Collective Scienter: An Unrecognized Danger in Legal Malpractice Cases

By: John K. Villa and John S. Williams[1]

Major litigation against law firms is a relatively recent phenomenon, with its roots in the bank and savings and loan crisis of the mid-1980s. To date, the theories of liability have outpaced thoughtful development of defenses. To a large extent, this is because very few large legal malpractice cases proceed past the motion to dismiss stage, where courts are often inclined to reject novel arguments made by the defense. Defenses such as causation, case-within-a-case, contributory negligence of corporate counsel, and loss causation, remain formidable barriers to recovery but largely unexplored.[2]

The focus of this article is the little-recognized concept of collective scienter, which, when invoked by a plaintiff in a lawsuit against a law firm, can be a formidable weapon. It is an issue most defense lawyers have probably not examined. The term incorporates two distinct but related concepts: whether the knowledge of individual lawyers in the firm can be aggregated and attributed to the firm for the knowledge requirement of various torts, and whether the knowledge and conduct of individual lawyers can be aggregated and attributed to the firm for the "scienter" element of various torts. The concepts are closely related because plaintiffs often try to prove law firm "scienter" by showing that various lawyers in the law firm *knew* a number of facts that together supposedly constituted red flags and from which the fact finder can infer that the law firm consciously intended to further wrongdoing. This collective knowledge or intent thus is used to establish the intent or knowledge element of many of the largest and most serious claims that are asserted against law firms. Collective scienter, to our knowledge, has never been expressly identified or discussed in any legal malpractice opinion. Plaintiffs, however, implicitly use the principle in their formulation of many of the most dangerous claims. While the doctrine of collective scienter has not received much attention in most areas of the law, where it has been considered, it has, in general, been rejected. Legal malpractice defense lawyers should pay more attention to it, and focus the courts' attention upon it, in defending the big case.

Collective scienter,… when invoked by a plaintiff in a lawsuit against a law firm, can be a formidable weapon.

It is at the outset useful to identify where collective scienter does and does not apply. Claims involving pure mistakes, conflicts of interest, and the like usually do not require the plaintiff to engage in this "aggregation" because those torts simply do not require scienter. Where scienter becomes a major factor, however, is in cases of aiding and abetting the misconduct of others. *See Restatement (Second) of Torts* § 876(b) (1979). Illustratively, claims for aiding and abetting breach of fiduciary duty or aiding and abetting fraud require that the lawyer or law firm know of the primary wrong and have the specific intent to advance it. *See, e.g.*, *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 292–93 (2d Cir. 2006) (applying New York law to aiding and abetting fraud); *Kolbeck v. LIT Am., Inc.*, 939 F. Supp. 240, 247–48 (S.D.N.Y. 1996) (applying New York law to aiding and abetting breach of fiduciary duty), *aff'd*, 152 F.3d 918 (2d Cir. 1998).

As it happens, these are by far the most dangerous claims that a law firm can face, for a number of reasons. Aiding and abetting claims often arise out of failed companies; the

[1] John K. Villa and John S. Williams are both partners at Williams & Connolly LLP, where they regularly represent law firms and lawyers in professional liability matters.

[2] A number of cases that would illustrate points made in this article were handled by our law firm. We decline to discuss claims against clients unless specifically directed to do so.

gravamen of the claim is that the law firm aided and abetted management in causing the collapse of the company or in defrauding classes of investors, creditors, or others. The alleged damages are the enterprise value—often in the hundreds of millions of dollars or more—or the losses of classes of investors who have lost virtually all of their investment. Not only are the losses enormous in such cases, but the aiding and abetting claim essentially deprives the law firm of the contributory fault or contributory negligence defenses that are effective against claims by corporate plaintiffs.[3] The plaintiff has, in effect, placed the corporate officer on the lawyers' side of the "v."

