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Claims in a Wide Range of Areas Fuel Class Action Litigation

It seems every time you pick up the newspaper, watch TV news, or visit your favorite online news outlet, you see another headline-making class action lawsuit, often involving a well-known company.

While class actions tend to flow at a fairly constant rate over the years, plaintiffs and defense lawyers in this complex practice area are seeing an uptick these days, particularly with claims in wage-and-hour, workplace discrimination and harassment, securities, antitrust, and privacy/data security matters.

Several recent Supreme Court rulings on class certification matters and lower court

actions on those holdings have kept class action attorneys scrambling to track the litigation topography and at times adjust their strategies. "It's been a really interesting time for class action law because there have been a number of decisions from the Supreme Court and a number of different interpretations in various districts in the realm of certifying classes on certain issues,"

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says William Warne, partner and chairman of Sacramento's Downey Brand.

Traditionally, certain jurisdictions attract more class action claims than others, and right now Sacramento and the Bay Area are bristling with activity, especially in employment law. "Northern California is probably the epicenter of employment class action suits involving wage-and-hour and EEO (Equal Employment Opportunity) claims," says Charles Thompson, partner and chair of the employment class action practice in the

San Francisco office of Kansas City-based Polsinelli. "We're seeing multiple filings every day in the California courts."

Thompson says plaintiffs' attorneys in the Golden State, as well as in other places, have grown increasingly sophisticated, and often set their sights on Silicon Valley employers that are appealing targets given their deep pockets and world-famous brands.

"We also have very sophisticated laws covering wage-and-hour and discrimination classifications," he says, adding that the firm has 12 class action attorneys firm-wide and plans to increase its hiring of experienced partners who can navigate the state's complex laws. "The large technology companies have such big brand names and draw a lot of media attention so they're very attractive to the plaintiffs' bar. And, the reporting on these cases tends to be skewed toward the plaintiffs' side."

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Threatening Deportation

Across the country in Greenbelt, Maryland, lawyers at Joseph Greenwald & Laake handle labor and employment and other class action claims on the opposite end of the spectrum, representing plaintiffs. Over the last year, they've seen a significant boost in what are essentially wage theft claims in the construction industry, with employers hiring workers of Hispanic descent and either allegedly underpaying them or simply not paying them at all—hanging the threat of deportation over their heads.

"My clients are mostly Hispanic and for a lot of them English is a second language," says Brian Markowitz, a Joseph Greenwald partner and labor lawyer, adding that these employees often feel vulnerable. "Many construction companies hire them do the work and then flat-out don't pay them. Given the current political climate, a lot of these employers think it's easy to leverage them.

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Practice Portrait

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They say, ‘If you sue me, I’ll have you deported.’ They make that threat whether the workers are here illegally or not. And unions are in decline so they’re not protecting people as much.”

Markowitz says the increase in these class action claims coincides with the rise of the current administration and its controversial rhetoric and actions. “The employers are committing wage theft and that started increasing ever since Trump ran for president,” he says. “This industry has always been bad, but it’s gotten worse, and the threats have gotten worse, and they’re very chilling. To me, it’s racist.”

Securities-Related Suits

The securities class action arena has also been very busy, with a significant rise in the number of filings in federal court, which corresponds with the increase in merger and acquisition activity. “It’s typical when a company announces that it’s going to be acquired that shareholders will sue, mostly because they feel they’re not getting enough disclosure about the transaction to enable them to vote [with sufficient information],” says Howard Suskin who co-chairs both the securities litigation and class actions groups at Chicago-based Jenner & Block. “Sometimes they’ll sue because they feel the price isn’t adequate.”

More and more securities-related class actions are filed in federal jurisdictions. This recent trend has emerged as Delaware—of course, a business-friendly state and a jurisdiction that’s home to a lot of litigation—has become much less receptive to those types of actions.

“So plaintiffs’ firms are migrating to federal court,” Suskin says. “In Delaware, the courts have said they will no longer allow these cases to settle on a class-wide basis for relatively modest disclosures. They don’t want absent class members to these settlements unless it’s really meaningful in terms of what’s being disclosed.”

