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Session 302
CLASS ACTION TRENDS

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EXECUTIVE SUMMARY

Class Action Trends

MODERATOR:

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PANELISTS:

- **Stacey Grigsby,** *Partner,* Covington and Burling LLP
- **James McClammy,** *Partner,* Davis Polk and Wardwell LLP
- **Alex Romain,** *Partner,* Milbank LLP

OVERVIEW

As COVID-19-related class actions continue to wind their way through the courts, new substantive and procedural issues continue to emerge. Class actions involving education, securities employment, technology, data breaches, and cybersecurity are increasing, and issues involving "standing" under Article III are also evolving. This panel of lawyers with expertise in class action litigation discussed these class action developments and provided guidance for identifying new class action trends. The speakers also offered in-depth updates on procedural matters.

BIG IDEAS

- **Standing requirements continue to figure prominently in class action lawsuits.**
- **As COVID-19 levels off, there is no shortage of class actions related to the pandemic.**
- **Courts appear to be ruling in favor of arbitration clauses that contain class action and arbitration wavers.**
- **California has seen an uptick in class action lawsuit filings in recent months, largely due to the consumer-friendly California Consumer Privacy Act.**

KEY TAKEAWAYS

Recent US Supreme Court decisions have clarified "standing" in the context of class actions.

As class actions involving consumer and labor law continue to be filed, "standing" issues have taken center stage. Standing, a jurisdictional requirement under Article III of the US Constitution, gives plaintiffs the right to invoke the authority of the courts. To establish standing, a plaintiff must show there was a concrete, imminent "injury in fact" with a causal connection to the issue at hand, and that a court's favorable decision can redress the injury. As a constitutionally imposed jurisdictional requirement, standing can be challenged at any time.

Recent US Supreme Court decisions have drawn attention to issues of standing. In *Spokeo v. Robins*, the plaintiff in a putative class action brought under the Fair Credit Reporting Act (FCRA) asserted standing because the defendant published false information about him. The Supreme Court held that a bare violation of the statute was insufficient to establish standing unless the plaintiff could demonstrate concrete injury as a result of the violation.

The Supreme Court further narrowed the standing requirement in *TransUnion v. Ramirez*, holding that a plaintiff at risk of future injury is not sufficient to show standing. The harm must have occurred or be imminent. In the aftermath of *TransUnion*, which has been widely cited, there has been some circuit split in defining the class. If a significant percentage of the class has not experienced an injury, do those who have experienced an injury constitute a class? Is there a minimum number of people who must be injured? Different courts are making different rules, making this an issue that might make it back to the Supreme Court.

Also, because these recent cases are considered defendant-friendly, it is reasonable to expect that some class actions, especially data privacy cases, will be litigated in state courts not bound by Article III standing requirements.

Standing is also a major factor for creative plaintiffs bringing actions related to data breaches.

Companies in virtually every industry are increasingly exposed to the possibility of a class action. New cases are being filed for data breaches under consumer protection and breach of contract statutes. Some cases involve plaintiffs reviewing and seeking to find some hole in a company's incident response materials that exposes the company to a class action claim.

"I think you're seeing plaintiffs trying to find ways to avoid these standing issues that have been a product of recent cases, looking very much to breach of contract and privacy torts to claim nominal damages for each class member, at the very least. I think as a result of some of these novel theories, things like standing will continue to be a major, major focus in the privacy area."

— James McClammy, Davis Polk and Wardwell LLP

Courts are generally enforcing class action and arbitration waivers, but defense counsel should be wary of potential pitfalls.

Arbitration clauses that contain class action and class arbitration waivers can pose unforeseen dangers for defendants. These are commonly seen in consumer goods contracts where the parties agree not to participate in class action lawsuits or class arbitrations. The Supreme Court has generally favored enforcement of these agreements.

For example:

- *AT&T Mobility, LLC v. Concepcion.* California's judicial rule rejecting arbitration clause waivers as unconscionable was preempted by the Federal Arbitration Act and is therefore invalid.
- *Lamps Plus, Inc. v. Varela.* Where a lawsuit filed as a putative class action is compelled into arbitration due to an arbitration clause, class-wide arbitration is not permitted unless unambiguously allowed by the arbitration agreement.

Defense attorneys also should be aware that plaintiffs are filing mass arbitration claims, which can involve enormous amounts of fees. These arbitration fees can far exceed the amount in controversy. Door Dash and Amazon were involved in mass arbitration cases where the plaintiffs sought tens of millions of dollars in arbitration fees, despite the cases being worth only a few million dollars.

"Enterprising plaintiffs' attorneys have decided to use the arbitration clause to their benefit. They take a number of arbitration claims that probably have nominal value, they file the arbitration claims, and they make a demand for the fees."

— Stacy Grigsby, Covington and Burling LLP

In light of this tactic, some companies have responded by:

- Drafting provisions stating that only the company can force arbitration; the enforceability of this type of provision remains to be seen.
- Eliminating arbitration clauses entirely, which is essentially deciding that a class action is preferable to costly mass arbitration.

While the pandemic appears to be declining, expect a new wave of pandemic-related class actions.

At the start of the pandemic, class actions focused on event cancellations and service disruption. While these types of cases are diminishing, other areas are gaining traction. Among these areas are:

- **Employment class actions.** As the government and private employers imposed employee vaccine mandates, trade groups, labor unions, and public policy groups filed class actions challenging these requirements. In January 2022, the Supreme Court enjoined the Department of Labor's vaccine mandate as exceeding authority.