When these claims are examined carefully, it becomes clear that in order to make their case that the law firm "knew" of the breach of fiduciary duty or "knew" of the fraud, the plaintiffs describe a series of so-called "red flags" typically involving several lawyers over a period of time, and implicitly aggregate all of this conduct to one consciousness—that of the defendant law firm. Thus, associate A saw one suspicious fact, partner B saw a second suspicious fact, counsel C saw a third suspicious fact, etc., and therefore the law firm must have known that the client was engaged in breach of fiduciary duty or fraud. In such circumstances, judges are likely to deny motions to dismiss (thus setting the stage for a large settlement), as they, like the plaintiffs, have implicitly aggregated all of this knowledge and intent to the law firm, as an entity. As we discuss below, that is inconsistent with the theory of vicarious liability for scienter-based liability and with the relatively modest jurisprudence in other areas of litigation.

I. Historical Background

Prior to the 1980s, legal malpractice cases were relatively infrequent, and were typically mistake-based claims. The savings and loan crisis of the 1980s changed that. Federal agencies that had insured deposits at failed financial institutions embarked on a campaign of lawsuits against directors of these failed financial institutions. When the insurers of directors and officers inserted "regulatory exclusions" in the insurance policies to foil FDIC suits, the FDIC's attention turned to claims against former counsel for failed thrifts and banks, which the FDIC had acquired when the insured depository institution failed. To collect on these claims, the receiver must file a lawsuit against the professional. Accordingly, the FDIC and other agencies brought suits against law firms, alleging offenses including negligence, ethical violations, conflicts of interest, violations of banking regulations, gross negligence, and, as most pertinent here, aiding and abetting fraud by management and aiding and abetting breach of fiduciary duty by management.

The aiding and abetting claims were particularly vicious as the law firms were saddled with the entire loss caused by management, typically the loss incurred in the failed bank. The FDIC hired a new and better class of law firm to develop and assert these claims, hired first-rate experts, and thereby ushered in a new era of legal malpractice cases. Some of these actions against law firms rested on theories of vicarious liability and failure to monitor the lawyer's compliance with professional standards. *See FDIC v. Nathan*, 804 F. Supp. 888 (S.D. Tex. 1992) (holding law firm could be liable for failure to supervise attorneys in the firm); *RTC Mortg. Trust 1994 N-1 v. Fid. Nat'l Title Ins. Co.*, 58 F. Supp. 2d 503 (D.N.J. 1999) (applying respondeat superior principles). Defendants raised a number of defenses, including contributory and comparative negligence, unclean

[3] Depending on the jurisdiction and the claim asserted, the law firm may still possess an *in pari delicto* defense, which can be very powerful in defeating such claims. *See, e.g., Kirschner v. KPMG LLP*, 938 N.E.2d 941 (N.Y. 2010). There are a number of other defenses to aiding and abetting cases, especially arising out of the requirement that the aider and abettor substantially assisted in the primary wrong. In some jurisdictions, the substantial assistance must itself amount to a proximate cause in the wrong. *See, e.g.*, *Lussier v. Bessette*, 16 A.3d 580, 585 (Vt. 2010); *Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co.*, 883 N.Y.S.2d 486, 489 (App. Div.—1st Dep't 2009). Moreover, lawyers doing nothing more than performing routine legal services often cannot, as a matter of law, amount to substantial assistance. *See, e.g.*, *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 188–89 (Minn. 1999); *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 865 N.Y.S.2d 14, 23 (App. Div.—1st Dep't 2008).

hands, estoppel, failure to mitigate damages, loss causation, statute of limitations, and speculative damages.

Ultimately, the banking agencies recovered millions of dollars through settlements in these cases and a rare verdict. *See* FDIC, *Managing the Crisis: The FDIC & RTC Experience*, 281, *available at* www.fdic.gov/bank/historical/managing/history1-11.pdf. ("The FDIC and the RTC filed a total of 205 attorney malpractice suits arising from less than 10 percent of all failed institutions. From those cases and some prelitigation settlements, the agencies recovered more than $500 million, averaging about $2.5 million for each suit filed. Most of the cases were settled at an early stage in the litigation."); *see also* Steve France, *Unhappy Pioneers: S&L Lawyers Discover a "New World" of Liability*, 7 Geo. J. Legal Ethics 725 (1994); *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 Harv. L. Rev. 1547, 1609–10 (1994). *See also FDIC v. Mmahat*, 907 F.2d 546 (5th Cir. 1990) (holding attorney and law firm liable for legal malpractice); *FDIC v. Clark*, 978 F.2d 1541 (10th Cir. 1992) (affirming judgment for legal malpractice). For example, several partners at a major Dallas law firm represented failed savings and loans. The firm ultimately paid $18 million to settle a potential FDIC lawsuit and a 1987 legal malpractice action. The Dallas suit was an "inflection point" in litigation against attorneys, and there has been no going back. One legacy of the FDIC cases has been the aiding and abetting theories that persist today.

