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Class Actions – Preparing for the Storm

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Class Actions Simplified:

Briefly, class actions are civil actions brought on behalf of plaintiffs who are alleging a similar type of harm from a common defendant(s). A singular or a few plaintiff class members are allowed to manage the interests of the many in the interests of 'simplicity'.

For certification as a class under Rule 23 of the Federal Rules of Civil Procedure as well as for most states, the plaintiff class must meet four requirements: [1] Numerosity, [2] Commonality, [3] Typicality, and [4] Adequacy.[i]

Numerosity:	the class is so numerous that joinder of all members is impracticable.
Commonality:	there are questions of law or fact common to the class.
Typicality:	the claims or defenses of the representative parties are typical of the claims or defenses of the class.
Adequacy:	the representative parties will fairly and adequately protect the interests of the class.

There are an estimated 10,000 new class action claims filed in the United States, with most becoming settled before reaching a trial on the merits.[ii]

This broad guide presents strategies for attacking class action lawsuits in their early stages, as well as a summary of recent developments on the class action front.

Initial Defensive Considerations

Before responding to the class action complaint, defense counsel must gather factual evidence for case evaluation and discovery. This will inform counsel on the parties involved, whether the correct forum was chosen, options to consider in dismissing the claims, and the best plan to proceed.

Obtain Facts

Prepare to gather all relevant facts from the client for a proper evaluation of the case.[iii] In order to properly defend the case, defense must understand the business and how it runs.[iv] This will provide information on the essential actors for the suit as well as the potential exposure.[v]

Additionally, by conducting an investigation of related litigation or class action trends around the country, defense will gain knowledge on how plaintiffs may be attempting to litigate the case as well as inform the case evaluation.[vi]

Counsel should familiarize themselves with the opposing counsel as well as the assigned judge.[vii] Defense can evaluate aspects of the case based on how much experience the opposing counsel has litigating class actions (which ultimately goes to the Rule 23 adequacy factors of certification).[viii] Moreover, knowing how a judge has ruled previously will provide insight for future settlement negotiations.[ix]

Consider the engagement of experts at the early stages of investigation, as they can provide substantial nuance on the alleged issues, as well as potentially undermine a class during certification by identifying where the plaintiffs are uncommon.[x]

Discovery and Document Production

Part of the expense of class actions often stems from the voluminous documents that will come into play. Soon after being informed of the class action, it is in defense counsel's best interest to streamline the process for how documents will be gathered, sorted, and stored.[xi]

By figuring this out early, counsel will streamline the identification of legal issues and defenses, as well as future discovery and disclosures. Defendants will also be less likely to face a spoliation claim.[xii] Documents are regularly purged during normal business operations but even the accidental spoliation of evidence can result in sanctions.[xiii]

Identify Any Legal Issues

Forum: First is the obvious question of whether the proper forum has been chosen. This may provide an easy avenue to dismissal.

Arbitration: Consider invoking arbitration rights if there is a mandatory arbitration clause in a contract with the plaintiff. This may allow the defendant to resolve the claims at a lower cost or curtail the claims completely, depending on the clause language.[xiv]

Remove: If a class action lawsuit is filed in state court, determine if removal is available through federal question or diversity jurisdiction. Defendants may escape a bad state court venue and mitigate risk of "nuclear" jury awards.[xv] In addition, federal discovery rules are usually stricter and more cost-efficient compared to state rules, and the class certification analysis will be more predictable.[xvi] However, state courts give more leeway in settling cases, and a state without easily accessible docket systems could lead to less copycat suits.[xvii]

Motion to Dismiss

A motion to dismiss, if available, is one of the best ways to short circuit a class action before the rigorous process of class certification. Filed through F.R.C.P. Rule 12(b)(6), it is the first chance to dismiss the case entirely or at least narrow the plaintiffs' claims.[xviii] Additionally, because it can be styled as a motion for failure to state a claim, defendants can even request this dismissal before filing an answer.[xix]

A strong showing in the dismissal motion may entice plaintiffs into a settlement, and at this phase, a settlement does not need court approval.[xx] It may also help show a court the potential deficiencies in the plaintiff's case that can be utilized during the class certification process. However, defense must be aware that a denial can help show the plaintiff where they need to strengthen their case for class certification or where they need to amend.[xxi]

Under F.R.C.P. Rule 23(c)(1)(A), courts are allowed to consider issues of class certification on just the complaint alone.[xxii] Defendants are allowed to move to deny class certification immediately and do not have to wait for a plaintiff's certification motion. Courts can recognize that some deficiencies are noticeable on the face of the complaint and do not need discovery to be completed in order to dismiss an action before certification.[xxiii]

Defendants can also make an early attack on class certification proceedings using a Motion for Judgement on the Pleadings under Rule 12(c) or a Motion to Strike Class Allegations under Rule 23 (d)(1)(D).[xxiv] While these can be filed at any time to stop the certification, a practitioner has to keep in mind that the motion may help a plaintiff plug any deficiencies, and that an early adverse ruling may make future settlement more complicated. [xxv]

Defenses

Attacking the Class in a Motion to Dismiss

Defendants have the option to attack how plaintiffs have defined their class and whether class members are identifiable.[xxvi] Courts must be able to determine who is and can be included as a plaintiff class member, and if the requested class is too broad, a court may find that it will defeat the process of having a class action because the parties would have to spend too much time narrowing the group down.[xxvii]

In the opposite way, a defendant can attack the class by asserting that the class members' individualized issues predominate, and there is a lack of a common question.[xxviii] The commonality requirement under Rule 23(b)(3), also provides that individual issues cannot overwhelm the common issues.[xxix]

Standing

Plaintiffs must establish standing for class actions in federal court under Article III.[xxx] To possess standing to sue under Article III, a plaintiff must have (1) suffered an injury-in-fact that was concrete and particularized and either actual or imminent; (2) there must have been a causal connection between the injury and the defendant's conduct (i.e. traceability); and (3) the injury must have been likely to be redressable by a favorable judicial decision.