"Following the decision enjoining vaccine mandates, it's likely that the burden of imposing vaccine mandates will fall on private employers, creating a shift in the target of the lawsuits."

— Alex Romain, Milbank LLP

Some employees are also challenging private employers' vaccine mandates based on religious exemptions, disability accommodations, and other claims. Plaintiffs in many of these lawsuits seek preliminary injunctions, with mixed results.

- **Securities/financial class actions.** Class actions have been filed alleging that companies misrepresented specific predictions about post-pandemic consumer behavior. For example, purchasers of Zillow securities filed a class action against the company because it incorrectly predicted home prices, leading to a backlog of inventory they were unable to sell. Cases like these are winding their way through the courts, so they should be monitored.
- **Mask mandates and remote learning class actions.** School districts and universities have been sued for remote learning policies, as well as mandatory vs. optional mask requirements. While these lawsuits are based on a number of legal theories, two prominent bases are violations of the Americans with Disabilities Act and breach of contract unjust enrichment theories.

A lesson from these cases is that a company must always be aware of the narrative and what it says in public. That narrative can have a significant impact on a company's legal strategy.

California has been a hotbed for class actions in recent months.

The California Consumer Privacy Act (CCPA) has resulted in over 125 lawsuits claiming CCPA violations related to consumer privacy, communications, data privacy, and financial services.

California's Attorney General issued an opinion that under the CCPA, unless a company can demonstrate an exception, consumers have the right to discover inferences that a company internally generates about that consumer through algorithms. While AG opinions are not controlling law, courts often give them great weight.

Continuing to emphasize California's focus on consumer rights, the AG also issued notices of noncompliance to numerous companies, announcing that the CCPA requires businesses to provide notice of financial incentive if they are profiting from the collection of customers' personal information.

BIOGRAPHIES

MODERATOR

Kristen Allen

Associate General Counsel, **State Farm**

Kristen Allen is an associate general counsel in the Litigation Section of State Farm's Corporate Law Department. In her current role, Kristen manages a team of attorneys who supervise extra-contractual and class action litigation filed against State Farm. Kristen joined State Farm in 2013 after practicing as a partner in Kirkland & Ellis's Chicago Office in the IP and General Commercial Litigation Departments. Kristen is a University of Illinois College of Law alum but also cheers for her undergrad Missouri Tigers whenever she can. Outside of work, Kristen enjoys traveling and spending time with her 4 active kids. She is a long-time member of the Children's Hospital of Illinois Family Advisory Board and has served for many years as a member of her local historic preservation commission.

Stacey Grigsby

Partner, **Covington and Burling LLP**

Stacey Grigsby is a stand-up trial litigator, who specializes in commercial litigation. She has served as a principal attorney in cases before numerous courts, including presenting nine oral arguments before the U.S. Court of Appeals. When she is not arguing in the courtroom, Ms. Grigsby serves as a strategic advisor to clients on litigation matters and government and regulatory investigations. While advising clients through complex and novel disputes, Ms. Grigsby has drawn upon her experience in private practice and in the government. Ms. Grigsby currently leads the defense of two large class actions, including one where the class seeks in excess of $1 billion in damages. She has provided advice to clients in matters involving pre- and post-award bid protests, government takings, contract disputes and claims, and investigations of alleged misconduct and fraud. She has also led complex internal investigations. Prior to joining the firm, Ms. Grigsby served for eight years at the U.S. Department of Justice, as a trial attorney, senior trial attorney, and later as counsel to the Associate Attorney General. As counsel to the Associate AG, she advised on a diverse set of department-wide and interagency issues, ranging from civil litigation to proposed regulations.

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James McClammy

Partner, Davis Polk and Wardwell LLP

James McClammy is a partner in Davis Polk's Litigation Department. He has represented financial institutions, corporations, debtors, creditors and creditor committees in a wide range of matters, including securities, commodities and antitrust class actions; bankruptcy-related litigation, and other complex federal and state law litigation. His experience includes a number of trials and evidentiary hearings as well as participation in mediation and other alternative dispute resolution proceedings. His recent matters include the representation of banks, financial institutions and hedge funds in class actions asserting violations of the federal securities and antitrust laws, the representation of Lehman creditors in mediations and other claims resolution proceedings, the representation of the foreign representatives of a Japanese memory chip manufacturer in seeking relief from the U.S. Bankruptcy Court, the representation of airlines in chapter 11 proceedings, and the defense of lenders in connection with fraudulent conveyance actions.

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Alex Romain

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Alex G. Romain is a partner in the Los Angeles office of Milbank LLP and a member of the firm's Litigation and Arbitration Group. Mr. Romain is a leading national trial lawyer with more than 20 years of experience representing individuals and corporations in high-stakes complex commercial litigation, white collar defense, and internal investigations. Mr. Romain's relentless advocacy has led to exemplary results for his clients. Prior to moving to California, Mr. Romain spent 10 years as a litigation partner at Williams Connolly LLP in Washington, DC. He has successfully defended numerous law firms, accounting firms, and actuarial firms against claims of professional negligence and malpractice and on conflicts issues. He has also defended individuals and corporations against allegations of campaign finance violations, obstruction of justice, bank fraud, environmental pollution, theft, fraudulent misappropriation, and attempted murder. Mr. Romain currently serves on Law360's 2021 Trials Editorial Advisory Board. He is a classically trained pianist and serves on the boards of the Los Angeles Master Chorale and the Alliance for Children's Rights.

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