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“She Told Two Friends and She Told Two Friends, and so on and so on...”

SOCIAL NETWORKING and ONLINE MEDIA as TOOLS to BUILD and BREAK CLASS ACTION LAWSUITS

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Class action lawsuits are a familiar tool in the arsenal of plaintiffs’ lawyers, including in litigation stemming from chemical exposure. Kraft Foods Global, Inc., for example, recently agreed to settle a class action suit initiated by more than one hundred families residing in Indiana, claiming that water and air in their homes was contaminated by pollution from a Kraft-owned factory. Kraft has agreed to pay \$8.1 million, install mitigation systems in impacted residences, and cleanup the local factory site and groundwater. Another major chemical manufacturer was hit this summer with a nationwide class action lawsuit alleging that a herbicide used for lawn care was harmful to trees and other vegetation (and has agreed to pull the product from the market).

The ease and accessibility of mainstream social media sites and targeted blogs, makes it that much easier for potential plaintiff classes like these to take root and grow. Social networking sites and blogs are, at their core, vehicles to share and seek information, whether based in hard facts or anecdote. Through these sites, individuals can suggest that others may be harmed, and how, by exposure to chemicals or products. Such sites can provide links to class action law firms to express interest in being part of a lawsuit. Firms can accumulate potential clients and class members at a brisker pace and in higher numbers.

Under the [Class Action Fairness Act of 2005](#) and [Rule 23\(a\) of the Federal Rules of Civil Procedure](#), four requirements must be met to warrant certification of a proposed class: (1) Numerosity -- the class must be sufficiently numerous that joinder of all members as individual plaintiffs would be impracticable; (2) Commonality -- there are questions of law or fact that are common to the class; (3) Typicality -- the claims of the class representative must be typical of the claims of the other members of the class sought to be represented; and (4) Adequacy -- the proposed representative must be able to adequately represent the class.

Because information can be automatically, instantaneously and exponentially disseminated, blogs and networking sites can be invaluable tools to cast a wide net or drill down on a targeted group, to help plaintiffs’ lawyers reach and document numerosity thresholds and mold classes, by demonstrating both the number of purportedly injured persons or entities and why individual joinder of each person as a plaintiff would be impracticable, especially when nationwide claims are asserted.

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SOCIAL NETWORKING and ONLINE MEDIA... (cont'd)

Defendants, though, are not left without advantages of social media tools of their own. Using these sites as resources can be especially useful with respect to attacking the commonality and related typicality prongs of class action litigation. The Supreme Court this summer revisited requirements for class certification, focusing on commonality and the extent to which class representatives share the same interests as class members. In [Wal-Mart Stores, Inc. v. Dukes et al., 564 U.S. ____ \(2011\)](#), the Court stated: "A class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.... Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements -- numerosity, commonality, typicality, and adequate representation -- effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'" Id. at 8 (internal citations omitted). The "crux of [the Dukes] case is commonality -- the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.'" Id. (citation omitted).

As we've all likely seen in our professional and personal lives, people often tend to be loose-lipped when communicating online and in shared spaces; and the adage "misery loves company" often leads people to liberally share specific details and theories as to how they've been wronged. Defendants seeking to defeat class certification should thoroughly canvas social networking sites and blogs to review and analyze how common or distinct the nature of potential class members' complaints and experiences may be. While individual postings will not necessarily constitute admissible evidence, they could be fertile jumping off points for class discovery. In a chemical exposure context, for example, these sites may lead to evidence that commonality and typicality are lacking, because individualized inquiries are necessary to determine, among other things, how each person used or misused a product, whether warnings were properly heeded, and the type and extent of harm purportedly experienced. As the Dukes Court observed, class "claims must depend upon a common contention" and "[t]hat contention, moreover, must be of such a nature that it is capable of class-wide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. at 9. "'Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.'" Id. at 10 (citation omitted). What defendants glean from social media sources may help defendants chronicle such dissimilarities, and further help demonstrate why the class representative does not adequately represent the class.

Even before litigation is instituted, corporate law departments would be wise to appoint someone to monitor the web, on a regular basis, for online forums that might be discussing the use, misuse, problems with or injuries stemming from their companies' products or services. Aside from providing a preview if litigation may be on the horizon, these sources can enable corporations to counterbalance misinformation, where appropriate, by themselves publicizing correct facts and information, as a check on the dissemination of, and inevitable elaboration on, information.

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