

Association of Corporate Counsel, National Capital Region

# Emerging Trends in Class Actions

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**Caroline L. Wolverton**

Senior Counsel  
Akin

**Julie A. Busta**

Counsel  
Akin

**Julie Ortmeier**

Vice President, General  
Counsel & Secretary  
Carfax





## We'll discuss:

- Data Privacy Class Actions
- Practical Considerations in defending a class action
- Hidden Fee Cases
- Mass Arbitration

# Data Privacy Class Actions - Types

**Data  
Breach**

**Ransomware  
Attack**

**Wiretapping  
Liability**

**Biometric  
Privacy**

# Data Breach Class Actions

## What is a data breach?

- Information exfiltrated without authorization
- E.g., customer credit card information, SSNs, medical information

## Data breach class actions increasing each year

- 2021: 476
- 2022: 732
- 2023: 2,040

## Businesses most affected:

- Healthcare
- Support services (consulting, billing, personnel management)
- Technology
- Financial services



# Data Breach Class Actions - Examples

## Equifax, 2017

- Affected appx 147 million, largest data breach involving personal and financial information to date
- Settled for appx \$700 million

## T-Mobile, 2021

- Affected appx 76 million customers
- Settled for appx \$350 million

## Lehigh Valley Health Network, September 2024

- Appx 135,000 patients affected, 600 nude images posted online
- \$65 million settlement

## 23andMe, September 2024

- Appx 6.4 million customers affected
- \$30 million settlement



# Data Breach Class Actions, cont.

## Theories of liability

- State consumer protection statutes, privacy statutes
- Negligence
- Breach of contract
- Federal statutes, e.g., FTC Act, Gramm-Leach Bliley Act

## Plaintiffs' standing is frequently an issue

- Risk of future harm alone not enough for damages.  
*TransUnion v. Ramirez* (2021)
  - *Perkins v. CommonSpirit Health* (N.D. Ill. Oct. 5, 2023) (putative class action dismissed where alleged access of non-sensitive information did not present imminent risk of loss)
  - Injunctive relief (e.g., enhanced security measures) is available

## Proactive measures: Data Security, Insurance



# Other Data Privacy Class Actions

## Ransomware Attacks

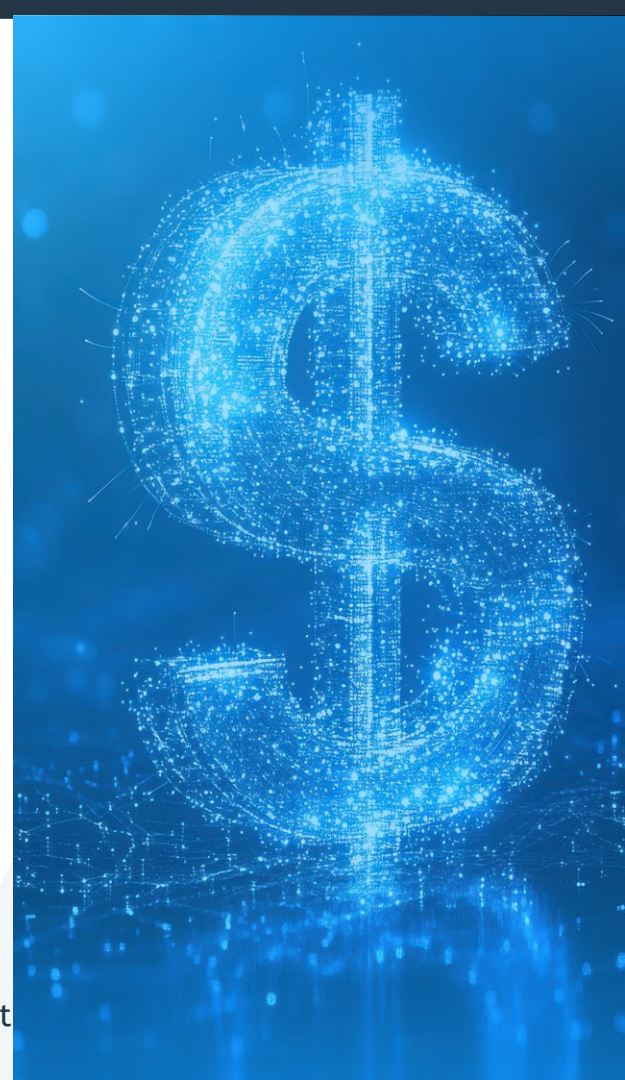
- Theft of sensitive data (customer, employee) and demand for payment
  - Colonial Pipeline (2021) - class actions claim negligence caused higher prices
  - CDK ransomware attack fallout

