Crowell

Litigation FORECAST 2025

Special Focus: Class Actions

Developments in class actions in and across practice areas are changing the landscape

Annual Jurisdictional Analysis

A New Landscape
A New Approach

As we report in this year's *Litigation Forecast* cover story, class action lawsuits are proliferating. But they're different now, not only because the stakes are higher, the class sizes larger, and the potential exposure greater. It's also because the tried-and-true class action defense playbooks are often no longer effective, creating a demand for an approach that is more holistic, more aggressive, and more strategic.

And that's why, given this seismic shift in the class action landscape, we've focused this year's edition on class actions across a range of subject matter areas, from appellate reviews and product liability cases to class actions in health care, consumer products, and employment. In these pages, our attorneys also explore the growing impact artificial intelligence is having on class action cases, moving well beyond copyright infringement to include the use of algorithms in pricing and hiring as well as in faulty AI-based decision-making.

Clients frequently turn to Crowell & Moring to stop class actions in their tracks. But a new landscape demands a new approach. And, as this volume demonstrates, we're ready to help you take that road.

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Rethinking the Class Action Strategy

As high-stakes class action lawsuits multiply, the standard playbook for defending against them may no longer work. A revised strategy involves some key departures from the traditional approach

Class action lawsuits continue to proliferate, often with increasingly high stakes in terms of larger class sizes and potential exposure. To a great extent, plaintiffs' attorneys have developed an industrialized approach that continues to raise the stakes in class actions: It's not unusual to see a given law firm file the same type of case against different companies dozens of times or more or file serial cases against the same company based on similar theories. In this high-risk environment, it is more and more important for defendants to rethink their long-term litigation strategies—and take a more holistic approach to dealing with these lawsuits.

Over the years, many companies have developed a more-or-less standard playbook for defending against class action lawsuits. This involves pursuing an early motion to dismiss in an attempt to have the case thrown out in its entirety or narrowed. While that motion is pending, the defendant may also try to settle the case with the named plaintiffs on an individual basis. "If a settlement can be negotiated, the defendant holds their breath and hopes that no other plaintiff pops up and brings the same class action claim again," says Sarah Gilbert, a partner at Crowell & Moring and co-chair of the firm's Litigation Group.

If neither of these strategies resolves the case, the defendant will often seek to keep discovery as limited as possible, both with respect to the putative class and its own documents and data, in an effort to minimize legal costs and business disruption and focus on developing arguments to oppose certification of the class.

If these efforts fail and the class is certified, defendants can file a petition for review under Federal Rule of Civil Procedure 23(f), but the circuit courts grant these petitions less than a quarter of the time, and even more rarely in the hotbed 9th Circuit. If that effort fails, defendants often feel that the only possible

course is to try to settle the case and avoid the risks of litigation—that is, to pay up and move on.

But that playbook may not always be the right one. In some cases, taking a more aggressive approach at the outset—and looking beyond quick settlements and instead focusing on preparing the case for trial—can pay off. However, this strategy involves some key departures from the traditional approach, starting early in the pretrial stage and continuing through the trial.

Why plan for trial?

To be sure, companies should not take every class action to trial, just as they would not take every non-class action to trial. Sometimes, settling makes sense. A company may wish to avoid negative press or to reach a business resolution. Or it may realize that it did something wrong and decide that the best course is to make things right through settlement.

But other cases do call for a more aggressive, trial-oriented approach. This may be especially true if the defendant company is confident that the facts and the law are on its side, if it risks facing copycat suits, or if the class action is challenging a key business practice that the company wants to preserve. In these situations, a settlement may not be feasible or the best choice.

There are several potential benefits to preparing for a trial from the outset of the case, rather than focusing solely on defeating class certification or settlement. "First of all, it maximizes the chance you will be prepared to win at trial, and it shores up arguments for appeal," says Jennifer Romano, a Crowell & Moring litigation partner and a member of the firm's Management Board who has tried two class actions. "But it's important to take a broader look at the potential upsides of fighting back."

For example, demonstrating to the named plaintiffs (and even more importantly, their counsel) that you are preparing for trial can help a defendant

"When defending against a class action, narrowing discovery too much can cause defendants to shoot themselves in the foot. You have to think through the full strategy to assess what evidence and data may be helpful when you get to trial."

JENNIFER ROMANO

reach a more favorable settlement. It essentially sends plaintiffs a message that the company is confident and willing to take the case all the way, which can strengthen the defendant's negotiating position. Trials present substantial risks for plaintiffs as well as defendants, especially with appeals courts being increasingly inclined to question large awards and large attorneys' fees. Thus, class plaintiffs (and their attorneys) may decide that settling for a lower amount is their best option.

While litigation involves risk for defendants, so too does settling. Individual settlements are often followed by copycat cases, and the more a defendant pays to settle one, the more the next plaintiff wants. And class action settlements are often followed by litigation from class members who have opted out of the settlement. "There are always law firms out there whose business model is recruiting class members to opt out of settlements to pursue later follow-on actions," Romano points out. "So an early settlement may end up being just a short-term, temporary solution." In addition, settling—especially for large amounts—sends the plaintiffs' bar a message about having deep pockets or being unwilling to go the distance. That can lead to a company becoming a "serial defendant" that is constantly in the crosshairs of the plaintiffs' bar.

Preparing for trial: Take action early

Every case is different, of course, but there are some important strategies to keep in mind when preparing a class action trial strategy.

For example, the traditional playbook may call for the defense to conduct only a narrow merits investigation early on and instead focus on class certification issues, such as whether all class member claims share common issues of fact and law. However, just as they would in other important commercial litigation, class action defendants should consider broadening their early case investigation and client interviews to focus on how they will defend the case on the merits. This includes not only discovery directed to the class representatives, but all discovery to defend the claim. For example, says Gilbert, "Though it may seem premature, defendants can prepare an initial version of an order of proof even before serving initial discovery requests and responses. This forces defendants to think through their defenses and trial themes, enabling them to tailor discovery responses and requests accordingly."

Similarly, defendants should consider a more robust approach to early written discovery of documents and data. As mentioned earlier, class action defendants will typically try to limit the scope of early discovery. That's because class action discovery tends to be somewhat "one-sided." For the plaintiffs, it may involve the deposition of just the named plaintiff and production of a limited number of documents, while defendants may well need to turn over large numbers of documents spanning many years, as well as have numerous employees deposed. Limiting the discovery burden for a defendant makes sense, but it should be tempered with an eye toward going to trial. Plaintiffs cannot be expected to request the documents that will be most helpful to a defense, and defendants are likely to be precluded from relying on such evidence at summary judgment and trial if it is not produced during discovery. That means that defendants should determine early on what story they want to tell at trial and then permit enough discovery to allow them to tell that story and challenge plaintiffs' claims and arguments.

For example, in a consumer products false advertising case, the defendant's initial inclination may be to disclose as little data as possible about each putative class member's purchasing decisions and communications with the defendant. But that data may be helpful in showing the differences among the class members and that some class members were not misled or injured. "When defending against a class action, narrowing discovery too much can cause defendants to shoot themselves in the foot," says Romano. "You have to think through the full strategy to assess what evidence and data may be helpful when you get to trial." She points out that defendants have at times gone so far as to waive attorney-client privilege to voluntarily produce privileged documents that were critical to their defense. While such a strategy usually would not be advisable, it illustrates the point that early and open-minded analysis of the scope of discovery can lead to much broader voluntary productions than are typical when following the traditional defense playbook.

"We have seen many instances where named plaintiffs became less interested in prosecuting their case or even withdrew their claims entirely after they experienced the realities of litigation."

SARAH GILBERT

Shaping the witness list

Preparing for trial calls for a different approach to witnesses as well. Early on, plaintiffs will typically want to depose a corporate designee on various topics. In deciding whom to disclose for these requests, defendants should consider not only the individual's expertise in the subject matter, but also how well they will perform in a deposition and, especially, a trial—that is, how effective they will be at telling the story the defense wants to tell.

Defendants should also think creatively about potential witnesses outside the company. It can be especially valuable to identify putative class members who can testify to counter a plaintiff's claims. This could mean people who have individualized circumstances that undercut the plaintiff's commonality argument. Or it could mean people who support the defendant's story. For example, in an antitrust case, some putative class members might testify that they actually have significant bargaining power when dealing with the defendant. "In looking for putative class members who can support your story, it is important to act early—before the class is certified and before restrictions on contacting them kick in," says Gilbert.

Defendants can also look at similarly situated non-class members. For example, in a class action claiming that the defendant failed to fully disclose information about how a retirement plan worked, it was beneficial for the defendant to find non-class member employees who did understand the instructions from the company, which showed that the company did in fact provide sufficient information to satisfy its duties. Or, in an employment class action alleging that a defendant did not pay female employees as much as similarly situated male employees, non-class member women employees might provide evidence and testimony showing that they were paid at least as much as their male counterparts. These non-class member witnesses can be especially valuable because the defense is not limited in talking to them and preparing them for trial or deposition, which is not the case with class members.

When it comes to discovery from named plaintiffs, it can help to be aggressive and to take depositions early. Even though a class representative may have little information to share, this discovery often is critically important. Information from named plaintiffs may show ways in which class members are not similarly situated, undermining commonality arguments. Or it may show that the named plaintiffs were not actually harmed by the alleged conduct. Often, unsophisticated plaintiffs are not strong testifiers and may make key admissions during depositions. And because named plaintiffs often have been solicited by plaintiffs' counsel, they often are unprepared for the inconveniences of discovery. "We have seen many instances where named plaintiffs became less interested in prosecuting their case or even withdrew their claims entirely after they experienced the realities of litigation," says Gilbert.

Strong expert testimony—from class experts, merits experts, and damages experts—is critical to success in class actions. But an expert's effectiveness depends on the strength of the evidence they can draw on. Thus, they should be retained early and involved in discovery. This helps ensure that defendants are requesting and/or producing the documents and data necessary to support expert opinions. Often, experts have deep knowledge of the relevant industry or market and can assist in developing the strategy for third-party discovery.

Ideally, expert opinions are informed by real-world case studies that juries can understand and relate to, not just dry and complex calculations and predictions. "Most importantly, when selecting an expert, don't just focus on experience or technical knowledge—the expert needs to be able to appeal to a jury by explaining complicated concepts in a way that is both interesting and accessible," says Gilbert.

