider whether individuals may need their own counsel.**
- **Conduct document collection and review.**
- **Conduct interviews and other internal investigation tasks.**
- **Remain in contact with the investigators throughout.**



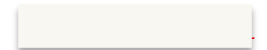
What are the biggest risks?

- **High cost of investigation and defense, potentially over an extensive period of time.**
- **Reputational damage (negative press, depression of morale, loss of business).**
- **Imposition of penalties (fines, disgorgement, suspension and debarment).**
- **Invitation of follow-on civil litigation.**



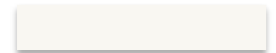
What are some typical pitfalls?

- **Underestimating the seriousness of an investigation, and the potential for a discrete investigation to expand.**
- **Underestimating the sophistication and knowledge of the investigative entities involved.**
- **Underestimating the powerful tools at their disposal.**
- **Minimizing rather than addressing bad facts.**
- **Failing to distance the company from bad actors.**



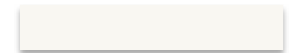
If you remember nothing else:

- **Government investigations do not go away on their own.**
- **You will be put to your proof.**
- **A good and motivated team of prosecutors and investigators will, in most cases, uncover the overwhelming majority of the facts.**
- **You hold no cards, other than your and your client's integrity, and the ability to deliver the facts in a prompt, thorough and cooperative manner.**
- **Failure to be responsive, timely and cooperative can only compound the issue (obstruction, 1001 charges, etc.).**



What is a Class Action?

- **At its best, it's a powerful tool for efficiency:**
 - Litigate identical claims of many people at once, rather than many times to perhaps different results (*e.g.*, airline crash; securities fraud).
- **At its worst, it's an extortion tactic:**
 - Plaintiffs threaten “bet-the-company” litigation, and receive big settlements even for weak cases.



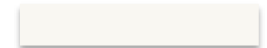
Government Investigations Make Class-Action Lawyers Happy



Many Class Actions Grow From Government Investigations

- **To name just a few:**

- In 2010, 9 class actions filed against for-profit education companies, stemming from US GAO investigation into marketing practices. (NERA, *2010 Securities Class Action Trends*)
- *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008) (class actions followed DOJ investigations)
- *Cole v. Gen. Motors Corp.*, 484 F.3d 717 (5th Cir. 2007) (plaintiffs filed class action after receiving notice of Cadillac recall from GM).
- *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (3d Cir. 2005) (NYAG investigation resulted in 140 class action complaints).
- *Jones v. Allercare, Inc.*, 203 F.R.D. 290 (N.D. Ohio 2001) (class action followed EPA-urged product recall)
- *Baum v. Great W. Cities, Inc.*, 703 F.2d 1197 (10th Cir. 1983) (class action followed FTC investigation)



Post-Investigation Class Actions are Worth More

- NERA study has found that *any* government investigation, even if unsuccessful, adds **20%** to value of class action settlement.
 - Stephanie Planich, et al., *2008 Trends*, NERA Economic Consulting, July 2008, at 22.





Investigations do the work for plaintiffs.

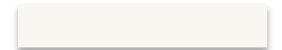
“We’ve got the government out front, and they’re getting documents within forty-eight hours, where it might take us a year . . .”

Bill Lerach, pitching to institutional investors



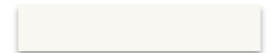
Investigations can be used to pressure class-action defendants

- Bad press
- Threat of additional discovery



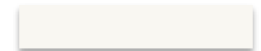
The Bad News

- Class actions do not have to meet as stringent standard of proof as a government prosecution.
- And the plaintiffs will have access to the government's work.



The Good News

- It's more difficult for a civil plaintiff to aggregate parties or remedies than a government agency.



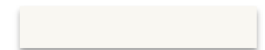
All Class Actions *Must* Meet the Requirements of Rule 23(a)

- Rule 23(a)(1) – Numerosity
- Rule 23(a)(2) – Commonality
- Rule 23(a)(3) – Typicality
- Rule 23(a)(4) - Adequacy



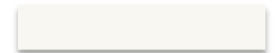
All Class Actions *Must* Meet One of the Requirements of Rule 23(b)

- Rule 23(b)(1) – Limited Fund Class
- Rule 23(b)(2) – Injunctive Relief Class
- Rule 23(b)(3) – Monetary Damages Class
 - Common issues predominate
 - Class action is superior to other forms of resolution



Plaintiffs will Argue: Big Similarity, Small Difference

- **All claims are basically the same**
- **Plaintiff is just like all class members**
- **Class action is the only way to resolve the dispute**



Defendant will Argue: Big Difference, Few Similarities

- **Look closely at claims, they're not all the same – different facts and different laws often apply.**
- **Plaintiffs are unique in some way.**
- **Many other ways of resolving the dispute that will take less time and money.**

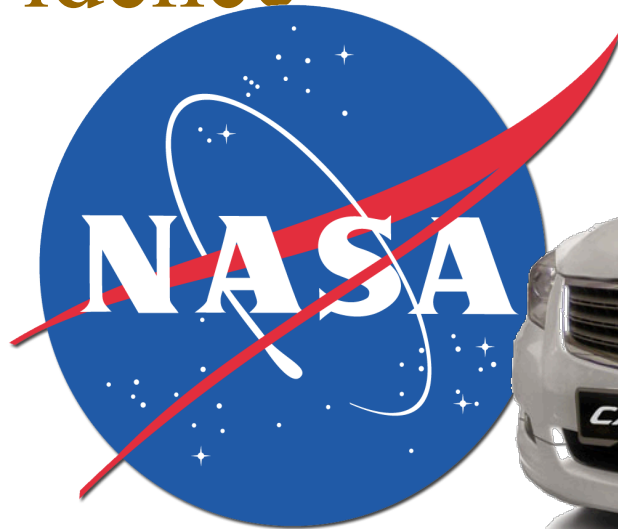


Countermeasures: Limit Discovery

- Already provided documents to government
- Provide government testimony to plaintiffs
- Argue that additional discovery not necessary
 - *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205 (9th Cir. 1975) (limiting discovery to that produced in state AG action).



Countermeasures - Play up good evidence



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There are “no electronic flaws ... capable of producing the large throttle openings required to create dangerous high-speed, unintended acceleration incidents.”

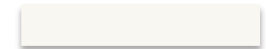
NASA

... But be prepared for plaintiffs to badmouth agency.



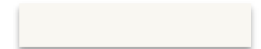
“Already there are those who are asking tough questions about the [NASA] report’s methodology.”

Steve Berman, Hagens Berman LLP



Countermeasures: Argue Superiority

- Government action may be better than private litigation
 - *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002) (regulation by NHTSA superior to class action).
 - *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205 (9th Cir. 1975) (state AG lawsuit was superior to class action).
 - *Brown v. Blue Cross & Blue Shield, Inc.*, 167 F.R.D. 40 (E.D. Mich. 1996) (refusing to certify class where state AG had already settled with defendant for public benefit).



Countermeasures: Argue Predominance/Commonality

- Government data can be rich source of variations
 - DOJ analyses
 - NHTSA databases
 - FTC complaint files

