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Class Action University

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Short-Circuiting Putative Class Actions: Ending Class Actions Before They Begin

Stephen B. Devereaux

King & Spalding

Livia M. Kiser

King & Spalding

Rachael M. Trummel

King & Spalding

Agenda

Use of Arbitration Provisions & Class Action Waivers

Pre-Suit Resolution Strategies

Immediate Post-Filing Strategies

From your company's perspective, what is the most important reason to avoid class action litigation?

1. Cost to defend
2. Reputational injury to company
3. Internal resources consumed
4. Can spawn viral litigation/regulatory and other scrutiny from state and federal entities
5. Risk of aggregate liability and exemplary damages



Use of Arbitration Provisions & Class Action Waivers

Recent Supreme Court Decisions Have Favored Enforcement Of Arbitration Provisions

Stolt-Nielsen S.A. v. AnimalFeeds Inter. Corp. (2010) (no class arbitration if agreement silent as to use of class procedures) (5-3).

Amex. v. Italian Colors (2013) (class arbitration waiver enforceable even if cost of litigation exceeds the potential recovery) (sharply narrowed “effective vindication” rule, potentially opening door for more procedural restrictions) (5-3).

Harry Schein, Inc. v. Archer and White Sales, Inc. (2019) (no exceptions: a contract that requires arbitrability to be decided by arbitrator will be enforced per its terms) (9-0).

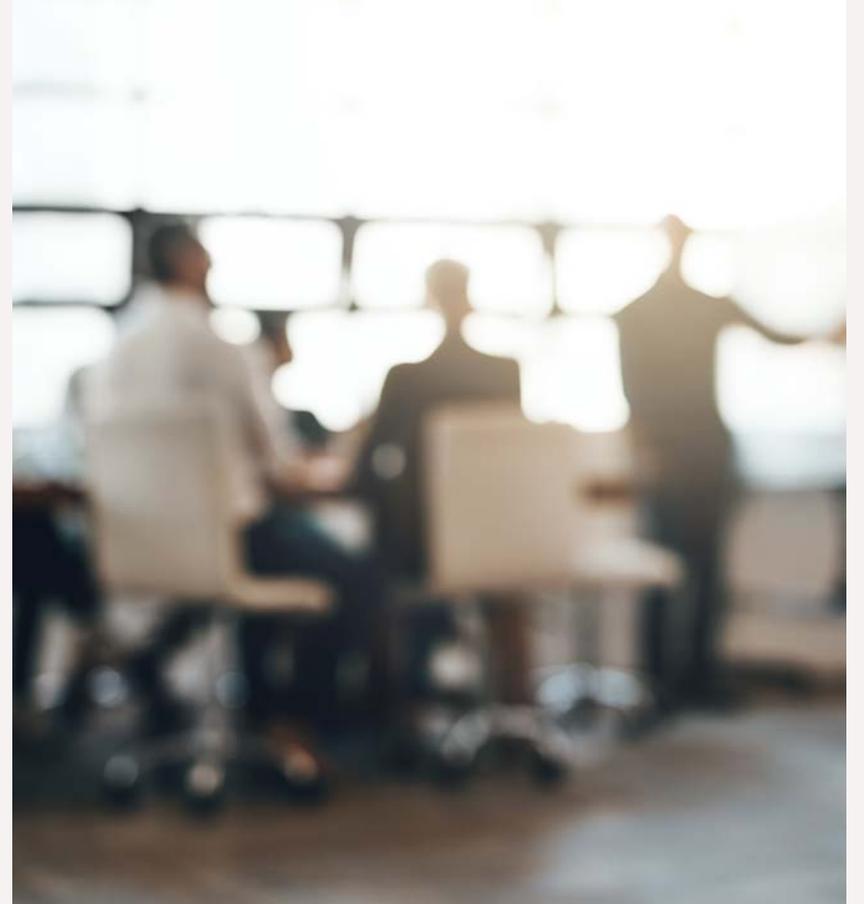
Lamps Plus Inc. v. Varela (2019) (no class arbitration even if agreement is ambiguous as to use of class procedures) (also adopted defense-friendly standard for appeal of arbitration-related order) (5-4).

Legislative and Regulatory Pushback

CFPB attempted to ban mandatory arbitrations and class action waivers (but in 2017, Congress and Trump administration revoked these bans).

Arbitration Fairness for Consumers Act of 2019 (focuses on student loans, credit cards, employment; bans class action waivers and arbitration agreements) (introduced Feb. 28, 2019).

Forced Arbitration Injustice Repeal Act (FAIR) of 2019 (broadly bans forced consumer arbitration and class waivers) (introduced Feb. 28, 2019).



Enforceability of Arbitration Provisions & Class Action Waivers

When is an arbitration provision *probably* enforceable?

- The party seeking to enforce it has a contractual right to enforce it
- Timely assertion of the right to arbitrate
- Must not be procedurally AND substantively unconscionable (but can be one or the other)
- Dispute must fall within the scope of arbitration provision

When is class action waiver *probably* unenforceable?

- When the plaintiff seeks vindication of a public right via injunctive relief (and lives in California)

Enforceability Challenges

Who decides arbitrability (depends on the contract)

How to get the arbitrator to enforce the class action waiver. (blow-up provision)

Cost of arbitrations—can be expensive, so need to be thoughtful about which arbitration service provider to use

- consumer arbitrations (can be simpler, can specify telephonic)
- consider where customers are located: domestic vs. abroad (if abroad, different regulatory scheme applies)

States may have certain reportability requirements that undermine confidentiality to some degree (e.g., CA)

Importance of severability clauses

Can always offer small claims court as an alternative

Pre-Suit Resolution Strategies

What Do You Do When ...

You receive a notice from a lawyer on behalf of a customer threatening a class action unless certain actions are taken?

1. I respond to the prefiling notice and attempt to informally resolve the dispute
2. I don't know – I've never received one of those
3. I ignore it – either it turns into a lawsuit or it doesn't
4. I hand it off to customer service



Addressing Customer Complaints

A robust customer service program can protect you from getting demand letters in the first place

Unaddressed customer complaints can lead to proposed class actions because if a consumer goes on the internet to see whether other consumers have had similar complaints, he/she will often see websites that look like forums but are actually referral sources for the plaintiffs' class action bar

Anytime you address a customer complaint, you are potentially creating differences between and among proposed class members (A GOOD THING)

Debit cards with value (e.g., for free service), coupons for free stuff (with bar scanner that tracks if used), etc.

- Building customer goodwill in relatively small-cost situations can be a great defensive method for preventing class action litigation out of the box.

Market Actions

A market action is when you identify some problem or issue with your product or marketing and take corrective action applicable to all consumers who purchased the product

Courts have held that when a company attempts to correct its mistakes, a class action is not a “superior” way to resolve the dispute.

- NB: depending on regulatory environment and nature of the problem, also may have to provide notice to regulators and purchasers.

