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Class Action Year in Review – 2021

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On Dec. 14, 2021, six BakerHostetler attorneys presented a brief overview of the landscape for class actions in 2021 and a preview of what to expect for 2022. The discussion covered class action litigation in several areas:

- Financial services.
- Advertising and marketing: food, beverage and product labeling.
- Privacy.
- Insurance.
- Employment.
- Appellate decisions impacting class actions.

The following is a summation of the key points of that presentation. For more information, please reach out to the relevant speakers or your BakerHostetler contact.

Financial Services

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TransUnion

The U.S. Supreme Court decision in *TransUnion v. Ramirez,* handed down last year, will have an impact on many types of class actions based on statutory claims. In essence, in a 5-4 decision, the Court held that if there is no concrete harm to the plaintiffs, then they have no standing. The *TransUnion* case involved consumers whose names were deemed a "potential match" with the Office of Foreign Asset Control's list of terrorists, drug traffickers and other criminals. The class comprised 8,185 individuals. The credit reports of 1,853 of those individuals were sent to third-party businesses, and the reports of 6,323 individuals were not published. A jury awarded more than $60 million to the class.

The Supreme Court ruled that the class members whose reports were published had Article III standing but that the rest of the class members lacked standing because their reports were not shared with third parties. Other than the named plaintiffs' claims, the Court also dismissed the other FCRA claims, and reversed and remanded the case back to the district court.

Although the Court did not provide much specific guidance for lower courts, the ruling is a victory for financial services companies defending against statutory consumer protection claims. The Court made clear that even when Congress provides a federal cause of action, the fact that the law has been violated will not by itself provide standing. The plaintiff still must show an injury in fact to sue in federal court.

Key takeaways from *TransUnion* include:

Standing is required for all claims, forms of relief and class members.

There is a critical distinction between a statutory right to sue and "concrete harm" for Article III standing.

Whether harm is "concrete" turns on whether the plaintiff's alleged injury has a "close relationship" to a harm "traditionally" recognized by courts (quoting *Spokeo, Inc. v. Robins*).

The risk of future harm may be insufficient for a claim for damage.

We still do not know how *TransUnion* will be used or apply in other contexts. District court decisions following *TransUnion* have not been consistent. Given all the different statutory claims that can be raised against financial services companies, *TransUnion's* holding may require a fair amount of development at the circuit and district court levels before broad generalizations can be made.

Other Cases and Trends

In *Anderson v. Edward D. Jones & Co., L.P.*, the Ninth Circuit recently reversed the dismissal of a state law breach of fiduciary

duty class claim against Edward Jones, holding that the Securities Litigation Uniform Standards Act (the Act) didn't bar such a claim.

The district court dismissed the claims, but the Ninth Circuit reversed the dismissal, construing the Act narrowly and ruling that it only bars actions based on an alleged misrepresentation or admission in connection with the plaintiffs' decision to buy or sell securities. And because the plaintiffs argued that the admissions only related to their brokerage account fees, the Act didn't bar the claims. Edward Jones has sought certification in the U.S. Supreme Court, and given that there's a circuit split, there's a reasonable chance that this case will be taken up by the Court in 2022.

Looking ahead, it is likely that there will be an increase in consumer banking fee-related class actions in 2022. There has been a renewed focus on such fees by government agencies, and there's often an increase in consumer class actions in areas of emphasis for government exams and enforcement.

Advertising and Marketing: Food, Beverage and Product Labeling

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"The Food Court" is a term coined years ago to capture the significant number of cases filed in the Northern District of California involving food and beverage marketing claims. While that trend continues, more and more cases are being filed in New York and other areas of the country. For example, there were approximately 53 false advertising food and beverage cases filed in 2011; however, between January and July 2021, there already were 77 food and beverage marketing class actions filed in New York alone. Illinois, Wisconsin, Missouri and the District of Columbia have also seen an increase in these claims – likely the result of a combination of favorable consumer class action decisions and location of plaintiffs' counsel.