With respect to class action lawsuits, the Supreme Court has recently reiterated that "[e]very class member must have Article III standing in order to recover individual damages." *TransUnion LLC v. Ramirez*, 210 L. Ed. 2d 568, 141 S. Ct. 2190, 2208 (2021). Indeed, a class action plaintiff "must establish personal standing to sue each defendant before attempting to satisfy the requirements of class certification under Rule 23," which requires plaintiff to demonstrate an actual and concrete injury-in-fact caused by each and every defendant. *Herlihy v. Ply-Gem Indus., Inc*., 752 F. Supp. 1282, 1291 (D. Md. 1990) (emphasis added) (internal citations and quotations omitted) (dismissing class action lawsuit for lack of standing because "each plaintiff has not and cannot allege an injury arising from the conduct of each and every defendant").

In *TransUnion LLC v. Ramirez,* the Supreme Court held a mere increased risk of harm is insufficient -- only a plaintiff "concretely harmed" by a defendant's actions has Article III standing.[xxxi]

The plaintiff may not have suffered an injury-in-fact, or the named plaintiff's situation does not fit with the rest of the class.[xxxii] In addition, if there are many unknown or absent class members, plaintiffs will have to prove that the absent class members do not defeat standing or any other prerequisites in Rule 23.[xxxiii]

Statute of Limitations

There are various statute of limitations depending on the claims being alleged by plaintiffs, and defendants should be aware of the applicable points in time in which claims would be barred.

In addition, under *China Agritech Inc. v. Resh*, the U.S. Supreme Court held that filing a class action does not toll the statute of limitations for individual class members, and they will be barred from a future filing after the time has elapsed if certification is denied.[xxxiv] In her opinion, Justice Ginsburg also wrote that absent class members should not wait to bring their own class suit if they are troubled by the limitational period.[xxxv]

Various Pleading Deficiencies

Moving to dismiss may force a plaintiff to be pinned down to a legal theory early, with less flexibility during class certification. Still, the standard for motions to dismiss are low, and plaintiffs are usually allowed to amend to cure those deficiencies.[xxxvi]

Under Rule 8, a defendant can challenge the sufficiency of the allegations and be held to whether it is "facially plausible" for relief, rather than a possible one.[xxxvii]

The plaintiff may attempt to stay generalized in their pleadings by not alleging specific facts, and moving to quash as a matter of law can be made by plaintiffs not alleging specific facts needed for a certain cause of action.[xxxviii] Through the complaint, defense counsel should carefully assess the viability of allegations through the applicable statutes and caselaw to determine if plaintiffs have missed anything.

Heightened Pleading Standard for Fraud under Rule 9(b)

If plaintiffs are pleading fraud, then under Rule 9(b), they must satisfy a heightened pleading standard.[xxxix] Rule 9(b) demands that the circumstances constituting fraud "be 'specific enough to give defendants notice of the particular misconduct so that they can defend against the charge and not just deny that they have done anything wrong.'"[xl]

Defeating Class Certification

While there will be opportunities to defend the class action after the certification proceeding, the class certification proceedings should be treated as if it was the trial because a defeat at this stage is effectively a victory for the defense.[xli]

Class certification is considered to be the most important part of the class action process because it can limit the defendant's risk to the named plaintiff's claims rather than a potentially unknown number of class members and their damages.[xlii] Therefore, the process to avoid class certification is crucial.

This is a thorough process and plaintiffs must "affirmatively demonstrate" all Rule 23 prerequisites in order to survive class certification.[xliii] This is more than a "mere pleading standard" and plaintiffs have to prove each element with a preponderance of evidence, not speculation.[xliv] A plaintiff's failure to establish even one prerequisite precludes certification. Courts are even allowed to slightly delve into the merits of a claim if there are factual findings needed to conclusively establish the Rule 23 prerequisites.[xlv]

Rule 23 Prerequisites

Within Rule 23, there are the mandatory requirements for class actions under section (a), and other requirements under (b) that come into play depending on the type of class action.[xlvi] Defense should focus on thoroughly debunking each element of Rule 23(a) and (b) rather than attempting only get to the merits of the case.[xlvii]

Rule (23)(a)

Numerosity - Rule 23(a)(1)

To prove this, plaintiffs must show that a simple joinder is impossible due to the large class size.[xlviii] While plaintiffs do not have to provide the court with an exact number, the court must be able to approximate the size from what plaintiffs have provided.[xlix] Part of this is also the plaintiffs making a showing that it would be more convenient to hold one trial, than many.[l]

Commonality - Rule 23 (a)(2)

Many class actions fail under this analysis because they lack facts or law that are common to every member.[li] The question for every judge should be whether the class members have common answers that can justify a single suit.[lii] Courts must be able to determine that there was a common breach from the defendants, as well as common injuries from the class members from that breach.[liii] Defendants must poke holes in the plaintiff's claim and show that there is a missing piece of commonality somewhere in the analysis.

The Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) raised the threshold for commonality, requiring that plaintiffs not only have a common question between them, but that the litigation would generate a common answer to help resolve the claims.[liv] "What matters to class certification ... is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation."[lv]

Typicality - Rule 23(a)(3)

The requirement for typicality provides that the assertions of the named plaintiffs are also typical to the unknown and absent class members.[lvi] "A claim is 'typical' if it arises from the same event or practice or course of conduct that gives rise to the claims of the other class members, and if his or her claims are based on the same legal theory."[lvii]

While similar to the commonality analysis, this should be a separate assessment as courts must "determine [] whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct."[lviii]

Adequacy - Rule 23(a)(4)

For adequacy, the plaintiff class must show that the named plaintiff's interests do not conflict with the interests of the unknown or absent class members and that that their counsel will vigorously defend all class members, even the absent ones.[lix]

Rule (23)(b)

Under this Rule, plaintiffs must show the applicability of at least one of the three (b) factors.[lx] They include making a showing that defendants have previously refused to engage with the individual adjudications, and so a class action is needed for injunctive or declaratory relief; individual actions would lead to inconsistent judgements throughout the class; or there are common questions which predominate over individual issues, and it would be more effective to adjudicate it together.[lxi]

The U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541 (2011) held that to use Rule 23(b)(2), an injunction or declaration would provide *all* class members with relief.[lxii] Most class actions, however, are based on the third predominance factor.

Predominance - Rule 23(b)(3)

Defense should argue that individualized issues and questions predominate and precludes certification, rather than a more simplified standard that all class members have a question of fact or law in common .[lxiii]

For predominance under Rule 23(b), the court must analyze whether there are other related actions or interests which would override the interests in the suit. This includes: "the difficulties in managing," individual class members that want to control the litigation, and if there are other similar actions by the class members already.[lxiv]

Defense can attempt to contest this superiority and manageability by requesting plaintiff to create a trial plan and opposing it, as well as critiquing the plaintiff's damages model.[lxv] Rule 23 (b)(3) requires plaintiff to show that a class-action will be manageable, and a trial plan will be able to show whether a class-wide trial is manageable and how the issues will be presented and proved at trial.[lxvi]

This similarly goes to the use of a damages model, courts can deny a certification if plaintiff have not shown how a damages model that is supported by their theory of liability.[lxvii] In addition, defense can even create their own trial plan to show that individualized actions would be superior.[lxviii]

In *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013), the Supreme Court heightened the threshold for predominance in holding that a class action was improperly certified because "[q]uestions of individual damage calculations [would] inevitably overwhelm questions common to the class."[lxix] A failure to offer a class-wide methodology to compute their damages that's tied to liability theory eliminated the plaintiff's certification request.[lxx]

Wal-Mart Stores, Inc. v. Dukes

The Supreme Court has outlined the analysis that should be applied when delving into the class certification in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541 (2011). *Wal-Mart Stores* showcases limitations on a plaintiff's ability to meet class certification requirements.[lxxi]

The Supreme Court clarified in *Wal-Mart Stores* that plaintiffs have a heightened burden under Rule 23, to "affirmatively demonstrate" that the Rule's requirements are met, even if that analysis delves into the merits of the claim.[lxxii] "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc."[lxxiii]

Further, the Supreme Court emphasized that a court analyzing whether the class certifications are met should take a "close look" and engage in a "rigorous analysis" .[lxxiv]

The Court also limited a plaintiff's use of Rule 23 (b)(2) injunctive relief certification, outlining that the Rule is not for individual awards of monetary relief, and pushing those plaintiffs to use the higher standard certification in Rule 23 (b)(3).[lxxv]

State Class Action Comparison Overview

Differences

While this outline has focused on the Federal Rules of Civil Procedure's guidance of class actions, every state has its own class action statute and rules. Most follow the Federal Rules of Civil Procedure's Rule 23 but states vary in their application of judicial guidance for their rules.[lxxvi]

In Maryland, plaintiffs were previously allowed to certify defendant classes before its abolishment under the updated Maryland Rule 2-231 in 2019. [lxxvii] Previously for defendants in the state, there was a possibility of being joined with a multitude of other defendants for liability issues, and without the opportunity to defend.[lxxviii]

Removal Possibilities

Congress's Class Action Fairness Act which was enacted in 2005, lowered the diversity barrier to class actions being filed in federal court and allowed a greater number of removals through 28 U.S. Code § 1453.[lxxix] CAFA grants federal courts jurisdiction for removal when the aggregate damages exceed $5 million, and when there is minimal diversity,

which is when any plaintiff class member is diverse from any defendant.[lxxx] This aggregation of damages to exceed the threshold includes compensatory, statutory, punitive, attorneys' fees authorized under a statute or contract, and damages for equitable relief.[lxxxi]

The Act also allows any defendant to request removal without consent from all defendants, does not impose the § 1446(c)(1) one-year limitation for removal after an action is commenced but does require removal to be done within 30 days of service, and without regard to whether "any defendant is a citizen of the State in which the action is brought".[lxxxii] While used less so, defendants can still remove through the usual diversity and federal question jurisdiction for removal.[lxxxiii]

