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& STRAWN
LLP



California Class Actions

Presented by:

AMANDA GROVES, GAYLE JENKINS, MONIQUE NGO-BONNICI AND SHAWN OBI

Presenters



AMANDA GROVES

CO-CHAIR, COMPLEX COMM. LITIGATION
PRACTICE

Charlotte and Los Angeles
+1 (704) 350-7755 +1 (213) 615-1851
agroves@winston.com



GAYLE JENKINS

PARTNER, CO-CHAIR OF WINSTON'S
CLASS ACTION PRACTICE

Los Angeles
+1 (213) 615-1851
gjenkins@winston.com



MONIQUE NGO-BONNICI

CHAIR OF SILICON VALLEY AND CHAIR OF
LOS ANGELES LABOR & EMPLOYMENT
PRACTICE

Los Angeles and Silicon Valley
+1 (213) 615-1808 +1 (650) 858-6495
mbonnici@winston.com



SHAWN OBI

SENIOR ASSOCIATE, COMPLEX
COMMERCIAL LITIGATION

Los Angeles
+1 (213) 615-1763
sobi@winston.com

Today's Agenda

- California's Privacy Class Actions: Ready, Set, Litigation
- An Expansive View of Jurisdiction in California: Where is Home?
- Paying Plaintiffs and their Lawyers: Who's Got Their Hand in the Cookie Jar?
- California Covid-19 Employment Litigation Trends
- Minimizing Employment Risks and Avoiding California Class and Representative Action Labor and Employment Landmines
- COVID-19 Class Actions: Leading the Charge



★ California's Privacy Class Actions: Ready, Set, Litigation

California's Consumer Privacy Act

- Private Right of Action
 - Express provision for data breach
- Class Actions
 - UCL “unlawful” prong
 - UCL “unfair” prong
 - Restitution & Injunctive Relief only

UCL CCPA Class Actions: Early Wave

- *Barnes v. Hanna Andersson and Salesforce.com Inc.* (N.D. Cal)
 - Allowed hackers to steal purchase information between Sept. and Nov. 2019
 - Failed to prevent/detect breach & faulty notice
 - Retroactive?
- *Burke v. Clearview AI Inc.* (S.D. Cal.)
 - Violation of collection provisions
 - Facial recognition software matching faces to other personally identifiable information

Cullen v. Zoom Communications, Inc. (N.D. Cal)

- UCL, CLRA and CCPA: collecting/disclosing personal info to third parties (e.g. Facebook)
- Lack of informed consent & reasonable security procedures
- New version of app → no longer sharing PII
- Prior versions of app still did
- Previously collected info not deleted?
- Seeks statutory damages → \$100 and \$750 per violation

In re Facebook Internet Tracking Litig. (9th Cir.)

- A Privacy Violation Without Damages Is a Concrete Injury
 - Statutory procedural violation
 - Privacy violations = historical, concrete interest
 - Common law claims
 - No economic loss ok
 - Right to disgorgement of profits from unjust enrichment
- Reasonable expectation of privacy
 - Compliance with CCPA as a defense?



★ An Expansive View of Jurisdiction in California: Where is Home?

Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773 (2017)

- No *general* jurisdiction if defendant is not at home in forum state
- *Specific* jurisdiction – for claims that “arise out of or relate to the defendant’s contacts with the forum”
- But open questions, of course

Can a federal court, after *Bristol-Myers Squibb Co. v. Superior Court of California*, still exercise specific jurisdiction over a nationwide class action?

- Trial courts have debated the question for nearly three years
- In March, 2020, two federal circuits became the first appellate courts to decide
 - *Molock v. Whole Foods Market Groups, Inc.*, No. 18-7162 (D.C. Cir. Mar. 10, 2020)
 - *Mussat v. IQVIA, Inc.*, No. 19-1204 (7th Cir. Mar. 11, 2020)

California's Approach

- Guess which of three possibilities taken by lower courts in Ninth Circuit
 - BMS does not apply outside the mass tort context
 - BMS does apply to national class actions
 - Defer issue until certification
- *Carpenter v. PetSmart, Inc.*, 2020 WL 996947, at *1 (S.D. Cal. Mar. 2, 2020)

Is it worth bringing an argument under BMS?