Targeting key trial advantages

The preparations outlined above can help defendants win on the merits—and take advantage of some of the key differences between the pretrial and trial stages. For example, to obtain class certification, plaintiffs typically work hard to simplify the case to show the court that it will be easy to use "common answers" to prove their arguments in litigation. However, once the court has certified a class, the plaintiff has the burden to prove each element of the case, including harm and a model for class-wide damages, using the common evidence.

"Sometimes, this is harder for the plaintiff than it initially appeared, because the oversimplification used for class certification may not stand up to the rigors of the courtroom. Here, defendants may have an

opportunity to demonstrate that the common evidence presented by the plaintiff is insufficient to prove each element of the case," says Romano.

That reality may cause class plaintiffs to broaden the evidence they introduce at trial, which can open the door to individualized issues that then support decertification of the class. Defendants can bring a motion to decertify a class at any time during trial, or even later. "Succeeding with that can be more likely than many would think, because a trial forces a plaintiff to prove all elements of a claim for the plaintiff and for every class member," says Romano. During a trial, she explains, plaintiffs will need to go into more detail about their case than they did in the early motions stage to demonstrate to the trier of fact that that they are entitled to relief. That can be a challenge, because doing so may force them to rely on individualized evidence and experiences, opening the door to class decertification. Thus, a win by an individual plaintiff may become a win only for that plaintiff, not an entire class. Or to avoid that problem, plaintiffs may underplay their hand and use only a limited amount of evidence, thereby narrowing their case and increasing their risk of losing on the merits.

Overall, focusing on trial rather than looking to quickly settle requires some significant departures from the traditional class action playbook. Companies considering this strategy should take a comprehensive view of the potential benefits, as well as the risks. In the right circumstances, they may find that a more aggressive approach to class actions has the potential to pay off—not only in the case at hand, but in helping to head off tomorrow's class actions as well.

Big Shifts in Administrative Law

As companies consider taking class actions to trial, a blockbuster decision from the U.S. Supreme Court instructing lower courts not to defer to federal agencies' interpretations of the statutes Congress charged them with administering may prove useful. Companies should also be aware of a second decision holding agencies' use of in-house judges to mete out civil penalties to be unconstitutional.

According to Dan Wolff, a partner in Crowell & Moring's Litigation Group and leader of the firm's Administrative Law Group, "These rulings reflect a doctrinal shift in administrative law as applicable to federal agencies."

The Supreme Court announced the rulings on successive days in June 2024. In *Loper Bright Enterprises v. Raimondo*, the Court nixed the 1984 "Chevron deference" doctrine, under which courts deferred to agency interpretations of statutes they are charged with enforcing where the statute is ambiguous, so long as the agency interpretation was a reasonable one. Reversing course, in *Loper Bright,* the Court held that the Administrative Procedure Act of 1946 directed the courts alone to decide all questions of law—including questions of statutory interpretation.

In *SEC v. Jarkesy,* the Court looked at whether the SEC could use its own administrative law judges (ALJs) to adjudicate fraud claims for which it was seeking civil penalties or whether the targets of those fraud claims had a right to a jury trial under the Seventh Amendment. The Court held that such defendants have the right to a jury trial in federal court.

The implications of these decisions are significant. "Under *Loper Bright*, regulated parties have a more level playing field. This has ramifications for challenging agency rulemakings, but it may also factor into defense strategies and class actions where the agency's or class's case hinges on the meaning of a statute," Wolff says.

As for *Jarkesy*, Wolff believes that parties facing civil penalties levied by agencies have an opportunity to challenge the enforcement process as unconstitutional if the first-level adjudicator is an ALJ.

Wolff sees several key takeaways from these decisions:

- Courts will no longer defer to agency interpretations of ambiguous statutes, leaving agencies to defend their interpretations on textual grounds.
- This may make it more appealing to challenge agency actions that turn on statutory interpretations. It also bolsters defenses to civil enforcement actions in which the agency position turns on the meaning of a statute.
- It is easier for class action defendants to defend themselves if plaintiffs' claims rely on agency interpretations.
- Companies facing civil penalties adjudicated by ALJs may decide to challenge the adjudicative process on constitutional grounds, regardless of the merits of the alleged violation.

Wolff suggests regulated entities consult with counsel to understand how these doctrinal changes alter the government-facing litigation risk calculus in their favor.

Companies, he says, should seek assistance from outside counsel steeped in administrative law, and general counsel should make sure their in-house litigators are coordinating with regulatory counsel regarding the potential to bring cases against agencies.

Appellate

The landscape of pretrial appeals is changing rapidly

In class action lawsuits, much of the focus is on pretrial motions—and often, the appeal of lower court rulings on those motions. But for defendants, two trends could make it more difficult to win on those appeals.

When class action litigants want to challenge a district court's decision either certifying or refusing to certify a class, they have to file a Rule 23(f) petition asking the Court of Appeals to take the case. "Getting such a petition granted has been getting harder and harder, with courts less and less willing to entertain appeals of class certifications," says Amanda Berman, a partner at Crowell & Moring and co-leader of the firm's Appellate Practice.

Berman points to the 9th Circuit's May 2024 rejection of Apple's attempt to appeal the certification of a class of app purchasers bringing antitrust claims against the tech behemoth. The circuit court's order denying permission to appeal—without any explanation of the court's reasoning beyond a simple citation to Rule 23(f) and a case identifying the relevant factors—set the stage for a $7 billion-plus class action accusing Apple of antitrust violations in its App Store. "This is just one example where a gigantic class was certified and the Court of Appeals refused to disturb the certification," she says.

"Rule 12 had become an increasingly high bar, with the courts … inclined to dismiss cases where there was any basis to say that the allegations didn't state a viable claim."

AMANDA BERMAN

The 9th Circuit is no outlier in this regard. "The rates of acceptance for appeals of Rule 23(f) certifications vary substantially across circuits, but it's well under 50 percent in pretty much every one," Berman says. "And an actual reversal is of course a subset of that, so in most circuits the 'success rate' for these appeals is 20 percent or less." It is thus imperative, she says, that litigants bring their best arguments on the certification issue before the district court—because they cannot count on getting a second chance to prevail on certification at the appeals stage.

Harder to win on Rule 12

Meanwhile, Rule 12 early dismissals for failing to state a claim—a traditional tactic of choice for class action defendants—are becoming harder to defend on appeal. That, in turn, has made district courts less inclined to dismiss class actions under Rule 12 in the first instance, fearing reversal on appeal and heeding the call of the Courts of Appeals to apply the pleading standards more liberally.

Over the course of several decades, says Berman, "Rule 12 had become an increasingly high bar, with the courts scrutinizing allegations very closely and being very inclined to dismiss cases where there was any basis to say that the allegations didn't state a viable claim." That held true in the class action context, where district courts had an extra incentive to avoid allowing complex multiparty matters to proceed to discovery and trial.

More recently, however, appeals courts have been taking a closer look at that trend. "They have generally been reversing that course, and they are now more willing to overturn class action dismissals," says Berman. "It's getting harder for defendants to win on Rule 12." As a result, she adds, "we've been seeing some very big class actions get further than they probably would have a while ago."

In light of this trend, says Berman, class action defendants should keep in mind that they can also or alternatively move to strike allegations—including class allegations—as insufficient. That more tailored approach may succeed where a comprehensive Rule 12 motion may fail either before the district court or on appeal. And it can help position the defendant to succeed at the summary judgment stage—after which the appeals court may be less inclined to reverse, knowing that the class plaintiffs were given the opportunity to develop their claims through discovery.

"There is a lot of push and pull around appellate review of class action dismissals right now, and the Courts of Appeals are struggling with how closely to scrutinize class allegations at the Rule 12 stage and how much grace to give class plaintiffs," says Berman. The current trend toward loosening pleading standards may make disposing of meritless claims harder for class action defendants—at least at the earliest stages. But a savvy class action defense lawyer may be able to prevail through a more tailored approach and thereby narrow the claims or the class.

Product Liability

Class actions are increasingly using economic loss to bring claims

A trend in product liability litigation has emerged over the past few years: Plaintiffs' attorneys are increasingly choosing to bring class actions based on "economic loss" instead of the more traditional personal injury claim.

Economic loss refers to circumstances in which an individual or organization loses money. Andrew Kaplan, a partner in Crowell & Moring's Mass Tort, Product, and Consumer Litigation Practice and co-chair of the firm's Litigation Group, offers an example.

"Let's say a person unwittingly buys a pharmaceutical product that contains a proven or alleged carcinogenic ingredient," Kaplan says. "The person could say that she suffered an economic loss because she bought a product that shouldn't have been sold and decides to sue the product's manufacturer on the grounds that the product was either worthless or worth less than what she paid for it."

Defendants face big risks

The risk of an adverse outcome in court isn't the only risk that class action defendants face. Kaplan cites several others as particularly significant:

Ease of bringing class actions: Unlike mass actions, class actions are relatively inexpensive for plaintiffs' attorneys and require only a few named plaintiffs.

More than one definition of "winning" for plaintiffs: Achieving victory at trial isn't the only way class action plaintiffs can win their case. The sheer size of a certified class often gives plaintiffs economic leverage that can induce a settlement by trial-wary defendants. As Kaplan puts it, "Class certification is the defining moment in these cases. For defendants, the risks and stakes are much higher once a class is certified."

Endless universe of potential claims: The opportunities for product-based lawsuits are endless because the number of products is endless. Whether the claim is based on economic loss or personal injury—or anything else that a creative plaintiffs' counsel might come up with—unexpected litigation can hit product manufacturers at any time.

Denial of insurance coverage: Increasingly, insurance companies are denying defendants' claims for reimbursement of economic loss. This is becoming a major cause of disputes between defendants and their liability insurers. Not only does it raise the threat of additional litigation related to the class action, but it also increases the stakes for defendants if they lose at trial or settle.

Forum shopping: Plaintiffs' attorneys tend to seek out jurisdictions that they consider plaintiff friendly. The fact that many products for which they claim liability are nationally distributed gives them more latitude in choosing a forum for their cases.

Preference for state consumer protection claims

Typically, class actions pursue claims under state consumer protection statutes for several reasons.

Importantly, it is easier to get class certification of purely economic claims under consumer protection statutes than personal injury claims. Since class certification puts enormous pressure on defendants, consumer protection claims are popular.