Another category of claims that keep teams like Suskin’s busy is generated by corporate bad news. For example, when a pharmaceutical company announces that a clinical trial failed and/or the FDA denied approval on a product, stocks often drop dramatically, sometimes as much as 50 percent. “We call these ‘event-driven’ class actions,” Suskin says. “For publicly held companies almost always there will be shareholder lawsuits, claiming that the company knew about the bad news sooner or was overly optimistic in terms of the projections for a clinical test.”

But another trend in the securities class action space has caused a fall-off in particular types of claims in accounting fraud. Typically, when a company’s stock takes a big hit, plaintiffs will look for opportunities to file claims that the company failed to make sufficient disclosures and then, when the truth comes out, the stock drops. In the last year or so, there have been fewer of these claims. “The companies are getting better at internal controls on accounting so there aren’t as many suits,” Suskin says.

More on the Horizon

Class action litigation is also on the upswing in antitrust areas, with filings slamming high-tech firms on claims of labor collusion agreements. The San Francisco-based plaintiffs’ firm Joseph Saveri Law recently won a landscape-changing case for class members in a suit against Apple, Google, Intel, Adobe Systems, Pixar, Lucasfilm, and other technology companies for illegally agreeing not to recruit each other’s highly trained employees, in an effort to depress wages.

“We’re talking about engineers, who tend to be highly compensated so there’s a lot of money involved—the damages can really add up,” says Joe Saveri, adding that more of these cases are looming on the horizon. “In the wake of that case the DOJ has looked at these and concluded that these are serious violations of the antitrust laws. They discovered that there are a lot more agreements out there than anyone thought.”

Antitrust class actions are hot right now for another reason. “The antitrust space has been very busy and continues to be that way, driven in part by a DOJ amnesty program,” Saveri says. “It says that if you tell the Antitrust Division of DOJ, ‘We’re aware of violations at our company; we’ve been a participant’ then you get incentives like reduced criminal and/or civil liability.” As a consequence, Justice has identified a number of price-fixing cartels, he adds, triggering the filing of several class action cases.

But in some areas in the class action arena plaintiffs have run up against impediments involving arbitration agreements. Saveri explains: “For a lot of consumer products, you’re supposed to sign an arbitration agreement or class action waiver when you buy that product. Those have been upheld and lawyers who handle a lot of consumer cases have been limited.”

Another “headwind” plaintiffs face, Saveri says, concerns judicial hostility. “In cases where class members get coupons and it’s hard to find a lot of value but the lawyers get paid in cash—well, I think judges are resistant to this type litigation,” he says, adding that as a result there’s been a decline in these cases.

Privacy Claims Climb

Both defense and plaintiffs’ lawyers say privacy/data security class actions will continue to climb, and they are preparing for a lot of activity. “We think there will be an explosion of lawsuits for negligence involving data breaches,” Joseph Greenwald’s Markovitz says. “There are various state-law statutes that allow people to be what they call ‘private attorneys general’ where someone who has been hurt by the negligence of a bank, for instance, files suit. It’s an up-and-coming area. We are gearing up for that and intend to be on the forefront of it.”

Suskin agrees that privacy claims from data breaches will likely increase but that plaintiffs in an increasing number of jurisdictions must show true harm. “The problem is that many courts have been taking the position that just because your data was breached, unless you suffer actual damage, you don’t have standing,” he says. “The mere fact of a hack isn’t enough, and those cases aren’t surviving motions to dismiss.”

Several attorneys interviewed for this article say they intend to boost their class action ranks. In Sacramento, Warne says Downey Brand benefits from the experience that former federal law clerks bring to the practice and that he and his partners “love” to hire lawyers with this type of hands-on, inside-the-judiciary insight.

“The area of class action law, especially on the federal side, is extremely dynamic right now, and the ability to hire federal law clerks has been very beneficial to our practice on this front,” he says. “They’ve worked with judges, and they participated in decisions that have been coming out involving [class action] cases in the last few years.” ■

—Steven T. Taylor