

motivated to try to prevent the product from injuring someone else's child."

San Francisco lawyer Richard Zitrin, who teaches legal ethics at the University of California, Hastings College of Law, noted in Senate testimony that professional ethics require lawyers to put their clients' interests ahead of society's—and the client's interest is to obtain the best settlement possible, even if it means agreeing to secrecy. Because only 15 to 20 states have enacted rules that try to keep discovery information public—

may seek class actions as eagerly as plaintiff attorneys because a certified class can shut down future litigation and control costs.

Talking about class actions is "swimming in deep water," said Feinberg. Some stumbling blocks that class action attorneys face are keeping class members informed (class notice), contract provisions that ban arbitration of class actions, assigning a named plaintiff, and jurisdiction and choice-of-law questions. He said the role of the judge is be-

corporations to put a ban on class actions in their contracts," said Bland. If the Court concludes that it does, "there are going to be a lot of areas where corporate America will just be unbridled," said Bland. "This is the future we face."

Speaking from the defense perspective, Victor Schwartz, general counsel for the American Tort Reform Association, noted that the Class Action Fairness Act of 2005 "was supposed to bring an end to class actions but really hasn't." He said the act did stop judicial "hell-holes"—his own copyrighted term for jurisdictions where many businesses allege that judges certified class actions with the speed of a customs agent stamping passports.

Schwartz described several tactics that he said plaintiff lawyers use as "escape routes" to circumvent Rule 23 preponderance of the evidence requirements and get class certification. They might submit statistical proof "to try and get around the fact that each [case] is different"; use techniques cited in the American Law Institute's *Principles of the Law of Aggregate Litigation*, which addresses ways to get cases bundled together and settled or tried; or seek to establish subclasses, with each treated as a class.

The latter is "a very strong weapon," he said, "because if you have enough subclasses certified, it's going to force the defense to the settlement table."

Robert Peck, president of the Center for Constitutional Litigation, moderated a group discussion of the future of class actions and summed up that panelists seem to agree that class actions will remain alive into the future.

"I don't think the class action is as dead as some people say," said Schwartz. "There's no end to the inventiveness in keeping them alive." ■

—REBECCA PORTER

Defendants may seek class actions as eagerly as plaintiff attorneys because a certified class can shut down future litigation and control costs.

and they aren't uniform rules—the country needs a federal law, he said.

"Until the law is changed to prevent the practice, attorneys believing it to be in their client's best interest to enter into a secrecy agreement that conditions the return of the 'smoking gun' to the defendant will simply do so," Zitrin said. "The attorney's perceived duty of zealous advocacy will trump the possibility of disclosure."

At press time, the House had yet to introduce a companion measure. ■

—REBECCA PORTER

Class actions evolving to survive, conference concludes

Class action litigation faces many challenges, but it is evolving, not dying, according to panelists at "Justice and the Role of Class Actions," a March conference held at the Benjamin Cardozo School of Law in New York City.

Countering the conventional wisdom that plaintiffs generally favor and defendants typically oppose class actions, keynote speaker Kenneth Feinberg said these cases should not be regarded as ideological battles between David and Goliath. Feinberg, an expert in mediation and alternative dispute resolution who served as special master for the September 11th Victim Compensation Fund, noted that defendants

coming a key issue, as is deciding who distributes the settlement and how to protect due process for the plaintiff.

Bans in arbitration are the biggest challenge, said Leslie Bailey, a staff attorney with the public interest law firm Public Justice, noting that forcing a consumer to waive his or her right to participate in a class action allows potential defendants to avoid blame for misconduct.

Her Public Justice colleague Paul Bland noted that many defendants have argued that when Congress passed the Federal Arbitration Act (FAA) of 1924, "it really meant that companies can do whatever they want, and it wipes away any state law."

Public Justice has repeatedly defeated that argument in court, he said, and currently three petitions by defendants are pending in the U.S. Supreme Court. "In the past we've beaten all cert petitions and said, 'No court has ever agreed with that. No serious court has ever found the FAA preempts state law.'"

Amicus briefs filed in the three cases, including one by the U.S. Chamber of Commerce, cite a split in the circuits on the issue and argue that companies don't know whether arbitration clauses are enforceable, so they need the Supreme Court to decide, said Bland.

"We'll find out if the Supreme Court has decided whether federal law wipes away all state laws limiting the ability of

Some therapist-patient communications not privileged, court says

The therapist-patient privilege does not apply to threats made by a patient directly to his or her therapist when the patient had reason to believe the therapist would report the threats, the Fifth