## Biometric Privacy

- Illinois Biometric Information Privacy Act (BIPA) (also laws in Texas, Washington)
  - *Cothron v. White Castle* (IL 2023) (fingerprint scans without consent; BIPA claims accrue each time data is unlawfully disclosed)
- Informed consent is key
- Relatedly, genetic Information protections (Illinois, Montana, Washington state)

## Online Tracking

- Pixels, recording interactions online
  - *Jackson v. Fandom* (N.D. Cal. 2023) (sale of video viewing history from pixels)
  - *Javier v. Assurance IQ, LLC* (9<sup>th</sup> Cir. 2022) (session replay tools)
- Recording chatbot interactions
  - Class action against Home Depot, Google over use of Google's Cloud Contact Center AI
- Claims rely on older laws: wiretap and privacy acts, Video Privacy Protection Act



# Hidden Fees

The new trend in consumer class actions is hidden fee cases.

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## 3 Bills Aim To Protect Consumers From Junk Fees On Tickets, Other Goods And Services

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BRIEFING ROOM STATEMENTS AND RELEASES



# Hidden Fees - Federal Activity

Issue in the spotlight to due to federal activity on the issue

Biden-Harris Administration  
Announces Broad New  
Actions to Protect Consumers  
From Billions in Junk Fees

A Junk Fee Prevention Act introduced in Congress in April 2023

Among many initiatives, there is a proposed FTC rule eliminating hidden fees across the economy, including event tickets, hotels and lodging, apartment rentals, car rentals, and more. The rulemaking process is still underway

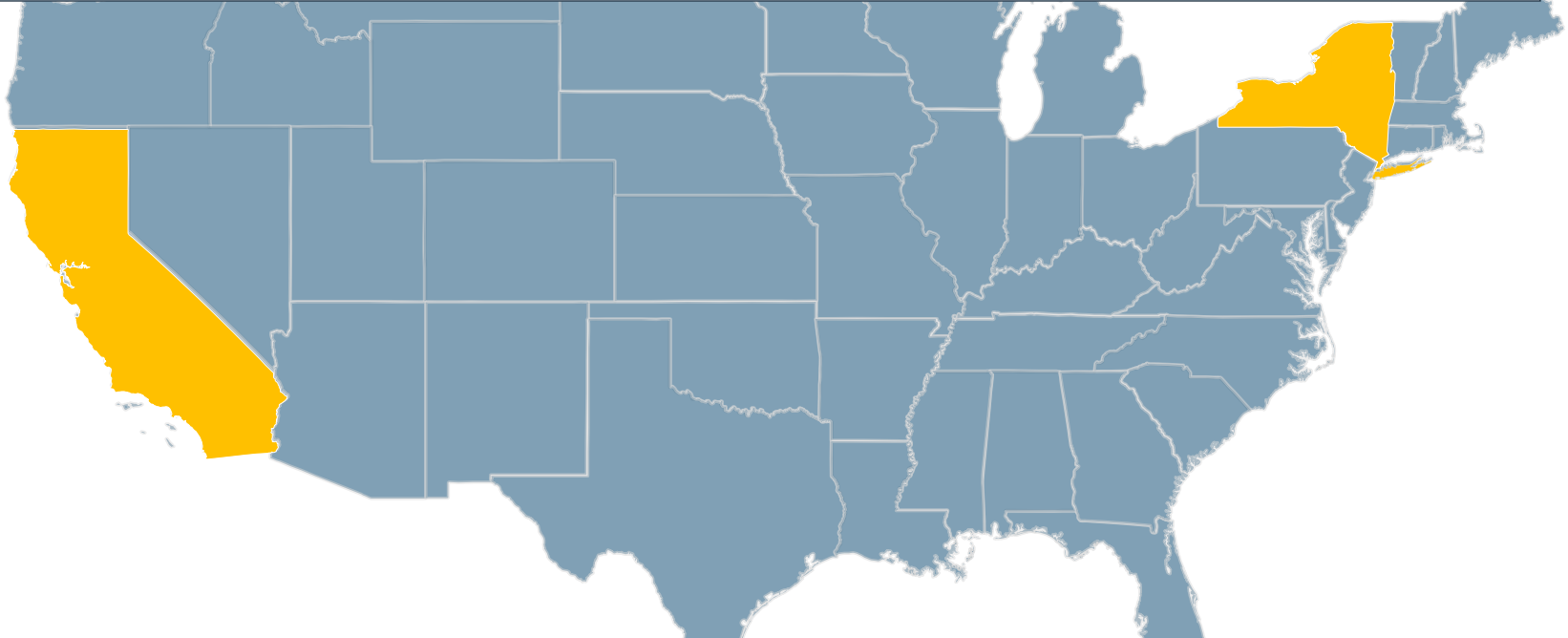
FTC Proposes Rule to Ban Junk Fees

Proposed rule would prohibit hidden and falsely advertised fees

# Hidden Fees - State Level

A patchwork of state laws are cropping up. Several states have enacted legislation already and others have bills in the legislative process.