One legacy of the FDIC cases has been the aiding and abetting theories that persist today.

The focus on attorneys began with the FDIC but has not been confined to the banking agencies. Many of the claims that started to be asserted against law firms were brought by parties other than clients or, as is the case with the FDIC, nonclients that had succeeded to the claims of clients. These parties—be they prosecutors, government regulators such as the SEC, counterparties in transactions, or even customers of the law firm's client—often could only bring claims that contain a knowledge, intent, or scienter element because the lawyer's fiduciary obligations extend only to the client. *See generally Restatement (Third) of the Law Governing Lawyers* § 56 (2000) (describing a lawyer's civil liability to nonclients as the same as that owed by a nonlawyer in similar circumstances).

Many times, the client will have already failed, therefore leaving plaintiffs primarily focused on the client's outside advisors as a source of compensation. Accordingly, the claims are often for aiding and abetting torts committed by the client, as to which plaintiffs will need to show actual knowledge of the client's wrongdoing and intent to further it. *See Restatement (Second) of Torts* § 876(b). The attempt to meet these standards often will lead plaintiffs to argue that the "law firm knew" various facts by aggregating the separate knowledge held by different lawyers.

Many claims against law firms also involve securities transactions. Although the Supreme Court's decisions in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), and *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), essentially closed the door on traditional securities fraud cases against law firms (*i.e.*, claims based on an issuer's alleged fraud regarding exchange-traded securities),[4] other types of claims remain possible. Federal securities litigation against lawyers remains permissible when all the requirements for primary liability are met. And certain state

[4] The Court in *Central Bank* eliminated aiding and abetting liability in private civil actions under Section 10(b) and Rule 10b-5, *see* 511 U.S. at 191; in *Stoneridge*, it eliminated so-called "scheme" liability under Rule 10b-5 subsections (a) and (c), *see* 552 U.S. at 158–59; and in *Janus*, it ruled that merely preparing statements on behalf of a corporate client, for example in fund prospectuses, is not actionable under Rule 10b-5, *see* 131 S. Ct. at 2302.

securities laws can still be a vehicle for suing lawyers.[5] By the same token, a plaintiff may be able to allege an aiding and abetting fraud claim based around a securities transaction. In those cases, the plaintiff usually must demonstrate knowledge or at least recklessness (depending on the theory of liability). In those cases, collective scienter may be an issue.

II. The Restatement Test

The general rule at common law, as reflected in the *Restatement of Agency*, was that scienter could not be aggregated across several individuals to establish the element for the entity defendant. As stated in the *Restatement (Third) of Agency*, "a principal may not be subject to liability for fraud if one agent makes a statement, believing it to be true, while another agent knows facts that falsify the other agent's statement. Although notice is imputed to the principal of the facts known by the knowledgeable agent, the agent who made the false statement did not do so intending to defraud the person to whom the statement was made." *Restatement (Third) of Agency* § 5.03, Comment *d*(2) (2006). The *Restatement (Second) of Agency* was in accord: "If knowledge, as distinguished from reason to know, is the important element in a transaction, and the agent who has the knowledge is not one acting for the principal in the transaction, the principal is not affected by the fact that the agent has the knowledge." *Restatement (Second) of Agenc*y § 275, Comment *b* (1959); *see also id.* § 268, Comment *d* & Illustration 4.

These conclusions spring from foundations of agency law. "Corporations, of course, have no state of mind of their own. Instead, the scienter of their agents must be imputed to them." *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1254 (11th Cir. 2008). Because of that, when a cause of action requires both "an essentially subjective state of mind" and "some sort of conduct"—as is the case when dealing with fraud claims or aiding and abetting claims—"the required state of mind must actually exist in the [same] individual." *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 366 (5th Cir. 2004).