Plaintiffs' attorneys also prefer state consumer protection laws because they tend to require a lower burden of proof for plaintiffs than standard personal injury claims. Kaplan explains that "plaintiffs may not have to prove physical injury or that they relied on the defendant's alleged misrepresentations about the product. Usually, it's sufficient to show that the manufacturer's communication about the product would be deceptive to a reasonable consumer."

Another big incentive to class actions based on state consumer protection statutes: These statutes sometimes allow for multiplication of damages and payment of attorney fees.

Expect more class actions

Kaplan believes that the number of economic-loss class actions will continue to rise over the next few years. "In addition to being relatively cheap to bring, easier to prove, and potentially providing big paydays for plaintiffs' counsel," he says, "the simple fact is that courts haven't shut them down and plaintiffs have won some cases. That alone suggests that there will be more."

Certain jurisdictions are viewed as more hospitable than others. For instance, many cases are filed in California, which has extensive ingredient disclosure laws for products. This makes it fairly simple to bring cases

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based on buying products off the shelf and testing them for ingredients. If a product has ingredients that weren't disclosed, doesn't have ingredients that were disclosed, or lists amounts of ingredients that materially differ from how much is in the product, the product is fair game for plaintiffs' attorneys to bring economic loss cases.

What defendants should do

Considering the risks of economic-loss class actions cited above, defendants should proactively protect themselves either from being sued or during an existing case. Kaplan recommends these steps:

- **Develop a holistic strategy** to defend economic-loss class actions (or any type of litigation, for that matter). Having a big-picture view of the company's exposure and docket can help to keep defenses consistent and avoid additional litigation.
- **Review liability insurance** to determine whether it specifically covers economic loss and, if so, how much. If not, try to obtain sufficient coverage.
- **Have robust, efficient systems** to track active cases and monitor consumer complaints. Responding to complaints quickly and effectively can prevent potential class actions from being brought.
- **Target named plaintiffs** to reduce the chance of class certification. This could take any of several forms: finding out whether the plaintiffs can prove that they purchased the product in the case, sending the plaintiffs full refunds for their purchases, and issuing refunds to all purchasers if a product has been recalled. Either of the last two steps is more likely to be successful pre-suit. And having a good claim-tracking system can help identify the potential claimants who could later turn into named class representatives.
- **Focus on disproving the injury claim** if economic loss is paired with personal injury. There should be no economic loss if there's no potential for injury.
- **Maintain ongoing communication** between business units and the legal department to effectuate the strategies discussed above.

Nitrosamine Class Actions: Different Courts, Different Results

A substantial volume of recent class claims have focused on organic compounds called nitrosamines and particularly NDMA. This compound, which has been identified as a possible human carcinogen, has been found in several medications, spurring many thousands of lawsuits. Most notably, it resulted in two large multidistrict litigations (MDLs) that included both personal injury lawsuits and class actions. Litigated medications included ranitidine, a drug designed to treat heartburn and acid reflux by reducing the amount of acid produced in the stomach. Ranitidine was sold under the brand name Zantac, which was among the most widely used medications in the U.S. for many years.

In September 2019, the Food and Drug Administration issued a warning that it had found small traces of NDMA in some ranitidine medicines, including Zantac. Manufacturers voluntarily recalled Zantac and other prescription and over-the-counter medications containing ranitidine in April 2020.

Plaintiffs' attorneys subsequently filed many thousands of ranitidine-based actions. These cases were consolidated into an MDL in the Southern District of Florida known as *In Re: Zantac (Ranitidine) Products Liability Litigation*. The court issued summary judgment in favor of the defendants in mid-2023, excluding all of plaintiffs' causation expert witnesses as unreliable. This ruling effectively ended both the personal injury lawsuits and the putative class actions. (The rulings are currently on appeal in the 11th Circuit.)

Another MDL in the District of New Jersey has focused on NDMA in generic sartan medications, a class of drugs used primarily to treat high blood pressure. In contrast to the Zantac MDL, the sartan MDL court has reached different conclusions on many of the same expert issues and certified a number of classes, including classes for economic loss claims.

Crowell & Moring partner Andrew Kaplan says, "While the sartan MDL is far from over and may change course, it illustrates the divergent results that can occur from jurisdiction to jurisdiction on very similar issues."

Health Care

Plaintiffs' bar is taking a page from the retirement plan playbook

A nascent trend is forming in the world of health care class actions. Plaintiffs' attorneys are taking the excessive-fee concept pioneered in retirement plan litigation and applying it to self-funded corporate health insurance plans. Andrew Holmer, a partner in Crowell & Moring's Litigation Group, says, "The plaintiffs' bar is testing the fences of excessive-fee class actions against health plans. We are likely at an inflection point where a few early wins for health plans could potentially fend off a wave of health plan excessive-fee class actions."

Where it all started

To get a better sense of what Holmer is suggesting, it's instructive to take a quick look at the history of excessive-fee class actions targeting retirement plans.

These cases began to emerge in the early 2000s, alleging that corporate 401(k) retirement plans were paying administrative and investment management fees that were too high—and that the plans' sponsors were therefore negligent in their fiduciary duties. As set forth in the Employee Retirement Income Security Act of 1974 (ERISA), such duties require plan fiduciaries to manage plan assets solely for the benefit of plan participants and their beneficiaries.

Plaintiffs' attorneys initially brought excessive-fee class actions against very large 401(k) plans, reasoning that they offered the deepest pockets for damages or settlements. As their strategy proved successful, they broadened their focus to include smaller 401(k) plans and certain 403(b) plans sponsored by nonprofit organizations.

The frequency and dollar size of excessive-fee class actions against retirement plans have reached unprecedented levels in the past few years (see chart). Holmer states that the plaintiffs' bar has filed similar suits against employer-sponsored health plans (also governed by ERISA). Decisions in these early cases will tell us whether the theories in the health care context have merit.

Knudsen: Standing issue is roadblock

In recent years, the plaintiffs' bar has begun to test excessive-fee theories developed in 401(k) litigation against health plans and related entities. Defendants include health plans and plan administrators and increasingly focus on their relationships with pharmacy benefit managers (PBMs), which are intermediaries that negotiate with drug manufacturers on behalf of plans to secure discounted prices.

One recent case, *Knudsen et al. v. MetLife Group*, was filed in January 2023. Plaintiffs claimed that MetLife used $65 million that its PBM had obtained in rebated discounts for itself—rather than putting that money into the self-funded health plan, which the plaintiffs argued would benefit participants.

In September 2024, a 3rd Circuit panel affirmed dismissal of the lawsuit on the grounds that plaintiffs didn't suffer actual or imminent financial harm under Article III of the Constitution, meaning that they lacked standing to bring the case. Although the plaintiffs *hypothesized* that putting drug rebates back into the health plan *might* have lowered their individual out-of-pocket costs, the 3rd Circuit held that was too speculative to support Article III standing. The 3rd Circuit did not completely rule out the "theoretical possibility" of standing in such cases, but it emphasized that plaintiffs needed to establish a direct impact on their own premiums or other out-of-pocket costs in concrete terms, such as in what years or by how much.

As plaintiffs continue to test the waters of 401(k)-style class actions against health plans, "standing will be an early roadblock for plaintiffs," says Holmer. "We expect standing will prove critical to keeping the floodgates of litigation closed."

Lewandowski: Focus on plan drug costs

Another test case, *Lewandowski v. Johnson & Johnson et al.*, was filed in February 2024. The named plaintiff, a Johnson & Johnson employee, claimed that the plan's fiduciaries breached their duty under ERISA by failing to demand lower drug prices from the PBM and, as a result, caused participants to pay higher premiums and to overpay for covered drugs. The case is the first of its kind to address the underlying costs associated with an employer's self-insured prescription drug benefit.

In June 2024, the defendants filed a motion to dismiss based on their assertion that the plaintiff

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lacked standing. Both sides made additional filings following the *Knudsen* decision. The plaintiff claimed that her standing argument would satisfy the 3rd Circuit's signaled criteria for standing, while the defendants countered that she lacked standing because she hadn't sufficiently proven harm of any kind. Even increased drug prices could not have raised the plaintiff's out-of-pocket costs, defendants argued, because the plaintiff's health plan included an out-of-pocket maximum—capping the amount she would pay out of pocket—which she would have hit even without the allegedly higher drug prices. As of late 2024, *Lewandowski* was pending a decision on the dismissal motion.

Holmer sees *Knudsen* and *Lewandowski*, as well as a recent copycat case filed against a different self-funded health plan in the District of Minnesota, as test cases that will have an outsized impact on whether the excessive-fee claim can migrate from retirement plans to health plans.

Action steps

There are steps that current and potential defendants can take to protect themselves, says Holmer.

The first is to focus early and aggressively on the plaintiffs' standing under Article III for cases that have been filed. "The 3rd Circuit set a high bar for standing in *Knudsen* in terms of showing precisely how, and how much, a fiduciary's decisions raised their individual premiums or out-of-pocket costs," Holmer says. "That is a very difficult standard for plaintiffs to meet, and defendants should hold plaintiffs to it."

Holmer also recommends measures defendants can take proactively before a lawsuit ever gets filed. "As with everything else in ERISA, plan language is important," Holmer explains. He notes that "in *Knudsen*, the health plan's governing documents were explicit that drug rebates would not be considered in determining co-insurance or co-payment amounts. So it's difficult to see how the plaintiffs in that case could have possibly shown an impact on their own out-of-pocket costs."

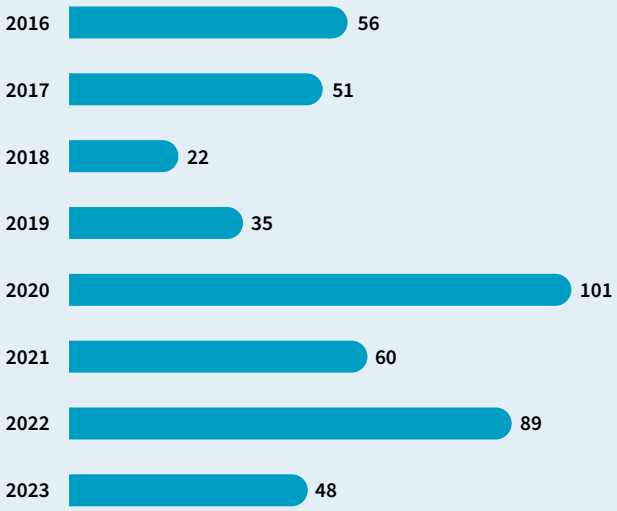
Holmer notes that plan designs relying on fixed co-payments for prescriptions can also have a prophylactic effect on cases like *Lewandowski*, in which plaintiffs focus on the individual costs of a selective group of cherry-picked drugs. "If the individual's co-pay doesn't change depending on the price of the drug, it's hard to see how a plaintiff could establish any financial injury," he says.