There are then multiple statutory exceptions that are the plaintiff's burden to prove in their remand motion that the action belongs in state court.[lxxxiv] In CAFA, Congress put forth party-based exceptions, claims-based exceptions, and geography-based exceptions.[lxxxv]

The party-based exceptions under 28 U.S.C. § 1332(d)(5)(A),(B), provides that a government defendant must be the primary defendant, and the number of members of all proposed plaintiff classes in the aggregate is less than 100.[lxxxvi]

The claims-based exceptions under 28 U.S.C. § 1332(d)(9)(A), (B), (C), precludes any class action that *solely* alleges: a covered statutory securities claim, relates to the internal affairs of a corporation and which arise under state incorporation laws, or those that relate to the rights and duties, including fiduciary duties, which relates to securities.[lxxxvii]

The geography-based exceptions under 28 U.S.C. § 1332(d)(3), (4), then includes multiple, potentially waivable, exceptions itself with the essential elements provided below.[lxxxviii]

- The discretionary exception states that district court can decline jurisdiction when: "greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed," and then the consideration of six factors in § 1332 (3).[lxxxix]
- The home-state controversy exception requires federal courts to decline to exercise jurisdiction where "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." § 1332 (4)(B).[xc]
- The local controversy exception mandates district courts to decline the exercise of jurisdiction when there is:

    [1] greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

    [2] at least 1 defendant is a defendant:

        from whom significant relief is sought by members of the plaintiff class;

        whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

        who is a citizen of the State in which the action was originally filed; and

    [3] principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

> [4] during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.

28 U.S.C. § 1332 (4)(A).[xci]

In response to this lowered barrier for removal, many plaintiffs have sought ways to circumvent CAFA, like attempting to argue that the aggregate damages does not meet the $5 million threshold and having individual class members waive higher damages to stay in state court, or purposefully attempting to fit into one of the above exceptions by filing a single state action where a defendant is already a citizen.[xcii] While too many have been utilized to name, defense counsel are advised to stay aware of their applicable Circuit decisions for these methods.[xciii]

Removal will be easier depending on the Circuit. Some Circuits, including the Seventh Circuit, have lowered the burden for a defendant to prove an amount in controversy for removal.[xciv] The court in *Back Doctors, Ltd. v. Metro. Prop. & Cas. Ins. Co.*, removed the presumption against removal and found that a Defendant's "plausible" estimate of the amount in controversy will control unless the plaintiff shows it to be an impossibility.[xcv]

Rule 68 Offer of Judgement

While less used, a defendant can rid themselves of a class action by utilizing Rule 28 at least 14 days before trial. Defense counsel can make an official offer of settlement to the named plaintiff, and if the plaintiff denies and the plaintiff's judgement is for less than the offer, they may be on the hook for the defendant's litigation costs after the offer is made.[xcvi] If the defendant wins on judgement, Rule 68 no longer applies.[xcvii]

However, these post-offer "costs" do not include attorney fees and so may not seem as enticing, as it really only entails fees related to court submissions, witnesses, and court reporters.[xcviii] If the plaintiff's cause of action is based in a statute granting attorney fees to the prevailing party, this may then be included as the "costs" under the Rule 68.[xcix]

Previously, defendants have used this as a tactic by making an offer on a named plaintiff, and the defense then argues that the rest of the case with the unnamed class members is moot and moves to dismiss for lack of jurisdiction.[c] While the Supreme Court in *Campbell-Ewald* held that an unaccepted offer of judgement does not moot a plaintiff's claim,[ci] the Court left open the notion that the suit can still be argued for moot if the defendant "deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff," because it was a payment for complete relief, rather than an offer.[cii]

When used effectively, this may shift risks to the plaintiff if they decide to continue the suit but if used carelessly by defense counsel, it may just create confusion.[ciii] One thing to note, is that if the plaintiff accepts this offer, a judgment is entered against the defense and the settlement details would be available to the public.[civ]

DEVELOPMENTS ON THE CLASS ACTION HORIZON

TOXIC TORTS:

Litigation involving PFAS has surged in recent years as scientific research has highlighted the widespread presence and potential health risks associated with these synthetic chemicals.[cv]

Per- and Polyfluoroalkyl substances ("PFAS"), which includes PFOS and PFOA, are synthetic chemicals with a myriad of everyday uses, from microwavable popcorn bags to firefighting foam and nonstick cookware.[cvi] Exposure to PFAS has been linked to adverse health effects, including numerous diseases and cancers.[cvii][cviii]

There has been over $11 billion in settlements against companies, including 3M, DuPont de Nemours, Corteva, and Chemours, in 2023 due to lawsuits linking the pollution in our waters to the adverse health effects.[cix] This growing awareness of these chemicals will only spur more class actions in the upcoming years.[cx]

Key Factors Driving this Trend:

While the litigation of these types of 'toxic torts' is not new, as litigators have been facing down asbestos and PCBs for decades, PFAS chemicals currently stand out for its combinations of PFAS's: persistence in the environment; exceptionally long half-life in humans; and its toxicity.[cxi]

- Persistence: Sometimes called 'forever chemicals', PFAS does not biodegrade, and can survive in the environment for centuries. It has already been found to contaminate Earth's water, air, soil, plants, and animals, as well as many humans.[cxii]