III. The Securities Context

Securities litigation is important to the doctrine of collective scienter in that it is one of the few arenas in which the principle has been tested—typically in cases against directors and officers—often under the rubric of "group pleading."[6]

In cases against groups of directors and officers and their companies that issued securities, the courts have confronted the question whether the requisite state of mind for a Section 10(b) claim can be shown by compiling the knowledge of different employees. All of the jurisprudence unfortunately involves motions to dismiss where the courts typically allow more latitude to the plaintiff. Even there, however, collective scienter or some variant of it has not fared well. In *Southland Securities Corp. v. INSpire Insurance Solutions, Inc.*, 365 F.3d 353 (5th Cir. 2004), the Fifth Circuit held that when determining "whether a statement made by the corporation was made by it with the requisite…scienter we believe it appropriate to look to the state of mind of the individual corporate official or officials who make or issue the statement (or order or approve it or its making or issuance, or who furnish information or language for inclusion therein, or the like)." 365 F.3d at 366. The *Southland* decision is frequently considered the first circuit

[5] Class action suits under state securities laws are prohibited by the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78bb. Moreover, the statutes of some states do not allow liability based on actions taken by attorneys in the ordinary course, *see* Ariz. Rev. Stat. § 44-2003(A); Ohio Rev. Code § 1707.431(A); and New York's blue sky law, the Martin Act, does not provide for private suits at all, *see CPC Int'l Inc. v. McKesson Corp.*, 514 N.E.2d 116, 118–19 (N.Y. 1987).

[6] The "group pleading" or "group published" doctrine has been on uncertain footing since the passage of the Private Securities Litigation Reform Act (PSLRA). *See, e.g.*, *Winer Family Trust v. Queen*, 503 F.3d 319, 336–37 (3d Cir. 2007) (rejecting doctrine and citing case law). Nevertheless, in the jurisdictions that still apply it, the "group pleading" doctrine recognizes, for purposes of a motion to dismiss, that some corporate documents are created by a group of corporate insiders, but does not technically apply to scienter. *See In re BISYS Sec. Litig.*, 397 F. Supp. 2d 430, 439 (S.D.N.Y. 2005).

court decision to reject collective scienter in the federal securities context.

The trend since *Southland* has been to reject collective scienter albeit perhaps not as crisply as we might prefer. Circuit courts in the Second, Seventh, and Ninth Circuits, which together see the lion's share of securities cases, have followed *Southland*. *See City of Livonia Emps.' Ret. Sys. & Local 295/ Local 851 v. Boeing Co.*, 711 F.3d 754, 759 (7th Cir. 2013) (Posner, J.) ("unless the complaint created a strong inference that [corporate executives alleged to have made the statements] knew they were false, there would be no fraud to impute either to them or to [the corporation]"); *Glazer Capital Mgmt., L.P. v. Magistri*, 549 F.3d 736, 745 (9th Cir. 2008) (although not categorically rejecting collective scienter, holding that "the PSLRA requires…scienter with respect to those individuals who actually made the false statements in the merger agreement"); *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc.*, 531 F.3d 190, 195 (2d Cir. 2008) ("To prove liability against a corporation…a plaintiff must prove that an agent of the corporation committed a culpable act with the requisite scienter, and that the act (and accompanying mental state) are attributable to the corporation"). Other circuit courts have also reached the same conclusion. *See Matrix Capital Mgmt. Fund, L.P. v. BearingPoint, Inc.*, 576 F.3d 172, 182 (4th Cir. 2009); *Mizzaro v. Home Depot, Inc.*, 544 F.3d at 1254; *Ezra Charitable Trust v. Tyco Int'l Ltd.*, 466 F.3d 1, 5–11 (1st Cir. 2006); *Aetos Corp. v. Tysons Food, Inc. (In re Tysons Foods, Inc. Sec. Litig.)*, 155 F. App'x 53, 56–58 (3d Cir. 2005). Indeed, there has been recent authority in the Sixth Circuit, which had been the one court of appeals to seemingly endorse collective scienter in the securities context. *See City of Monroe Empls. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 688–89 (6th Cir. 2005). That court changed course on October 10, 2014, in *Ansfield v. Omnicare, Inc. (In re Omnicare, Inc. Securities Litigation)*, 769 F.3d 455 (6th Cir. 2014).