In addition, just like traditional 401(k) excessive-fee cases, health plans and fiduciaries can further mitigate their liability by establishing and documenting a prudent process that is used to choose the plan's PBM or administrator and takes into account things like administrative fees, cost savings, and qualitative benefits to plan members.

Finally, Holmer recommends that potential defendants review their fiduciary liability insurance coverage. Policies should cover items related to PBMs and administrators, excessive fees, and fiduciary issues more broadly.

Excess Fee and Performance Lawsuits by Year

As of 12/31/2023



SOURCE: EUCLID FIDUCIARY EXCESS FEE AND PERFORMANCE CASE TRACKING

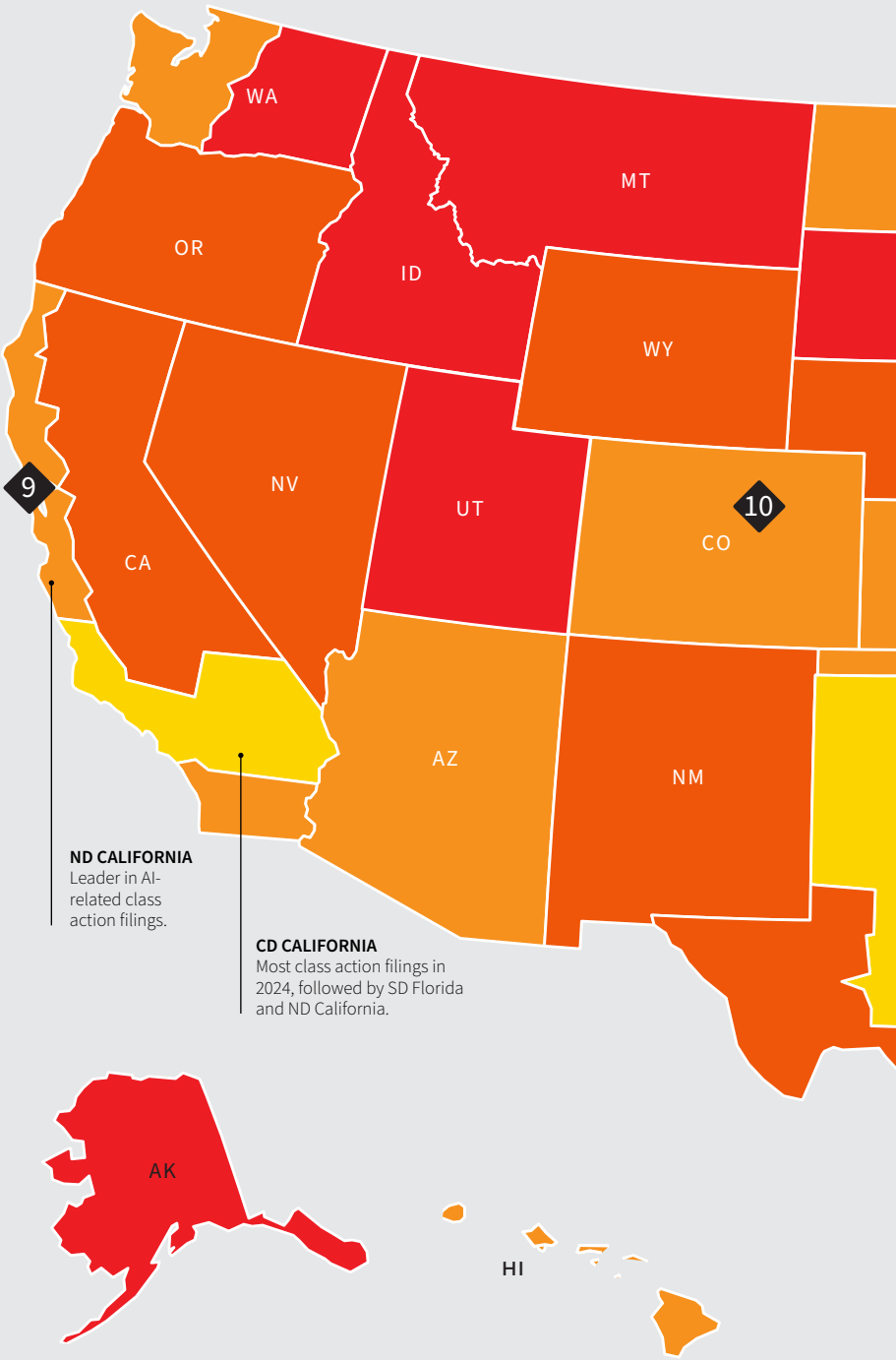
Jurisdictional Analysis

Class actions across the country

Class action litigation remained strong in 2024, on pace to match the past two years. Last year expanded the trend of class action litigation driven by technology, regulatory changes, and consumer expectations. Class action litigation based on privacy and data security breaches increased last year—including recent high-profile cases and significant settlements. Similarly, consumer rights and product liability cases have continued to increase and to drive large settlements due to consumer awareness of their rights and amendments to consumer protection laws. These developments and increasing trends in class action litigation provide numerous opportunities for litigation in many sectors.

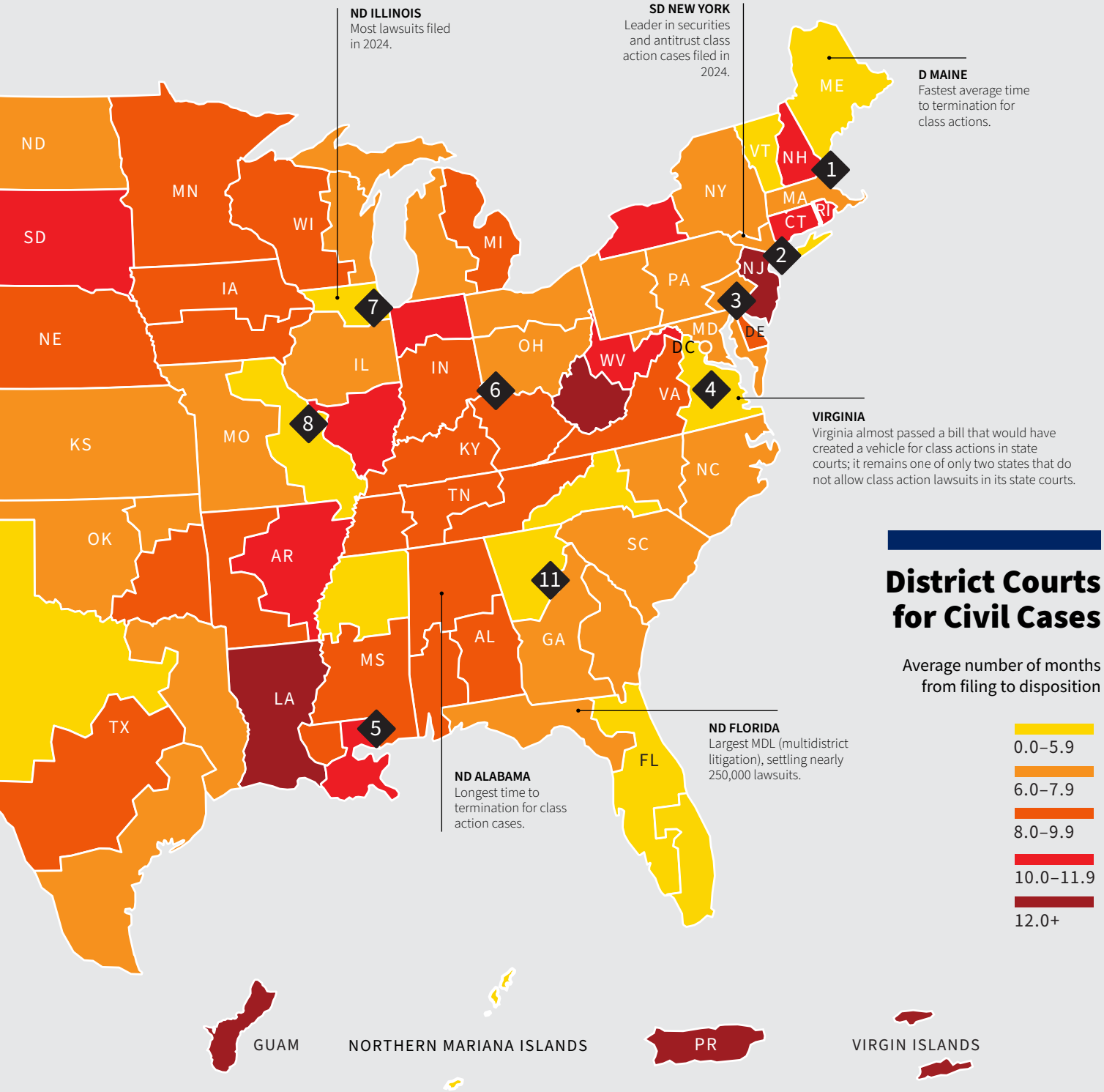
A large number of terminated MDL cases this past year disproportionately affected and skewed the time to termination. They have been excluded from the calculation of average number of months from filing to disposition shown on this map.

MARIA SOKOVA



UNITED STATES COURTS OF APPEALS

Circuit	Notice of Appeal to Disposition (in Months)	S. Ct. Reversal Record
1st	9.0	2 of 2
2nd	13.5	6 of 7
3rd	6.1	2 of 4
4th	5.8	1 of 1
5th	5.2	8 of 10
6th	7.3	3 of 3
7th	6.7	2 of 2
8th	3.2	2 of 4
9th	15.3	5 of 11
10th	4.7	1 of 1
11th	7.5	3 of 3
DC	12.6	3 of 5
FED.	14.1	3 of 3



District Courts for Civil Cases

Average number of months from filing to disposition

- 0.0–5.9
- 6.0–7.9
- 8.0–9.9
- 10.0–11.9
- 12.0+

Consumer Products

Microplastics are ubiquitous. So, increasingly, are the class action suits they're spawning

An August 2024 judge's decision to dismiss a major class action claim against bottled water makers will likely do little to stem the flow of microplastics litigation in the year ahead, says Meshach Rhoades, managing partner of Crowell & Moring's Denver office.