- Half-life: This is a measure used in pharmacies to determine how long it takes before half of a chemical leaves the body. Normal medications take a couple of hours to go through the body, and the 'long-acting' versions are engineered to stay in the body longer or have a longer half-life.[cxiii]

    - One PFAS chemical, for example, perfluorooctanesulfonic acid ("PFOS"), has a half-life of five years, meaning that a single exposure may be retained in a human for more than 20 years. This is in contrast to the active ingredient in Roundup weed killer, glyphosate, which has a half-life of about 10 hours.[cxiv]

- Toxicity: Causally linked to a number of cancers and diseases, PFAS chemicals are now proven to be incredibly toxic. The exposure of PFAS has been linked to cancers of the kidney, testicles, breast; low infant weigh; liver damage; thyroid disease; preeclampsia; and even to a suppressed immune function.[cxv] [cxvi]

Due to its persistence, water providers are detecting PFAS chemicals in water supplies and this has led to lawsuits by private and public water providers against the sources of contamination. These water-related lawsuits include the companies utilizing PFAS like DuPont and 3M Company, and the creators of firefighting foam, or "Aqueous Film-Forming Foams".[cxvii]

While lawsuits between 3M and water providers in the United States has settled for $10.3 billion, there are still a number of other ongoing lawsuits against 3M that have been filed by individuals, like firefighters, and states alleging damages from PFAS.[cxviii] Additionally, some states have begun to sue companies that manufacture PFAS for an alleged lack of transparency regarding the harmful effects of PFAS and suppression of scientific research findings that warned its use.[cxix] Recent allegations have also been made against bottled water manufacturers for false representation of "100% Natural Spring Water", with arguments that it contains harmful levels of phthalates and microplastics.[cxx]

Recent Notable Cases:

In re Aqueous Film-Forming Foams Products Liab. Litig., No. 2:18-MN-2873-RMG, 2024 WL 489326, at *1 (D.S.C. Feb. 8, 2024)

- On February 8, 2024, the U.S. District Court in South Carolina approved the class settlement and class certification for plaintiff's claims involving aqueous film-forming foams which were alleged to have contaminated ground water and drinking water across the United States. [cxxi] Plaintiffs alleged that the defendants made and/or sold the firefighting foams that contained PFAS and contaminated water.[cxxii]

- This multi-district litigation lawsuit was created out of "approximately 90 civil actions from eight judicial districts" with Plaintiffs that primarily included cities and water service providers throughout the United States.[cxxiii]

- Many Defendants, including Chemours, Corteva, and DuPont de Nemours, agreed to settle the matter for $1,185,000.00 for the suit dismissal.[cxxiv] The initial Settlement Class to receive distribution of the settlement amount includes "All Public Water Systems in the United States of America that draw or otherwise collect from any Water Source that, on or before the Settlement Date, was tested or otherwise analyzed for PFAS and found to contain any PFAS at any level".[cxxv]

Privacy Class Actions:

In recent years, the digital landscape has evolved rapidly, leading to the widespread collection and utilization of personal data by companies in most industries. While this has allowed for personalized services and targeted advertising, it has also raised significant concerns regarding privacy infringement and data misuse. As a result, customers are increasingly aware of corporate access to their personal information, and regulatory bodies are enacting stricter data protection laws.

Data privacy litigation has been considered to be the number one class action trend to watch in these last few years. Hundreds of class actions were filed in 2022, and it has since increased.[cxxvi]

Factors Driving this Trend:

- Data Breaches: High-profile data breaches from unknowing parties have garnered significant media attention and public awareness on the vulnerabilities of company use of personal data.[cxxvii] For these class actions however, plaintiffs have had trouble showing an injury-in-fact to support standing.[cxxviii]
- Increased Scrutiny: The heightened public awareness of their data importance has led to more scrutiny of a company's data handling and more requests for accountability from companies.
- Technological Advancements: The ongoing proliferation of technologies, including artificial intelligence, biometric data collection, and others like smart glasses which enables the wearer to surreptitiously record and take photos of others, has presented new challenges for privacy protection that regulators are unable to keep up with.[cxxix]

Class Action Litigation from Privacy Legislation:

The implementation of comprehensive data protection regulations, such as California's Customer Privacy Act, has given customers more control over their data, and increased penalties for company's that are non-compliant with these protections.[cxxx] Additionally, Plaintiffs are reinventing the use of older privacy statutes, like the federal Electronic Communications Privacy Act and Video Privacy Protection Act to suit their needs.[cxxxi]

Video Privacy Protection Act (VPPA)

The federal Video Privacy Protection Act (18 U.S.C. § 2710(b)) has been a jumping point for class actions targeting companies that utilize online video communications.[cxxxii] This private right of action was originally enacted by Congress in 1988 to prevent the providers of rental video tapes and other audio and/or visual materials from

disclosing a customer's personally identifiable information.[cxxxiii] Litigants are able to recoup up to $2,500 for each class member in violations.[cxxxiv] Additionally, Congress updated the VPPA in 2012 to also include digital streaming services to potentially face disclosing violations. [cxxxv]

