






Current Trends and Strategies to Defend Class Action Lawsuits

Statistics

- In 2016, labor and employment class actions were the most common, making up 37.7% of matters and 38.9% of spending.
- Consumer fraud class actions, which were the most common type of class action in 2015, are now second, accounting for 19% of matters and 17.8% of spending.
- The remaining kinds of class actions are product liability, securities, intellectual property, and antitrust. Data privacy class actions make up less than 5% of matters and spending.

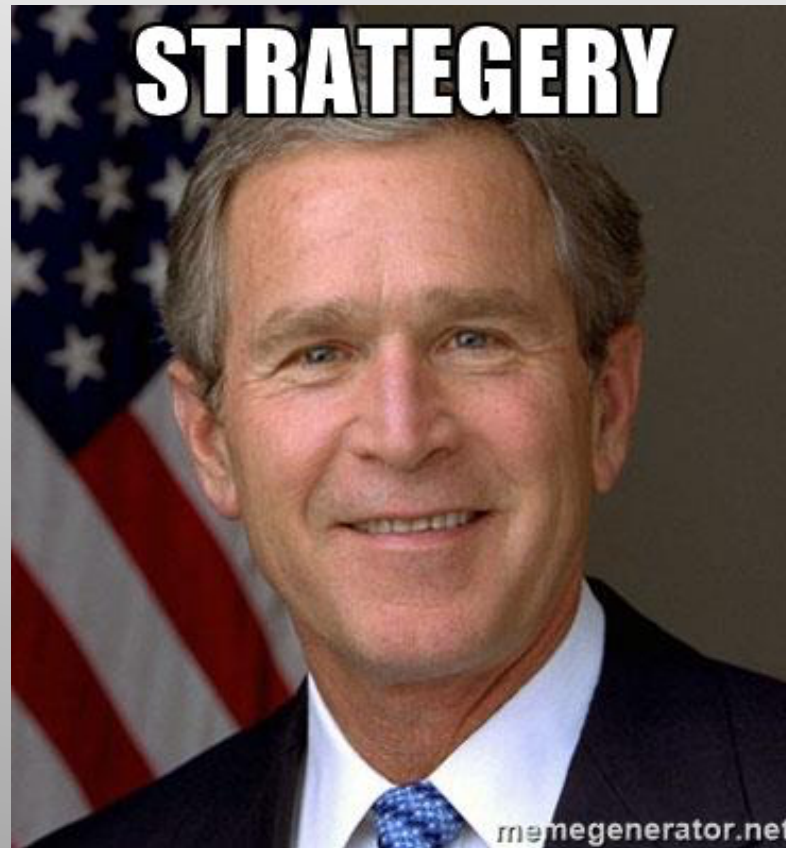
Class Actions and Annual Spending Breakdown by Type

PERCENT OF MATTERS AND SPENDING

 PRACTICE	 MATTERS	 SPENDING
LABOR & EMPLOYMENT	37.7%	38.9%
CONSUMER FRAUD	19.0%	17.8%
PRODUCT LIABILITY	9.9%	9.4%
SECURITIES	9.6%	10.7%
INTELLECTUAL PROPERTY	7.5%	5.9%
ANTITRUST	6.5%	7.9%
OTHER (INCLUDING CONTRACTS, DATA PRIVACY, INSURANCE)	9.8%	9.4%

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And now...



Federal Rule of Civil Procedure 23

Civ.R. 23(a) Prerequisites:

- (1) **Numerosity** – Plaintiff must provide proof that joinder is impracticable – cannot be based on speculation
- (2) **Commonality** – questions of law are common to class; also common *answers*.
See Dukes, supra.
- (3) **Typicality** – whether the named representatives’ claims have the same essential characteristics as the claims of the class at large
 - Methods of attack: factual differences between plaintiffs; plaintiffs lack of proof of similarities; plaintiffs harmed in different ways; legal defenses (such as statute of limitations) that might apply to rep but not others in the class
- (4) **Adequacy of Representation** – (a) the chosen class representative cannot have antagonistic or conflicting claims with other members of the class; and (b) the class representatives must be willing and able to “vigorously pursue the litigation on behalf of the class,” and the attorneys they have chosen to represent the class must be “qualified, experienced and able to conduct the litigation.”
 - Methods of attack: named plaintiff’s involvement and knowledge of matter; competency of counsel