Plaintiffs in the case had claimed that the company behind Ice Mountain bottled water violated the Illinois Consumer Fraud and Deceptive Business Practices Act when it used the wording "100% Natural" on its labeling, even though the water was actually found to contain microplastics—particles of less than 5 mm that can be shed by plastic bottle material.

But a federal judge roundly—and somewhat humorously—rejected the claim, on the grounds it was preempted by the Federal Food, Drug, and Cosmetic Act, which gives the Food and Drug Administration exclusive authority to define certain terms, including "spring water." Plaintiffs also failed to meet the "reasonable consumer" standard under the law, he said.

"No reasonable consumer would think that a bottle of water wasn't a bottle of water because it contained infinitesimally small amounts of microplastics," wrote Judge Steven Seeger of the Northern District of Illinois. "The claim doesn't hold water."

However, a raft of similar bottled water class actions remains in other, more plaintiff-friendly jurisdictions, such as New York and California, says Rhoades. In addition, plaintiffs' lawyers have begun targeting other products, including baby bottles.

Several false advertising class actions have been filed against baby bottle makers by plaintiffs who found microplastics leached into infant formula that had been warmed in bottles labeled free of bisphenol A, also known as BPA.

Spreading beyond water

While the FDA banned the use of BPA—a chemical used in the making of some plastics—in 2012, plaintiffs claim defendants created a false sense of security for consumers with their "BPA Free" label wording and caused them to assume the bottles were free of all types of microplastics.

Rhoades says she expects plaintiffs' attorneys to take aim at makers of others beverages besides water that are bottled in plastic. "I think we'll see it spread to just about everything," she says. "Supplements with certain types of coatings, processed, and even non-processed foods."

Still, Rhoades does not recommend that manufacturers rush to make radical changes to their labeling, such as adding a "may contain microplastics" warning—as has been suggested by plaintiffs' attorneys.

Rhoades notes that they should instead watch closely as a "reasonable consumer standard" in microplastics cases becomes clearer. "Microplastics are so ubiquitous," she

GETTY IMAGES

"It would be incredibly hard to argue that the standard should be zero concentration. But what concentration would be 'reasonable'? That's still a question."

MESHACH RHOADES

says. "It would be incredibly hard to argue that the standard should be zero concentration. But what concentration would be 'reasonable'? That's still a question."

Monitoring the research

Moreover, Rhoades says, the science is still developing on whether microplastics are harmful in the small amounts found in water, food, and beverages. Plaintiffs have offered studies that claim to show an association between microplastics and negative health outcomes, such as heart disease and male infertility.

However, after a comprehensive review of available studies, the FDA concluded in a July 2024 report that "current scientific evidence does not demonstrate that the levels of microplastics … detected in foods pose a risk to human health."

The agency was critical of many published microplastics studies as having "used methods of variable, questionable, and/or limited accuracy and specificity," but it said it will continue to monitor emerging research on the effects of microplastics and take regulatory action if necessary.

"Just like the science on the effects of BPA took many years to develop, the science on the effect of microplastics will too," says Rhoades. "Once we have a clearer understanding of the potential toxicity, the ball will move one way or the other."

A New Challenge for Cosmetics Makers: Dealing with the FDA

Key developments expected this year, as the FDA ramps up the implementation of major new cosmetics regulations, could shape the class action landscape for the beauty and wellness industry for years to come, says Crowell & Moring partner Robbie Rogart Jost.

When Congress passed the Modernization of Cosmetics Regulation Act in 2022, it was the most significant expansion of the Food and Drug Administration's authority to regulate cosmetics in more than 80 years. Prior to MoCRA, cosmetics industry reporting on safety information, such as product ingredients and adverse health events, was largely voluntary.

Starting in July 2024, the FDA began enforcing a MoCRA provision requiring major cosmetics manufacturers to register facilities where each product is made and designate a "responsible person," who is tasked with listing each marketed cosmetics product, along with its ingredients, with the FDA.

That responsible person must also receive adverse health event reports and disclose to the FDA any "serious" reports associated with the product within 15 days.

Because the structure of MoCRA mirrors the way the FDA regulates medical devices in many key respects, including for adverse event reporting, Jost says it would not be surprising to see a MoCRA adverse event reports database similar to the one for medical devices, known as the Manufacturer and User Facility Device Experience database, or MAUDE. MAUDE is easily searchable by a variety of parameters, including keyword, product name, and date of reports.

While MoCRA does not create a private right of action for consumers who allegedly have been harmed by a product, such a database could provide information to those looking to launch class action lawsuits.

As Jost explains, "If someone sees there have been 150 reports in the last two weeks about this hand cream or that mascara, well then that's just a road map for a plaintiff's attorney."

In addition to MoCRA's disclosure requirements, the legislation directs the FDA to issue a report no later than the end of 2025 on the use and safety in cosmetics of perfluoroalkyl and polyfluoroalkyl—widely used, long-lasting chemicals also known as PFAS. PFAS in cosmetics such as mascara and foundation have been the subject of several recently launched class action lawsuits alleging that cosmetics companies failed to list the chemicals as ingredients in their products.

Jost says it is unlikely the FDA report will offer definitive proof that PFAS are or are not harmful in cosmetics, but there's no doubt its report will become an important data point in litigation. "MoCRA represents a seismic change for an industry that has not had to meaningfully deal with the FDA, so it's difficult to predict the implications," she says. "We should begin to have a clearer picture in the year ahead."

Sustainability

100 percent ethical sourcing? Zero emissions? Recyclable? Class action plaintiffs beg to differ

Expect the recent surge in class actions challenging sustainability claims made by consumer goods companies to continue in the year ahead, says Crowell & Moring partner Jason Stiehl, who is a member of the firm's Litigation and Advertising and Brand Protection groups.

Several of the country's biggest brands were hit in 2024 with lawsuits asserting they misled consumers about their products' social and environmental impacts.

Fashion brands in particular have been targeted by "greenwashing" suits claiming their efforts to reduce carbon emissions, use more environmentally friendly materials, or even launch recycling programs for their products fell well short of what they promised in marketing campaigns. Especially with the advent of mandatory climate disclosure rules in the EU, the UK, and, most recently, in the U.S., those types of claims are increasingly vulnerable to public scrutiny, says Stiehl.

"Given recent government attention to [stated sustainability targets], it would not be surprising to see those claims challenged by the plaintiffs' bar."

JASON STIEHL

Can anything be '100 percent'?

Also last year, several large companies were hit with class action suits related to "100 percent ethical sourcing" claims, promoting their commitment to buying from suppliers who abide by certain human rights and labor standards.

Especially in industries that source farm-grown ingredients from around the world, those claims can be difficult to support, says Stiehl.

"In today's global supply chain, it's often difficult to trace and confirm each link in the chain, making a claim of 100 percent a risky proposition," he says.

Ambiguous words such as "ethical" should also be avoided if possible. "Without a clear definition, this has become a hotbed for complaints," he notes.

Sustainability suits are likely to expand in scope in the year ahead, with plaintiffs' attorneys taking their cues from elected officials and government regulators, says Stiehl. For example, New York Attorney General Letitia James recently filed suit against JBS USA, the American subsidiary of the world's largest producer of beef products, for allegedly "misleading the public about its environmental impact." Citing public statements going as far back as 2015, James said the company had "claimed it would achieve net zero greenhouse gas emissions by 2040, despite documented plans to increase production and its carbon footprint."

Stiehl says it is likely that James' suit will bring follow-on consumer class action suits, not just against JBS but also other companies that have made public statements about environmental and social goals. Those statements could come not just in the form of ad campaigns and product labels but even through financial reports such as 10-Ks.

"About five years ago, it was in vogue to publicly set very ambitious sustainability targets. Given recent government attention to these statements, it would not be surprising to see those claims challenged by the plaintiffs' bar," he says.

Green Guide updates

Stiehl says marketers and plaintiffs' lawyers alike will also be watching for a long-anticipated Federal Trade Commission update on its Green Guides, further clarifying standards for claiming a product is "recyclable."

A slew of class actions have been filed over the past several years by both environmental organizations and private individuals, asserting that "recyclable" labeling on everything from plastic water bottles to foam cups is "false and deceptive." Those claims are bolstered by a dramatic softening in the recycling market as well as a 2022 report by Greenpeace stating that only 9 percent of plastics actually gets recycled in the U.S.

During the Green Guides revision process, the agency has invited public comment on the guides' current definition of "recyclable," which focuses on local access to recycling programs. Depending on changes the FTC makes, retailers could face tougher substantiation requirements or need to make recycling disclaimers on packaging.

While the Green Guides are not legally binding, they do provide insight into areas where the agency will be focusing its enforcement activities. "Whatever the agency focuses on, consumer class action suits typically follow," says Stiehl.

Antitrust

A new frontier: Algorithmic pricing class actions

On a very basic level, generative artificial intelligence (Gen AI) takes in vast amounts of information, analyzes it, and provides results. It uses mathematical algorithms to find patterns in the information and exploits those patterns to achieve the user's goal.

Considering AI's boundless potential to do creative things with information, it seems inevitable that it would also generate litigation. That's precisely what's happening now in the field of antitrust. "We're at the beginning of what's likely to be a long-term trend," says Jordan Ludwig, a partner in Crowell & Moring's Antitrust and Competition Practice. "AI-based antitrust class actions appear to be just getting started. It's cutting-edge legal territory, with only a few cases filed so far and even fewer decisions."

"AI-based antitrust class actions appear to be just getting started. It's cutting-edge legal territory, with only a few cases filed so far and even fewer decisions."

JORDAN LUDWIG

Focus on algorithmic pricing

Algorithmic pricing is an area of antitrust litigation that's attracting a great deal of interest. Plaintiffs have alleged that defendants use algorithms to fix prices, share information, or both. While class actions have been brought in a variety of industries, some of the earliest cases thus far have targeted hotels in Las Vegas and Atlantic City.