Demand Letters — A Potential Opportunity?

Many state consumer protection statutes require that a pre-suit demand letter be served upon a company by a consumer before filing suit

- Some statutes confer additional defenses if Defendant engages in good faith with the demand, *e.g.*, Tex. Bus. Code §17.501.
- Specific prefiling notice provisions of statutes like California's CLRA may also limit claims if the plaintiff fails to comply with the requirement

Possible Opportunities:

- Sharing and requesting information: show that the matter cannot proceed as a class action and/or that the claim is meritless
- Sharing delays the case and may gain strategic information

Immediate Post-Filing Strategies

What Do You Think?

Should you share information informally with opposing counsel after complaint is filed?

1. Never
2. Always
3. It depends



Sharing Information: When is it Appropriate?

When you can offer credible information that demonstrates it will be difficult (if not impossible) to certify a class (*note: not every plaintiffs' lawyer will be receptive or economically rational*)

Examples:

- Having information regarding the specific plaintiff that tends to defeat the claim (e.g., he/she never purchased the challenged product or service)
- Already having undertaken a market action and provided a remedy
- Showing core factual premise underlying claim is simply not true
- Demonstrating that variations between and among consumers will defeat predominance

Positioning A Case For Resolution

When you do resolve a case on an individual, informal basis, resolve it in a way that lessens the likelihood of follow-on or copycat litigation.

- Obtain warranty that all persons with the issue known to the plaintiff/plaintiffs' counsel have been disclosed,
- Obtain warranty that all products for which customers have complained have been disclosed, etc.

Consider private resolution on a class-wide basis if that makes strategic sense (e.g., to avoid difficulty in formally settling cases under the new rules).

Consider whether to agree to injunctive relief that effectively moots future claims (particularly effective if the company has already elected on its own to discontinue the complained-of practice or advertisement).

Obtaining Finality

Require the plaintiff's lawyer to earn his/her fee. Stipulations of voluntary dismissal can include language that states an investigation was done by Plaintiff's counsel and no trouble found (or it has been resolved). Requires an actual investigation. Prevents lawyer from suing you again and also suggests to others in a public filing that there is no issue of concern

Do your diligence! Before you make any offer, require plaintiff's counsel to share information regarding the product or service allegedly purchased, and make sure you fully understand the vulnerabilities in plaintiff's case

Compel disclosures of and participation of all firms/lawyers involved in the matter to reduce the risk of new litigation filed by a splinter group disappointed by their share of the recovery

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Questions

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Data Breach Class Actions: Current Issues and Trends