- Four-fifths of courts have found that *Bristol-Myers Squibb* does not bar the claims
- Where no personal jurisdiction has been found, it is usually only as to the named putative class representatives who are from out-of-state



★ Paying Plaintiffs and their Lawyers: Who's Got Their Hand in the Cookie Jar?

Who has their hand in the cookie jar?

- *Harvey v. Morgan Stanley Smith Barney LLC*, 3:18-cv-02835 (ND Cal.)
 - Attorneys who inked settlement ordered to share fees with lawyers for objectors
 - Standard: either increase the fund *or* otherwise substantially benefit it
 - Proposed Intervenorors were entitled to a portion of the fees for the benefits they provided to the settlement.

Catalyst Attorneys' Fees

- California Code of Civil Procedure § 1021.5 allows fees to a “successful party” “in any action which has resulted in the enforcement of an important right affecting the public interest”

Catalyst Attorneys' Fees

- Plaintiff is a “successful party” under this pragmatic approach if:
 - (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought
 - (2) the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense
 - (3) the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit

Catalyst Attorneys' Fees

- “Substantial causal factor”
 - I.e., caused the defendant to act sooner than it otherwise would have
- Two limitations on the catalyst theory
 - (1) the lawsuit is not “frivolous, unreasonable, or groundless”
 - (2) plaintiff “first reasonably attempt[ed] to settle the matter short of litigation”
- Futility

Catalyst Attorneys' Fees – Case Examples

- *Henderson v. J.M. Smucker Co.*, No. CV 10-4524-GHK VBKX, 2013 WL 3146774, at *4 (C.D. Cal. June 19, 2013)
 - Defendant made three changes to its business practices:
 - (1) removal of the trans fat
 - (2) removal of the “wholesome” and “homemade goodness” claims
 - (3) removal of the saturated fat comparison chart
 - Defendant argued it was already in the process of making these changes before the lawsuit

Catalyst Attorneys' Fees – Case Examples

- *Henderson v. J.M. Smucker Co.*, No. CV 10-4524-GHK VBKX, 2013 WL 3146774, at *4 (C.D. Cal. June 19, 2013)
 - Catalyst for Smucker's reformulation of its Uncrustables Sandwiches product
 - Defendant was in the best position to show why it reformulated Uncrustables when it did

Catalyst Attorneys' Fees – Case Examples

- *Gordon v. Tootsie Roll Indus., Inc.*, No. 18-56315, 2020 WL 1846920 (9th Cir. Apr. 13, 2020)
 - Putative class action challenging the amount of empty space, or “slack fill,” in certain Junior Mints and Sugar Babies candy boxes manufactured by defendant
 - Tootsie Roll made changes to the boxes during the litigation
 - Plaintiff withdrew her motion for class certification
 - Court denied plaintiff’s motion for fees and awarded costs to Tootsie Roll