Federal Rule of Civil Procedure 23

Civ.R. 23(b) Types of Class Actions

- Predominance - common questions predominate over any questions affecting only individual class members
 - Methods of Attack: Plaintiff rep. cannot demonstrate elements of claims for each class member; differing facts; cannot prove all class members were damaged
 - Example: A plaintiff's reliance on oral statements or misrepresentations outside of allegedly uniform written disclosures can preclude typicality and predominance. *See Jordan v. Paul Fin., LLC*, N.D.Cal. No. C 07-04496 SI, 2009 U.S. Dist. LEXIS 7592 (Jan. 27, 2009)
- Superiority - class action superior to other litigation devices to resolve dispute
 - Methods of Attack: Point out difficulties of managing a class action; show that each putative class member's claims are separate and distinct lawsuits resulting in inefficient mini-trials; fee-shifting statutes may undermine arguments in favor of superiority

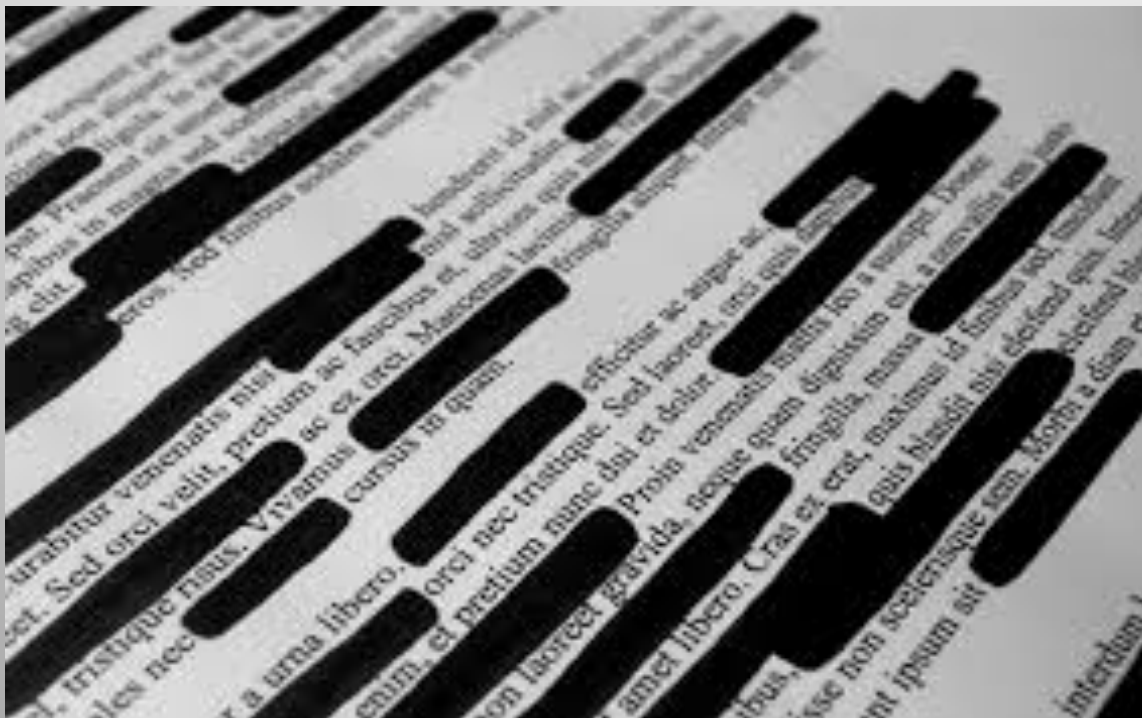
Motion Practice

- A defendant can file both of these motions at any time to determine whether class treatment is appropriate:
 - Motion for Judgment on the Pleadings under Rule 12(c)
 - Decided based on pleadings
 - Motion to Strike Class Allegations Rule 23(d)(1)(D)
 - Could introduce new factual matter
 - Advantages: At the outset, the defendant can frame the issues opposing class certification by filing opening brief. The defendant also gets last word when filing their Reply in Support of these Motions.
- Motion to Stay Class Discovery Pending Dispositive Motion



Miscellaneous Issues That May Arise

- The Potential Impact of Arbitration Clauses
 - When disputes must be sent to arbitration can prevent class certification or reduce class members.
 - *D.R. Horton* issues relating to enforceability of class action waivers in employment context
- Unclaimed Funds
 - If a settlement agreement doesn't address the handling of unclaimed funds, the court will have to make a determination on how to distribute them.
 - Example: *Fears v. Wilhelmina Model Agency, Inc.*, S.D.N.Y. No. 02-CV-4911 (LAP), 2014 U.S. Dist. LEXIS 132205 (Aug. 11, 2014) (distributing \$6 million in unclaimed funds from a nearly \$22 million settlement to seven charities that focus on services utilized by women and the underinsured).
- Reversionary Clause
 - Allows the defendant to recoup any amount not claimed during a claims process.
 - Note: The Ninth Circuit generally disapproves of reversionary clauses. *See Glass v. UBS Financial Services, Inc.* 331 Fed.Appx. 452, 456 (9th Cir. 2009) (holding that reversionary settlements are generally “problematic”).
- The Impact of Rule 68 Offers of Judgment



Discovery

- To redact identifying information of potential class members or not?