David Balser

King & Spalding

Phyllis Sumner

King & Spalding

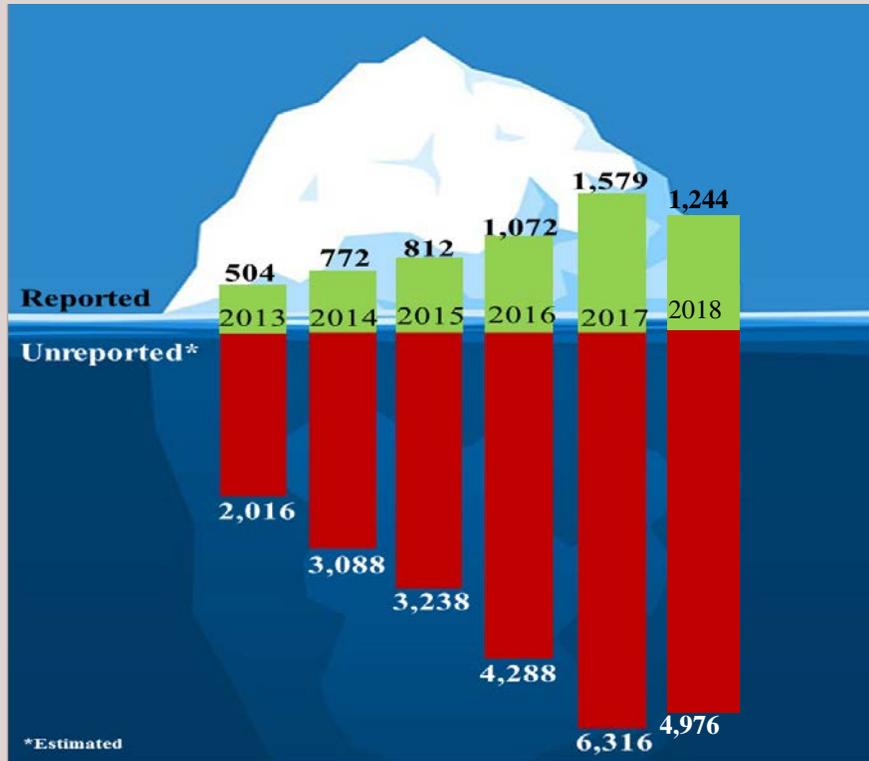
John Toro

King & Spalding

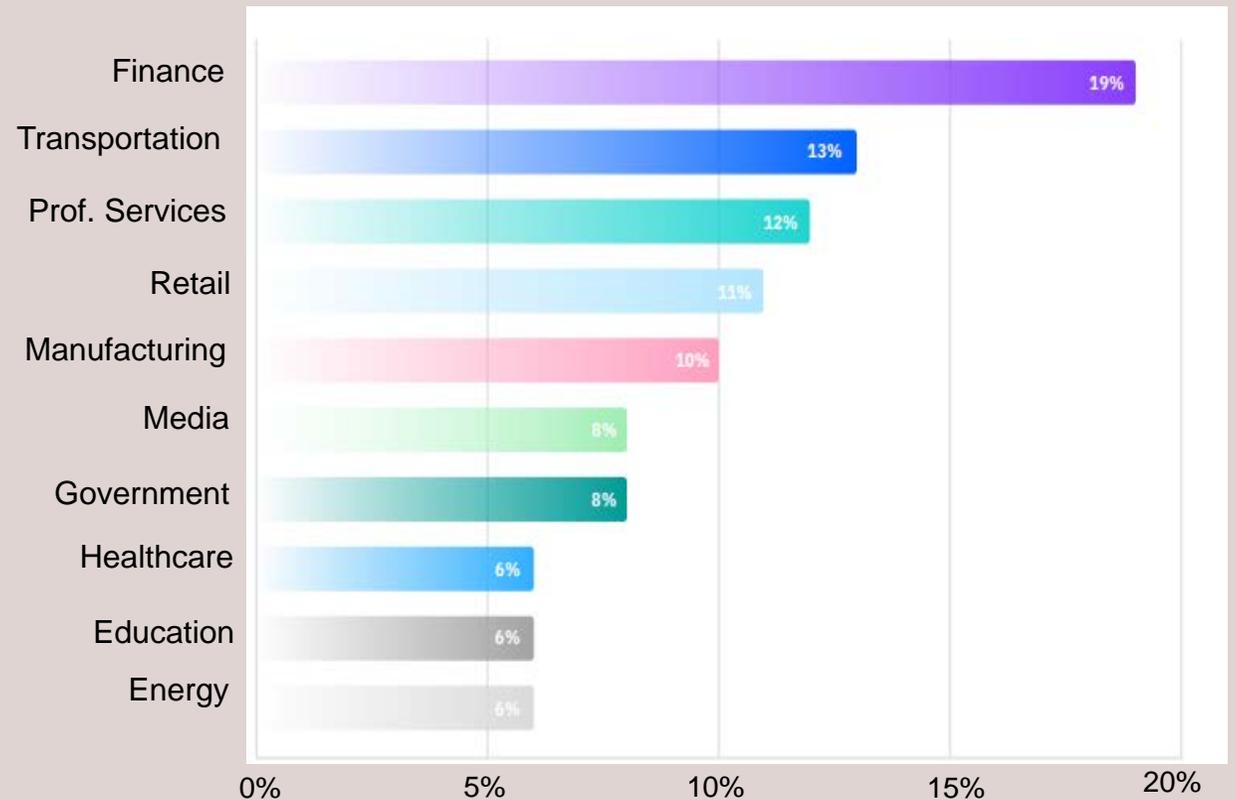
Cybersecurity Landscape

Cybersecurity Landscape

Number of public data breaches over the last 6 years

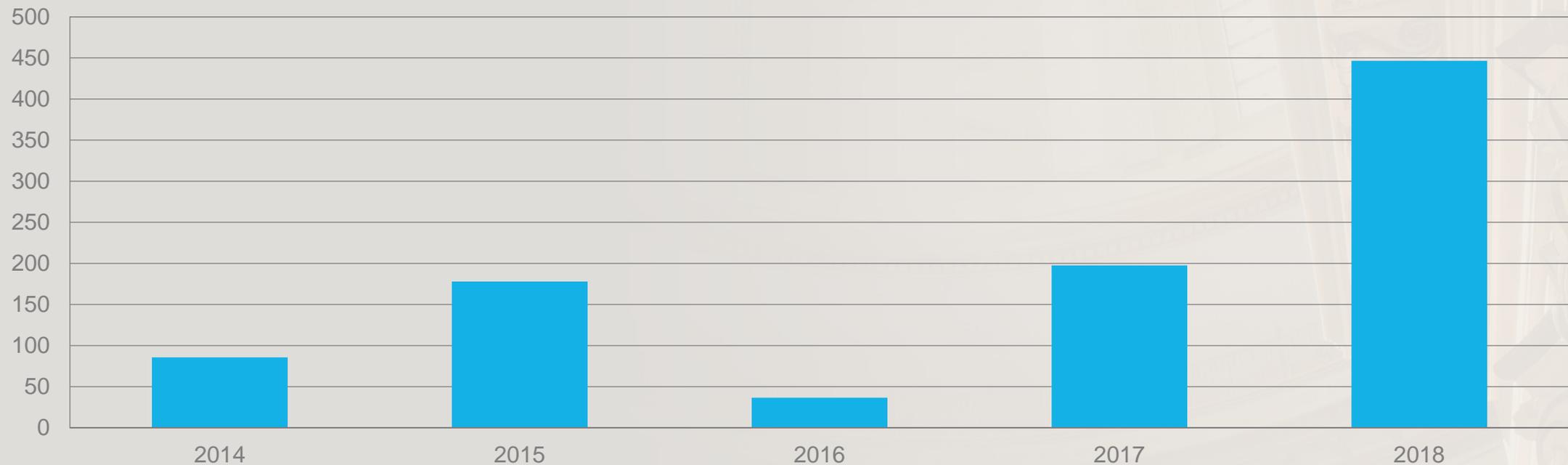


Industry sectors affected



Millions of Records Exposed in Recent U.S. Data Breaches

Records Exposed (millions)



Cybersecurity Landscape

Consequences of a Cyber Attack

Business Impact



- Disruption of business operations
- Trade secret/IP theft
- Remediation costs
- Legal costs and penalties
- Industrial accidents
- Management shakeup
- Reputational harm
- Loss of business
- Insurance
- Stock drop

Legal Implications



- Contractual obligations
- Notification laws and disclosure obligations
- Government investigations/enforcement actions
- Law enforcement
- Private litigation and class actions
- Legal action against perpetrators and related parties
- Customer and vendor litigation