The early 2000s saw a rise in liability claims stemming from the VPAA against the video streaming services for displaying the consumer's watch history, with estimates ranging from 80 to 100 class actions in 2022 to 2023 for it as plaintiffs alleged a modern reading of the statute.[cxxxvi] Recently, there has been class actions that focus on the weaponization of the VPAA against video trackers on websites like Meta's "Pixel" tracking tool.[cxxxvii] This is code by Meta that companies implant into their websites, to transmit personal information based on a consumer's contacts with the website.[cxxxviii] Plaintiffs were implementing these lawsuits with the accusations that these companies were then disclosing that data to third parties without consent.[cxxxix] High profile class actions have included those against Boston Globe, Sony Corp. and Facebook.[cxl]

Important to note however, is that this trend using the VPPA may be on the downswing as companies are becoming increasingly aware of these lawsuits and their obligations under VPPA, limiting their exposure by enacting stricter internal compliance policies.[cxli] [cxlii] Bloomberg Law noted in November 2023 after a 2023 study on the outcomes of class actions under the VPPA: 17 cases were dismissed by the court, 29 cases were voluntarily dismissed, and 19 cases were settled.[cxliii] Many of those voluntarily dismissed by the plaintiffs were done so before the defense had filed a response, leading to an inference that plaintiffs knew their claims could not hold up.[cxliv] Additionally, a number of these lawsuits have been dismissed by courts after an analysis prompted by defendants on a variety of defenses, including whether the class member can be considered a consumer for purpose of the statute, and whether the company utilizing the website is a video tape service provider under the statute.[cxlv]

While few of these cases in this resurgence have been examined by a federal court of appeals, some have been decided in the district courts. In *Carroll v. Gen. Mills, Inc.*, No. CV231746DSFMRWX, 2023 WL 4361093, at *3 (C.D. Cal. June 26, 2023), the court rejected a VPPA claim against General Mills because the company was not a videotape service provider, rather the company only utilized videos on its website as a marketing strategy.[cxlvi]

Relatedly, the Middle District of Tennessee in *Salazar v. Paramount Glob.*, No. 3:22-CV-00756, 2023 WL 4611819 (M.D. Tenn. July 18, 2023) found that a subscription to an online newsletter was insufficient to qualify the plaintiff as a subscriber for purposes of the VPPA because the named plaintiff only alleged himself to be a subscriber of the company newsletter and could not show that the newsletter subscription equated to subscribing to the company's video materials.[cxlvii]

Electronic Communications Privacy Act (ECPA)

In addition to the VPPA, plaintiffs have been increasingly filing lawsuits based on the Electronic Communications Privacy Act, a federal wiretap law, in addition to state wiretap laws.[cxlviii] The Electronic Communications Privacy Act was enacted by Congress in 1986 to restrict the government's ability to wiretap and eavesdrop electronically.[cxlix] States have adopted similar regulations consistent with this as well to protect electronically transmitted communications.[cl]

Over a hundred class actions have been filed since 2022 alleging violations of the federal and state wiretapping laws.[cli] Through class actions, plaintiffs are alleging that the disclosure of a customer's online chats to outside companies is a violation of wiretapping laws.[clii] This covered technology includes software that tracks a website user's interactions with the site and records it, as well as the storage of a user's transcripts with a website's chatbot.[cliii]

Related State Legislation Inspiring Class Actions

Various states have similar enacted wiretap laws that plaintiffs have utilized in their class actions. These states include California, Pennsylvania, Florida, and Arizona. Ither various statutes bar the misuse of a consumer's personal data and imposing steep penalties, such as in California, Illinois, South Dakota, Ohio, and Puerto Rico.[cliv]

The California Invasion of Privacy Act (CIPA), Cal. Penal Code § 630, *et seq.*, has created an upcoming new state source for wiretapping class action litigation in the Ninth Circuit. One prominent case coming out of CIPA has helped to define the analysis of wire tapping laws. *Javier v. Assurance IQ, LLC*, 649 F. Supp. 3d 891 (N.D. Cal. 2023), coming out of California's district court ruled against the defense's argument that CINA allows a website to obtain consent for the collection of their data after the collection had already begun.[clv]

Similarly, the Pennsylvania Wiretapping and Electronic Surveillance Control Act (WESCA) has introduced developments in the Third Circuit under *Popa v. Harriet Carter Gifts, Inc.*, 52 F.4th 121 (3d Cir. 2022). The court held the defendant liable for intercepting the plaintiff's site interactions that were recorded by the company and disclosed to third parties. [clvi]

Renewed Judicial Examination of Settlements in Class Actions

Settlements have long been a cornerstone in resolving all litigation actions, including class actions. For plaintiffs, it provides an efficient resolution for a large amount of participants, and for defendants, it protects against the potential for uncontrollable nature of jury verdicts.[clvii]

To protect unnamed class members, Rule 23(a) requires class action settlements to be "fair, reasonable and adequate" and puts the onus on courts to approve them before the settlements can be considered final.[clviii]

However, in recent years, courts are increasingly taking a closer look at the fairness and adequacy of class action settlements, leading to the "frequent invalidation of settlements".[clix] Particularly the decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) demonstrated the U.S. Supreme Court's reiteration of standing applicability for class actions.[clx] These decisions are notably only based on Article III standings, which is a jurisdictional limit for federal courts. State courts still have more leniency for class members on standing.