Recent Case Law Developments

Federal Statute Class Action Claims

Fair Debt Collection Practices Act ("FDCPA")

- Purpose: "[T]o eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses. 15 U.S.C. 802(e).
- If successful, a plaintiff may be awarded costs and attorney's fees. 15 U.S.C. 813(B)(3).
- Adequacy issues: *Dickens v. GC Servs.*, M.D.Fla. No. 8:16-cv-803-T-30TGW, 2016 U.S. Dist. LEXIS 156916, at *19 (Nov. 14, 2016) (holding that the adequacy requirement was not met because the named plaintiff only sought statutory damages, and "certifying his proposed class would preclude class members from recovering actual damages if they suffered them, which the FDCPA otherwise allows").



Recent Case Law Developments

Federal Statute Class Action Claims



Fair Credit Reporting Act (“FCRA”)

- Purpose: To provide the accuracy and fairness in credit reporting and to provide reasonable procedures to do so. See 15 U.S.C. 1681
- If successful on claim for willful or negligent noncompliance, plaintiff may be awarded costs and attorney’s fees. 15 U.S.C. 1681n(a)(3).
- Damages of up to \$1,000 per violation of timing and disclosure requirements when conducting background or credit checks
- In *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S.Ct. 1540 (2016), the SCOTUS held that a class action plaintiff does not have Art. III standing to sue in federal court under the FCRA and other federal statutes absent a sufficient allegation of the existence of a concrete injury.

Recent Case Law Developments

Federal Statute Class Action Claims

Real Estate Settlement Procedures Act (“RESPA”)

- Purpose: to provide more effective advance disclosure to homebuyers and sellers of settlement costs; eliminate kickbacks or referral fees; reduce amount required in escrow to ensure payment of real estate taxes and insurance; to modernize local recordkeeping of land title information. 12 U.S.C.S. 2601.
- Penalties for violations include attorney’s fees and treble damages
- *Toldy v. Fifth Third Mortg. Co.*, N.D. Ohio No. 1:09 CV 377, 2011 U.S. Dist. LEXIS 113274 (Sep. 30, 2011)
 - The presence of the fee-shifting and treble damages provisions contained in RESPA have compelled a number of courts to preclude a finding of superiority under Rule 23(b)(3).
 - “[W]hether a putative class member's loan garners RESPA coverage cannot be known short of a case by case analysis” thus precluding predominance in this matter. *Id.* at *9.



Recent Case Law Developments

Federal Statute Class Action Claims

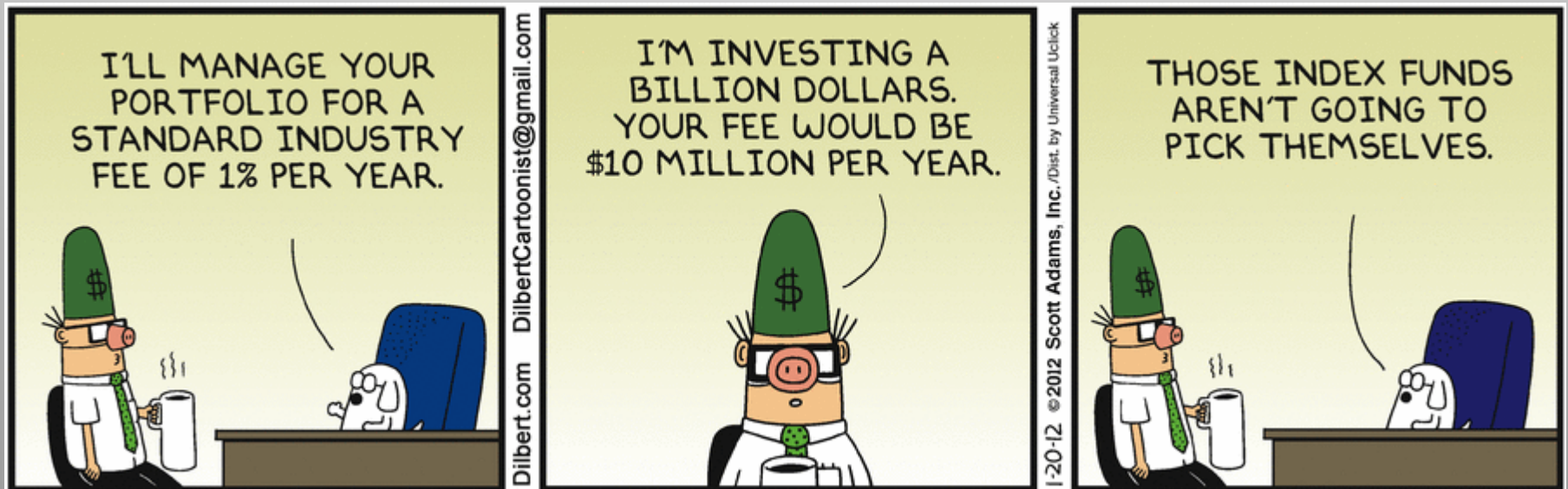
Private Securities Litigation Reform Act (“PSLR”)