**We will focus on New York and California**



# Hidden Fees - New York

## New York's Arts and Cultural Affairs Law Section 25.07(4)

- In August 2022, sellers and resellers are required to clearly disclose the total cost, including all ancillary fees, of a ticket for purchase in a “clear and conspicuous manner.”
- This total cost must be provided in the ticket listing before the purchase is made and must not be false or misleading.
- These restrictions apply to places of entertainment: theaters, stadiums, arenas, racetracks, museums, and amusement parks. They also apply to any licensee or other reseller or third-party platform that facilitates ticket resales.
- Since December 2023, over 25 lawsuits have been filed in New York federal and state courts against museums, movie theaters, and other entertainment venues for allegedly charging service fees on admission tickets without proper disclosure to customers. These lawsuits have targeted a diverse range of defendants, including Regal Cinemas, the Museum of Ice Cream, Fandango Media, and Legoland.



# Hidden Fees - California

## California Senate Bill 478

- Went into effect on July 1, 2024.
- Essentially a price transparency statute, this bill prohibits the advertisement, display, or offering of a price for a good or service that excludes mandatory fees or charges, except for government-imposed taxes or shipping fees.
- It applies to the sale of goods and services for a consumer's personal use but excludes those for commercial purposes, such as rental car companies, automobile dealerships, property managers, and food delivery companies.

## California Senate Bill 1524

- This bill, which goes into effect July 1, 2025, establishes exemptions and requirements for restaurants, bars, grocery stores, and other food service businesses subject to the new hidden fee law.
- This bill mandates that any disclosure, advertisement, or notice displaying the price of food or beverage items must include text that is “clear and conspicuous” in explaining its purpose. Essentially, this bill permits restaurant surcharges to remain legal, provided these additional fees are presented clearly.
- It clarifies that food delivery platforms are not covered by this exemption and must adhere to the all-in pricing requirements of SB 478.

# Hidden Fees - Litigation

While both statutes are relatively new, there are some key reminders to be ready for those cases:

- Take a look at your pricing practices and make sure they comply with these new laws, if you do business in those states
- Take a look at your arbitration agreement and refresh the class action waiver provisions and other relevant sections.
- Also take a look at your practices for binding your customers to the arbitration agreement (and notifying them of changes) and make sure you are using the strongest methods to beat threshold challenges.
  - Use a clickwrap agreement
  - Display the “I agree...” language prominently and conspicuously

# Mass Arbitration

Since *Concepcion*, companies had years of success of compelling individual arbitration to defeat purported class actions.

Plaintiffs lawyers responded by trying a new tack of bringing mass arbitrations, soliciting hundreds to thousands of claims (usually through social media)

# Mass Arbitration

Mass arbitrations are a serious headache for companies because those costs of the arbitration filing fees can balloon into the millions quickly—in one case \$9.5 million dollars in arbitration fees.

The massive upfront fees act as leverage for the plaintiffs' attorneys to extract huge settlements for claims that are weak on the merits.

Additionally, thousands of claims are now subject to the opaque and varied rules of the arbitration body with limited appeal options.

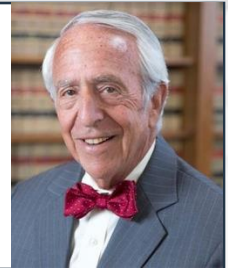
# Mass Arbitration

The federal courts have shown no inclination to help companies from these mass arbitrations, particularly after the companies have tried to use arbitration to avoid the federal courts for years



“You’re going to pay that money,” U.S. District Judge William Alsop said in court. “You don’t want to pay millions of dollars, but that’s what you bargained to do and you’re going to do it.”

Judge Breyer said on enforcing an arbitration clause was “the petard.” And now, he said, quoting Hamlet, the company was being “hoisted by (its) own petard.”