The trend since *Southland* has been to reject collective scienter albeit perhaps not as crisply as we might prefer.

That is not to say that the decisions are uniform. *See id.* at 473–75; *see generally* Bradley J. Bondi, *Dangerous Liaisons: Collective Scienter in SEC Enforcement Actions*, 6 N.Y.U. J. L. & Bus. 1, 7 (2009). There is variation among the courts as to which corporate individual's scienter should count in assessing the corporate intent. For example, *Southland* was decided at such an early juncture that it used an open-ended formulation, in which it referred to establishing corporate scienter through the state of mind of those "who furnish information or language for inclusion therein, or the like." 365 F.3d at 366. The Sixth Circuit in *Ansfield* adopted a similar approach, although it is unclear whether such a sweeping standard is appropriate after the Supreme Court's decisions in *Stoneridge* and *Janus*. 769 F.3d at 476. *Janus*, in particular, established that drafting or providing information for a statement are not enough to be deemed the maker of the statement. 131 S. Ct. at 2303–05.

There is also divergence as to the pleading question of whether the corporate actor who acted with scienter must be identified in the complaint. The Fifth Circuit in *Southland* held that the PSLRA's specificity requirements demanded that the corporate actor be identified by name. 365 F.3d at 367. Some other decisions suggest that it may not be necessary to identify the culpable agent in the complaint because it may be reasonable, depending on the misrepresentation in question, to infer that a responsible corporate agent knew of the misrepresentation. *See Dynex*, 531 F.3d at 195–96 ("Congress has imposed strict requirements on securities fraud pleading, but we do not believe they have imposed the rule…that in no case can corporate scienter be pleaded in the absence of successfully pleading scienter as to an expressly named officer."); *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 513 F.3d 702, 710 (7th

Cir. 2008) (Posner, J.) (suggesting example that a "dramatic" departure from the truth could give rise to an inference that unnamed actors making the statement were aware of its falsity). The short answer is that collective scienter has not fared well in securities litigation.

IV. Criminal Cases

In *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987), the court of appeals upheld a bank's conviction for failing to report multiple client withdrawals that each exceeded $10,000. The court approved a jury instruction that stated: "the bank's knowledge is the totality of what all of the employees know within the scope of their employment. So, if Employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all." *Id.* at 855. The court also determined that "willfulness could be found via flagrant indifference by the Bank toward its reporting obligations." *Id.* at 856. Given such willfulness, the collective knowledge of its employees was properly imputed to the bank. *Id.*

We think this [collective scienter] issue should move to the forefront of complex suits against law firms in the years ahead.

The case is unquestionably a landmark decision, but its precedential effect is muddled. The decisions the court of appeals relied upon were ones where collective knowledge theories were not successful. And the question in *Bank of New England* still turned on "wrongful intent of specific employees." *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996) (discussing *Bank of New England*). The First Circuit simply approached the question through whether the bank was "flagrantly indifferent" to its reporting obligations and, indeed, whether it was deliberately set up to be indifferent. *Bank of New England*, 821 F.2d at 855, 858. Following *Bank of New England*, several courts have rejected its holding. *See United States v. Science Applications Int'l Corp.*, 626 F.3d 1257, 1274 (D.C. Cir. 2010) (rejecting collective knowledge in False Claims Act cases); *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1122 (D.C. Cir. 2009) (per curiam) (in RICO case, noting "the legal soundness of the 'collective intent' theory" as "dubious" but citing *Bank of New England* in support); *United States v. LBS Bank-New York, Inc.*, 757 F. Supp. 496, 501 n.7 (E.D. Pa. 1990); Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 Geo. Wash. L. Rev. 210 (1997).