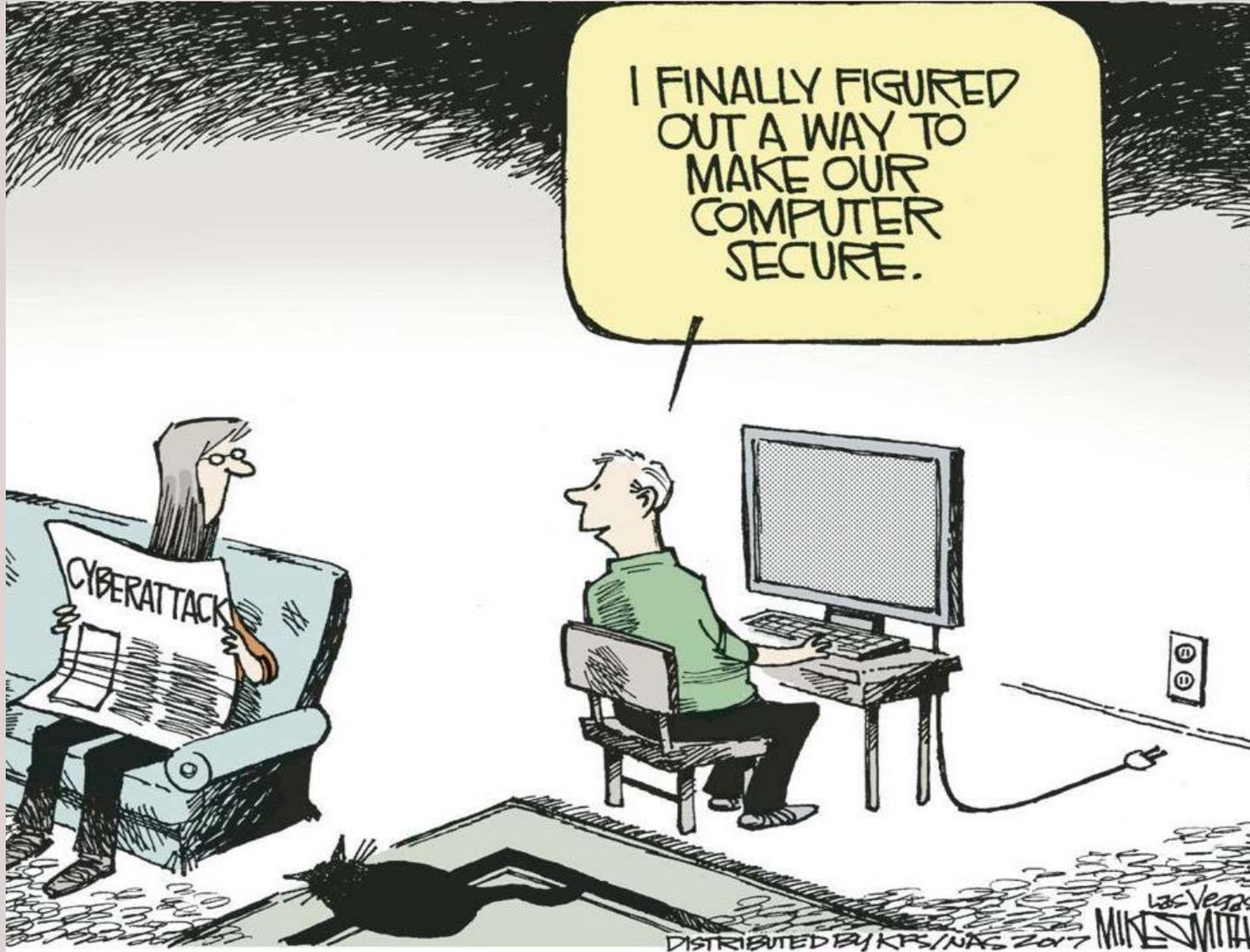
Data Breaches Are Inevitable

Data Breaches Are Inevitable



“High-impact intrusions are becoming more common; the threats are growing more complex; and the stakes are higher than ever... That requires all of us to raise our game.”

— CHRIS WRAY, FBI DIRECTOR



The only surefire way to prevent a data breach ...

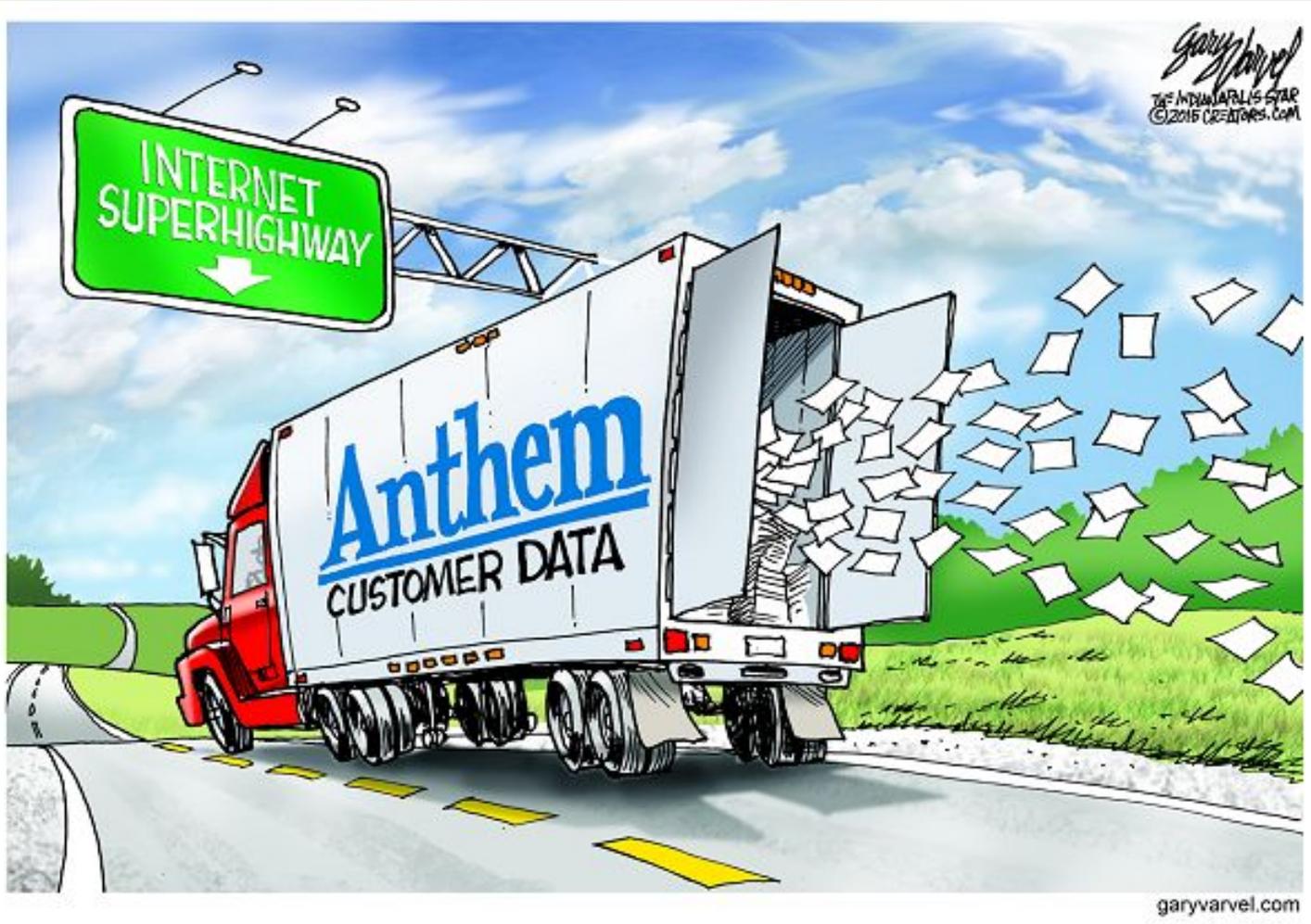
Major Data Breaches



Target data breach announced in 2013.

Exposure of personal information belonging to 110M individuals.

Compromised information included payment card data and emails.



Anthem data breach announced in 2015.

Exposed personal data of 79 million people including medical IDs and Social Security numbers.



Equifax data breach announced in 2017.

Over 147 million impacted consumers.

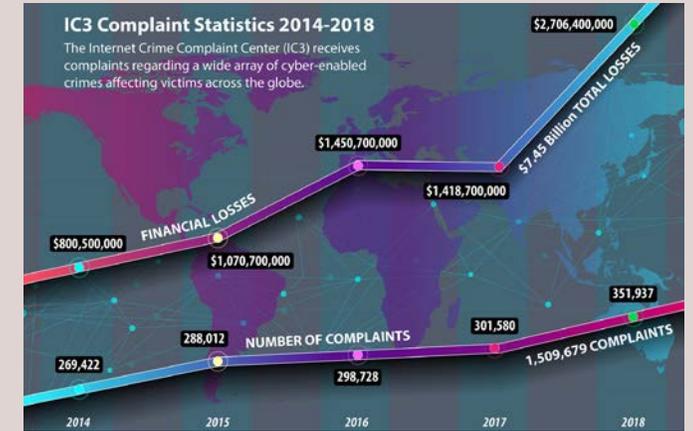
Information compromised included social security numbers for some consumers.