Flavoring cases have been the predominant food and beverage consumer class cases in 2021 and into 2022, with vanilla flavoring most common in 2021. A single firm filed the majority of these cases, and in 2021, the firm lost at least 15 different vanilla cases in decisions rendered by 15 different judges. These cases exemplify a trend by the plaintiffs' bar to target certain types of flavors and/or ingredients. With the slew of recent vanilla dismissals, it will be interesting to see if plaintiffs continue this strategy in 2021 or change tactics. Chocolate, snack foods and flavored sparkling water top the list of more recent food and beverage consumer class actions.

Two other consumer class action trends are origin claims and "natural" claims. Both trends expand beyond the food and beverage markets into other consumer products, including personal care products. In 2021, challenges to these cases were not as successful: Multiple courts denied motions to dismiss and granted certification. Manufacturers still lack formal rule guidance from the FDA regarding the use of the term "natural." Toward the end of 2021, legislation was introduced to address the use of the term to advertise cosmetics.

"Green" claims, or what plaintiffs call "greenwashing," also continues to be a focus of the plaintiffs' bar and consumer class actions. In this area, we will be focused on the Federal Trade Commission's (FTC) Green Guides for use of environmental marketing claims. Those guides were last updated in 2012, and the FTC announced last summer that it would be reviewing the guides in 2022. As with other areas of regulatory focus, we expect corresponding private litigation.

One additional – and somewhat unusual – type of case that has seen an uptick is the type that is brought under the Consumer Protection Procedures Act in Washington, D.C. This act allows individuals and organizations to bring lawsuits as private attorneys general in lieu of a putative class action. Advocacy groups like Food & Water Watch, Organic Consumers Association and GMO Free USA/Toxic Free US lead in these types of filings. They are primarily targeting claims involving humanely raised meat, chicken or dairy; claims involving environmentally sustainable practices; and claims involving any of the terms "clean," "natural" and "pure." So far, the defense bar has raised successful standing defenses in some of these cases. We expect these cases will continue to increase in 2022.

Also in our crystal ball for 2022 is a continued focus on consumer class actions. We expect that the active FTC, under its new chairperson, Lina Khan, will have an impact on advertising and marketing consumer class actions. We also expect that there will be many more ingredient cases, supply chain origin cases and green cases.

Privacy

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Trends in privacy class actions fall into two categories: data breach class actions and privacy class actions.

In 2021, data breach class actions seemed to be filed in the aftermath of almost any data breach of significant size. A breach with more than a few thousand affected individuals is likely to draw a class action, particularly in certain sectors, such as healthcare. There has been significant

ransomware activity involving healthcare institutions over the past couple of years, particularly throughout the COVID-19 pandemic. Such ransomware attacks have disrupted the operations of those institutions and also generated litigation, with dozens of healthcare class actions filed over the past year.

Class actions involving the aftermath of payment card data breach incidents are still occurring, although that trend has slowed, probably due to new technology that is making it more difficult to access data.

Legal trends in data breach class actions include the following: 1) the courts have consistently narrowed potential classes based on risk and damages, or made certification subject to decertification at a later date; 2) the effect of *TransUnion* on questions of standing is not yet known, with some courts holding that *TransUnion* prevents standing for any damages claims arising from potential future injury but others interpreting the decision more narrowly; 3) courts also have been resistant to protecting privilege claims over communications with forensics vendors; and 4) cases are being filed following the passage of the California Consumer Privacy Act, but its effect on the quantity of litigation has not been as dramatic as some predicted.

Outside of data breaches, we are seeing a lot of creative privacy class actions arising out of various statutory schemes. While some of these statutes have been around for decades, they are being applied in new and creative ways. Many cases concern Internet tracking or customer data collection practices, particularly involving social media and Internet companies.

A particularly hot trend has been litigation under the Illinois Biometric Information Privacy Act (BIPA). Many of these lawsuits are brought against employers, generally for using fingerprinting technologies to clock employees in and out. In addition, a recent trend is BIPA claims against vendors performing identity confirmation-type services without direct customer interaction where direct consent is not possible.

The California Invasion of Privacy Act (CIPA), the California wiretapping law, continues to be a basis for class action litigation. For years, claims have been brought under this statute based on consumer calls that are being recorded without a notice that the call is being recorded. Recently, plaintiffs have attempted to bring claims under CIPA and similar state statutes based on technologies that record Internet browsing activities. These include "session replay" cases filed in Florida and California. While largely unsuccessful, these claims involve the use of technologies that track computer mouse movements and clicks, usually on retail sites. Although these are generally used for optimization, plaintiffs allege that they are a violation of wiretapping statutes.

