Hot Topics And Developing Issues In Class Action Litigation

What to expect in 2018

Brian L. Moffet | ACC Baltimore Lunch | April 25, 2018

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CLASS ACTION STATISTICS

Class action filings and class action spending are on the rise.

- On average, companies managed 5.9 class actions in 2016 compared to 4.4 class actions in 2013.

- Companies surveyed reported spending a combined $2.17 billion on managing class actions in 2016 compared to spending $2.05 billion in 2013

- Labor and employment class actions have become the most common type of class action with consumer fraud and product liability class actions following behind.

CLASS ACTION TRENDS

Class action litigation is a rapidly developing area of the law. Here are the top four trends to keep an eye on in 2018.

- Standing to Pursue Statutory Claims
- Offers of Judgment
- Ascertainability of Identity of Class Members
- Fairness in Class Action Litigation Act

CLASS STANDING ISSUES

The centerpiece of class action standing is the Supreme Court's decision in *Spokeo v. Robins.*

- A technical violation of a statute without alleging a "concrete" harm is insufficient to establish standing to sue in federal court.

- Decisions of the lower federal courts have been mixed with highly variable results.

- A double-edged sword.

- Important implications in data privacy class actions among other statutory claims

OFFERS OF JUDGMENTS

In *Campbell-Ewald Co. v. Gomez,* the Supreme Court held that an unaccepted offer of judgment for the relief sought does not moot a named plaintiff's claim. *BUT. . .*

- The door was left open on whether a named plaintiff's individual claim may be mooted by actually tendering the relief sought (as opposed to merely offering).

- Courts are split but the trend appears to favor denying defendants' attempts to use an offer of judgment to compel a finding of mootness.

ASCERTAINABILITY OF CLASS MEMBERS

Ascertainability refers to the requirement that a class definition provide objective criteria for determining whether a particular individual is a member of the proposed class.

- Disagreement as to meaning of "ascertainable"
  ‣ Administratively feasible to identify class members   OR
  ‣ Identification of class member by reference to objective criteria

- Ascertainability is critical in consumer data breach class actions.

FAIRNESS IN CLASS ACTION LITIGATION ACT

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- Purposes of act are threefold
  - Assure fair and prompt recoveries for class members and multidistrict litigation plaintiffs with legitimate claims
  - Diminish abuses in class action and mass tort litigation that are undermining the legal system; and
  - Restore the intent of the framers of the Constitution by ensuring federal court consideration of interstate controversies of national importance consistent with diversity jurisdiction principles

- Passed the House of Representatives on March 9, 2017 by a vote of 220-201

- Bill currently in Senate with the Committee on the Judiciary

FAIRNESS IN CLASS ACTION LITIGATION ACT - HIGHLIGHTS

- **Class Injury**: "Same Type and Scope of Injury" requirement

- **Conflicts**: Disclosure of any relationship between class counsel and class representatives

- **Administrative Feasibility:** identity of putative class members be objectively ascertainable

- **Attorney's Fee Awards**: delays and limits payment of attorney's fees

- **Case Management**: stay of discovery

- **Appeals**: mandatory appellate review

Firm Overview

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