Major Data Breaches

2018 – Year of the Data Breach ... Again

Many thought 2017 was peak year
2018 similarly daunting

- Exactis – **340M** records
- Under Armour – **150M** MyFitnessPal users
- Facebook – **50M** user records
- Marriott – **500M** guest records

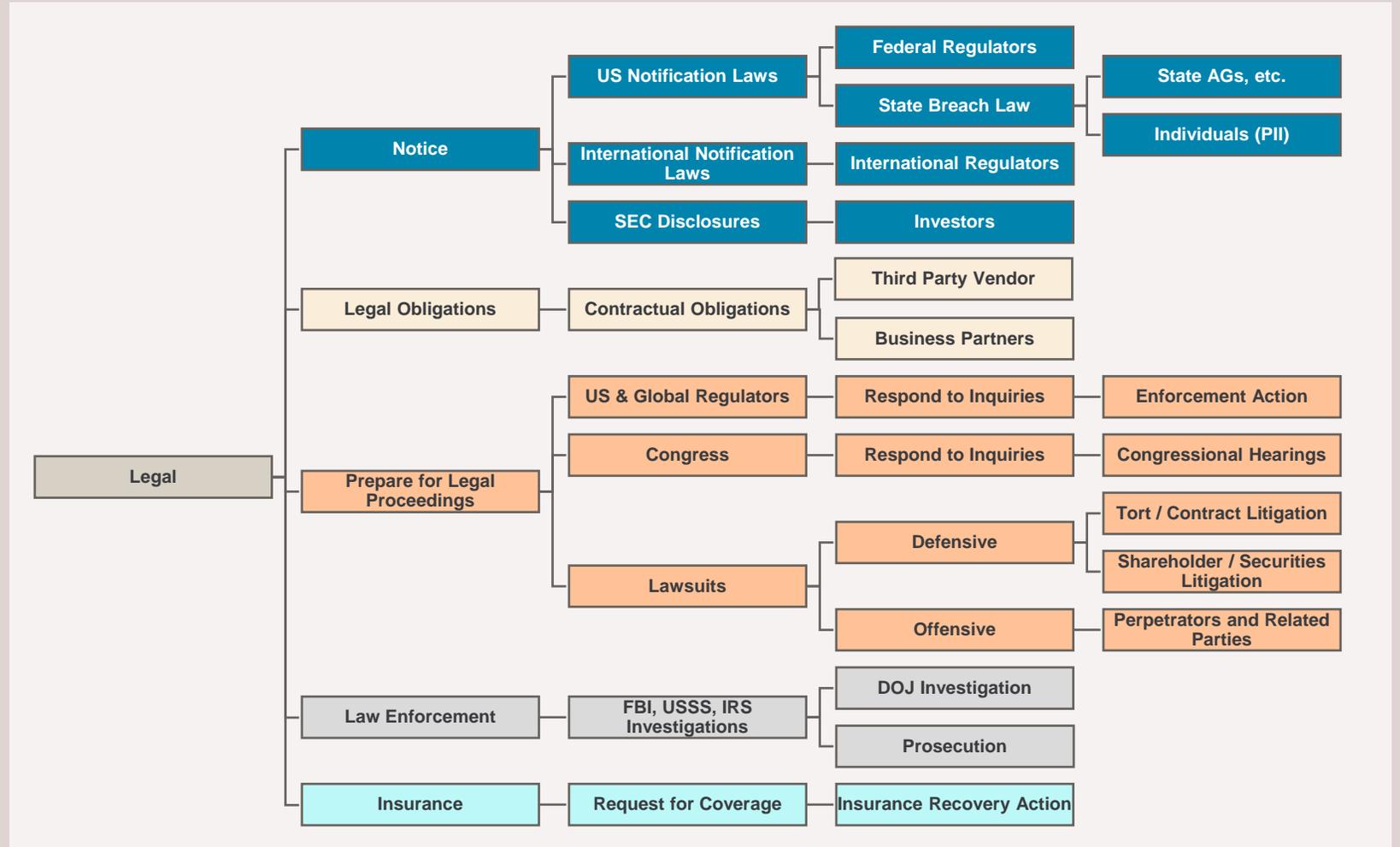


Average Cost
Per Incident

\$3,860,000

Data Breach Aftermath

Legal Workflow (the never-ending story)



Data Breach Litigation

Types of Private Plaintiffs

Consumers (PII)

Financial institutions
(card data)

Businesses
(vendor/contractor data)



Consumer Class Action Process

- Competition for forum and lead counsel
- Consolidated complaints
- Motions to dismiss
- Class certification and/or settlement

Primary Causes of Action

Negligence

Consumer protection

Breach of contract

Notification laws



Unique Legal Issues

- Circuit courts are split on standing
- Duty to protect PII
- Cognizable injury
- Financial institutions face hurdles

Circuit Split on Standing

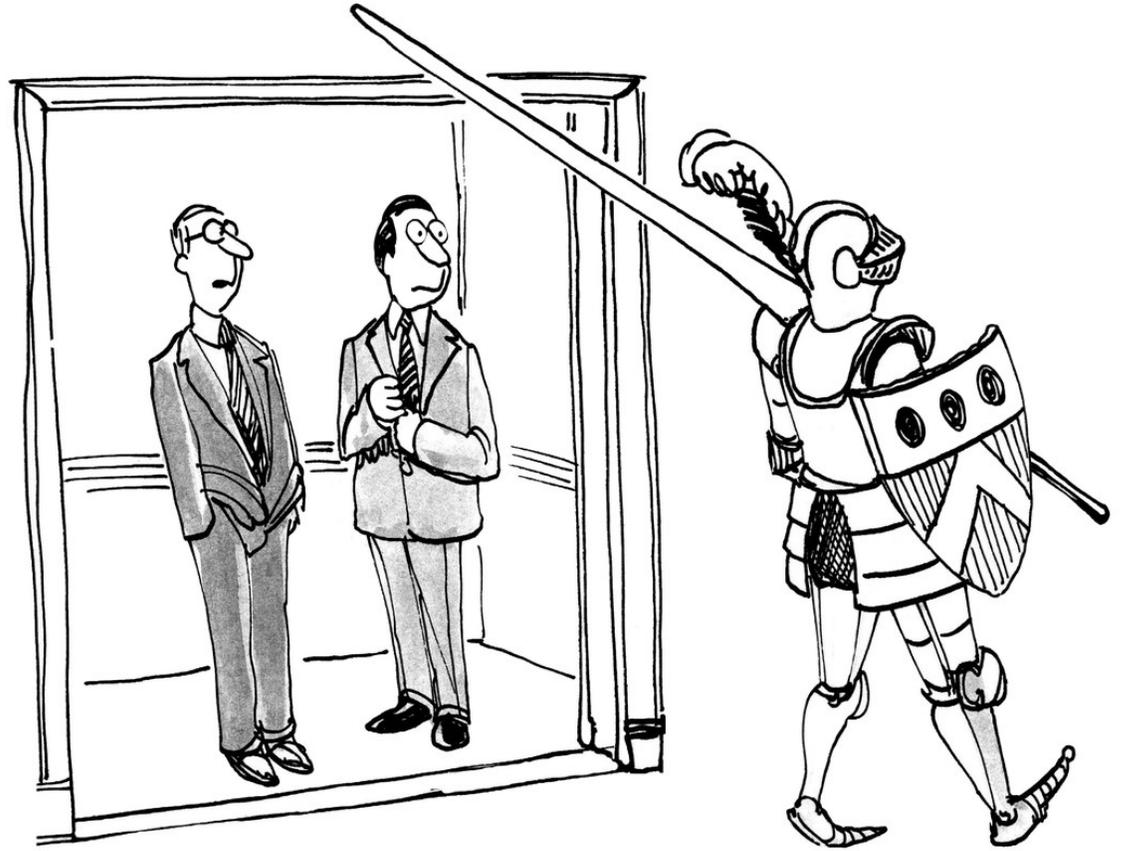
In some cases, the Second, Third, and Fourth Circuits rejected the idea that a consumer has standing based solely on allegations of a heightened risk of identity theft or prophylactic measures taken to combat that risk.