V. Claims against Law Firms

This brings us to law firms. Law firms should be vigilant not to ignore or acquiesce in plaintiffs' attempts to establish knowledge or scienter through a collective approach. Although research has not uncovered a single case in which a court has discussed the collective scienter issue in a suit against a law firm, the authors can attest that it has been used often without attribution or even recognition. We think this issue should move to the forefront of complex suits against law firms in the years ahead.

The issue arises in law firm cases for the same reason it does in the securities context—it is a useful way for plaintiffs to build a "red flags" case. Plaintiffs recite a compendium of alleged facts that are aggregated across different settings and transactions spread out over a number of years. Often law firms are especially likely to be the victim of such an approach because former clients, or whoever stands in the former client's shoes, such as a trustee or the FDIC, can demand the client file before starting litigation. They can then use the file to piece together a wide-ranging narrative to appear in the complaint.[7]

[7] While former clients often do not need to prove knowledge, because they can instead rely on malpractice liability, they sometimes assert such claims, especially if they are alleging that corporate management breached fiduciary duties to the corporation or committed fraud against it. In those circumstances, they must plead knowledge to make out the necessary elements for aiding and abetting liability.

Even in cases where the plaintiff is a nonclient, the plaintiff often can still get access to the law firm's client file if the client waives privilege.

As already noted, however, collective scienter relies upon a misapplication of agency law, a point just as true in the law firm context as in the corporate context. "Vicarious liability of law firms…results from the principles of respondeat superior or enterprise liability." *Restatement (Third) of the Law Governing Lawyers* § 58, Comment *b*. For example, when issuing an opinion, the knowledge of the law firm generally is the knowledge of the lawyers working on the opinion. *See* Donald W. Glazer, Scott FitzGibbon, & Steven O. Weise, *Glazer & FitzGibbon on Legal Opinions* § 4.2.3.3 (3d ed. 2008 & Supp. 2013). Accordingly, in general, a plaintiff must plead specific facts raising a strong inference that the individual lawyer who allegedly acted with the requisite scienter was responsible for the statements made.

Bars on collective scienter apply more explicitly to lawyers' ethical conduct, at least outside of the area of conflicts of interest. *See, e.g., Restatement (Third) of the Law Governing Lawyers* § 123, Comment *b* (imputation rules for purposes of conflicts of interest); *see also* Model Rules of Professional Conduct, Rule 1.10(a). The Model Rules of Professional Conduct preclude a lawyer from knowingly participating in a client's fraud; but those rules refer specifically to the "lawyer" gaining knowledge, and do not refer to the knowledge of other lawyers at the firm. *See* Model Rules of Professional Conduct, Rules 1.2(d) and 1.13. For such purposes, "only the knowledge of the lawyer performing the counseling or other assistance in question is determinative," not the knowledge of other lawyers at the firm. *Restatement (Third) of the Law Governing Lawyers* § 94, Comment *g*.

How can one effectively assert the collective scienter defense—pointing out to the court that it is improper to aggregate the knowledge or conduct of a number of lawyers to establish scienter? One means of doing so, which one of the authors has just attempted, is to use the opinion of an expert in law firm conduct to focus the court on this point. Another would be to seek amicus support, even at the motion-to-dismiss stage, to focus the court's attention on the importance of the issue.

Because collective scienter is recognized as an important issue in law firm litigation in big cases, one can expect that plaintiffs will either deny the existence of the issue or push back by arguing that a firm deliberately organized its handling of a matter so as to keep knowledge compartmentalized. Such compartmentalization, they would argue, would amount to willful blindness, which is frequently employed as a substitute for knowledge (albeit not intent). Law firms should be sensitive to such arguments, and avoid the criticism that their lawyers could later be accused of putting their heads in the sand. For example, while a law firm's opinion generally speaks only to the knowledge of the lawyers involved in preparing the opinion, those lawyers cannot deliberately refrain from speaking with other lawyers whom they know have additional information relevant to the opinion.

* * *

The preceding are, of course, just some of the many issues that may arise as the question of collective scienter becomes more of an issue in law firm litigation. Law firms should keep abreast of the latest developments in this area, both in cases against law firms, and in other contexts.