

Class Action Lawsuit Issues and Trends

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What is a “Class Action”?

- One or a few plaintiffs pursue claims on behalf of a class of similarly situated individuals who are not directly part of the case
- Trial by proxy
- Alternative to similar claims separately filed by many individuals



Why should you care about class actions?

- Potentially large aggregated exposure
- Motivated Plaintiffs' attorneys
- Significant distraction
- Costly Defense
- Potentially Bad Publicity



Financial Institutions Targeted by Class Action Attorneys

- Processes/procedures applied equally to large segment of customers
- Fees charged
- Deep Pockets!



The Goal for Plaintiffs (and their Attorneys)

- Multi-million dollar settlements
- Overdraft fees
- Overdraft “high-to-low” charges
- Overdraft “opt-in” disclosures
- Extended/sustained overdraft fees



How Does a Lawsuit Become a Class Action?

- Numerosity
- Common questions of law or fact
- The named plaintiff is typical of the class
- The named plaintiff can adequately protect the class
- A class action is a superior way to proceed
- Common questions predominate over individual issues



How Does a Lawsuit Become a Class Action?

- Plaintiff must get court approval for class action
- The “ball game” oftentimes is the motion for class certification
 - Class certification = big settlement
 - No Class certification = game over

APPROVAL



How Does a Lawsuit Become a Class Action (or not)?

- Defense focus:
 - Merits of plaintiff's particular claim
 - Individualized issues – why is plaintiff's claim different from others?
 - Show difficulty of class wide proofs
 - Show how a class trial would be unworkable



The Best Way to Handle a Class Action

- The Best Class Action is one that is never filed.
- Arbitration advantages:
 - Private vs. public
 - Generally more limited discovery
 - Individual claims vs. class actions – huge benefit for “low/no damages” type claims
- Supreme Court generally has upheld class action waivers in arbitration agreements



2017 Headline: “Congress Restores Protections from Class Claims”

- July 2017: CFPB enacts ban on class action waivers in consumer-facing arbitration agreements.
- Rationale:
 - Individuals less likely to sue
 - Lower Awards:
 - Class Claims: Over \$1 billion paid to 34 million consumers
 - Individual Arbs: 1,000 cases, total \$360,000 in awards
 - No change in business practices resulting from arbitrations
- Industry fought back
 - Noted most money goes to lawyers, not customers
 - Significant burden on judicial system

CFPB Rule Overturned



- Congress: CFPB Rule “anti-business” and not in public interest
- November 1, 2017: CFPB Rule Overturned, effective immediately
- Restored ability of financial institutions to protect themselves from costly and damaging class action claims
- “Back to the Future” ... The old rules apply again, but that doesn’t mean you are automatically protected

Crafting an Enforceable Arbitration Clause

- Make sure all applicable agreements contain an arbitration clause!
- Make sure arbitration clause is prominently featured and uses plain language.
- Make sure the clause complies with recent Supreme Court precedent:
 - No excessive administrative fees
 - Include “opt out” provision
 - Make sure agreement covers all essential terms



Beyond the Arbitration Clause: How to Defend Class Action Claims

- Don't put your head in the sand — develop comprehensive game plan for dealing with class claims
- Do so *before* you are served with an actual complaint
- Internal risk assessment:
 - Evaluate applicable agreement or transaction
 - How many customers involved
 - Identify key internal personnel
 - Implement appropriate document hold
 - Involve counsel sooner rather than later



Beyond the Arbitration Clause: How to Defend Class Action Claims

- Consider the forum
 - Advantages and disadvantages of different available judicial paths
 - Consider removal/timing
- Analyze potential bases to dismiss or limit the claim
 - Review class certification issues and develop approach to deny certification
 - Evaluate bases for early motion to dismiss some or all claims
 - Consider settlement discussion AFTER you are in position to come from a position of strength
- Consider messaging strategy
 - Internal message
 - Consider retaining outside PR professionals



Key Takeaways

- An ounce of prevention is worth a pound of cure ...
 - Have counsel evaluate agreements and business methods that have potential to generate class claims (e.g. documents and policies used routinely and repeatedly with broad group of customers)
 - Make sure important relationships are governed by valid and enforceable arbitration agreements with class action waivers
 - Have a plan in place for reacting quickly to any class action claim that may be filed — don't wait until there is a fire before you have a fire drill!

Questions?

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Thank you!

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