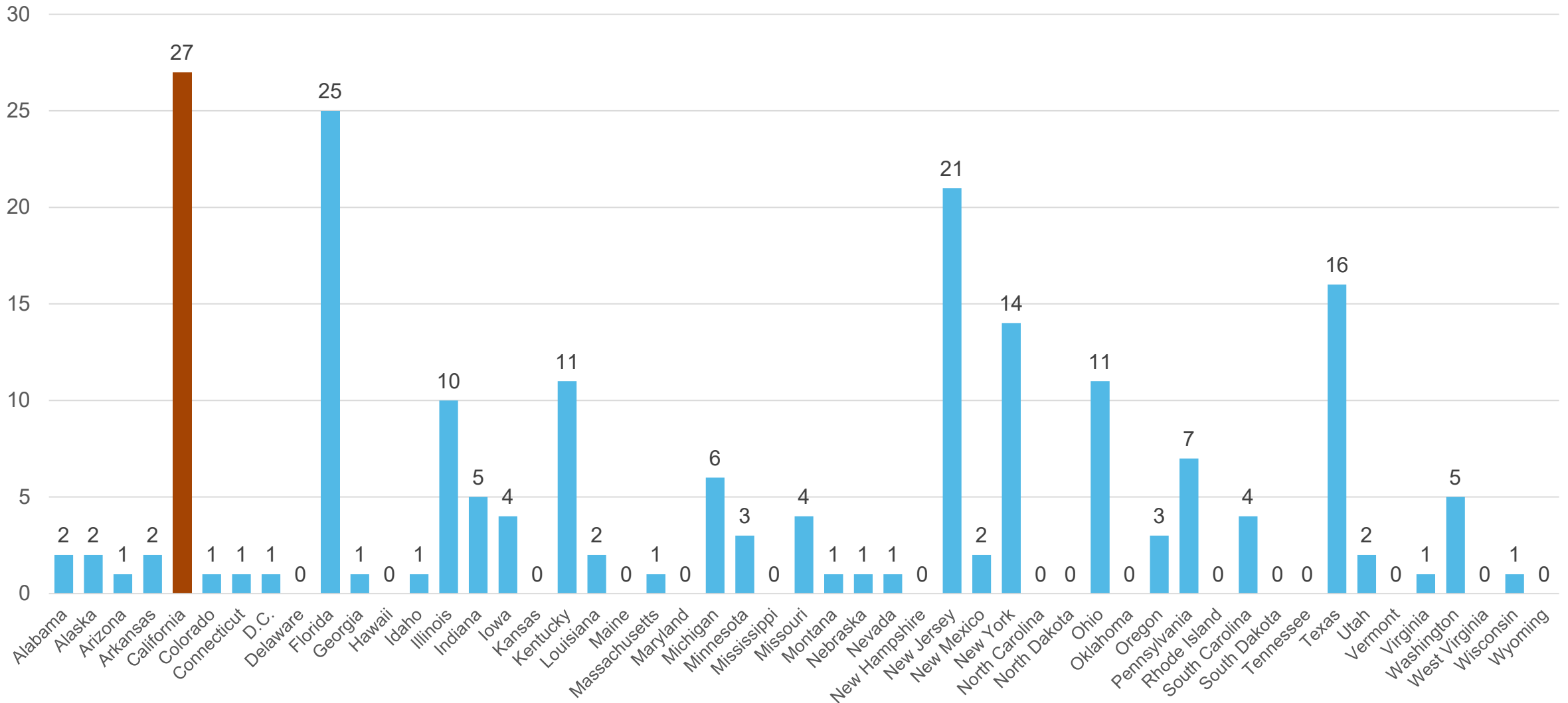
Catalyst Attorneys' Fees – Case Examples

- *Gordon v. Tootsie Roll Indus., Inc.*, No. 18-56315, 2020 WL 1846920 (9th Cir. Apr. 13, 2020)
 - The Ninth Circuit upheld the district court's decision on appeal
 - Plaintiff expressly disclaimed that product labeling would address her concerns
 - Plaintiff was not entitled to “catalyst” fees
 - Plaintiff repeatedly rejected product labeling as a solution to the alleged problem



★ California Covid-19 Employment Litigation Trends

COVID-19 Employment Litigation and Class & Collective Actions



WARN Act

- Federal and State Worker Adjustment and Retaining Notification (WARN) Acts
 - California's WARN Act is far more expansive than the federal WARN Act
 - Applies to any employer that operates any industrial or commercial location that employs (or has employed in the last 12 months) at least 75 persons
 - Notice obligations are triggered when:
 1. The business's operations are "effectively stopped," or
 2. There is a layoff during any 30-day period of 50 or more employees at the location, or
 3. If all or substantially all of the operations are being moved to a different location 100 or more miles away
 - Biggest distinction as applied to COVID-19 related events is that California's WARN Act applies to temporary job loss regardless of duration, whereas Federal WARN ACT only applies to layoffs lasting longer than six months
 - There are some exceptions to the notice requirements:
 - Federal: Faltering Business, Unforeseen Business Circumstances, and Natural Disaster
 - California: Does not have an Unforeseen Business Circumstances exception, but Governor Newsom issued an executive order that allows California employers to provide as much notice as practicable so long as the notice includes this phrase: "If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI)."