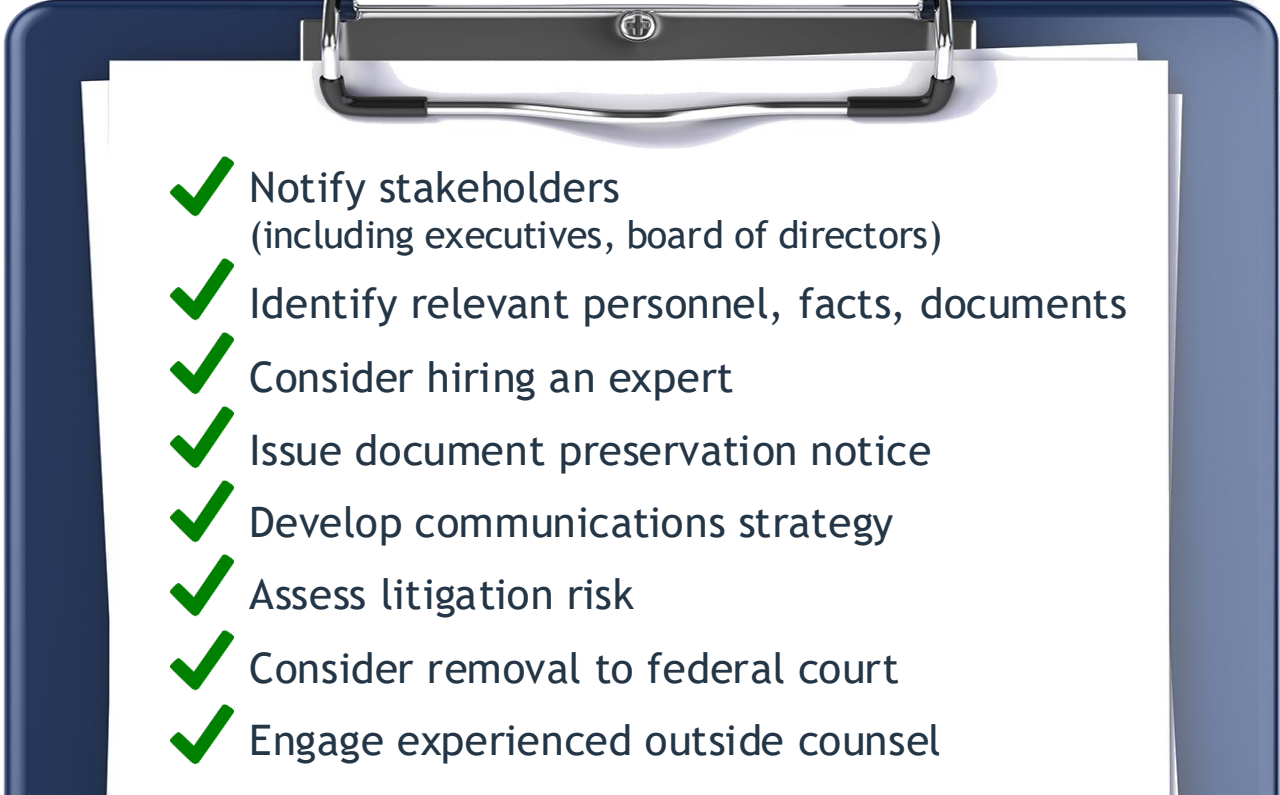
# Mass Arbitration

Some potential methods to address the risk of mass arbitration are:

- Pre-dispute resolution provision in arbitration agreement, make bilateral on both parties
- Request individualized proof of arbitration agreement
- Revise class action waiver to include mass actions
- Adding mass arbitration procedures to the arbitration agreement
- Exploring arbitration providers and their mass arbitration procedures
- Amazon chose to drop its binding arbitration for consumer disputes

# Class Action To Do List

If your company is served with a class action complaint:

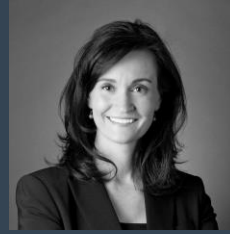
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- ✓ Notify stakeholders  
(including executives, board of directors)
  - ✓ Identify relevant personnel, facts, documents
  - ✓ Consider hiring an expert
  - ✓ Issue document preservation notice
  - ✓ Develop communications strategy
  - ✓ Assess litigation risk
  - ✓ Consider removal to federal court
  - ✓ Engage experienced outside counsel



Caroline L. Wolverton



Julie A. Busta



Julie Ortmeier

Have Any  
**Questions**