One very recent trend involves customer/subscriber list litigation in which plaintiffs allege that the transfer of subscriber information to third parties is an invasion of privacy that violates protections against unauthorized use of name and likeness.

Insurance

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In the realm of automobile insurance, there are two strands of class actions based on automobile insurance policies that promise to pay the "actual cash value" of totaled vehicles.

The "tax, title, and fee" strand is based on policy language or regulations that allegedly tie the actual cash value of a total vehicle to the replacement cost of the vehicle. Plaintiffs in these cases assert that the cost to replace a vehicle includes certain items beyond the cost of the vehicle itself – such as taxes, title fees and dealer fees – and that insurers are therefore obligated to pay amounts for these fees.

The "total loss valuation" strand involves allegations that third-party vendors improperly calculated the "actual cash value" of the totaled automobile. The theories differ in these cases but are usually based on the language of a particular state's total loss statute or the methods that the vendors use to calculate actual cash value. In 2021, insurers saw success on the merits (Eighth Circuit) and at class certification (S.D. Fla.) in these cases. But 2022 is poised to be an important year, as there are class certification appeals pending in the Fifth, Ninth and Eleventh Circuits.

There have been mixed results in the tax, title and fee cases on both the merits and class certification. *Compare Angell v. Geico Advantage Ins. Co.*, 2021 WL 5585732 (S.D. Tex. Nov. 30, 2021) (granting class certification), *with Desai v. Geico Cas. Co.*, 2021 WL 5762999 (N.D. Ohio Dec. 6, 2021) (denying class certification). Standing remains an important issue, with courts continuing to assess the implications of *TransUnion* and whether every class member must be able to establish Article III standing in order to certify a class.

Similar issues surround insurers' predominance arguments, as insurers in these cases may be able to present evidence that some class members were paid or were otherwise not entitled to the disputed fees. Emphasizing that this evidence creates individualized liability questions (*see Desai*), not just individualized damages questions (*see Angell*) can make all the difference for class certification.

In the realm of property insurance, labor depreciation class actions continue to be litigated across the country. Plaintiffs dispute whether insurers are entitled to depreciate both material and labor when settling claims, and more state supreme courts have now addressed the liability issue on the merits. In May, the South Carolina Supreme Court ruled in favor of an insurer defendant on the issue, but in September, the Illinois Supreme Court ruled

in favor of an insured plaintiff. The Arizona Supreme Court also accepted a certified question on the issue, with a tight briefing schedule to be concluded by March 2022. With the diverging state court opinions, and more cases alleging multi-state classes, legal variation predominance arguments are likely to be a key issue at the class certification stage.

2021 also saw an explosion of COVID-19 insurance claims. These claims are usually filed under first-party commercial property insurance policies, claiming loss of business income due to COVID-19. There are a number of factual variations among these cases, but they typically turn on whether the COVID-19 business interruption was caused by "direct physical loss or damage."

A professor at the University of Pennsylvania Law School compiles data on these cases and reports that, as of mid-November 2021, there have been 2,088 COVID-19 coverage cases filed, about 22 percent of which were filed as class actions. Insurers have been successful in dismissing these cases, winning about 85 percent of motions to dismiss rulings in federal court and just under 70 percent in state court. Insurer victories also include merits victories in the Sixth, Eighth, Ninth and Eleventh Circuits. District courts in Ohio and South Carolina have also certified liability questions to their respective state supreme courts, and we expect to see more of that in 2022.

The other development in the COVID-19 insurance space is a new wave of "COVID-19 rate cases." Plaintiffs claim that because insured drivers were driving less during the pandemic, insurers should have lowered their premiums or given bigger refunds to drivers. There has been at least one recent victory for plaintiffs, with more cases like this likely to come in 2022.

Employment

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The California Labor Code Private Attorneys General Act (PAGA) allows aggrieved employees to sue on behalf of other aggrieved employees by stepping into the shoes of the state and collecting any civil penalties that the California labor commissioner otherwise could seek and collect. Such penalties are distributed 75 percent to the state and 25 percent to aggrieved employees.