Expense Reimbursement

- California Labor Code Section 2802 requires employers to reimburse California employees for “all necessary business expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties.”
- Previously, because working remotely was not required, many employers could decline “work from home” reimbursements as the employee chose to work remotely. However, COVID-19 and the resulting shelter-in-place orders have required many employees to work remotely.
- Some possible expenses that might require reimbursement:
 - Cell phone
 - Internet
 - Premium Zoom Accounts
 - Printing/Printing Paper
 - Home Office Supplies

Wage and Hour

- Preliminary and Postliminary Activities
 - Many COVID-19 workplace policies require employees to do temperature checks, employee questionnaires, wear PPE and engage in sanitizing efforts
 - The FLSA only requires that employers pay employees for time spent on pre-shift and post-shift activities that are “integral and indispensable” to the employee’s principal activities (i.e. “necessary to the principal work performed” and “done for the benefit of the employer”
 - California law takes a more conservative approach with regard to what preliminary and postliminary activities are compensable
 - California Supreme Court found that preliminary and postliminary security screenings by an employer were compensable under California law - *Frlekin v. Apple, Inc.*
- Off-the-Clock Work from Non-Exempt Telecommuters
 - It is imperative that all non-exempt employees working remotely are instructed to accurately record all work activities and meal break times
 - Compensable worktime includes things such as logging into and out of computer systems for the day – processes which can be unexpectedly delayed and complicated in a mass work from home situation

Americans with Disabilities Act/Retaliation

- ADA Claims
 - The EEOC has updated its 2009 Guidelines entitled “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” in response to COVID-19
 - “[I]f an employee with a disability needs the same reasonable accommodation at a telework site that he had at the workplace, the employer should provide that accommodation, absent undue hardship. In the event of undue hardship, the employer and employee should cooperate to identify an alternative reasonable accommodation.”
 - Employers must engage in the interactive process with employees
- Retaliation Claims
 - Employers cannot take adverse action against an employee because he or she complains that the employer wrongfully denied a request for accommodation or a request for paid leave under the FFCRA
 - Employers cannot take adverse action against an employee who complains that the Employer is not doing enough to protect employees from COVID-19



COVID-19 Class Actions

COVID-19 Class Actions

- Number of COVID-19 related class actions continued to increase
- Trend so far shows a majority are filed in district courts in California (87), Florida (45), New York (63) and Illinois (28)

COVID-19 Class Actions

- Price gouging
 - *Fraser, et al. v. Cal-Maine Foods, Inc., et al.*, Case No. 3:20-cv-02733 in the U.S. District Court for the Northern District of California (April 20, 2020)
 - Class action suit against Whole Foods, Costco, Amazon, Wal-Mart and several others alleging “...despicable and illegal practice of price-gouging of essential groceries, specifically eggs...” during the COVID-19 pandemic

COVID-19 Class Actions

- Deceptive marketing
 - *Taslkian v. Target Corporation, et al.*, Case No. 2:20-cv-02667, in the U.S. District Court for the Central District of California
 - A class action lawsuit claims that Target is misrepresenting its store brand hand sanitizer as being able to kill “99.9% germs” and prevent viruses such as the coronavirus
 - *David, et al. v. Vi-Jon Inc. d/b/a Germ-X*, Case No. 3:20-cv-99999, in the U.S. District Court for the Southern District of California
 - According to the Germ-X class action, the maker of the product is profiting off of deceptive marketing by taking advantage of the public’s fear of the coronavirus outbreak

COVID-19 Class Actions

- Failure to Refund
 - *Herrera, et al. v. Cathay Pacific Airways Ltd.*, Case No. 3:20-cv-03019 (ND Cal)
 - A class action lawsuit alleges that Cathay Pacific owes airline passengers a refund for all canceled flights
 - *Hanson v. Ticketmaster Entertainment Inc.*, 3:20-cv-2685 (ND Cal.) (April 17, 2020)
 - Class action for unfair business practices and contract. Defendant has chosen not to provide ticket refunds to customers for events that have been canceled due to COVID-19
 - *Ruiz v. Magic Mountain, LLC*, 2:20-cv-3435 (CD Cal) (April 13, 2020)
 - Class action for violations of the Legal Remedies Act and the Unfair Competition Law. Six Flags has made the unconscionable decision to keep charging its thousands of membership and season pass holders monthly membership fees while closing 100 percent of its theme parks

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