- Purpose: Designed to limit frivolous securities laws
- Large increase in federal PSLR filings in 2016 (43% increase since 2015)
- Damages Limitations:
 - Total attorneys’ fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.
 - Damages based on “mean trading price” of the security
 - *In re Kosmos Energy Ltd. Sec. Litig.*, 299 F.R.D. 133 (N.D.Tex.2014)
 - Denying class certification because the proposed class representative was not adequate to represent the class interests as demonstrated by her reviewing only documents provided to her by counsel, her unfamiliarity with the registration statement that formed the basis of the claims, and her failure to recognize the name of certain defendants.
 - Certification was also denied because plaintiff failed to establish that common issues predominated over individual issues. Individual investor’s knowledge inquiries were required due to the varied amounts and times that information regarding the company’s difficulties became available to the investors.

Recent Case Law Developments

Federal Statute Class Action Claims

- Department of Labor's Fiduciary Rule - Now Delayed
 - Contains a provision that will open the door for class-action lawsuits against investment firms selling commission-based products in retirement accounts under the best interest contract exemption.



Recent Case Law Developments

Employment Law Class Action Claims

Wage & Hour Claims Under The Fair Labor Standards Act (“FLSA”)

- Opt In v. Opt Out
- *Demauro v. Limo, Inc.*, M.D.Fla. No. 8:10-cv-413-T-33AEP, 2011 U.S. Dist. LEXIS 1229 (Jan. 3, 2011).
 - The court denied both local and national class certification because of the individualized analysis needed to determine whether each driver was an independent contractor or employee for FLSA purposes.
- *Wright v. Lehigh Valley Hosp.*, E.D.Pa. No. 10-431, 2010 U.S. Dist. LEXIS 86915 (Aug. 24, 2010).
 - The court denied the plaintiff's FLSA class certification motion because she had failed to show that putative class members were similarly situated. The plaintiff failed to name a single nurse willing to opt in to the proposed class and made unsupported assertions that other nurses were subjected to the same conditions, thus failing to meet her minimal burden.



Recent Case Law Developments

Employment Law Class Action Claims

Wage & Hour Claims Under The Fair Labor Standards Act (“FLSA”), Continued...

- *Maxcimo v. Chipotle Mexican Grill, Inc.*, No. 12-8333 (S.D.N.Y. March 29, 2017).
 - Class decertified since not similarly situated. Apprentice/Mangers own testimony varied as to whether they performed managerial tests to be considered exempt.
- *Chipotle Mexican Grill, Inc.*, No. 17-1028 (10th Cir. March 27, 2017).
 - Writ of mandamus denied to decertify 10,000 member collective class action. Court compared ad hoc approach, Rule 23 approach and the spurious approach in deciding whether the class should have been certified.
- *Hall v. Guardsmark*, No. 11-213 (W.D.Pa. Aug. 7, 2012).
 - Class certification denied to potential class of security guards for allegedly working pre and post shift without pay.

Recent Case Law Developments

Employment Law Class Action Claims

Discrimination Claims

- *Spencer v. Comcast Corp.*, E.D.Pa. No. 16-2589, 2017 U.S. Dist. LEXIS 22790 (Feb. 17, 2017).
 - The plaintiff alleged he was discriminated against based on his race when he was fired for hanging up on a customer. The court denied class certification due to the plaintiff's failure to include the names of any other employees who were similarly discriminated against at the Comcast call center.
- *Rhodes v. Cracker Barrel Old Country Store*, N.D.Ga. No. 4:99-CV-217-HLM, 2002 U.S. Dist. LEXIS 25962 (Dec. 31, 2002).
 - Age discrimination class action lawsuit was denied class certification based on the plaintiffs' failure to meet the necessary commonality and typicality requirements. The judge reasoned that the employees did not appear to possess the same interest or to have suffered the same injuries as the class members and their claims lacked the essential elements of the claims of the class.

Thank you for your kind attention.

Questions/Comments are welcome