The California Supreme Court's *Iskanian v. CLS Transportation* decision held that arbitration agreements cannot preclude representative action waivers under PAGA. Plaintiffs can bring representative actions under PAGA without certifying a class, needing only to show a somewhat cohesive group of similarly situated aggrieved employees. The *Iskanian* Court also went out of its way to make it clear that prohibition is not preempted by the Federal Arbitration Act, and the issue has made its way to cert petitions to the U.S. Supreme Court a number of times. To date, the Court has been unwilling to address the issue, but on Dec. 15, 2021, it granted certiorari in one such case, *Viking River Cruises, Inc. v. Moriana*, and oral argument is scheduled for March 30, 2022.

However, the question may be moot because the House-passed version of the Build Back Better bill includes an amendment to the National Labor Relations Act that would expressly prohibit class and collective action waivers for employment claims and impose civil penalties of $50,000 to $100,000 for violations.

The uptick in pay equity and gender discrimination litigation is likely to continue given the emphasis that state and federal lawmakers have placed on workplace equity. For example, one major entertainment company is presently defending a class action alleging "rampant gender pay discrimination and an unlawful policy of 'pay secrecy.'" And a tech company has recently settled a gender pay discrimination case for $3.8 million and is defending another class action with a certified class of almost 11,000 female employees.

The federal Paycheck Fairness Act would allow significantly lower barriers to filing equal pay lawsuits by making some material amendments to the equal pay provisions of the Fair Labor Standards Act. The Paycheck Fairness Act passed the House this year but has stalled in the Senate, so the extent to which the federal government picks up this baton remains to be seen. However, states have not been reluctant to address this issue. California, Colorado and Illinois, in particular, have robust statutes regarding equal pay.

Also, note that this issue is not limited to the United States. In March 2021, the European Union proposed legislation touching on this topic, so be alert for legislative developments on this issue across the globe.

COVID-19-related employment litigation includes lawsuits over moving workers to telework arrangements, laying off or furloughing workers, and halting business operations. Between summer 2020 and summer 2021, COVID-19-related lawsuits nearly doubled, with California, New Jersey, Florida and New York being the top jurisdictions for these claims. The cases typically involve claims alleging a disparate impact on protected groups, WARN Act violations, wage and hour violations and overtime pay for working from home, reimbursement for personal protective equipment expenses, failure to provide pandemic-related leave, and failure to protect workers. We expect to see workplace class actions related to the pandemic evolve as the pandemic response continues to progress.

In 2022, expect to see class actions filed over mandatory vaccination policies, remote work discrimination and long COVID-19 discrimination.

Appellate Decisions Impacting Class Actions

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Service Awards

The Eleventh Circuit has definitively held, in two opinions, that service or incentive awards to class representatives are prohibited as a matter of law. In *Johnson v. NPAS Sols.,* 975 F.3d 1244 (11th Cir. 2020), the court rejected a $6,000 incentive award to the class representative, describing such an award as "part salary and part bounty" and as serving to "promote litigation by providing a prize to be won." In *In re Equifax Inc. v. Customer Data Security Breach Lit*., 999 F.3d 1247 (11th Cir. 2021), the Eleventh Circuit affirmed, in its entirety, a $380.5 million settlement of cases consolidated in the Northern District of Georgia against Equifax regarding a 2017 data breach, with the exception of reversing the district court's decision approving incentive awards. The case was remanded solely for the limited purpose of vacating the incentive awards.

To date, no other circuit has found incentive awards improper in response to other challenges. Courts in other circuits that have considered *Johnson* have either expressly rejected it or declined to follow the Eleventh Circuit, with courts describing *Johnson* as a "novel reading of old Supreme Court decisions" and "contravening" the precedent in other circuits. However, the Southern District of New York, while authorizing incentive awards in the wake of *Johnson*, recognized that the "legal basis for such awards" has "been questioned over the years" and "[t]his issue is deserving of congressional attention."

Administrative Feasibility

There remains a circuit split over whether proving administrative feasibility is a prerequisite to class certification, with the Eleventh Circuit recently recognizing that "administrative feasibility is [o]ne of the most hotly contested issues in class action practice today."