Sixth, Seventh, Ninth, and D.C. Circuits have found standing based on allegations of a substantial risk of future injury.

Other circuits have yet to reach the issue.

Is There a Legal Duty?

Common law duty to protect PII not universally recognized



What Is a Sufficient Injury?

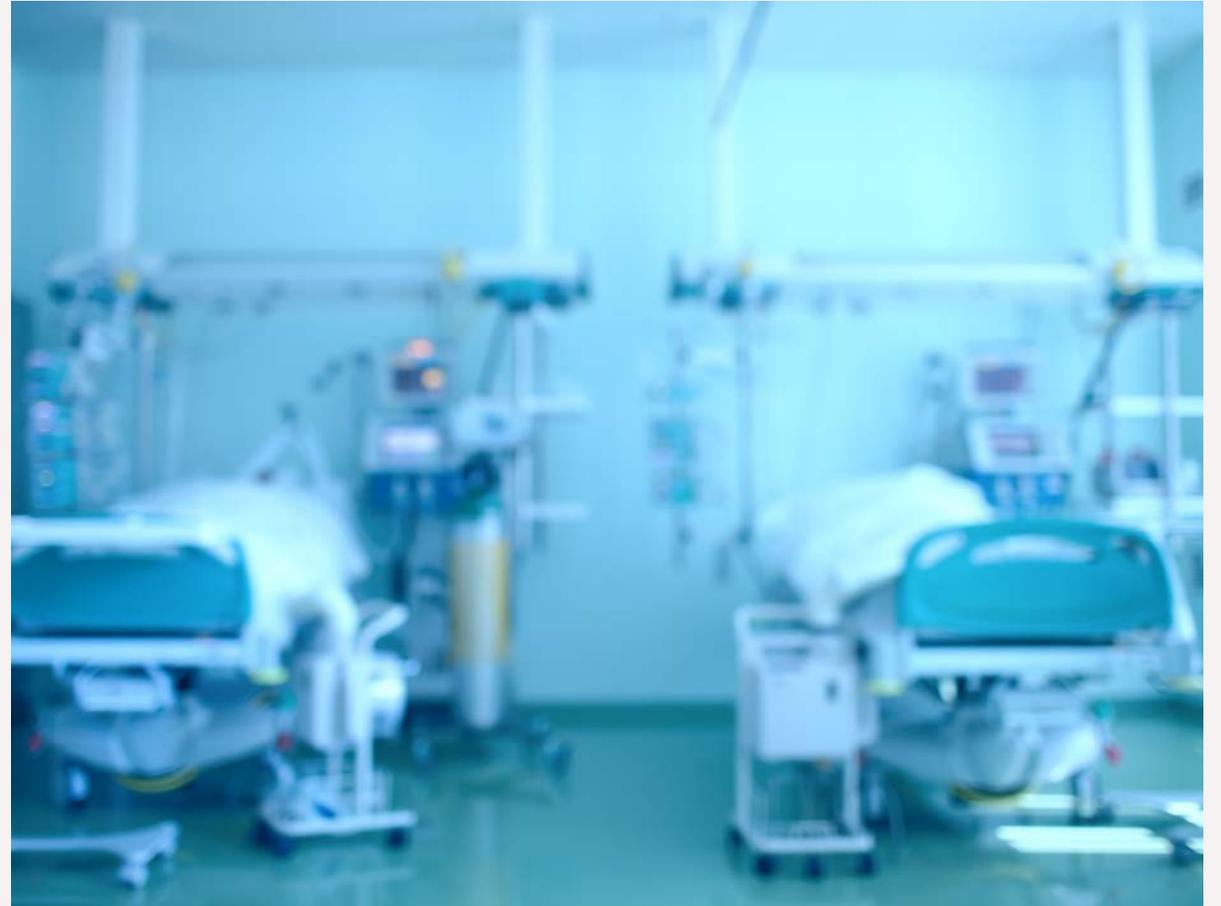
Courts generally agree actual identity theft and payment card fraud can be sufficient injuries



What is a Sufficient Injury?

Battleground issues:

- Mere theft of PII
- Increased risk of future injury
- Mitigation expenses
- Time and effort



Financial Institution Claims Face Hurdles

Under the economic-loss doctrine, the Seventh Circuit affirmed the dismissal of financial institutions' complaint, holding that the remedies provided in the contracts that link merchants, banks, and card brands precluded tort remedies.

Community Bank of Trenton v. Schnuck Markets, Inc., 887 F.3d 803 (2018)

End Game

Data Breach Consumer Class Action Settlements Will Likely Continue

Anthem (2018) – \$115M

Experian (2018) – \$22M

Wendy's (2019) – \$3.4M

Yahoo (2019) – \$117.5M





No major data breach class action has yet been certified for purposes other than settlement.

Key Issues at Class Certification

Rule 23 requires that “questions of law or fact common to class members predominate over any questions affecting only individual members.”

A data-breach Plaintiff would need to show with common evidence that the breach **caused** a sufficient **injury** to each class member.

Whether plaintiff can establish predominance largely turns on what constitutes a sufficient injury

- Identity theft or mitigation expenses
- Mere theft of PII

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Data Breach Class Actions: Current Issues and Trends

Questions

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Can We Still Settle Class Actions?

Eric Gladbach

King & Spalding

Michael Shortnacy

King & Spalding

Anne Voigts

King & Spalding

Agenda

Amendments to Rule 23

Updated Notice Provisions

Revised Approval Requirements

Addressing Objections

Appellate Revisions

Individual District Court Rules

Amendments to Rule 23

Amendments to Rule 23

Effective December 1, 2018.

Last substantial update was in 2003.

Generally codify the practices of many circuit and district courts nationwide and allow for cost-effective handling of class action settlements.