Article III Standing

Under Article III, class members are required to show that they have received a concrete harm for a federal court class action.[clxi] The U.S. Supreme Court held that only a plaintiff "concretely harmed" by a defendant's actions has Article III standing in *TransUnion LLC v. Ramirez*, 594 U.S. 41, 141 S. Ct. 2190 (2021), rather than only showing an increased risk of harm.[clxii] As Justice Thomas states in his dissenting opinion, this decision may have the net effect of increasing class actions for violations of federal consumer laws in state courts.[clxiii]

Federal courts have intensified its focus on making sure that all class members have Article III standing, and are going to the extent of raising the issue *sua sponte* and reversing class actions settlements that were approved by the lower court.

These cases includes, including *Draven v. Pinto*, stating "[e]ven at the settlement stage of a class action, we must assure ourselves that we have Article III standing at every stage of the litigation," 41 F.4th 1354, 1359 (11th Cir. 2022), *rev'd on other grounds*, 74 F.4th 1336 (11th Cir. 2023) (en banc), and *Harvey v. Morgan Stanley Smith Barney LLC*, whose court remanded a settlement because the "district court did not make a factual finding that every class member suffered some injury." No. 19-16955, 2022 WL 3359174, at *3 (9th Cir. Aug. 15, 2022)).[clxiv] This can be compared to the Second Circuit in *Hyland v. Navient Corp.*, 48 F.4th 110, 117 (2d Cir. 2022), finding that certification

for the settlement was proper because the plaintiffs had at least one named party which could satisfy the injury prong.[clxv]

Recent Notable Cases:

In re Apple Inc. Device Performance Litigation, 50 F.4th 769 (9th Cir. 2022)

- The U.S. Court of Appeals for the Ninth Circuit outlines a more flexible approach in its determination of Article III standing as it related to class action settlements.
- While the court vacated a settlement agreement because the lower court approved it while citing the wrong legal standard, the court stated that some class members are allowed to have no injury while still maintaining standing for a settlement. Because the settlement occurred before certification, the plaintiff's initial basis for injury sufficed to establish injury for all of the plaintiffs.
- However, the court opined that if the settlement occurred after the pleading stage and closer to the trial, like in *TransUnion*, the individual members would have had to prove their injuries for a proper settlement.

Williams v. Reckitt Benckiser LLC, 65 F.4th 1243 (11th Cir. 2023)

- In a *sua sponte* ruling, U.S. Court of Appeals for the Eleventh Circuit held that an approved class action settlement and certification had to be vacated because the plaintiffs lacked standing under Article III in regard to the injunctive relief aspect of the settlement.[clxvi]
- Plaintiffs had filed a punitive class action against Reckitt Benckiser, alleging the violation of consumer protections laws in the defendant's use of false and misleading statements to help consumers believe that the defendant's supplement would improve brain functions.[clxvii] A settlement that provided compensation and injunctive relief was reached and approved by the U.S. District Court for the Southern District of Florida.[clxviii]
- On appeal, the Eleventh Circuit raised the question of standing without prompting from any party.[clxix] The court found that there was no standing for injunctive relief because the plaintiffs had only shown past harm from the defendant's supplement and had not shown a likelihood of future harm as injunctive relief necessitates. Plaintiff's future harm argument hinged on stating that they would purchase the supplement in the future if the product actually enhanced their brain functions, however, the court found the argument to be an illogical basis for injunctive relief.[clxx] The court cited the Supreme Court's statement in *TransUnion*, where a plaintiff must show standing to each requested relief.[clxxi]
- Similarly, the U.S. Court of Appeals for the Second Circuit in *Berni v. Barilla S.P.A.*, 964 F.3d 141 (2d Cir. 2020), went a step further on standing for injunctive relief and found that because injunctive relief would not apply to every class member, it would be improper to consider on an individualized basis and class certification itself would be improper.[clxxii]

To avoid reversal of a class action settlement, recent caselaw determines that the class is required to be consistent with Article III standing all the way through litigation.[clxxiii] To navigate this development in class actions, it is imperative for Defense Counsel to be aware of the scrutiny their settlements will be under.

This is an emerging trend and as more circuits determine their approaches to when a more definite standing comes into play, there will be significant implications as to narrower settlements and how classes are defined on the federal level.[clxxiv]

Attorneys' Fee Awards in Class Action Settlements

In addition to the increased interest of courts on standing as it relates to the vacation of class action settlement

agreements, courts are similarly finding themselves concerned with the awards of attorney's fees to class counsel.[clxxv] The recent U.S. Court of Appeals decisions for the Second Circuit and Ninth Circuit outline courts' inclination to dissect attorney fee awards when they are deemed disproportionate to the class members' relief.[clxxvi]

Recent Notable Cases:

Lowery v. Rhapsody Int'l, Inc., 75 F.4th 985, 990 (9th Cir. 2023)

- In the Ninth Circuit, the Court of Appeals vacated and remanded the lower court's approval of an award of attorney fees in a settlement agreement and holding that the amount was unreasonable given the amount that would be paid to the individual class members.[clxxvii]
- The class members had brought suit against Rhapsody for its infringement of their copyright in the reproduction and distribution of their music without a license. A settlement three years later consisted of a $50,0000 payment overall to the class members and an award of more than $6 million in attorney fees.[clxxviii]
- While the District Court approved an award for attorney's fees in the agreement, they lowered it to $1.7 million. On appeal, the Ninth Circuit vacated that award with the finding that it was unreasonable considering that it was "more than thirty times larger" than what the class members received.[clxxix] Further stating that courts must consider the actual value of the settlement to class members to make certain that the attorney fees are reasonable in comparison.[clxxx]