The First, Third and Fourth Circuits say "yes" and require a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition. The Second, Sixth, Seventh, Eighth and Ninth Circuit and, most recently, the Eleventh Circuit take the opposite view, holding that ascertainability only requires defining classes clearly with "objective criteria." The Fifth and Tenth Circuits have not squarely addressed the issue.

In its recent decision, *Cherry v. Dometic Corp.,* 986 F.3d 1296 (11th Cir. 2021), the Eleventh Circuit has walked back from its earlier position in two unpublished opinions and held that administrative feasibility was not a requirement for class certification, stating that "Rule 23 provides no basis to require administrative feasibility" and, therefore, "[p]roof of administrative feasibility cannot be a precondition for certification." The Eleventh Circuit pointed out that a class is "clearly ascertainable" if its membership is "capable of being" determined, but "membership can be capable of determination without being capable of convenient determination." Nonetheless, the Eleventh Circuit noted that administrative feasibility "remains relevant as to whether a proposed class may proceed under Rule 23(b)(3)" as part of the manageability criterion" of Rule 23(b)(3)(D)."

With a clear circuit split, it will be interesting to see whether the U.S. Supreme Court addresses the issue.

Enforceability of Arbitration Provisions and Class Action Waivers in Consumer Arbitration Agreements

Courts are continuing to enforce arbitration clauses and class action waivers in consumer arbitration agreements. As a result, companies are increasingly trying to require arbitration of any dispute concerning online purchases (which exploded during the pandemic) by making an agreement to arbitrate and a class action waiver in online terms a condition of purchase.

For example, in *Hennessey v. Kohl's Corp.,* Case No. 4:19cv1866, – F. Supp. 3d – (E.D. Mo. Nov. 19, 2021), the defendant asserted that the plaintiff, by creating an online shopping and loyalty program account and accepting terms and conditions (available via hyperlink), voluntarily waived her right to pursue a class action and could not adequately represent any putative class. There, the terms and conditions contained a section titled "Class Action Waiver." The court found that the plaintiff had constructive knowledge of this waiver when she created her online account and that she received consideration in creating an online account by having access to express checkout and by being able to save her billing and shipping information and review past orders. The court held that the class action waiver was neither procedurally nor substantively unconscionable (recognizing that "take-it-or-leave-it agreements between businesses and consumers are used all the time in today's business world") and that mutuality of contract was present. The court held that the class action waiver could be enforced outside of an arbitration provision.

Other Notable Appellate Decisions

Other notable appellate decisions include:

Moser v. Benefytt, Inc., in which the Ninth Circuit held that the defendant had not waived its lack of personal jurisdiction challenge as to nationwide classes by not asserting the defense at the Rule 12 stage.

The defendant had sought dismissal of nationwide classes under the Supreme Court's holding in *Bristol-Myers Squibb Co. v. Superior Court of California,* 137 S. Ct. 1773 (2017), wherein

the Court held that a California state court did not have personal jurisdiction over nonresident plaintiffs. In its analysis, the Court recognized that Rules 12(h) and 12(g)(2), taken together, provide that a party waives any *available* defense in Rule 12(b)(2) by omitting the defense from a pleadings stage motion. However, the Ninth Circuit reasoned, a lack of personal jurisdiction defense was not an *available* defense over unnamed, nonresident putative class members who were not yet parties to the class. The Court stated, "To conclude otherwise would be to endorse the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation before the class is certified." The Court held that the defendant "could not have moved to dismiss on personal jurisdiction grounds the claims of putative class members who were not then before the court, nor was [Defendant] required to seek dismissal of hypothetical future plaintiffs."

Prantil v. Arkema Incorp., in which the Fifth Circuit joined with the Third, Seventh and Eleventh Circuits in applying the *Daubert* standard to expert opinions at the class certification stage.

The Fifth Circuit held that the *Daubert* standard for admissibility of expert evidence applies at the class certification stage when scientific evidence is relevant to the decision to certify the class. The Court definitively held that "the *Daubert* hurdle must be cleared when scientific evidence is relevant to the decision to certify."

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