Amendments to Rule 23 — Practitioner Considerations

Consider using the cost-saving options for notice.

Avoid the pitfalls of amendments for preliminary/final approval.

Use new objector requirements in seeking final approval or having the settlement upheld on appeal.

Note any district/judge rules on class action settlements.

Updated Notice Provisions

Overall: Expand Ways to Notice the Class

- Now allows “electronic means, or other appropriate means.”
- Reliance on courts and counsel to focus on the means most likely to be effective.
- Acknowledgment of technology evolving substantially over the past 30-40 years.



Notice — Advisory Committee Notes

“Contemporary communication realities” may provide a reliable additional or alternative method for giving notice.

Warns a significant portion of the class may have limited or no access to email or to the internet.

Reiterates “ultimate goal” of allowing class members to make “informed decisions” by requiring notices to be in plain, easily understood language.



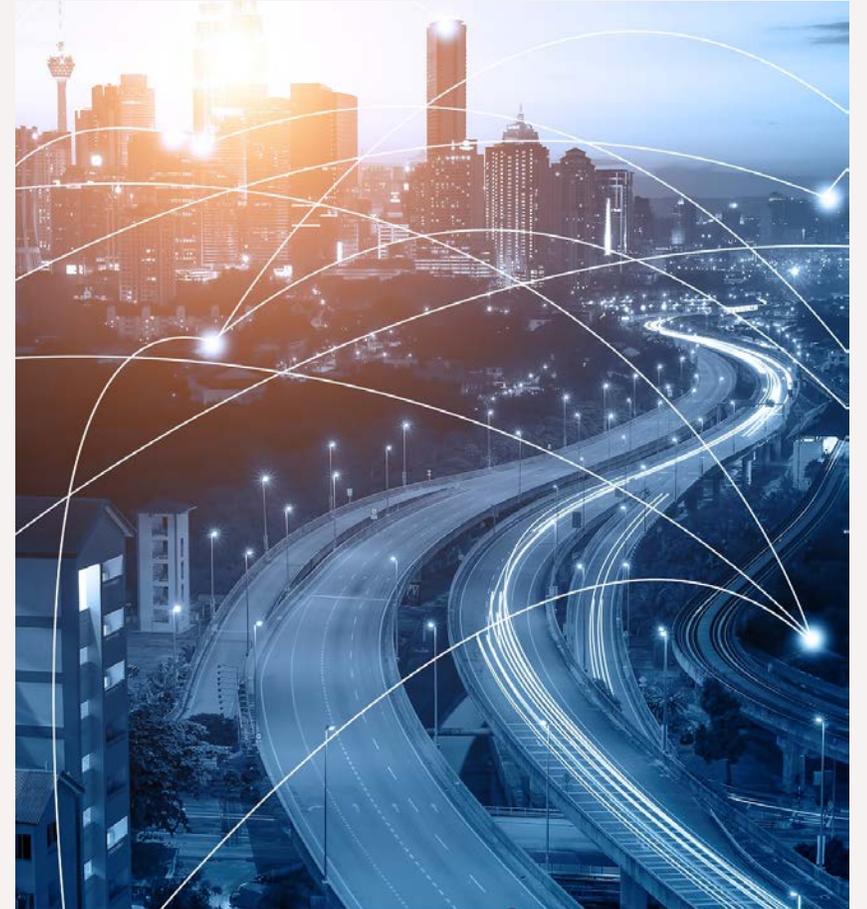
Suggested Practices

Determine client expectations for budget.

Discuss ways to identify class members.

Consider using an expert and/or professional claims administrator.

Avoid email spam filters and make notice accessible to mobile devices.



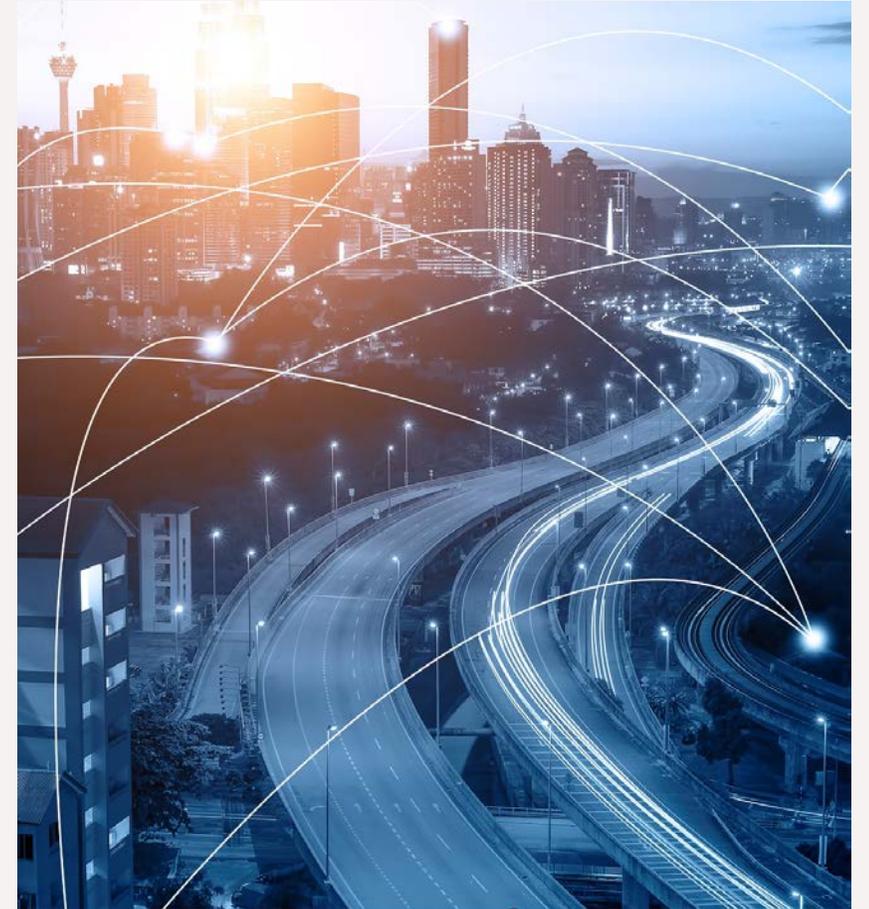
Suggested Practices

Determine reliability of email notice:

- Read rate
- Delivered rate
- Open rate
- Bounce rate

Digital campaigns can be effective:

- Social media
- Digital ad buys



Revised Approval Requirements

Revised Approval Requirements

For preliminary approval, the amendments front-load a lot of the information for the Court to consider in authorizing the dissemination of notice.

For final approval, the amendments codify key factors that district courts must consider in evaluating class action settlements, creating a uniform set of procedures.

Revised Approval – Preliminary Approval

New requirement that giving notice is justified by the parties' showing that the court will likely be able to:

- (i) approve the proposal under Rule 23(e)(2); and
- (ii) certify the class for purposes of judgment on the proposal.