The Las Vegas case (*Gibson v. Cendyn Group*) was filed under the Sherman Antitrust Act in the District of Nevada in January 2023. Plaintiffs claimed that several hotel operators on the Las Vegas Strip colluded to use the same algorithmic pricing software in a "hub-and-spoke" conspiracy to keep their room rates high. The court rejected the plaintiffs' complaint multiple times, concluding that the plaintiffs failed to allege any conspiracy among the hotel defendants. The court acknowledged the plaintiffs' case was a "relatively novel antitrust theory premised on algorithmic pricing going in search of factual allegations that could support it."

This case is notable in part because it is the first algorithmic pricing case to reach the appellate courts—a fact that has attracted attention. In September 2024, plaintiffs asked the 9th Circuit to reverse the district court's dismissal of their case. The Antitrust Division of the U.S. Department of Justice, as well as several interest groups, filed an amicus brief in support of plaintiffs.

The Atlantic City case (*Cornish-Adebiyi v. Caesars Entertainment*) was filed a few months after *Gibson* in the District of New Jersey. As with *Gibson*, plaintiffs alleged that the defendants used a common software provider—the same one as in *Gibson*—to further a conspiracy to control the pricing of their hotel rooms. These plaintiffs suffered the same defeat as the plaintiffs in *Gibson*: All of their claims were dismissed with prejudice.

The plaintiffs in *Cornish-Adebiyi* appealed the district court's dismissal to the 3rd Circuit. So there are now two pending appeals in two separate circuits concerning cases with very similar factual backgrounds. Antitrust lawyers are closely watching both cases for guidance on how the appellate courts will treat these so-called "algorithmic price-fixing" cases.

Potential defendants should be proactive

Ludwig believes, "The ideal outcome for potential defendants is to avoid litigation in the first place. Of course, that is not always possible, but there are several steps they can take to reduce the likelihood of class actions."

AI has many benefits and can be pro-competitive. But given the current regulatory and litigation climate, the first step to managing risk is to take a cautious approach with AI. It's vital to understand how both algorithms work and the inputs that go into them. Companies should also avoid communicating with competitors about pricing and the tools used to set prices.

In addition, Ludwig says, companies might consider providing antitrust training to less traditional audiences, including software developers. If a company is developing an AI tool in-house, it may become increasingly important for software developers to understand what may pose an antitrust risk.

Employment

Both old and new issues are driving the increased likelihood of class action suits

Class actions are alive and well in the world of employment law. Much is happening, and there's plenty more to come, says Rebecca Springer, a Crowell & Moring partner who serves as talent and inclusion lead in the firm's Labor and Employment Practice.

Springer highlights four specific areas particularly worthy of attention: compensation; age discrimination in entry-level recruiting; artificial intelligence; and diversity, equity, and inclusion (DEI) programs.

Compensation: Looking for greater transparency and equity

Class actions on pay equity issues aren't new—but they're picking up steam, and the drumbeat of pay equity cases will likely continue through the coming years. Federal and state governments, private litigants, shareholders, and the general public are all demanding greater transparency from companies about their compensation policies and pay profiles and are insisting on equitable pay practices.

The Office of Federal Contract Compliance Programs (OFCCP) considers itself the primary government watchdog for pay equity and has extracted numerous multimillion-dollar settlements from contractors in recent years. The Equal Employment Opportunity Commission (EEOC) has identified equal pay as a top enforcement priority for its 2024–2028 fiscal years (see chart, page 21).

Activist shareholder groups are insisting on greater pay transparency from top companies and publishing scorecards on performance, which shine a light on potential class action targets. Pay equity class actions against big employers in recent years have generated sizable settlements, including $215 million from a large financial institution.

Springer recommends that employers take proactive steps to reduce their pay equity exposure. Notably:

- Conduct regular (annual or biennial) pay equity assessments, pursuant to the attorney-client privilege, to identify and remediate potential areas of legal risk.
- Establish guardrails when setting pay to ensure that hiring or promotion compensation decisions take into account the pay profile of the existing workforce in comparable roles.
- Have a broad pay equity program that details your company's compensation philosophy and pressure-tests it. Be able to explain the factors that legitimately affect pay and demonstrate that your pay practices are equitable.

Age discrimination: Job ads pose big risk

Employers have long advertised entry-level job openings as requiring a recent college degree or only a few (e.g., one to three) years of experience. This sounds straightforward, but it exposes companies posting such ads to claims of age discrimination.

Multiple cases in recent years have alleged that companies that limit qualifications in job postings to recent college graduates or those with no more than a few years of relevant experience are unfairly discriminating against older workers in violation of the Age Discrimination in Employment Act.

Employer programs that recruit college graduates for particular roles only through campus recruiting are under direct attack, as well as other recruiting efforts focused on entry-level positions. AARP has taken up the mantle in several of these cases, and the EEOC has sided with older workers and has identified "job advertisements that exclude or discourage certain protected groups from applying" as one of its enforcement priorities.

While such entry-level recruiting practices remain commonplace for the moment, the conduct is not without consequences. PwC settled a claim for $11.6 million in 2020, a major tech firm paid $11 million in 2019, and other large employers are currently facing litigation.

Springer expects age discrimination class actions to gain momentum in the next few years. The conflict between two strong trends supports her view: The workforce is getting increasingly older while demand rises for candidates who know the latest technologies and have the requisite skills.

AI: Beware of algorithms

Companies are increasingly relying on artificial intelligence in recruiting and hiring, promotion, succession planning, and performance management practices. As the use of AI in employment decisions grows exponentially, so too does the concern that it might yield discriminatory results. While there hasn't been

"The pay equity drumbeat only grows louder over the years. Potential defendants need to be consistently attentive to their compensation practices to reduce exposure on an ongoing basis."

REBECCA SPRINGER

any significant class action litigation yet, Springer warns that "they're coming, and companies need to carefully consider their use of AI to avoid being the next target."

Some state and local governments have jumped into the fray, with Colorado, Illinois, and New York City passing laws governing the use of AI in employment. Others are likely to follow suit in 2025. Even where there aren't AI-specific laws on the books yet, Springer notes that the coming year is likely to see AI practices challenged under existing federal and state civil rights laws.

Springer encourages employers to take several steps to mitigate the risk of class action litigation. First, companies must get their arms around how AI is being used in the workplace—new tools often are implemented without the involvement of in-house counsel, so even the magnitude of risk is unknown.

Second, to the extent possible, companies should ensure that their algorithms don't have built-in biases that could trigger litigation. Third, they should analyze employment decisions based on AI tools to determine whether the tools' use has an adverse impact on the basis of any protected characteristic (e.g., race, gender, etc.). Finally, if there is adverse impact, they should conduct a validation study under the attorney-client privilege and consider whether to modify their practices to minimize impact on a protected group.

Employers should engage outside counsel to help them navigate this new and as-yet untested area of law. External lawyers can provide insight into both the ever-evolving laws and how others in the company's industry are addressing AI issues.

DEI: Programs under attack

Emboldened by Supreme Court decisions such as *Students for Fair Admissions v. Harvard/UNC* (which invalidated race-conscious affirmative action in college admissions) and *Muldrow v. City of St. Louis* (which lowered the bar for what constitutes discriminatory conduct), both state attorneys general and private litigants have been challenging programs designed to enhance diversity, equity, and inclusion in the workforce.

In the employment context, at issue are initiatives such as minority hiring or representation goals; targeted recruitment efforts; and internship, mentorship, or sponsorship programs. Also under scrutiny are companies' supplier or contractor programs and financial investment programs. Springer expects these challenges to increase during the Trump administration.

While the DEI landscape certainly comes with increased risk these days, she notes that most companies nonetheless remain committed to DEI. Companies that maintain various DEI initiatives should carefully consider how the programs are structured in order to avoid being a prime target for efforts to dismantle them. They shouldn't base their decision-making on race, gender, or another protected category.

In addition, DEI programs that are open to all can nonetheless emphasize a commitment to diversity-related themes. Making selections for participation based on individual circumstances and conduct can also reduce risk. Companies should carefully monitor evolving affirmative and defensive legal theories and litigation to understand how the risk profile of DEI programs and initiatives will evolve in 2025.

EEOC's Subject Matter Priorities for Fiscal Years 2024–2028

1. Eliminating barriers in recruitment and hiring
2. Protecting vulnerable workers and persons from underserved communities from employment discrimination
3. Addressing selected emerging and developing issues
4. Advancing equal pay for all workers
5. Preserving access to the legal system
6. Preventing and remedying systemic harassment

SOURCE: EEOC STRATEGIC ENFORCEMENT PLAN 2024-2028, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Privacy

Plaintiffs' attorneys test theories to bring claims against companies using customer data

After a surge in privacy class action lawsuits in 2024, San Francisco-based Crowell & Moring partner Kristin Madigan says she expects to see more of the same in the year ahead, as plaintiffs' lawyers continue testing out new legal theories to bring claims against any company that collects, uses, or sells customer data.

A record number of data breaches has fueled much of the rise in privacy litigation and government scrutiny, as it has become all but inevitable that a company that has been a victim of a data breach involving customer data will also get hit with a class action lawsuit and government investigation, says Madigan, who is a member of the firm's Litigation and Privacy and Cybersecurity groups.

But less conventional suits targeting how companies handle personal customer information and the role of consumer notice and choice—even in the absence of a data breach—are increasingly common as well, says Madigan, most notably under California's Invasion of Privacy Act (CIPA), a Cold War-era wiretapping statute passed to protect citizens from eavesdropping on private conversations. Unlike the California Consumer Privacy Act (CCPA/CPRA), CIPA provides for a broad private right of action and statutory damages.

CIPA was enacted with telephone communications in mind in 1967, decades before the internet would become commonly used by businesses to interact with customers. Then in 2021, the plaintiff in *Javier v. Assurance IQ* claimed an insurance company and its software provider violated CIPA when it used session replay software to record his interactions with the company's website as he sought an insurance quote.

A California district court quickly granted a motion to dismiss for failure to state a claim on the basis that the plaintiff had retroactively consented to the recording by agreeing to the company's privacy policy. But the 9th Circuit reversed in an unpublished opinion on the grounds that the defendant started recording the plaintiff as soon as he began inputting his personal information and that prior consent was not obtained.