Moses v. New York Times, Co., 79 F.4th 235 (2d Cir. 2023)

- Likewise, the U.S. Court of Appeals for the Second Circuit held that the lower court erred in not considering the granting of a $1.25 million fee award in relation to the $395,000.00 award that the class members were to receive. In this case, class members had brought suit against the New York Times for their allegations in violating California's Automatic Renewal Law. [clxxxi]
- The Second Circuit remanded the award to the lower court, for the court to include an analysis of attorney fees when considering the reasonableness of a settlement agreement. [clxxxii]

These cases are to highlight the emerging trend of Circuits providing a closer look at attorney fees and prompts notice that attorney fee awards must be considered for reasonableness before a court strikes it down. It may lead to a court's complete rejection of the settlement, and not just wasted time and fees.[clxxxiii]

California's Private Attorneys General Act

California, through the Private Attorneys General Act (PAGA) under Cal. Lab. Code § 2698 et seq., has created a private cause of action for aggrieved employees to recover penalties for an employer's labor violations for themselves, other employees, and the State of California.[clxxxiv] Through this allowance to file on behalf of other employees and the State, PAGA acts as a sort of gateway to a class action while avoiding the certification and statutory class action requirements.[clxxxv] While enacted in 2004, the amount of class action filings, has recently jumped in 2023.[clxxxvi]

In the last couple of years, the number of class action filings has increased by a thousand each year.[clxxxvii] When suits under PAGA are filed, a notice is required to the Labor and Workforce Development Agency and during the COVID-19 pandemic, in 2021, there was a historical number of filings at over 6,000.[clxxxviii] This could be primarily due to recent decisions by the California Supreme Court, which broadened classifications of breaks and calculation of bonuses that favored employees. [clxxxix] Or it could be the steep penalty payout to employees from the enforcement actions and attorney fees.[cxc]

In an attempt to circumvent these "class actions", Californian employers have utilized arbitration agreements to force employees away from PAGA and into arbitration proceedings. However, the Californian Supreme Court's holding in *Adolph v. Uber Technologies, Inc.* has limited an employer's ability to do so.[cxci] In *Uber*, the court ruled that an employee maintains standing under the PAGA private cause of action, even when the individual claims are compelled to arbitrate under the employment arbitration agreement.[cxcii]

Due to the drastic increase in litigation by private plaintiff attorneys, the Fair Pay and Employer Accountability Act has been introduced as a ballot measure for November 2024 in order to replace PAGA with an alternate form of enforcement.[cxciii] It would take PAGA from private attorneys and mandate prosecution by the Labor Commissioner instead.[cxciv]

Be Careful What You Wish For: Large-Scale Mediation

Many companies have included mandatory arbitration and mediation provisions in online shopping and other agreements, in part, as an effort to avoid class actions.

Recently however, plaintiff's counsel have been able to cultivate large groups of similarly situated potential plaintiffs and demand a large-scale mediation process for forums that are not built for the large-scale demands. This large-scale mediation process can be time-consuming and quite costly for defendants.

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[x] *Id.*
[xi] McDonald, *supra*.
[xii] Ramos, *supra*.
[xiii] *Id.*
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[xv] McDonald, *supra* at 18.
[xvi] *Id.*
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[xx] Cooper, *supra*.
[xxi] McDonald, *supra* at 19.
[xxii] Heller, *supra* at 1.
[xxiii] *Id.*
[xxiv] P. Russel Perdew & Douglas Sargent, *Creative Class Action Defense Strategies*, Locke Lord LLP 6, https://www.lockelord.com/newsandevents/events/2011/10/~/media/BFA948107046490D9B78DC06384C7D30.ashx (last visited Feb. 28, 2024).
[xxv] *Id.*
[xxvi] Heller, *supra* at 2.
[xxvii] *Id.*
[xxviii] *Id.*, at 3.
[xxix] *Id.*

[xxx] *TransUnion LLC v. Ramirez*, 594 U.S. 413, 427, 141 S.Ct. 2190 (2021).
[xxxi] *Id.*
[xxxii] McDonald, *supra* at 19.
[xxxiii] Dan Goldfine and Allison Sluga, *Inflection Points and Class Action Litigation*, Dickinson Wright PLLC (Jun. 2023), https://www.dickinson-wright.com/news-alerts/inflection-points-and-class-action-litigation.
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[xxxvi] McDonald, *supra* at 19.
[xxxvii] *Id.*
[xxxviii] *Id.*
[xxxix] *Id.*
[xl] *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (citing *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (quoting *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1997)).
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[xlii] Goldfine, *supra*.
[xliii] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541 (2011).
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[l] *Id.*
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[lv] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551 (2011) (internal citations and quotations omitted).
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[lvii] *Beattie v. CentryTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (internal quotations and citations omitted); Frost Brown Todd, *Class is in Session: Rule 23(a) Requirements for Class Actions* (Mar. 13, 2012), https://frostbrowntodd.com/class-is-in-session-rule-23a-requirements-for-class-actions/#:~:text=Rule%2023(a)(3)%20requires%20that%2C%20%22the,or%20her%20claims%20are%20based.
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[lix] Goldfine, *supra*.; Frost Brown Todd, *supra*.
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[lxix] Simson, *supra* at 2; *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013).
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