Revised Approval – Final Approval

The touchstone is still whether the settlement is “fair, reasonable and adequate.”

Requirements: (A) the class representatives and counsel adequately represented the class; (B) the proposal was negotiated at arm’s length; (C) the relief provided is adequate; and (D) the proposal treats class members equitably relative to each other.

Suggested Practices

For preliminary approval, front load approval requirements.

For final approval, point out how costs, risks and delay of trial and appeal favor final approval in conjunction with relevant circuit court factors.

Be prepared to report to the court about actual claims experience.

Consider a clause in the Settlement Agreement to require the parties be put back into position immediately before submitting the settlement.



Addressing Objections

Addressing Objections

Amendments designed to promote good faith objections and deter professional objectors.

Amendments now require that:

- Objections need to state to whom it applies
- Objections “state with specificity the grounds for the objection”
- District court must approve side payments to objectors

Suggested Practices

- Deter professional objectors from filing.
- Be wary of professional objectors seeking to withdraw or not file their objections in the first place.
- Consider recalibrating response to deal with professional objectors.
- Note new objection withdrawal process if consideration is involved.



Appellate Revisions

Fed. R. Civ. P. 23(e)(5)(C)



Procedure for Approval After an Appeal

“If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.”

Advisory Committee Notes — Appeals

Until the appeal is docketed by the circuit clerk, the district court may dismiss an appeal on stipulation of the parties or on the appellant's motion.

Thereafter, the Court of Appeals has authority to dismiss the appeal.

Suggested Practices

- Should be read in conjunction with objections section.
- The district court is in the best position to assess the objection and its possible withdrawal.
- Consider the filing of an appeal bond if the appeal is filed by a professional objector.

Individual District Court Class Action Settlement Rules

Example: Procedural Guidelines for Class Action Settlements for N.D. Cal.

Court requires additional information for:

- Preliminary approval
- Final approval
- Post-distribution

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Can We Still Settle Class Actions?

Questions

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Viral Litigation Trends

May 9, 2019 | Atlanta

Elizabeth J. Cabraser

Lieff Cabraser Heimann
& Bernstein

John P. Hooper

King & Spalding

Jacquie K. Seidel

King & Spalding

Definition of Viral Litigation



SCANDAL

- **Exposure is an attack on brand, and goes beyond possible settlement / verdict costs** – reputational worth, share value, employee morale, loss of business and additional legal/regulatory exposure.
- **Level of scrutiny is fed by the media** which increases the stakes and potential punitive liability in the underlying litigation.
- **Can become a “bet-the-Company” situation.**

Spreading the Virus

The Washington Post Feb. 19, 2019

Oklahoma could provide first test of who will pay for the opioid crisis – and how much

 **Legal NewsLine** Feb. 15, 2019

Imerys Talc files for bankruptcy over mounting baby powder litigation

The New York Times Nov. 12, 2014

Big Banks Are Fined \$4.25 Billion in Inquiry Into Currency-Rigging

Sports Illustrated

Feb. 9, 2019

New Wave of Concussion Lawsuits Could Create Massive Ripple Effect for College Football

WSJ

Sept. 21, 2015

U.S. Conducts Criminal Probe of Volkswagen, Sources Say; Investigation is related to allegations that German auto maker cheated on U.S. emissions tests

Bloomberg

Nov. 14, 2018

Long After BP Spill, Worker Lawsuits Still Coming

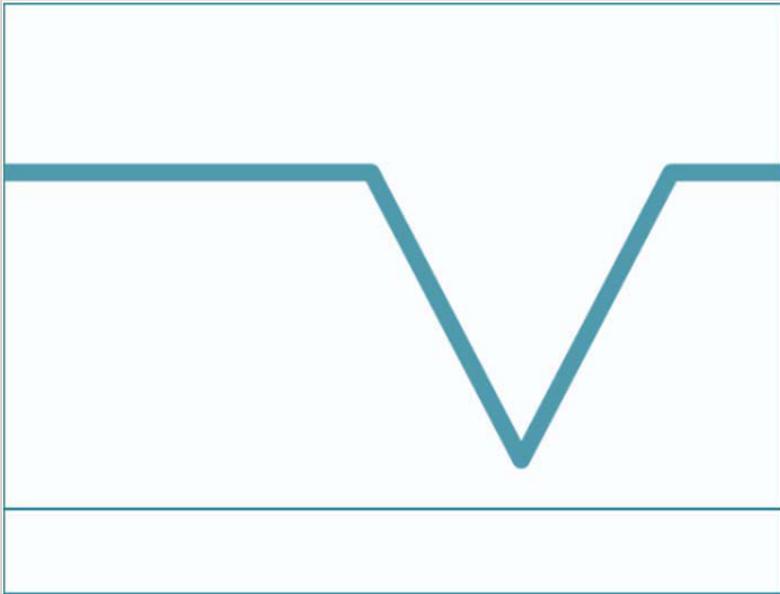
npr

May 18, 2017

4 Car Companies Settle Takata Airbag Lawsuit For \$553 Million

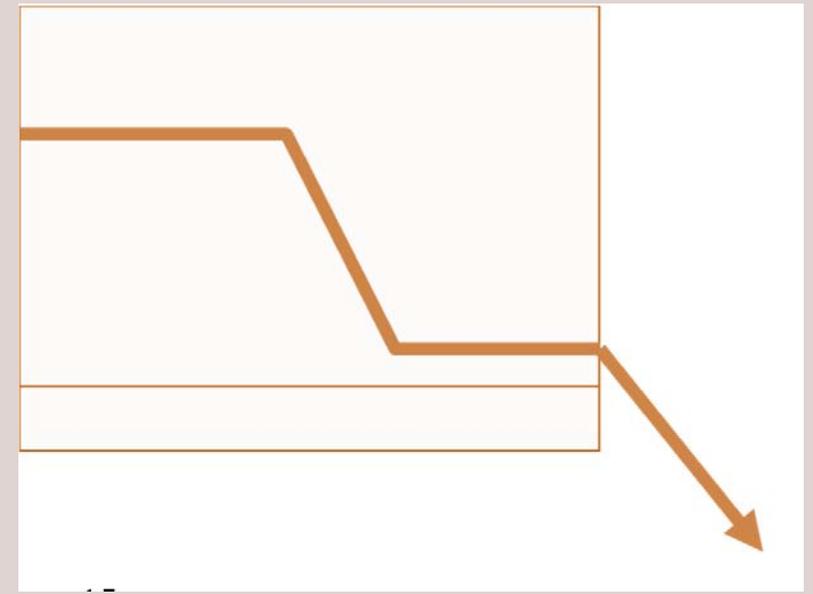
Goal in Managing the Threat of Viral Litigation

A Blip on the Screen



versus

A Defining Moment



Driven by Perception:

If the world thinks a situation is a crisis, it is a crisis.

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Viral Litigation Trends

Questions