The suit was dismissed in 2023 after a court ruled that CIPA's one-year statute of limitations had lapsed before the plaintiff filed suit. But by that time, the number of CIPA claims was already on the rise, and in 2024 there were hundreds of such cases filed in California, with plaintiffs targeting not just tech companies or firms that collect sensitive personal information but also defendants in every sector, from apparel retailers to fast-food chains.

Targeting data analytics and tracking tools

The range of website technology targeted in CIPA suits has expanded well beyond session replay software. Plaintiffs have argued that widely used third-party data analytics and tracking tools and even search bars on websites violate CIPA's prohibition on the use of pen registers, which record outgoing phone numbers, including the date, time, and length of calls, and trap and trace devices, which record incoming phone numbers.

In *Greenley v. Kochava*, for example, the defendant offered a software development kit to application developers that allowed the defendant to obtain geolocation data of app users, which it then sold to clients for advertising purposes. The U.S. District Court for the Southern District of California rejected the defendant's argument that app users consented to the information sharing when they downloaded the apps but never opted out of the location sharing, and it denied the motion to dismiss, saying the software could in fact qualify as a pen register. (The court granted a joint motion to voluntarily dismiss the case in mid-October 2024, as both parties said they were near a settlement.)

In another case that survived a defendant's motion to dismiss, the U.S. District Court for the Central District of California found that the transmission to third parties of search terms entered by plaintiffs into the search bar of a website could violate CIPA.

Most recently, a plaintiff filed suit in the Northern District of California claiming that a customer service software company violated CIPA when it surreptitiously recorded consumers' telephone conversations with its satellite TV-provider clients, then analyzed those conversations by using artificial intelligence to identify patterns and classify the data so their clients could "optimize the [consumers'] buying journey to drive more revenue."

"What we're seeing now is laying the groundwork for the next wave of privacy litigation, which we expect will continue to grow once AI really takes off."

KRISTIN MADIGAN

"I think what we're seeing now is just laying the groundwork for the next wave of privacy litigation, which we expect will continue to grow once AI really takes off," says Madigan.

Still early days

So far, the majority of recent CIPA complaints are still in the early stages of litigation, and court rulings have been mixed, with many not surviving defendants' motions to dismiss.

For example, in 2024, a California Superior Court dismissed a claim on the grounds that the plaintiff failed to allege a "concrete injury in fact," as the CIPA statute requires.

None of the recent CIPA complaints has yet been brought to trial, and one of the largest publicly disclosed settlements came in September, when Oracle agreed to pay $115 million in a case in which it was accused of tracking consumer activity without consent, in violation of CIPA.

Madigan points out that Oracle, as a data analytics company, is on the front lines of the privacy debate, but that all businesses that collect and process customer data and work with third-party providers need to pay attention.

"What's happening with CIPA is really just an example of a larger trend," Madigan says. "Many of the firms filing these suits are sophisticated. They are scraping your websites; they are employing technologists. They are looking for ways to at least make a *prima facie* evidentiary case that will survive a motion to dismiss. That theoretically raises the risk of class-wide statutory damages."

Moreover, Madigan says, they are searching for old laws with statutory damages provisions, like CIPA, that could be dusted off and applied to new technology. Given that privacy law in the U.S. is a patchwork of federal statutes and regulations, as well as the laws of 50 states, it would not be surprising if they found more.

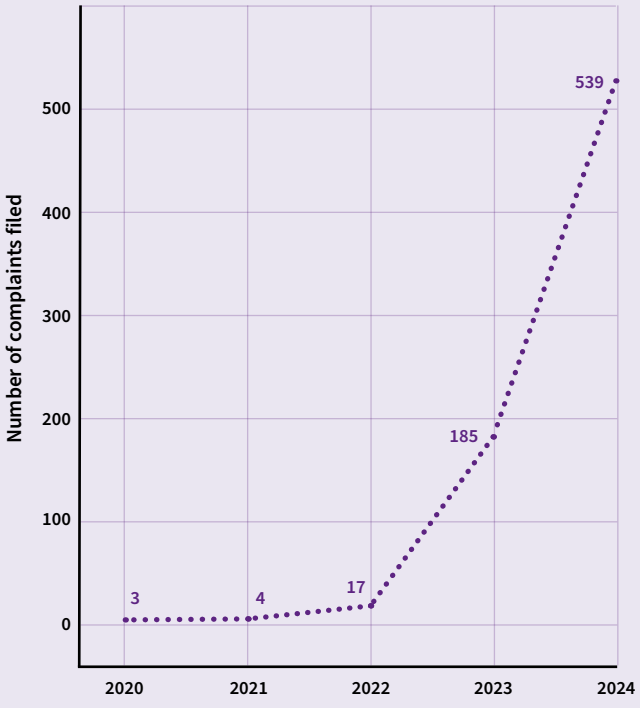
In fact, complaints have been filed using old CIPA-like wiretapping laws in Pennsylvania, Maryland, and Massachusetts, though not nearly in the same numbers as seen in California and without as much success so far.

Madigan says companies should take a close look at their data-sharing practices with third parties to make sure they are consistent with disclosures on their websites and that agreements are in place governing data sharing and use. Companies need to assess when to provide a data-gathering opt-out option for consumers, and in some instances, even consider adopting an explicit opt-in approach.

"It's so important to understand your risk factors," says Madigan. "What are the steps you are taking to mitigate that risk, and how much cover is that really giving you?"

Explosive Growth in CIPA Complaints

CIPA complaints filed in California state and federal courts between 12/12/2019 and 10/18/24, by year



SOURCE: COURTHOUSE NEWS SERVICE

Artificial Intelligence

The rapidly evolving landscape of AI class action litigation has become a wild, wild world

Artificial intelligence (AI) has been finding its way into business for some time, but that trend was dramatically accelerated with the arrival of generative AI (Gen AI), which can create new content on its own. The release of a relatively easy-to-use version of Gen AI in late 2022 was followed by the rapid adoption of the technology—and not long after, by the arrival of class action lawsuits centered on AI.

To date, these AI-related class actions have primarily involved various content creators suing companies that create and sell Gen AI tools for copyright infringement. "These lawsuits cover the input and output sides of AI," says Warrington Parker, managing partner of Crowell & Moring's San Francisco office. "On the input side, visual artists, musicians, and authors are alleging that the use of their works to train AI is infringing on their copyrights. On the output side, they are saying that AI can essentially recreate their original work." For example, instructing AI to create a portrait in the style of a certain artist could lead the technology to produce an exact or near-exact replica of one of the artist's works.

One of the first of these copyright infringement cases was *Andersen et al. v. Stability AI*, filed in early 2023. Here, a group of visual artists alleged that the training of AI tools offered by Stability and other companies not only infringed on their copyrights, but also created right of publicity and Digital Millennium Copyright Act violations. Dozens of other similar class actions soon emerged, including lawsuits involving writers such as Michael Chabon, Laura Lippman, Sarah Silverman, and Ta-Nehisi Coates. In several cases, courts have struck down some of the broader claims, such as the DMCA violation in *Andersen*, but left the copyright infringement claims in place.

This type of litigation is still in the early stages, and courts will likely need to keep grappling with the issue for some time. As case law evolves to define the issue more clearly, additional guidance may come from the Federal Trade Commission as well. The commission, which has already been pursuing cases of fraud involving AI, has signaled that it is also interested in the issue of whether using creator content to train AI could be an unfair business practice. When an artist's work is used to develop AI tools, the FTC has noted, "not only may creators' ability to compete be unfairly harmed, but consumers may be deceived when authorship does not align with consumer expectations. A consumer may think a work has been created by a particular musician or other artist when it is an AI-created product." The FTC may well put out guidelines on the issue in the coming year.

"The landscape around AI and copyright is still uncertain," says Parker. But in this environment, companies that are training AI "should budget out the risks of what they are doing and determine whether they are using someone else's copyrighted materials and how to address the issue around that going forward."

Up next: Consumer class actions

These copyright class actions brought by creators have developed quickly, but they are just the tip of the iceberg. Looking ahead, we are likely going to see a growing focus not only on AI and copyright infringement, but also on the broad impact that AI has on consumers as the technology shows up in more and more aspects of their daily lives. "We have yet to see consumer class actions in the AI space, but they can be expected to emerge soon," says Parker. When they do, he says, they are likely to fall into two categories: *AI-based selections* and *bad AI decisions*.

"Selection cases are those involving things like hiring decisions and decisions to extend credit and loans," says Parker. "These could arise any time a company has AI picking one person over another based on a number of variables, where plaintiffs could make a claim on the basis of age, race, or gender." Such lawsuits could be based on AI being biased because it reflects the biases or inaccuracies of the data it ingests. Thus, companies should assess their training content and their AI tools for such biases. "Some of this is already being imposed in some jurisdictions, he says. "In New York, for example, you have to certify that the AI system you use is not biased."

Selection-related class actions could also arise from a company not really understanding why or how its AI tool is making the decisions it makes, and therefore

"The landscape around AI and copyright is still uncertain. [Companies training AI] should budget out the risks and determine whether they are using someone else's copyrighted materials and how to address the issue around that going forward."

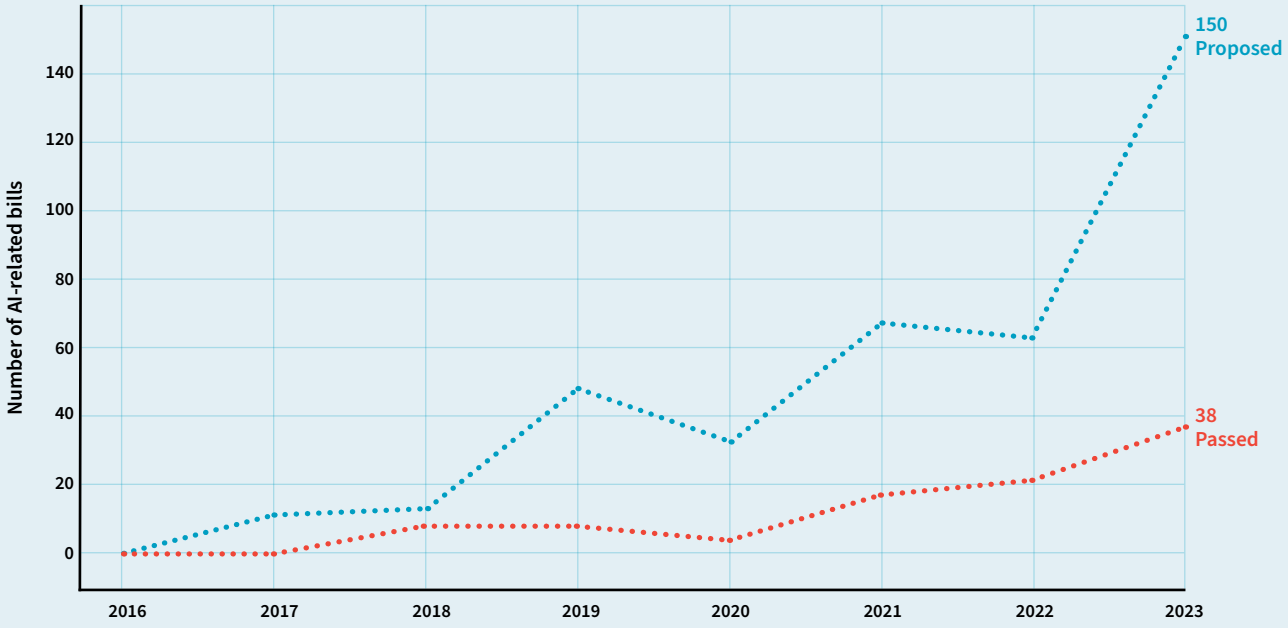
WARRINGTON PARKER

being unable to explain it to consumers. That's not uncommon with the technology, since it is essentially a "black box" that can more or less train itself, typically relies on very complicated calculations, and, once trained, operates with little or no human intervention.

Meanwhile, companies' increasing reliance on AI to handle customer-facing interactions could also lead to consumer class actions stemming from the technology's fallibility. "There is an assumption today that AI is rational, reasonable, and makes great decisions, but that's a falsity," says Parker. In activities ranging from chatbot responses to product returns, customer refunds, and dynamic pricing, AI—which has been known to "hallucinate"—could come up with "answers that just don't make sense," he says. And when those answers determine things such as who gets a refund or who gets charged what with dynamic pricing, it could lead to the unfair and possibly illegal treatment of customers.

It's still unclear exactly how AI-related consumer class actions will emerge and evolve. But companies should "at least be attempting to put their arms around issues with a risk analysis. What are the risks associated with AI? What are the risks we don't know about—and how can we learn about those?" asks Parker. "A company's customers may number in the millions and be located across 50 state jurisdictions—and with a bunch of class action law firms ready to go, I expect it to be a wild, wild world out there for companies using AI to serve consumers."

Number of State-Level AI-Related Bills in the United States, 2016–2023
(proposed vs. passed)



SOURCE: ARTIFICIAL INTELLIGENCE INDEX REPORT 2024

United Kingdom

Nearly a decade after U.S.-style collective actions emerged, opt-out lawsuits are on the rise

A 2023 court decision on the legality of litigation funding agreements will likely continue to cast a cloud of uncertainty over collective actions in the United Kingdom at least until the summer of 2025, when a key government advisory board report on the issue is expected to be published.

U.S.-style collective actions have only been possible in the UK since 2015, when attorneys can file a complaint on behalf of a whole class of plaintiffs without first getting their permission. Because the law only allows for opt-out lawsuits involving competition infringement claims, the number of cases filed has been fairly limited, at least in comparison to the number filed in the U.S., says London-based Crowell & Moring partner Laurence Winston.

Still, such suits have been on the rise over the past several years, as class action plaintiffs began finding ways to cast consumer or privacy law claims as competition law issues. They gained momentum after a 2020 UK Supreme Court ruling that paved the way for the first-ever certification of an opt-out class, which included 46 million individuals with potential claims of $12 billion. (The dispute, over credit card fees, is ongoing.)

"Collective actions are still relatively new in the UK, so there are a lot of issues that have yet to be worked out. This just adds one more issue to be resolved."

LAURENCE WINSTON

Since then, dozens more claims have been filed against big tech platforms, often on issues that are concurrently being investigated by government regulators.

In 2023, however, the UK Supreme Court ruled that litigation funding agreements that allowed funders to recover a percentage of damages—rather than a multiple of the funders' costs—were unenforceable. Given that most opt-out collective actions have been funded through such agreements, the decision created significant uncertainty surrounding the future of opt-out cases in the UK.

"Collective actions are still relatively new in the UK, so there are a lot of issues that have yet to be worked out. This just adds one more issue to be resolved," says Winston, who is co-chair of the firm's International Dispute Resolution Group. "It could make it much less attractive for litigation funders."

Establishing a position on litigation funding

In March 2024, the UK's Ministry of Justice announced plans to legislatively overturn the Supreme Court ruling, to "help people pursuing claims against big businesses secure funding to take their cases to court." The Litigation Funding Agreement bill appeared to be working its way through the parliamentary process until August, when the justice minister announced that it would shelve the legislation until after a review of litigation funding is published by the Civil Justice Council by summer 2025.

The Civil Justice Council is a government-appointed board "with responsibility for overseeing and coordinating the modernization of the civil justice system."

"This review will set out the current position on litigation funding, including that of third-party funding, and will consider access to justice, its effectiveness, and regulatory options," the council said in a statement.

Other lingering questions regarding litigation funding in opt-out class actions could also see some resolution in the coming year, says Winston. For example, at the time of publication, court-watchers were awaiting a verdict in the first full trial of an opt-out collective action, which was held in January 2024.

One development to look for after the verdict: how the court decides to treat undistributed damages, or payments that go unclaimed by unengaged class members. Court rules state that undistributed damages can be transferred to the class representative or be paid to charity. If the court rules that they should go to the class representative, that's a big boost for class action plaintiffs and their funders.

Winston points out that whatever the court's ruling, it will very likely be appealed to the Supreme Court. "We are a decade out from the passage of the Consumer Rights Act, and there are still a lot of unknowns," he says. "But 2025 could be the year some of these key issues will be decided."

European Union

EU- and member state-level reforms should spur increase in class actions

A cross-border lawsuit filed in Italy in 2024 could be the first test of how recently imposed, plaintiff-friendly changes in European Union law will impact class actions in the EU.

A coalition of plaintiffs' lawyers known as the Global Justice Network filed suit against Dutch-based manufacturer Philips on behalf of 1.2 million European users of Philips' sleep therapy devices and mechanical ventilators. The suit, which claims that sound abatement foam used in the devices deteriorated into a sticky powder that was then inhaled by users, asks for 70,000 euros per claimant for emotional distress and other damages. According to a spokesperson for GJN, the powder is "carcinogenic and can lead to potentially lethal illnesses."

Philips recalled the devices globally beginning in 2021 and has paid out billions in settlements in similar class action cases in the United States.

The GJN suit was filed in Milan, where Philips' head of quality products is located, but is open to plaintiffs from across the EU, marking the first time a 2020 EU directive allowing for cross-border class actions has been applied.

"EU collective action law is still evolving. Some of the impacts of the [EU directive] should become more apparent with time."

EMMANUEL PLASSCHAERT

The directive, which was adopted with the aim of "improving consumers' access to justice" while including "safeguards to prevent abusive litigation," also required every EU member state to implement its own mechanism for collective actions.

Though a few countries, including Poland and France, had yet to formally approve a class action mechanism, the directive went into effect in June 2023.

"EU collective action law is still evolving," says Brussels-based Crowell & Moring partner Emmanuel Plasschaert. "Some of the impacts of the [EU directive] should become more apparent with time."

A move toward forum shopping?

Plasschaert says the new measures could lead to forum shopping, with class action lawyers looking for ways to file in countries that have adopted more plaintiff-friendly procedures governing class actions, within the limits of the applicable international private law. Plaintiffs' lawyers might be more likely to file in member states that have a shorter average time for cases to be settled, for example, or more access to discovery or plaintiff-favorable opt-in/opt-out rules.

For example, the Netherlands adopted a class action framework that is considered one of the most plaintiff-friendly in all of Europe, including the possibility of U.S.-style opt-out claims—in which class members have to take steps to opt out of the litigation if they do not want to be included. (However, in cross-border cases filed in the Netherlands, potential claimants in other member states would still have to opt in, under EU rules.)

In Belgium, recent reforms shifted the "opt-in" or "opt-out" period to much later in the litigation timeline, making the process significantly more plaintiff-friendly, Plasschaert says.

Win-win or lose-lose

"Essentially, group members get to choose whether they want to be part of the proceedings only after they already know that either a settlement agreement has been reached or the court has declared the case well-founded," says Plasschaert. "It's win-win for the plaintiffs and lose-lose for the defendant."

Belgium also expanded the range of suits that can be brought to include claims by aggrieved investors against an issuer of securities. It also now allows entities formed specifically to bring a class action on behalf of a group. Previously, only well-established consumer protection groups or protection groups of subject matter experts (SMEs) could serve as class representatives.

Under the old Belgium rules, less than a dozen class action cases were filed over the decade it was in effect.

"With both EU-level and member state-level reforms, it seems inevitable that the number of class actions is going to increase," says Plasschaert. "After a few of these cases work their way through the system, we will have a better sense of what the magnitude of the increase will be."

Entering the Class Action Fray with Confidence—and Competence

Crowell & Moring has a broad and robust defense practice in class action work that is bolstered by our deep regulatory roots. With that background, we bring deep subject matter experience to our representations that makes our litigators highly effective in the complex and specialized world of class actions. Our litigation depth allows us to form teams that bring together the right people with the right experience to craft winning strategies for clients, whether they're facing routine or existential class action threats.

At the same time, our approach to class action defense is evolving, and we are building teams and systems to better meet our clients' commercial and legal objectives by using highly customized, novel defense strategies. And we don't undertake these increasingly complicated and sophisticated matters on a whim or with a mind toward "learning as we go." Instead, we partner with our clients to enter these frays with the confidence and competence developed through years of immersion in the practice areas that drive the litigation.

Those areas—and the Crowell attorneys who practice within them—are at the heart of this year's *Litigation Forecast*, with its special focus on class action lawsuits. In this volume, these attorneys discuss the developments that are changing the class action landscape and demanding an increased level of commitment and creativity as we provide a range of approaches and solutions tailored to achieve each client's unique business and litigation goals—whether we're beating class certification before the suits progress or prevailing when we make our case at trial.

As always, we hope you'll find this *Forecast* provocative, informative, and useful as you move into the year ahead. We look forward to hearing from you and to continuing the conversation.

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